

**ABC Automotive Products Corp. and Local 365,
International Union, United Automobile, Aero-
space and Agricultural Implement Workers of
America (UAW), AFL-CIO.** Case 29-CA-
14335

November 30, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 16, 1995, Administrative Law Judge D. Barry Morris issued the attached supplemental decision. The Respondent filed exceptions, and the Charging Party filed an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached supplemental decision 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.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, ABC Automotive Products Corp., Brooklyn, New York, and ABC Automotive Products Corp., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order by paying a total of \$371,598 plus interest and additional amounts as computed pursuant to *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), respectively, less any taxes withheld pursuant to state and Federal law.

¹In response to the Respondent's exceptions, the General Counsel filed with the Board its brief to the administrative law judge.

²The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Rosalind Rowen, Esq. and *Diane Lee, Esq.*, of Brooklyn, New York, for the General Counsel.

Michael P. Pierce, Esq. (Sereni and Lunardi), of Broomall, Pennsylvania, for the Respondent.

Irving T. Bush, Esq., of New York, New York, for the Respondent.

K. Dean Hubbard, Jr., Esq. and *Yuval D. Bar Kokhba, Esq. (Eisner & Hubbard, P.C.)*, of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. On April 27, 1992, the National Labor Relations Board issued an Order¹ directing that ABC Automotive Products Corp. (Respondent) make whole Phillipe Bolisca, Levoyant Brioche, Eddie Dominick, Pierre Francois, Richard Harrington, Pablo Lopez, Michael J. Mood, Jerome E. Smith, Arthur Richburg, and Ronald Williams (the discriminatees) for their losses resulting from Respondent's unfair labor practices. On December 17, 1992, the United States Court of Appeals for the Second Circuit entered its judgment enforcing the Board's Order. A controversy having arisen over the amount of backpay due each discriminatee, on October 20, 1994, the Regional Director for Region 29 issued an amended backpay specification and notice of hearing. Answers were filed on November 8 and December 8, 1994. Seven days of hearing were held before me in New York City commencing January 9 and ending May 16, 1995. All parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the parties on August 2, 1995.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. SINGLE EMPLOYER

The backpay specification alleges that ABC Automotive Products Corp., a New York corporation, formerly located at 847 Shepherd Avenue in Brooklyn, New York (ABC Brooklyn), and ABC Automotive Products Corp., a Pennsylvania corporation, located in Philadelphia (ABC Pennsylvania) are affiliated businesses constituting a single integrated business enterprise.

A. *ABC Brooklyn*

ABC Brooklyn was engaged in the distribution and remanufacture of automotive products. Seymour Perlman was chief executive officer between 1986 and 1990. Seymour Perlman's son, David, was the president of ABC Brooklyn from 1986-1988. David's title changed from president to general manager in 1988 and he continued as general manager through 1990.² Between 1988 and 1990 David ran the day-to-day operations of ABC Brooklyn and participated with his father in negotiations with Local 365 UAW (the Union).

B. *ABC Pennsylvania*

In 1988 David purchased a plant from Diversified Interests, an automotive parts remanufacturer located in Philadelphia. David then changed the name to "ABC Automotive Products Corp.," the same name as ABC Brooklyn, and was its president and sole shareholder. Between 1988 and 1990 David spent most of his time running ABC Brooklyn.

¹307 NLRB 248.

²At the hearing in the underlying proceeding, when Seymour Perlman was asked to identify his son's position, he testified "David Perlman is the president of ABC Automotive Products Corp." (Tr. 249.)

Jerome Smith, a discriminatee employed by ABC Brooklyn, credibly testified that during 1988 and 1989 David and Seymour instructed him to load equipment and products onto trucks for shipping to ABC Pennsylvania. Smith also credibly testified that desks and office equipment were shipped from ABC Brooklyn to ABC Pennsylvania.

C. *Intrafamily Loan*

David Perlman testified that he and his mother, Leona Perlman, loaned ABC Brooklyn \$285,000. David testified that to secure the loan he and his mother had a security interest in the equipment, inventory, and accounts receivable of ABC Brooklyn. At the hearing Respondent did not produce a copy of the loan or a copy of any document evidencing the security interest.

D. *Letterheads, Catalogues, and Invoices*

Both ABC Brooklyn and ABC Pennsylvania used identical letterhead, product catalogues, and invoices. Peter Fullerton, the Union's vice president, credibly testified that in 1988 Respondent's Philadelphia address was listed together with the Brooklyn address on ABC Brooklyn's letterhead. The record contains Respondent's letter dated June 19, 1989, which lists both the Brooklyn and Philadelphia addresses. Respondent's joint product catalogues for 1991 list ABC Pennsylvania's Philadelphia address as the "manufacturing" address and ABC Brooklyn's address as the "Executive Offices." Similarly, Respondent's invoices during 1990 contain both the Brooklyn and Philadelphia addresses. Richard Deosingh, the accounting manager for F & S Distributors, a customer of Respondent since 1989, credibly testified that there had been no changes in the business relationship between F & S and Respondent except for the fact that while in 1989 invoices were payable to Respondent at its Brooklyn address, since January 1991 payments were made to Respondent at its Philadelphia address.

E. *Control of Labor Relations*

ABC Brooklyn and the Union were parties to a collective-bargaining agreement between 1986 and 1989. Fullerton credibly testified that he always dealt with both Seymour and David and that they both told him that they had authority to represent Respondent. In June and July 1989 negotiations were conducted between the Union and ABC Brooklyn regarding the collective-bargaining agreement which was to expire in August. David and Seymour represented ABC Brooklyn during the negotiations.

F. *Common Management and Employees*

After negotiations failed to produce an agreement, a strike commenced on August 17, 1989, and lasted until August 19, 1991. Prior to the strike there were approximately 20 employees at ABC Brooklyn. After the strike began there were approximately five employees who remained and continued to work in the plant while the striking employees were picketing. ABC Brooklyn employees, Flood, Esposito, Torres, and Brown were transferred to ABC Pennsylvania. Flood, who built distributors at ABC Brooklyn, performed the same work for ABC Pennsylvania. Esposito, who worked as a secretary in the Brooklyn facility was transferred to ABC Pennsylvania for a month to perform secretarial work. Brown,

who was the sales manager of ABC Brooklyn, became the sales manager of ABC Pennsylvania.

G. *Transfer of Equipment, Inventory, and Customer List*

Mood testified that he delivered parts from ABC Brooklyn to ABC Pennsylvania during 1989 and 1990. He testified that he delivered testing equipment and the "bench area that we used to rebuild rack and pinions." David Perlman testified that in conjunction with the closing of the Brooklyn plant, after ABC Brooklyn defaulted on the family loan, he and his mother exercised their security interest in the inventory, equipment, and accounts receivable of ABC Brooklyn. He testified that he and his mother sold the inventory, accounts receivables, and equipment to ABC Pennsylvania for \$100,000. David testified that a customer list contains very valuable "proprietary information." He acknowledged that ABC Pennsylvania "took over" the customer list of ABC Brooklyn.

II. EFFORTS OF DISCRIMINATEES TO OBTAIN EMPLOYMENT

On August 29, 1989, the discriminatees struck Respondent. The strike lasted until August 19, 1991. The striking employees received \$100 per week and were required to be on the picket line 1 day per week.

Bolisca testified that he did not look for employment during 1989. He further testified that his efforts to obtain employment consisted of looking at newspaper ads, speaking to friends about job opportunities, and visiting stores. Brioche testified that he began looking for employment while on the picket line and looked at newspaper ads. He also testified that he applied at Pathmark for a job and "a lot of places I went to they just didn't give me any application because there were no jobs."

Dominick was the shop steward and he testified that he was on the picket line every day. He testified that Fullerton took him to a number of places to seek employment and that among the places he applied to for employment were A & S, a garbage disposal company, paint factories, and hospitals. He testified that he was hospitalized during 1993 and he was unable to work for approximately 2-1/2 months. He further testified that he developed a heart problem in January 1995 and was required to be connected to an oxygen tank beginning in February 1995. He testified at the hearing connected to an oxygen tank.

Francois testified that he began looking for work in 1990. He testified that he made telephone calls searching for work and among the companies he looked for work were Murray Auto Parts, RBG, and Dorlette Motors. In January 1991 he was hired as a part-time employee by Atlantic Express and he became a full-time employee there in September 1991. He testified that he never received an offer of reinstatement from Respondent.

While Harrington testified that he would not have taken full-time work while he was on strike, there was no evidence that he was offered a job which he declined. He testified that he looked for work beginning August 1989. Among the companies where he applied were Daily News, several lumberyards, Pathmark, and a liquor store. He testified that he earned approximately \$3000 per year through 1992. He further testified that in the latter part of 1989 he had a hernia

operation and was hospitalized for 2 weeks and required an additional month for recuperation.

Mood testified that he began looking for work in 1990. He testified that he applied to Sears, a shoe store, and read the ads in the newspapers. He was incarcerated from July through December 1992. He further testified that he did not look for work in 1993 and that he was again incarcerated beginning April 1993.

Arthur Richburg died on November 21, 1994.³ His brother, Caesar Richbow, testified that he saw Arthur looking at newspaper ads. Richbow further testified that Arthur told him he was looking for work. He, however, did not testify that he actually saw his brother looking for work. Respondent's counsel objected to the testimony on the basis of hearsay. I sustained the objection.

Smith testified that beginning in August 1989 he received job applications from the Union which he filled out. He testified that he looked at newspaper ads every day and applied for some jobs from those ads. He also testified that soon after the beginning of the strike he started working for his landlord and received \$100 per week for approximately 1 year. He began working for Regency Service in February 1992 and remained there until February 1994, when he was laid off. He testified that since February 1994 he looked for many jobs, including jobs at such companies as the Times, OPC, and Big R.

At the hearing the backpay specification was amended so that no backpay is being claimed for Williams after the first quarter of 1993. Williams testified that beginning in August 1989 he regularly looked at newspaper ads and applied at various neighborhood companies including Honeywell, RPS, and Pergament. He testified that after his unemployment benefits ran out in April 1991 he did some odd jobs working on three cars for which he was paid \$90 per car. He testified that he was hospitalized in June 1991 and that he was unable to work after that time.

III. DISCUSSION AND CONCLUSIONS

A. Single Employer

In *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965), the Supreme Court, in considering which factors determine whether nominally separate business entities should be treated as a single employer, stated:

The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

In *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), the Board stated:

We conclude that "single employer status," for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that, in addition to the criterion of common ownership or financial control, the other criteria, whether or not they are present at the top level

³The General Counsel has submitted Richburg's Social Security report. It is admitted into evidence as G.C. Exh. 28.

of management, are "controlling" indicia of the actual exercise of the power of common ownership or financial control; and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the "arm's-length relationship found among unintegrated companies." [Footnote omitted.]

Concerning interrelation of operations, the name of ABC of Pennsylvania was changed to be the very same name as ABC Brooklyn and ABC Pennsylvania "took over" the customer list of ABC Brooklyn. There was a transfer of office equipment, testing machines, and inventory from ABC Brooklyn to ABC Pennsylvania. Those companies utilized identical letterhead, catalogues, and invoices. Respondent used catalogues and invoices that listed ABC Pennsylvania's Philadelphia address as the "manufacturing" address and ABC Brooklyn's address as the "Executive Offices."

With respect to common management, during 1988 to 1990 David Perlman was concurrently running the operation of both locations as general manager of ABC Brooklyn and president of ABC Pennsylvania.⁴ When David's title changed from president to general manager of ABC Brooklyn he ran the day-to-day operations of ABC Brooklyn and participated in all major decisions.

Concerning centralized control of labor relations, David participated in the negotiations with the Union between 1988 and 1989 and had the authority to represent the Company. Concurrently, as president of ABC Pennsylvania, he controlled labor relations there.

With respect to common ownership, it appears that Seymour Perlman was the owner of ABC Brooklyn⁵ and that David was the sole shareholder of ABC Pennsylvania. Nevertheless, the Board has held that where close family members owned two separate corporations the companies were deemed to be a single employer where the same individual was chief executive officer in each company and exercised virtually unrestricted operational, financial, administrative, and labor relations control over both companies. *Hahn Motors*, 283 NLRB 901 (1987). See also *Blumenfeld Theatres Circuit*, supra, 240 NLRB at 216.

In addition, as stated in *Blumenfeld Theatres Circuit*, supra, 240 NLRB at 215, it is instructive to examine whether there is an "arms-length relationship found among unintegrated companies." David Perlman testified that he and his mother loaned \$285,000 to ABC Brooklyn and obtained a security interest in the inventory and assets of ABC Brooklyn which were later transferred to ABC Pennsylvania. Respondent produced no written evidence of the loan or of the security agreement. This would not appear to be the "arms-length" relationship normally found among companies which are unintegrated. Accordingly, under all of the circumstances, I believe that ABC Brooklyn and ABC Pennsylvania are affiliated businesses constituting a single integrated business enterprise.

⁴As noted earlier, the record is unclear as to David's title. At the hearing in the underlying proceeding, Seymour Perlman identified his son as president.

⁵At the hearing in the underlying proceeding, Seymour Perlman responded affirmatively to the statement, "You can only testify to what happened since you owned the company." (Tr. 303.)

B. Efforts to Obtain Employment

An employer may mitigate his backpay liability by showing that a discriminatee “willfully incurred” loss by a “clearly unjustifiable refusal to take desirable new employment.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941). This, however, is an affirmative defense and the burden is on the employer to prove the necessary facts. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966); *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 551 (1978); *O.K. Machine & Tool Corp.*, 279 NLRB 474, 477 (1986). Bolisca testified that he did not look for employment during 1989. Francois testified that he began looking for work in 1990. Similarly, Mood testified that he began looking for work in 1990 and that he did not look for work in 1993. Otherwise the record contains evidence demonstrating the efforts made by the discriminatees in attempting to seek employment. While in some instances the job search records were incomplete and the discriminatees were unable to remember certain specifics as to job applications, “it is well established that employees are not disqualified from backpay merely because of poor recordkeeping or uncertainty as to memory.” *Hickory’s Best, Inc.*, 267 NLRB 1274, 1276 (1983); *Diversified Case Co.*, 272 NLRB 1099, 1100 (1984). Accordingly, I find that Respondent has not sustained its burden of showing that the discriminatees did not “make reasonable efforts to find interim work.” *NLRB v. Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966).

C. Strike Benefits

The strike began August 29, 1989, and lasted until August 19, 1991. The striking employees received \$100 per week from the Union and were required to be on the picket line 1 day per week. Respondent argues that these sums should be deducted from gross backpay as interim earnings. As was stated in *Rice Lake Creamery Co.*, 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888, 893 (D.C. Cir. 1966):

If the strike benefits received by the discriminatees constitute wages or earnings resulting from interim employment, they are proper deductions from gross pay. If these sums represent collateral benefits flowing from the association of the discriminatees with their union, then these sums are not deductible. The burden of proving that the strike benefits constituted wages for picketing and thus were in the nature of interim earnings, was on Respondent.

In *Madison Courier*, 202 NLRB 808, 810 (1973), remanded on other grounds 505 F.2d 391 (D.C. Cir. 1974), the Board stated:

There is no record evidence indicating that the receipt of strike benefits by the unfair labor practice strikers in any way interfered with their efforts to locate suitable interim employment. In the absence of such evidence we find that the claimants’ right to receive backpay should not be diminished by the fact that the claimants picketed, attended union-sponsored training sessions, or received strike benefits roughly comparable to their take-home pay during the period of the Respondent’s liability.

While the discriminatees were required to picket 1 day per week, I believe that Respondent has not satisfied its burden of proving that the strike benefits constituted “wages for picketing.” In addition, there is no evidence indicating that the receipt of strike benefits by the discriminatees “in any way interfered with their efforts to locate suitable interim employment.” Accordingly, I conclude that the strike benefits should not be deducted from the gross backpay.

D. Deductions from Backpay

Bolisca testified that he did not look for employment during 1989. The backpay specification shows a computation of net backpay in the amount of \$4284 for the third and fourth quarters of 1989. I am deducting that amount from the sum of \$28,362 which appears in the specification. Accordingly, the net backpay amount due Bolisca is \$24,078.

Dominick testified that he was hospitalized during 1993 and was unable to work for approximately 10 weeks. The backpay specification indicates that he was unavailable for 8 weeks due to medical reasons. I am deducting from the backpay figure for 1993 an additional 2 weeks’ backpay, which totals \$568. Accordingly, the net backpay amount for Dominick is \$72,136.

Francois testified that he began looking for work in 1990. The backpay specification shows a computation of net backpay in the amount of \$4828 for the third and fourth quarters of 1989. I am deducting that amount from the sum of \$22,520 which appears in the specification. Accordingly, the net backpay amount due Francois is \$17,692.

Harrington testified that in the latter part of 1989 he was hospitalized for 2 weeks and required an additional month for recuperation. The backpay specification shows that he was unavailable for 2 weeks during the last quarter of 1989 and for 4 weeks during the first quarter of 1990 due to medical reasons. It appears that the deductions have already been made in Harrington’s net backpay computation.

With respect to Mood, the General Counsel amended the backpay specification to reflect that it would not claim backpay for the third and fourth quarters of 1992. In addition, the General Counsel has amended the specification to reflect that Mood had interim earnings of \$300 per week making deliveries for Respondent from August 1989 until the end of the first quarter of 1990. The General Counsel’s brief claims the net backpay amount for Mood to be \$30,856. Mood testified that he began looking for work in 1990. The specification shows net backpay for the third and fourth quarters of 1989 totaling \$4420. I am deducting that amount. Mood also testified that he did not look for work in 1993 and that he was again incarcerated beginning April 1993. The backpay specification shows a total of \$6760 for 1993, which I am deducting. Therefore, I am deducting \$11,180 from the \$30,856 requested by the General Counsel. Mood is due as net backpay the sum of \$19,676.

In its brief the General Counsel has amended the claim for Williams to reflect Williams’ testimony that he was hospitalized for 1-1/2 in June 1991 and spent one-half month recuperating after his hospitalization. The General Counsel asserts the amount due to Williams is \$40,086. Williams testified that he was hospitalized in June 1991 and that he was unable to work after that time. The backpay specification lists as net backpay \$20,748 for the period beginning the third quarter of 1991 through the first quarter of 1993. Since

Williams testified that he was unable to work during that time, I am deducting that amount from the sum requested by the General Counsel and find that the amount of backpay due Williams is \$19,338.

CONCLUSION OF LAW

I find that ABC Brooklyn and ABC Pennsylvania are affiliated businesses constituting a single integrated business enterprise. I further find that the backpay computation, as amended, is appropriate. Respondent has not sustained its burden of showing that there should be any additional off-sets. See *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, ABC Automotive Products Corp., Brooklyn, New York, and ABC Automotive Products Corp., Phila-

⁶If 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.

delphia, Pennsylvania, its officers, agents, successors, and assigns, shall pay the sum of \$83,838 to the Union's welfare fund and shall pay to each of the following employees as net backpay the amounts set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),⁷ less tax withholdings required by Federal and state laws:

Phillipe Bolisca	\$24,078
Michael Mood	19,676
Levoyant Brioche	42,940
Arthur Richburg ⁸	15,048
Eddie Dominick	72,136
Jerome Smith	34,200
Pierre Francois	17,692
Ronald Williams	19,338
Richard Harrington	42,652

⁷Under *New Horizons*, supra, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁸Since Richburg is deceased, the backpay due him shall be paid to the legal administrator of the estate or to any person authorized to receive such payment under applicable state law.