

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WONDER MEATS, INC.

and

Case Nos. 22-CA-21258X
22-CA-21524
22-CA-21648
22-CA-21870

LOCAL 174 UNITED FOOD AND
COMMERCIAL WORKERS UNION, AFL-CIO

Bert Dice-Goldberg, Esq., for the General Counsel.
Gary Thompson, Esq., for the Respondent.

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on March 11, 2003.

On July 1, 1998, the National Labor Relations Board, herein called the Board, issued a Decision and Order in the above-captioned case, approving the Settlement Stipulation entered into by the parties and approved by the Administrative Law Judge. The Board's Order directed Wonder Meats, Inc., Respondent herein, its officers, agents, successors, and assigns, to take certain affirmative action, including, upon request, bargain with the Union as exclusive representative of all its unit employees at its Carlstadt, New Jersey facility, offering its employees full and immediate reinstatement to their former positions, expungement from its records of any reference to the discharges and make employees whole for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) & (3) of the Act.

On October 28, 1998, the Court of Appeals for the Third Circuit entered its Judgment enforcing in full the Board Order herein.

A controversy presently exists over the amount of backpay due under the terms of the Board's Order. The Regional Director of the National Labor Relations Board for Region 22, pursuant to authority duly conferred upon him by the Board, issued an Amended Compliance Specification and Notice of Hearing. During the trial of this case, based upon an Amended Compliance Specification and Notice of Hearing issued on December 31, 2002, and a Second Amended Compliance Specification issued on January 14, 2003, the Compliance Specification was further amended at the trial to correct the backpay claims for two discriminatees: Azucena Ponce and Luis Robledo.

Respondent's Answer and its contention at the trial consists solely of the formula the Region used to compute gross backpay. Respondent alleges that the Region relied upon the

wrong records, and that the number of hours which the Region claimed the discriminatees would have worked during the backpay period had they not been discharged unlawfully were too high.

Thus, the sole issue in this case is the method of computation of the gross backpay.

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The backpay periods which are not in dispute are set forth below:

(a) The backpay periods for Ysidro Cadet begins on March 24, 1996 through May 2, 1996 and from January 9, 1997 through July 21, 1998.

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(b) The backpay periods for Dora Cardona begins on March 25, 1996 through May 2, 1996, July 26 and August 2, 1996 and from August 30 through July 21, 1998.

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(c) The backpay periods for Rafael Medina begins on March 26, 1996 and ends on July 21, 1998.

(d) The backpay periods for Gonzolo Medina begins on March 25, 1996 and ends on May 2, 1996.

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(e) The backpay periods for Grigorio Medina begins on March 25, 1996 and ends on May 2, 1996.

(f) The backpay periods for Sandino Melendez begins on March 25, 1996 through May 2, 1996 and from October 25, 1996 through July 21, 1998.

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(g) The backpay periods for Azucena Ponce begins on March 26, 1996 through May 2, 1996 and from August 30, 1996 through July 21, 1998.

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(h) The backpay periods for Luis Ramos begins on March 20, 1996 and ends on July 21, 1998.

(i) The backpay periods for Luis Robledo begins on March 24, 1996 and ends on May 21, 1998.

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The Region's Gross Backpay Calculations

To calculate backpay in this matter, the Compliance Officer testified that she utilized a backpay period taken from the dates of Respondent's unlawful conduct until it either reinstated the discriminatees or placed them on a preferential hiring list in July 1998. The dates were taken from the Consolidated Complaint, Stipulation of Formal Settlement and Board Order in this case.¹

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Using the dates of their discharges and a calendar for 1996 through 1998, the Compliance officer, by quarter, calculated how many weeks of work the discriminatees were owed backpay. Looking at, for example the calculations in the Specification for discriminatee Ysidro Cadet, Appendix B-1 of the Second Amended Specification, ² the backpay period is listed at the top of the

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¹ The Compliance officer was the only witness called by Counsel for the General Counsel. Her testimony as to the method and the calculation by which the gross backpay was computed is not contested. Respondent's only contention is that another method should have been used. Thus, I credit entirely the Compliance officers testimony.

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² All references to columns refer to Appendix B of the Second Amended Specification.

document. Looking at the left hand side of the document, the calendar years and quarters are laid out in Column 1. The number of weeks for which backpay is owed is listed in Column 2. Based upon standard Board procedure, the Compliance Manual and using payroll records for the discriminatees for 1995, the year prior to Respondent's unlawful conduct, the Compliance officer

5 computed the average number of hours each discriminatee worked per week for the entire year of 1995, and projected that average number of hours per week forward in Column 3.³ The Compliance officer used an average hour figure because the discriminatees did not work the same number of hours every week. Prior to preparing the Specification the Compliance officer asked Respondent for all its payroll records, including records subsequent to 1995. Respondent provided

10 only those for 1995. Respondent's President indicated the rest of its records were with its accountant, and thus unavailable. The Compliance officer divided the average number of hours per week into regular hours, Column 4, all 40 hours per week, and overtime hours, Column 7, consisting of all average hours worked in addition to 40 hours per week. She took the discriminatees' hourly wages, from the 1995 payroll records, and then multiplied hourly wages by

15 the number of weeks in each calendar quarter and by average hours to get regular backpay, Column 2 x Column 4 x Column 5 = Column 6.

The Compliance officer also determined, using the 1995 payroll records, how many hours of overtime the discriminatees worked on average per week. She multiplied the number of

20 average overtime hours by the discriminatees' hourly overtime wage, at time and a half, and then by the number of weeks they were owed backpay in each calendar quarter. That calculation yielded the overtime backpay owed each discriminatee per calendar quarter, Column 7 x Column 8 x Column 2 = Column 9. When the regular backpay and overtime backpay was added together, the result was the gross backpay due each discriminatee per quarter, Column 6 + Column 9 =

25 Column 10. Adding each quarter's gross backpay per quarter yielded the total gross backpay due each discriminatee.⁴

Respondent contests the Compliance Specification and claims the discriminatees would have worked fewer hours

30 The Compliance officer testified that after the Region issued its Compliance Specification, Respondent sent additional payroll records. Respondent supplied quarterly statements of payroll for the last two quarters of 1996, omitting the first and second quarters, and provided quarterly earnings for all of 1997 and three quarters of 1998. The 1997 records do not break down the

35 number of hours employees worked by employee or by week. The 1998 records contain no references to hours worked at all. Thus, the Region had no way of determining the hours employees worked on a week-by-week basis or what portion of those wages were due to overtime from the 1996 through 1998 records. The Region could not calculate average hours employees worked by using the 1996 through 1998 records because Respondent did not provide sufficient or

40 complete records for those years. Since there was no way to use the records Respondent provided after the specification issued with accuracy, and the 1995 records were the only complete records Respondent provided, the Region relied entirely upon the 1995 records in amending the Specification.

45 ³ The only exception to this formula was discriminatee Luis Ramos, who was listed as a salaried employee in Respondent's payroll records. Therefore, the Compliance officer multiplied the number of weeks for which Ramos was owed backpay in each calendar quarter (Column 2) by his weekly salary (\$600 – Column 3), to arrive at his gross backpay (Column 4).

50 ⁴ As Respondent had paid the discriminatees settlement money under an Informal Settlement Agreement which was later revoked, the settlement money was treated like interim earnings and deducted with interim earnings from gross backpay to yield net backpay.

Respondent contends that its mere assertion that it lost its two biggest customers is sufficient proof to support a reduction in the number of hours the discriminatees worked. Respondent made no showing that those customers were not replaced by other customers or that business did not otherwise improve. However, the records Respondent did provide for 1996
5 indicated that employees continued to work 40 hours per week plus overtime.

Additionally, Respondent in its Answer claimed that it had only 15 employees. However, its records indicate 46 people on the payroll in the third quarter of 1996 and fourth quarter of 1997. Respondent offered no explanation for this discrepancy.

10 Analysis and Conclusion

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *National Labor Relations Board v. Mastro Plastics Corp.*, 354 F. 2d 170, 178 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1965). 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 Respondent's illegal conduct. *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533, 544 (1943); *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1975). 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. *La Favorita, Inc.*, 313 NLRB 902 (1994). The Region's formula clearly meets this test. When presented with alternative formulas in compliance proceedings, the Administrative Law Judge must determine which formula is the most accurate, basing the recommendation on all of the facts adduced by the parties. *W. L. Miller Co.*, 306 NLRB 936, fn 1 (1992); *Hacienda Hotel and Casino*, 279 NLRB 601, 603 (1986).
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The Board's Casehandling Manual (Part Three,) Compliance Proceedings, Section 10532.2 indicates that an appropriate formula for computing backpay is to use a projection through the backpay period of the discriminatee's average hours and/or earnings from an appropriate period prior to the unlawful action. Utilizing a formula specified by the Board in the Casehandling Manual is per se an appropriate method for computing backpay. See, *Paterson-Stevens, Inc.*, 325 NLRB 1072, 1075 (1998). In the instant matter, the Region utilized a formula specified in the Compliance Manual, and based its computations on averages derived from a full year of records; the only complete records Respondent provided.
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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 who any uncertainty must be resolved." *La Favorita, Inc.*, 313 NLRB 902, 903 (1994); *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). In this case, Respondent essentially contends that the incomplete records, based on its unsubstantiated testimony regarding a reduction in business should be used to calculate the gross backpay. I conclude that using those incomplete records would only introduce doubt and uncertainty to the computations. Where there are uncertainties or ambiguities, doubts must be resolved in favor of the wronged party rather than the wrongdoer. *Paterson-Stevens, Inc.*, 325 NLRB 1072, 1075 (1998).
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Respondent offered no meaningful evidence to establish that it had a reduction in work or that employees' hours were reduced during the backpay period. Instead, Respondent's President testified that he lost two of his biggest customers. He left unresolved whether those customers were replaced by other customers, his business could have doubled even with the lost of those customers. The records Respondent provided for 1997 and 1998 either did not show the number of hours employees worked or did not break those hours down by week or employee; yet Respondent contends that the Region should have utilized those records in its calculations.
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Additionally Respondent's records were self-contradictory. In this connection, Respondent contended that it had only 15 employees, yet its own records indicate 46 people worked during the backpay period. Respondent offered no explanation for this discrepancy. It should be affirmed, i.e., *Intermountain Rural Electric Ass'n.*, 317 NLRB 588, 591 (1995).

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I conclude that the formula utilized by the Region is one the Board finds acceptable, and that the records upon which the Region based its calculations were the only complete records that Respondent provided. I also conclude that any uncertainty resulted from Respondent's failure to provide complete records from other time periods. I further conclude that uncertainty must be resolved in the discriminatees' favor. Accordingly, I conclude the Region's calculations are appropriate. *Paterson-Stevens Inc.*, 325 NLRB 1072, 1075 (1998).

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I conclude that Respondent's contention that hours due to the discriminatees should somehow be reduced because replacement workers were not as skilled or experienced as the discriminatees is not supported by any authority. Respondent's illogical assertion would reward Respondent at the Compliance stage of the case for conduct found to be unlawful in the underlying matter.

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I finally conclude that based upon clear precedent, standard Board procedure and all the facts, the General Counsel's formula for backpay is the most accurate accounting procedure, and all backpay should be awarded as set forth in the Second Amended Specification as supported by the Amended Specification and its Appendices.

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Accordingly, as set forth in the Specification, and in my findings of facts and conclusions of law I conclude the net backpay for each discriminatee is set forth as follows:

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Ysidro Cadet	\$24,535.17	plus interest
Dora Cardona	\$17,842.16	plus interest
Gonzalo Medina	\$ 3,177.16	plus interest
Grigorio Medina	\$ 2,188.63	plus interest
Rafael Medina	\$26,208.00	plus interest
Sandino Melendez	\$37,078.66	plus interest
Azucena Ponce	\$24,700.80	plus interest
Luis Ramos	\$18,843.51	plus interest
Luis Robledo	\$ 1,773.36	plus interest

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Based upon the above finding of fact and conclusions of law, I recommend the following Order ⁵

Order ⁵

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ORDER

The Respondent, Wonder Meats, Inc., its officers, agents, and assigns, shall make whole the employees named below by paying to 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 withholding required by Federal and State laws.

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⁵ 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.

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	Ysidro Cadet	\$24,535.17	plus interest
	Dora Cardona	\$17,842.16	plus interest
	Gonzalo Medina	\$ 3,177.16	plus interest
	Grigorio Medina	\$ 2,188.63	plus interest
5	Rafael Medina	\$26,208.00	plus interest
	Sandino Melendez	\$37,078.66	plus interest
	Azucena Ponce	\$24,700.80	plus interest
	Luis Ramos	\$18,843.51	plus interest
	Luis Robledo	<u>\$ 1,773.36</u>	plus interest
10	Total Backpay is	\$156,347.45	

Dated, Washington, D.C.

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Howard Edelman
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE Respondent, Wonder Meats, Inc., our officers, successors, and assigns, shall make the employees named below whole by paying to them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB (1987) accrued to the date of payment minus tax withholding required by Federal and State Laws.

Ysidro Cadet	\$24,535.17	plus interest
Dora Cardona	\$17,842.16	plus interest
Gonzalo Medina	\$ 3,177.16	plus interest
Grigorio Medina	\$ 2,188.63	plus interest
Rafael Medina	\$26,208.00	plus interest
Sandino Melendez	\$37,078.66	plus interest
Azucena Ponce	\$24,700.80	plus interest
Luis Ramos	\$18,843.51	plus interest
Luis Robledo	<u>\$ 1,773.36</u>	plus interest

Total Backpay is \$156,347.45

WONDER MEATS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor, Newark, NJ 07102-3110

(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.