

A.P.A. Warehouses, Inc./Sea-Jet Trucking Corporation/Affiliated Terminals Incorporated/Sea-Jet Industries, Incorporated/Sea-Jet Trucking and A.P.A. Warehouses, Incorporated and Local 348, Warehouse Production Sales & Service Employees Union and The International Union of United Automobile and Agricultural Implement Workers of America, AFL-CIO. Cases 29-CA-13151, 29-CA-13150, 29-CA-13199, 29-CA-13232, 29-CA-13280, and 29-CA-13291

June 8, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On February 25, 1992, Administrative Law Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party (UAW) filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A.P.A. Warehouses, Inc./Sea-Jet Trucking Corporation/Affiliated Terminals Incorporated/Sea-Jet Industries, Incorporated/Sea-Jet Trucking and A.P.A. Warehouses, Incorporated, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Charging Party (UAW) asserts that the Respondent's exceptions do not conform to the Board's Rules and Regulations, and therefore should not be considered by the Board. We find that the Respondent's exceptions sufficiently conform to the Board's Rules and Regulations to warrant consideration.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely on the judge's unqualified statement that "employees are not required to lower their sights or to accept employment of a lesser nature." We also correct the judge's citation of *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422-423 (1st Cir. 1968).

Katie Parvin, Esq. and April M. Wexler, Esq., for the General Counsel.

Gary C. Cooke, Esq. (Horowitz & Pollack, P.C.), of South Orange, New Jersey, for the Respondent.

Nicholas Fish, Esq. and Eugene Eisner, Esq. (Eisner, Levy, Pollack & Ratner, P.C.), of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. On November 10, 1988, the National Labor Relations Board issued a Decision and Order,¹ concluding that the Respondent unlawfully denied reinstatement to employee Augusto Diaz for his strike-related activities in violation of Section 8(a)(1) and (3) of the Act. In pertinent part, the Board ordered Respondent to offer Diaz immediate, full, and unconditional reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent one, and to discharge employees hired since the discrimination against him in order to make room for him. The Board also ordered Respondent to make Diaz whole for any loss of wages or benefits which he may have suffered as a consequence of the discrimination against him.

On May 25, 1990, the United States Court of Appeals for the Second Circuit entered its judgment against Respondent enforcing the Board Order.

As the parties were unable to agree upon the amount of backpay due to Diaz, the Regional Director for Region 29, pursuant to authority duly conferred upon, issued a backpay specification on August 29, 1990. Respondent filed timely amended answer thereto on October 29, 1990. Upon due notice, a hearing was held in Brooklyn, New York, on April 11 and 12, 1991, on the issues raised by the pleadings. All parties were afforded a full opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. Posthearing briefs filed by the General Counsel and the Respondent have been carefully considered.

On consideration of the entire record herein and on my observation of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. RELEVANT UNDERLYING FACTS AND THE ELEMENTS OF THE BACKPAY SPECIFICATION

The Respondent consists of a number of interrelated corporations which were found to constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The unfair labor practice proceeding dealt with a labor dispute involving Respondent's warehouse operation and its warehouse employees. The Charging Union had initiated an unfair labor practice strike against Respondent which was engaged in by a complement of more than 100 of its warehouse employees, including Diaz. Upon the Union's unconditional offer to return to work, made on behalf of the striking employees on March 17, 1988, Respondent offered to reinstate all the strikers except for Diaz. The Board affirmed Administrative Law Judge Green's credibility resolution that Respondent's owner, Abie Moscovitz, had informed Diaz during the strike that he would never work again for the Respondent and concluded that Diaz's response that Moscovitz was "like Hitler" was insufficient to warrant his disqualification from reinstatement as it did not reason-

¹ *A.P.A. Warehouses*, 291 NLRB 627 (1988).

ably tend to coerce or intimidate employees in the exercise of the rights protected by the Act under the *Clear Pine Mouldings*² test.

During the instant proceeding, it was established that Diaz had been one of seven or eight employee leaders of the strike and that Moscowitz had also told Diaz that Diaz would have to beg to him to get his job back.

With respect to the backpay period, the specification begins the period on March 17, 1988, the date of Respondent's discriminatory refusal to reinstate him, and continues it to the present, in the absence of a valid offer of reinstatement. However, no claim for backpay is made after August 29, 1990, when the specification issued.

In computing Diaz' gross backpay, the specification utilizes as an appropriate measure of what Diaz would have earned during the backpay period, his hourly rate of pay multiplied by his average number of weekly hours, adjusted for overtime, computed on a calendar quarterly basis. As Diaz' hourly rate of pay, the specification used the figure of \$8.12 per hour which Diaz had received during the 6 months preceding the commencement of the strike. In an amended specification approved and received in evidence at the opening of the hearing, claim is made that effective July 10, 1989, Diaz would have received an increase in his hourly rate to \$8.50 per hour which would have continued through the backpay period.

The specification lists Diaz' average number of weekly hours during the backpay period as 38.35. To this is added a figure of 5.25 hours, representing Diaz' average weekly overtime. A figure of 46.23 adjusted hours per week is then derived by totalling Diaz' regular hours and his overtime hours adjusted for time and a half overtime pay. The gross backpay resulting from multiplying Diaz' 46.23 adjusted hours per week by his rate of pay both before and after July 10, 1989, was computed on a calendar quarterly basis for each quarter from March 17, 1988, through August 29, 1990, the figures for the first and last quarters representing only the portion of those two quarters for which a claim could be validly asserted.

The specification also contains interim earnings, computed on a quarterly basis, which it is admitted Diaz earned during the backpay period. Finally, the specification includes Diaz' net backpay, also computed on a calendar quarterly basis, the total of which, as computed, is set forth as the sum, which if paid by Respondent, plus interest accrued to the date of payment, minus withholdings required by Federal and state laws, will discharge its obligation to make Diaz whole.

II. RESPONDENT'S CONTENTIONS

Respondent's amended answer to the backpay specification denies Diaz was not validly offered reinstatement. Respondent would limit backpay from March 17, 1988, to June 29, 1990, when it sent Diaz a letter offering him a return to work in a comparable position at his former rate of pay because it did not have available the exact position Diaz had formerly held.

As to the formula used for computation of gross backpay, Respondent disputed the amount of hours Diaz would have worked since the conclusion of the strike, but failed to comply with Section 102.5(b) of the Board's Rules and Regula-

tions which requires that "if Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement and setting forth in detail the Respondent's position as to the applicable premises and furnishing the appropriate supporting figures." As a consequence, the General Counsel's motion to preclude Respondent from adducing testimony in support of an alternate formula for computing gross backpay was granted during the second day of hearing.

In determining that Diaz' work hours during the backpay period should be adjusted an average of 5.25 hours per week overtime, Board Compliance Officer Richard Epifanio testified that he examined the Respondent's records for a representative period prior to the discrimination³ relating to the employees in the department including floormen in which Diaz had been employed. In this connection it is noteworthy that unrebutted testimony showed that at the time of the hearing floorman Miguel Aurich was working 4 hours overtime a week and that most of the other floormen worked overtime, depending on the job. Only Aurich, who started in 1977, and one other employee, had more seniority than Diaz, as floormen. Diaz had started in 1980.

In further determining that Diaz would have received an increase in pay from \$8.12 to \$8.50 an hour effective July 10, 1989, Epifanio also testified that on a recent examination of Respondent's more current records of employees in Diaz' department he discovered that many of the employees received wage increases for the week of July 10, 1989. Respondent's records confirmed that 7 of 10 floormen received raises at the beginning of the third quarter of 1989. In determining the precise amount of Diaz' projected wage increase Epifanio took as his guide the only other departmental employee, Miguel Aurich, who was receiving the same hourly rate as Diaz prior to the strike, \$8.12. Aurich's wage increased to \$8.50.

In following the procedures outlined above in reasonably determining what Diaz' average overtime hours and wage rates would have been during the backpay period the General Counsel was complying with the commands of the Act and its rules. As the cases make clear, the gross backpay computation need be no more than an approximation of the actual loss of earnings so long as it is not unreasonable or arbitrary under the circumstances. *Mastell Trailer Corp.*, 273 NLRB 1190 (1984); *Iron Workers Local 378 (Judson Steel)*, 227 NLRB 692 (1977); *Bagel Bakers Council v. NLRB*, 555 F.2d 304 (2d Cir. 1977).

Respondent's amended answer also contested the accuracy of Diaz' interim earnings itemized in the specification as well as the adequacy of his search for work, claiming further that Diaz provided false and/or misleading information regarding his search for work. It is well to note here that the burden is on the Respondent to establish facts which would mitigate its liability, such as wilful loss of earnings and the amount of interim earnings to be deducted from any backpay award. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966).

² 268 NLRB 1044 (1984).

³ The specification lists that period as being the 6 months prior to the commencement of the strike.

III. THE FACTS, ANALYSIS, AND CONCLUSIONS
REGARDING RESPONDENT'S OFFER OF EMPLOYMENT
AND DIAZ' SHORT-LIVED RETURN TO WORK

Diaz testified that at the beginning of July 1990 he received a letter from Respondent to come back to work. When he reported for work early in the morning of July 16, 1990, he spoke to the general manager who described two vacancies in unloading trailers and receiving. Diaz' response was that this was not his job and he would not take it. Before finally rejecting the offer he spoke by phone with union counsel who spoke in turn with the manager. As a result Diaz accepted the receiving job. His rate of pay was the same he had earlier received, \$8.12 an hour.

Diaz worked for 4 days and then left Respondent's employment after he was injured when he was struck by a box he was unloading, hurt his lower back, and was treated as a day patient at a hospital near his home. He reported his experiences on the job to a Board agent and did not return. To date, he has never received an offer to return to his original, prestrike position as floorman.

Diaz described the work of his old job of floorman as preparing orders, receiving goods through the elevator and stacking them with the use of a mechanical hi-low truck which he drove and operated while seated. Lighter freight he moved by hand. In receiving he was unloading trailers all day, carrying boxes manually, some heavy ones weighing in excess of 35 to 40 pounds included, from the trailer to skids which he then moved manually with a handjack to positions on the platform. Diaz credibly described the major differences between the two jobs as the requirements of continuous unloading and the manual lifting of heavy boxes in receiving. Previously, as a floorman, Diaz prepared orders and did paperwork a portion of each day and moved and stacked heavier freight while seated at the hi-low machine.

In addition to the more onerous physical aspects of the new job offered Diaz, it is also apparent that while Diaz received his old rate of \$8.12 in receiving, while employed there he was the only employee earning anywhere near that rate; the majority of the more than 20 employees in that department were earning between \$4 and \$4.50 per hour, only 3 had a rate in the \$6-an-hour range and only 3 had rates in the \$5-an-hour range. In contrast, of the eight floormen employed as of the week of April 11, 1991, during the hearing, six were being paid \$8 or more an hour and none were making \$4.50 or less. The receiving department was viewed by Respondent as employing mainly entry level employees while the floormen department employed much higher rated employees. In fact, only six other hourly rated employees outside the floormen department, in order preparation, and elevator operators, earned more than floormen, \$9 an hour or more, in April 1991.

In light of all of the foregoing, it is not only surprising but incredible that Respondent's comptroller, Harold Pretter, would deny the suggestion made to him by union counsel, that a floorman's job was a highly desirable job at the warehouse.

While the General Counsel has established that the receiving job which Diaz was offered was not identical to his former position, Diaz was privileged to reject the offer because it did not comply with the Board's reinstatement order only if Diaz' former position "no longer exists." The determination as to the continued existence of Diaz' former posi-

tion hinges on an analysis of whether the position continued to be employed in Respondent's warehouse operation and which employees continued to occupy that position at the time Respondent made its offer. If, e.g., employees newly hired since Diaz was discriminatorily denied reinstatement were working as floormen when Respondent made its late June 1990 offer, in compliance with the language of the Board's Order, Respondent was obliged to discharge one of these employees to make room for Diaz. If, also, employees initially assigned to other lessor positions were reassigned and promoted to positions as floormen for the first time after Diaz was discriminated against, Respondent would have been similarly obliged to release or reassign such employees to make way for Diaz. In such a situation, the promoted employee would be deemed as hired for the position since the discrimination as surely as if he had been newly hired from the outside.

The evidence shows that Respondent continued to employ floormen in department 48 throughout the backpay period and that some of them were first paid as floormen after Respondent's March 17, 1988 discriminatory refusal to reinstate Diaz. Thus, Porfirio Amigon was first paid as a floorman on January 5, 1990, at an hourly rate of \$6.50. Eduardo Torres did not receive his first paycheck for work performed as a floorman until June 15, 1990, at an hourly rate of \$5.75. Even if Respondent's claim that Eduardo Torres used the name of Artenio Torres when originally hired on January 16, 1986, and until he had received his U.S. Immigration Service authorization for employment as a resident alien and social security number in June 1990, under the alias of Artenio Torres, he did not receive his first paycheck as a floorman until October 7, 1988, at an hourly rate of \$5.50. Trinidad Torres, who had been hired August 11, 1986, first received pay as a floorman for the week ending April 22, 1988, at the rate of \$6 an hour. By April 11, 1991, he was being paid \$8.25 an hour.

With respect to both Amigon and Torres, Respondent claims they were employed as floormen helpers and not as floormen. Well prior to July 1990 to at least until the hearings in April 1990, Respondent employed nine employees in the floormen department 48, three of whom were designated as floormen helpers and six as floormen. Floormen apparently are assigned to different floors of the six-story warehouse and on three of the floors work with a helper. The evidence disclosed that the physical duties performed by floormen and helpers are interchangeable except that floormen receive orders and deal with the paperwork and on those floors where a helper is assigned will divide up the work of moving and stacking the merchandise with the helper. It further appears that helpers are paid less than the floormen, in a range of \$5 or more as a starting rate to as much as \$6.50 or \$7 an hour, while floormen are paid \$7 an hour and up.

Respondent's claim with respect to the two classifications of floormen positions did not excuse its failure and refusal to offer a floorman position to Diaz, who would have been reinstated to his former position by an assignment to a floorman classification, whether as floorman or helper, at his old rate. Since, however, Respondent did have at the end of June 1990 at least one floorman position which was then filled by an employee, Trinidad Torres, who had been reassigned to the position after Diaz' discrimination occurred,

Respondent's refusal to reinstate Diaz to that position constituted a failure to offer reinstatement in accordance with the Board's Order and Diaz' backpay period thus continued to run after June 1990 to at least the April 1991 hearing.

IV. THE FACTS, ANALYSIS AND CONCLUSIONS
REGARDING DIAZ' EFFORTS TO MITIGATE HIS
BACKPAY CLAIM

The backpay specification, as amended, lists interim earnings of varying amounts in each quarter of the backpay period, except for the 2-week period in the first quarter, and the full second quarter of 1988. During this period Diaz was interviewed at the Board's Regional Office on a number of occasions. He also sought work on his own, without success, in particular during the second quarter, registered for and collected unemployment insurance and reported to the state unemployment office every other week in connection with his job search.

Diaz, in his testimony, and as corroborated by a written statement he submitted to the Board, listed the names of at least seven employers, among others he could not recall, where he sought work during this period. He also reviewed regularly help-wanted advertisements which appeared in several hispanic newspapers without finding any job vacancies.

After this unsuccessful search, starting in the third quarter of 1988, and continuing through the fourth quarter of 1989, Diaz had earnings as a self-employed taxi cab driver. He used his own used 1982 model automobile, worked alone grossing on average more than \$400 over a 35- to 42-hour workweek.⁴ In order to generate business he utilized a car service to take calls from customers and to contact him by two-way radio. Diaz' net earnings from this work totaled \$5200 over the last two quarters of 1988 after deducting the various expenses needed to generate the income. Those expenses included the purchase of gasoline, insurance, car repairs, and the weekly fee charged by the car service. Beginning in 1989, Diaz switched from one car service to another, but because of additional automotive repair charges, as well as a break-in of his auto on the street, which resulted in lost worktime and the decision to use another used auto, Diaz' net earnings were substantially reduced. As a result of the lost time and all of his expenses, including, among others, a \$200-base fee paid to the new car service, gasoline expense of \$3500 and car repairs totaling \$1488, Diaz' gross earnings of \$13,000, netted him \$3650 and less than \$1000 per quarter in 1989.

Starting in December 1989, Diaz ceased his cab-driving operation, and sought employment again, contacting friends, visiting companies, and reading help-wanted ads in newspapers. In March 1990, Diaz secured a position as assistant with a company he had visited first in May 1988 at the suggestion of a friend. Benny's Kitchens, located in Queens, New York City, that renovates kitchens and installs new tile floors. The earnings Diaz reported from this work, for the first and second quarters of 1990, at the rate of \$135 per

⁴Diaz' testimony that he made between \$100 and \$200 per week in the last half of 1988 is in error, as noted by Respondent in its brief. The correct figures are derived from Diaz' 1988 Federal tax return which show a gross income from his cab business of \$11,700. Over the 26-week period involved Diaz averaged \$411 in gross collections.

week could not be supported by any earnings statements as he was paid in cash off the books. Toward the close of the backpay period Diaz secured limited earnings for the short period he worked again for Respondent in the receiving department.

Diaz' claimed net backpay also reflects some limited compensations he received from the Union in 1988 to make up for wages lost when he attended a prehearing conference and multiple hearings on behalf of the Union in connection with this matter. The General Counsel also successfully moved to reduce Diaz' gross earnings by \$1100 for the third quarter of 1989 to reflect his removal from the labor market during a trip he made to Honduras, his native country, which exceeded by 2.8 weeks the paid vacation plus Labor Day Holiday he received while previously employed by Respondent.

Respondent's contention on the basis of this evidence, that Diaz failed to mitigate his backpay claim, is simply not supportable as a matter of law. Respondent has not met its burden of showing a willful loss of earnings by eliciting on Diaz' cross-examination that he could not produce the paid receipts for his automotive expenses incurred in 1988 and 1989⁵ which were itemized on the copies of his 1988 and 1989 Federal income tax return, and did not have any records of his cash earnings from Benny's Kitchen. Neither Diaz nor the General Counsel's failure to produce the underlying records should nullify the sufficiency of the evidence presented. Poor recordkeeping should not disqualify a backpay claimant. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159 (1980). Neither should he be prejudiced because documents have been lost, especially where a "reasonable approximation" of interim earnings may be arrived at. *Id.* at 1159.

Neither is Respondent's burden satisfied by the argument made in its brief that by continuing a relationship with the new car service through all of 1989 that produced a substantially lessor financial return than the one with the original car service in 1988, Diaz somehow willfully sustained losses. Diaz' fair explanations regarding the difficulties he experienced over the year in maintaining a workable business vehicle free from breakdowns and vandalism leading directly to his ultimate decision to abandon self-employment by the end of the year and seek paid employment were adequate to establish the bona fides of Diaz' mitigation efforts during that period. Respondent's argument amounts to no more than mere speculation after the fact and does not constitute the affirmative demonstration required of it that by engaging in the cab service enterprise Diaz was ignoring actual or potential sources of employment available to him. See *NLRB v. Inland Empire Meat Co.*, 692 F.2d 764 (9th Cir. 1982).

Respondent neither called timely any witness nor offered any independent evidence seeking to support its claims of willfulness or lack of reasonable efforts to find interim work. Diaz' own efforts to seek interim employment establish a diligent search for work. He identified the seven employers he could recall which he visited in his initial job search over a 2-month period in 1988. And he credibly described the results of such efforts. In its brief, Respondent disputes the address of one of the employers, asserts the lack of a listing

⁵Diaz explained that he had forwarded them to the Board and counsel for the General Counsel represented that they were not in her file.

of another in the local telephone directory and claims that two others have been closed "for several years." Diaz was not confronted with any of these claims, and the assertion of these contentions as facts outside the record cannot be given any credence. Even if true, however, they do not impeach Diaz' recital regarding his visits to these employers 3 years before. Taken together with his regular review of newspaper job ads, consultations with friends, and unemployment service interviews Diaz met the test required of him to mitigate his loss of income. Coupled further with his unsparing efforts thereafter to operate a taxi service, an enterprise to which he turned when his initial job search proved unsuccessful, and his later successful procurement of employment in the first two quarters of 1990 when the taxi service failed, Diaz presents a claimant who met the reasonable standard of diligence required of him. *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422-423 (1st Cir. 1968); *Cornwell Co.*, 171 NLRB 342, 343 (1968).

Diaz' acceptance of a lower paying job with Benny's Kitchen in early 1990 also met this standard. While employees are not required to lower their sights or to accept employment of a lesser nature, Diaz' acceptance of the lower paying job of assistant with the kitchen renovation firm, given the circumstances of his recently failed business and a continuing inability to find equivalent work relieved him of the duty to continue an unsuccessful search. *Sioux Falls Stock Yards*, 236 NLRB 543, 551 (1978); *Champa Linen Service*, 222 NLRB 940, 942 (1976); *Firestone Synthetic Fibers Co.*, 207 NLRB 810, 815 (1973).

In view of the foregoing, Respondent's reliance in its brief upon *American Pacific Concrete Pipe Co.*, 290 NLRB 623 (1988), which in dictum notes that the discrediting of a discriminatee's testimony about his interim earnings can nul-

lify a backpay claim, is inapposite and unavailing. Neither may Respondent rely on *American Navigation Co.*, 268 NLRB 426 (1983), which held that willful concealment of interim employment will disqualify a claimant from receiving backpay in the quarters in which such concealment took place. On the record before me, Respondent has dismally failed to show such concealment or similar fraud or deceit.

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

ORDER

A.P.A. Warehouses, Inc./Sea-Jet Trucking Corporation/Affiliated Terminals Incorporated/Sea-Jet Industries, Incorporated/Sea-Jet Trucking and A.P.A. Warehouses, Incorporated, Brooklyn, New York, their officers, agents, successors, and assigns, shall pay to Augusto Diaz the sum of \$35,723.84, the backpay provided for herein, with interest thereon, to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987),⁷ less tax withholdings required by state and Federal laws.

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.

⁷Under *New Horizons*, interest on and after January 1, 1987 shall be 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. Interest on amounts accrued prior to January 1, 1987 shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).