La Favorita, Inc. *and* United Food & Commercial Workers Union, Local #7. Cases 27–CA–11014–8, 27–CA–11210, and 27–CA–11386

SUPPLEMENTAL DECISION AND ORDER

February 28, 1994

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On October 12, 1993, Administrative Law Judge James S. Jenson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, La Favorita, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and state laws:

Valentin Garcia	$7,476.00
Petronilo Garcia	10,982.37

[1] The judge wrote a separate ''Conclusion'' concerning backpay for Valentin Garcia and Petronilo Garcia. The Board refers to both of these conclusions as the judge's recommended Order.

A. E. Ruibal, for the General Counsel.
Sylvian R. Roybal, of Denver, Colorado, for the Respondent.
John Bowen, of Wheat Ridge, Colorado, for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This supplemental proceeding to determine the amount of backpay due Valentin Garcia and Petronilo Garcia, who were discriminatorily terminated by the Respondent, was heard on June 9, 1993, in Denver, Colorado.

The backpay specification in Cases 27–CA–11014–8 and 27–CA–11210 involving Valentin Garcia, issued on October 26, 1992, and was amended at the hearing. The backpay specification in Case 27–CA–11386 involving Petronilo Garcia, issued on January 28, 1993, and was also amended at the hearing. Respondent filed timely answers to both specifications and their amendments. All parties were afforded full opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by both the General Counsel and Respondent, and have been carefully considered.

On the records before me, from my observation of the demeanor of the witnesses, and consideration of the contentions and arguments of counsel and their briefs, I make the following

FINDINGS OF FACT[1]

The Issues

Cases 27–CA–11014–8 and 27–CA–11210: Whether the backpay for Valentin Garcia should be computed on a quarterly basis under the *Woolworth* formula,[2] or total backpay minus total interim earnings as approved by the Supreme Court in Title VII cases.

Case 27–CA–11386: Whether Petronilo Garcia engaged in a willful loss of earnings by quitting his job at the Sheraton Hotel, thereby terminating further backpay liability.

A. *Legal Principles*

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed, *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1965), and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943). Once that is established, ''the burden is upon the employer to establish facts that would mitigate that liability.'' *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). Any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. The formula should be representative of the discriminatee's employment history and take into account intermittency of employment. *Iron Workers*

[1] As noted, the hearing in these matters was on June 9, 1993. At the commencement, the General Counsel amended the specifications, introduced the formal documents into evidence, and rested. The Respondent then examined both discriminatees, and the General Counsel cross-examined. Briefs were due July 28, following an extension granted pursuant to the General Counsel's request. On July 19, I received from the General Counsel, a motion to reopen record to receive in evidence as G.C. Exh. 3, payroll summaries for three employees for the purpose of assisting me ''as background to the allegations in the specifications,'' stating the exhibit ''was not offered into evidence at the hearing as a matter of inadvertence.'' Although it does not dispute the authenticity of the proffered exhibit, the Respondent argues inadvertence is not a sufficient reason to allow its admission nor is the concept of newly discovered evidence applicable. Accordingly, Respondent contends it would be unfairly prejudiced by its admission. Neither party has requested the hearing be reopened and I believe it would be prejudicial to the Respondent to receive the document without affording it full opportunity at a supplemental hearing to also adduce additional evidence to meet the General Counsel's case. In my view the assistance the proffered document would give me does not warrant the expense of a reopened hearing. The General Counsel's motion to reopen record for the purpose of receiving G.C. Exh. 3 is denied. The General Counsel's motion and Respondent's response have been marked as rejected and added to the formal file.

[2] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Local 378 (Judson Steel), 227 NLRB 692 (1977). Where awards may be only close approximations, the Board may adopt formulas reasonably designed to produce such approximations. *NLRB v. Carpenters Local 180*, 433 F.2d 934 (9th Cir. 1970). Another well-established principle is that ''the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved.''

''[T]he principle of mitigation of damages does not require success; it only requires an honest good faith effort'' *NLRB v. Cashman Auto Co*., 223 F.2d 832, 836 (1st Cir. 1955). See also *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217 (1974); *United Aircraft Corp*., 204 NLRB 1068 (1973). My function is to consider whether the General Counsel's formula is the proper formula in view of all the facts adduced by the parties and to make recommendations to the Board as to the most accurate method of determining backpay. *American Mfg. Co. of Texas*, 167 NLRB 520 (1967).

B. *Cases 27–CA–11014–8 and 27–CA–11210*

Valentin Garcia's backpay period began on December 18, 1989, and ended August 10, 1992, with Respondent's offer of reinstatement which was refused. The specification alleges that Valentin would have been rehired on December 18, 1989, at the regular hourly rate of pay of $4.75, that the overtime hourly rate is 1-1/2 times the hourly rate, and that on April 1, 1991, he would have been entitled to a 25-cent-an-hour raise. No evidence to the contrary having been offered by Respondent, it is so found. The regular hours and overtime hours the General Counsel has assigned to Valentin are the quarterly average of regular and overtime hours worked by employees Patricia Reyna, Luis Simental, and Margarita Gonzales. In the absence of Respondent advancing an alternative method, it is found that the General Counsel's method of determining regular and overtime hours is correct. The specification does not claim any expenses as an offset to interim earnings. The Respondent does not admit that the interim earnings as alleged in the specification are complete; however, no contrary evidence was elicited, nor was it shown that Valentin failed to make a diligent search for work. Respondent contends that Valentin is entitled to no backpay since his interim earnings for the entire backpay period exceeded his gross backpay. This claim is grounded on the argument that the Board should not use the quarterly method of computation in the manner set forth in *F. W. Woolworth*, supra, but rather the total backpay minus total interim earnings utilized in Title VII cases. The Board has, with court approval, consistently applied the *Woolworth* formula since 1950 in literally thousands of cases, and its order in the underlying unfair labor practice case, as enforced by the Tenth Circuit Court of Appeals, ordered that backpay be computed in that manner. Therefore, I reject the Respondent's argument and shall compute the backpay in the manner specified by the Board.

Conclusion

Based on the foregoing and the whole record, I conclude that the Respondent's obligation to make whole Valentin Garcia shall be satisfied by payment to him the amount of $7476 as detailed in the amended backpay specification, and summarized in Appendix A, attached hereto, and that interest shall be paid to him in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by law.

C. *Case 27–CA–11386*

Petronilo Garcia's backpay period began April 5, 1990, when Respondent unlawfully discriminated against him by reducing his hours of work,[3] and ended December 7, 1992, with Respondent's offer of reinstatement which was refused. The amended specification alleges that Petronilo's rate of pay from April 5, 1990, to March 31, 1991, was $4.60 per hour, that the overtime hourly rate is 1-1/2 times the hourly rate, and that on each of the following dates, April 1 and September 13, 1991, and July 24, 1992, he would have been entitled to a 25-cent-per-hour raise. No evidence to the contrary having been offered by Respondent, it is so found. The regular hours the General Counsel has assigned to Petronilo are the quarterly average of regular hours worked by Patricia Reyna, Louis Simental, and Margarita Gonzales; the overtime hours for the second quarter of 1990 are based on the average of overtime hours of Margarita Gonzales and Louis Simental; and the overtime hours for the remaining quarters are based on the quarterly average of those two individuals and Patricia Reyna. In the absence of Respondent advancing an alternative method, it is found that the General Counsel's method of determining regular and overtime hours is correct. The specification does not claim any expenses as an offset to interim earnings. While the Respondent does not admit that the interim earnings as alleged in the specification are complete, no contrary evidence was elicited, nor was it shown that Petronilo failed to make a diligent search for work. The record shows that on June 28, 1990, Petronilo commenced working at the Sheraton Hotel for $4.50 per hour and that he was discharged effective August 6, 1990, for failing to call in or show up for work, having told his employer that he was going to Mexico and would return in early August. His earnings record from the Sheraton shows that for the 2-week period ending August 4, 1990, he worked 35.25 hours for which he was paid $158.63. His total Sheraton earnings were $825.77. The record shows Petronilo had been scheduled for an orientation at the Sheraton on July 24, which was rescheduled for July 31. Prior to that date, however, he had found another job with Cornerstone Foundation, where he commenced working on July 31, 1990, and worked until hired by Pormor Construction during the fourth quarter of 1990 and worked until the third quarter of 1991 when he started with Eaton Metal Products. He worked at Eaton Metal Products until November 5, 1991, when he went to Mexico for 2 months, thereby removing himself from the labor market. The General Counsel properly excludes that period from the backpay computation. Petronilo commenced working again for Pormor Construction on January 3, 1992, where he continued to work throughout the backpay period.

The Respondent argues that Petronilo should be denied backpay after August 6, 1990, when he was terminated by the Sheraton Hotel for ''No Call, No Show.'' His termination date and date of starting to work for Pormor coincide. Further, the fact the Sheraton Hotel may have terminated him does not constitute a willful loss of earnings. E.g., *Harvest*

[3] See 306 NLRB 203 (1992).

Queen Mill & Elevator Co., 90 NLRB 320, 338 (1950) (discriminatee Cook discharged for refusing to work on Sundays); *Mastro Plastics Corp*., 145 NLRB 1710, 1716 (1964) (discriminatee Vargas discharged from several interim jobs, one for being in jail for 10 days); *Barberton Plastics Products*, 146 NLRB 393, 396 (1964) (discriminatee discharged for unsatisfactory performance); *Webb Mfg. Co*., 174 NLRB 37, 38 (1969) (discriminatee Cline fired for unsatisfactory work); *Artim Transportation System*, 193 NLRB 179, 183 (1971) (discriminatee discharged after argument with supervisor over working conditions). In any event, it is clear that Petronilo did not remove himself from the labor market by virtue of the Sheraton Hotel termination. Although Respondent also refers to Petronilo's termination by Eaton Metal Products for not reporting or calling in, the General Counsel has excluded from the gross backpay computations, the period from November 5 to December 31, 1991, when he went to Mexico and thereby removed himself from the labor market for that 2-month period. In sum, the Respondent has failed to show a willful loss of earnings or that Petronilo had interim earnings not reported.

Conclusion

Respondent's obligation to make whole Petronilo Garcia shall be satisfied by payment to him the amount of $10,982.37 as detailed in Appendix B, attached hereto, and that interest shall be paid to him in the manner prescribed in *New Horizons for the Retarded*, supra, accrued to the date of payment, minus tax withholdings required by law.[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Cases 27–CA–11014–8 and 27–CA–11210

VALENTIN GARCIA

Yr./Qtr.	*Total Regular Pay*	*Total Premium Pay*	*Total Gross Backpay*	*Total Interim Earnings*	*Net Backpay*
89/4	$380	$491.19	$871	- 0 -	$871
90/1	2,470	2,405.88	4,876	$1,314.51	3,561
90/2	2,470	1,830.56	4,301	3,710.64	590
90/3	2,470	2,423.84	4,894	4,135.23	759
90/4	2,470	2,037.83	4,508	3,656.11	852
91/1	2,470	2,223.21	4,693	4,218.90	474
91/2	2,600	1,855.35	4,455	5,049.30	- 0 -
91/3	2,600	3,006.45	5,606	5,238.04	368
91/4	2,600	1,747.50	4,348	4,503.25	- 0 -
92/1	2,600	1,284.53	3,885	4,764.91	- 0 -
92/2	2,600	975.90	3,576	5,337.36	- 0 -
92/3	1,800	584.63	2,385	3,767.13	- 0 -
TOTALS	$27,530	$20,866.87	$48,397		$7,476

APPENDIX B

PETRONILO GARCIA
Case 27–CA–11386

Calendar Qtr.	*Hours*	*Rate*	*Gross Back-pay*	*Source*	*Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*
1990/2d	474	$4.60	$2,180.40	La Favorita (Actual)		- 0 -		
	249	6.90	1,718.10		$2,980.80		$2,980.80	$917.70
			$3,898.50					
1990/3d	520	4.60	$2,392.00	La Favorita (Actual)				
	339	6.90	2,339.10		69.60			
			$4,731.10	Sheraton	825.77	- 0 -		
				Cornerstone	1,512.50			
					$2,407.87		2,407.87	2,323.23
1990/4th	520	4.60	$2,392.00	Pormor	60.00			
	285.81	6.90	1,972.09	Cornerstone	1,898.01	- 0 -		
			$4,364.09		$1,958.01		1,958.01	2,406.08
1991/1st	520	4.60	$2,392.00	Pormor Const.	2,584.63	- 0 -	2,584.63	
	311.81	6.90	2,151.49					
			$4,543.49					1,958.86
1991/2d	520	4.85	$2,522.00	Pormor Const.	3,748.00	- 0 -	3,748.00	
	247.38	7.28	1,800.93					
			$4,322.93					574.93
1991/3d	400	4.85	$1,940.00	Pormor Const.	1,914.50	- 0 -	3,629.06	
	308.35	7.28	2,244.79	Eaton Metal Product	1,714.56			
	120	5.10	612.00		$3,629.06			
	92.51	7.65	707.70					1,875.43
			$5,504.49					
1991/4th	200	5.10	$1,020.00	Eaton Metal Product	1,071.54			
	89.62	7.56	685.59	(out of labor market 11/5–12/31)				
			$1,705.59			- 0 -		634.05
1992/1st	520	5.10	$2,652.00	Pormor Const.	3,670.13		3,670.13	
	171.27	7.65	1,310.22					
			$3,962.22			- 0 -		292.09

APPENDIX B—Continued

PETRONILO GARCIA
Case 27–CA–11386

Calendar Qtr.	*Hours*	*Rate*	*Gross Back-pay*	*Source*	*Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*
1992/2d	520	5.10	$2,652.00	Pormor Const.	4,534.00		4,534.00	
	130.12	7.65	995.42			- 0 -		
			$3,647.42					- 0 -
1992/3d	120	5.10	$612.00	Pormor Const.	5,228.00		5,228.00	
	51.51	7.65	394.05					
	440	5.35	2,354.00			- 0 -		
	130.13	8.03	1,044.94					- 0 -
			$4,404.99					
1992/4th	400	5.35	$2,140.00	Pormor Const.	4,792.00	- 0 -	4,792.00	
	174	8.03	1,397.22					- 0 -
	(10 wks. to 12/7)							
			$3,537.22					- 0 -
Net Backpay								$10,982.37