JD–88—04
Owensboro,KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BOWLING TRANSPORTATION, INC.

and Case 25-CA-26896 Amended

RICHARD ASHBY

Derek A. Johnson, Esq., for the General Counsel.
Konrad Kuczak, Esq., of Dayton, Ohio, for the Respondent.

SUPPLEMENTAL DECISION AND ORDER

Statement of the Case

Ira Sandron, Administrative Law Judge. This matter arises out of a compliance specification and notice of hearing issued on April 30, 2004, against Bowling Transportation, Inc. (the Respondent), stemming from the Board's Decision and Order in 336 NLRB 393 (2001), as affirmed by the Sixth Circuit Court of Appeals in *Bowling Transportation, Inc. v. NLRB*, 352 F.3d 274 (6th Cir. 2003). As set forth in the Board's decision, the Respondent's unfair labor practices included its discharge of Jeffrey Horton on December 23, 1999, for his protected concerted and suspected union activities.[1]

Pursuant to notice, I conducted a trial in Owensboro, Kentucky, on July 15, 2004, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Witnesses included Horton, Compliance Officer Lisabeth Luther, and Bill Bowling, the Respondent's president and CEO.[2]

The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

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[1] The Board found that two other employees, Richard Ashby and Kenneth Hanks, also were unlawfully discharged. They, too, were named in the compliance specification. However, based on a compliance agreement with the Respondent, approved by the Regional Director on July 7, 2004, the General Counsel withdrew those portions of the compliance specification relating to them. See GC Exh. 2. Accordingly, only the Respondent's backpay liability to Horton remains at issue.

[2] See 336 NLRB at 397.

Issues

1. Whether the compliance officer erred in selecting Joseph (Jody) Johnson as the representative employee for calculating Horton's gross backpay, rather than employee Jason Quinn.

2. Whether the Respondent's backpay liability was cut off by its February 16, 2002 letter offering Horton reinstatement, rather than by its later letter of March 5, 2002.[3]

3. Whether, as the Respondent contends, Horton should be awarded no backpay for the second quarter of 2000 and from July 1, 2001 on, because he concealed earnings, first from Bennett Trucking and then from Robert Priest.

4. Whether the unpaid wages owed to Horton by Priest should be considered interim earnings.

Facts

Based on the entire record, including the Board's Decision and Order, testimony of witnesses, and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact.

The Appropriate Representative Employee for Calculating Gross Backpay

Horton started on July 9, 1998, as a local truck driver. In approximately January 1999, he was assigned to be an intra-plant driver at AK Steel, Rockport, Indiana (Rockport), where he remained as a supertruck driver until his discharge in December 1999. In that position, he operated equipment only at the site.

By letter dated January 18, 2002, to the Region, Attorney Kuczak stated that two employees worked for the entire backpay period: Johnson and Quinn.[4] Johnson earned a total of $77,831.76, whereas Quinn earned $63,189.36. Kuczak attributed this difference to Johnson's volunteering for overtime and his being "senior to everyone else at the Rockport facility," which enabled him to avoid layoffs that affected the operation. He concluded, therefore, that Quinn was the more suitable representative employee.

Johnson was hired on September 1, 1998, approximately 2 months after Horton. He was reassigned to Rockport a few weeks before Horton began there, or in approximately December 1998. When large-scale layoffs took place in April 2000 and thereafter, Johnson was the only Rockport employee who was not laid off. Bill Bowling testified that for over-the-road drivers, the Company "tries" to honor seniority, but for

[3] GC Exhs. 3 & 4, respectively.

[4] GC Exh. 5 at 2.

intra-plant drivers, seniority is based on when they started at the particular job, not when they began working for the company.[5]

Neither the date Quinn was hired nor the date when he was assigned to Rockport are in the record. He was originally an over-the-road driver out of the Respondent's Owensboro, Kentucky location but at some point went to Rockport. Quinn's name was not included in a list of 31 employees who worked at Rockport from the inception of the intra-plant operation in the spring and summer of 1999, submitted to the Region in January 2002.[6] By letter of April 2, 2004, Kuczak transmitted Kentucky unemployment reports for Bowling.[7] Employees who did not work at Rockport prior to January 2000, were highlighted; Quinn was one of them.

Quinn was laid off from Rockport in or after April 2000 and was reassigned to an over-the-road job. He later quit his employment with the Respondent. Some drivers who were laid off from Rockport and given over-the-road jobs later returned to Rockport.

Luther explained that she determined to use Johnson rather than Quinn as the representative employee because Johnson's seniority and work experience were more commensurate with Horton's than were Quinn's. Thus, for the entire "representative period," both Johnson and Horton were employed exclusively at Rockport as supertruck drivers, whereas, in contrast, Quinn worked for part of the period as an over-the-road driver away from the facility.

Analysis and Conclusions

The governing legal precepts are well established. The objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Alaska Pulp Corp.,* 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*, 313 NLRB 177, 194 (1941).

As the Board recognized in *Alaska Pulp Corp.*, supra at 523, "Determining what would have happened absent a respondent's unfair labor practices . . . is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed a wide discretion in picking a formula." See also, *Moran Printing*, 330 NLRB 376 at 376, 377 (1999). The Region has the burden of establishing only that the gross backpay amounts contained in a backpay specification are a reasonable and not arbitrary approximation. *Virginia Electric Co. v. NLRB*, 219 U.S. 532, 544 (1984); *Performance*

[5] Tr. 118. I can find nothing in the record showing that the Respondent expressly articulated this application of seniority prior to the hearing; the statement about Johnson's seniority in Kuczak's January 18 letter was ambiguous. I also note that the list of Rockport employees submitted by the Respondent gave only their initial hire dates and said nothing about their starting dates at Rockport. See GC Exh. 6.

[6] GC Exh. 6.

[7] GC Exhs. 7 & 8.

Friction Corp., 335 NLRB 1117 (2001); *Atlantic Limousine*, 328 NLRB 257, 258 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986).

Any uncertainties in the amount of backpay due are resolved in favor of the backpay claimant rather than the respondent, who is responsible for the underlying unfair labor practices that have led to the uncertainties. *United Aircraft Corp.*, 204 NLRB 1068 (1973); *Alaska Pulp Corp.*, supra at 522. Indeed, to hold otherwise would effectively punish backpay claimants for the respondent's illegal conduct against them.

I cannot conclude that the Region's decision to select Johnson as the appropriate representative employee, instead of Quinn, was unreasonable or arbitrary. Significantly, both Johnson and Horton were employed as supertruck drivers at Rockport since approximately January 1999, whereas Quinn was an over-the-road driver until an unknown date in or after January 2000, when he became a supertruck driver there. Since Quinn was laid off at some point in 2000, his tenure at Rockport has to be considered brief and not equivalent to Horton's. I note, also, that Quinn did not become a supertruck driver at Rockport until after Horton was unlawfully discharged from that position, raising the possibility that but for Horton's unlawful discharge, Quinn would not have gone to Rockport in the first place.

Moreover, the Respondent has not demonstrated that had Horton still been employed at Rockport at the time of the 2000 layoffs, he would not also have retained his job as a supertruck driver there, along with Johnson, rather than been switched to an over-the-road job as was Quinn. Indeed, I am not persuaded by the record evidence that Horton would have been laid off at Rockport prior to Johnson had they both been employed at that facility in 2000. Thus, the Respondent has not satisfactorily demonstrated that it in fact used facility seniority rather than company seniority in determining priority of layoffs for intra-plant drivers at Rockport. In this regard, the list of Rockport employees submitted by the Respondent gave only the dates of hire and contained no notations of starting dates at Rockport, and nothing in the record shows that prior to the hearing, the Respondent ever expressly articulated it use of facility seniority for intra-plant drivers.

Accordingly, I accept the General Counsel's selection of Johnson as the appropriate representative employee for purposes of calculating Horton's gross backpay.

When the Respondent Made a Valid Offer of Reinstatement

The Respondent's general counsel sent Horton a letter dated February 16, 2002,[8] stating in relevant part:

> This letter is to serve as notification of your reinstatement with BowlingTransportation, Inc. Please call Bill J. Bowling at the above listed

[8] GC Exh. 3.

telephone number immediately upon receipt of this letter for work reporting instructions.

Horton called Bowling on or about the same day that he received the letter. He asked What kind of position he was being offered. Bowling replied that it was over-the-road driving, not intra-plant. According to Horton, he did not respond.

Bowling testified that he did tell Horton there were over-the-road openings. However, he further testified that he told Horton they could get him into the intra-plant position but that it would probably take a couple of weeks. Bowling also told him to talk to the Company's general counsel.

Attorney Kuczak sent Horton a second letter, dated March 4, 2002,[9] one of the stated purposes of which was to "clarify the offer of reinstatement." The letter explained that the nature of the "inside" work at Rockport had changed since Horton had worked there, in that drivers there now had to do local driving in addition to intra-plant driving. Horton was given a choice of working at Rockport on that basis or being an over-the-road driver, a position that might have more job security. Kuczak told Horton to advise Bowling before the close of business on March 8, 2002, which of the two positions, if either, he wished to accept. Horton never responded.

Luther testified that she determined that the March 4 letter was a valid offer of reinstatement and further determined that 2 weeks after Horton presumably received it (March 5) was a reasonable period of time. On the contrary, the Respondent contends that the February 16 letter constituted a valid offer of reinstatement.

Analysis and Conclusions

In order to require a discriminatee to respond and to toll backpay liability, an employer's reinstatement offer has to meet certain criteria. It must be specific, unequivocal, and unconditional in offering a discriminatee his or her previous (or substantially equivalent) position, at the same rate of pay, with seniority and benefits intact. *Hoffman Plastic Compounds*, 326 NLRB 1060, 1061 (1998); *Tony Roma's Restaurant*, 325 NLRB 851, 852 (1998). The burden is on the employer to establish that its offer met these requirements. *Tony Roma's* at 852.

The February 16 letter simply said it was "notification of your reinstatement," and there is no claim by the Respondent that Bowling said anything to Horton about his rate of pay or his seniority and benefits. Accordingly, the letter cannot be considered a valid offer of reinstatement.

Although Kuczak's letter of March 4, similarly did not make any mention of pay or seniority and benefits, the Region accepted it as a valid offer of reinstatement, and I will not look behind that decision. As to the Region's using March 19, as the cutoff date for backpay liability, Bowling told Horton it would take about 2 weeks to get him into a

[9] GC Exh. 4.

position at Rockport, and Kuczak stated in the letter that if Horton accepted a "local" position, someone else would have to be laid off and given reasonable notice. I find in these circumstances that the Rockport position offered Horton would not have been available to him for approximately 2 weeks, had he chosen to accept it, and that the Region's choice of March 19, 2002, as the ending date for the Respondent's backpay liability was reasonable. Therefore, I conclude that the Respondent's backpay liability ended on that date.

Horton's Employment After December 19, 1999

Horton's first job after his discharge was with SOS Transport, for which he was a regional driver from January to early April 2000, and was paid $5,119.74.[10] In that position, he hauled aluminum and steel in a number of states and was on the road most of the workweek, generally from Sunday evening or Monday morning until Friday afternoon.[11]

After working for SOS, Horton obtained a "lower 48" over-the-road position with Bennett Trucking, for which he was paid $9,204.90 in 2000 and $7,900 in 2001.[12] This position also required him to be out on the road during most of the workweek. While employed by Bennett, Horton drove either a Bennett-owned truck or a truck that dispatcher Robert Priest leased to Bennett.

Near the end of his employment with Bennett, Horton entered into an oral agreement with Priest, under the terms of which he would drive Priest's truck, be paid $600 a week by Priest, and eventually receive the truck after Priest paid it off, provided Horton still worked for him. Priest mentioned no specific time frame for when he would pay off the truck or when Horton would get it. Prior to this agreement, Bennett paid him. Afterward, the record is not wholly clear, since Horton testified, "We had several working relationships" as far as compensation was concerned,[13] and the Respondent called neither Priest nor anyone else from Bennett as witnesses.

Bennett went out of business at the end of September 2001. Soon thereafter, Horton drove for Triumph Trucking aka Jaro. For 4 or 5 weeks, Horton drove a Jaro-owned vehicle and was paid $1,594.99 by Jaro.[14] When Priest's truck came out of repair, Horton drove it for Jaro, with his compensation to come from Priest.

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[10] See R. Exh. 9.

[11] The Region added additional meal costs to his net backpay when he held positions that required him to be on the road during most of the workweek. Although the Respondent previously objected to this, the issue was nowhere raised or argued in the Respondent's posthearing brief, and I conclude that Respondent is no longer pursuing it. In any event, I find the Region's determination was appropriate, since his job with the Respondent did not cause him to be away from home during the workweek.

[12] GC Exhs. 11 & 9 at 6, respectively.

[13] Tr. 75.

[14] R. Exh. 10.

Horton testified that during the 3-month period at the end of 2000 and the beginning of 2001, his employment was "basically" by Priest.[15] He received advances from Jaro for such items as fuel and truck maintenance, and he used part of these moneys for his own personal expenses. However, with the exception of 1 week, Priest never paid him for driving Priest's truck for Jaro, and at the time Horton stopped driving for him, Priest owed him approximately $4,000 to $6,000. Priest never provided him with a form W-2 or form 1099.

Horton's testimony was that he continued to work for Priest without being paid because Priest had underwent open-heart surgery and was short on money. However, in early 2001, Horton concluded that he could no longer afford to work on that basis, and he quit. I find somewhat incredible his testimony that when he returned the truck to Priest, nothing was said about the $4,000 to $6,000 that Priest owed to him. Horton never took legal action to collect such moneys, testifying that he did not believe he could collect and that he later could not locate Priest.

Analysis and Conclusions

Once the General Counsel has arrived at reasonable net backpay amounts, the burden shifts to the Respondent to establish affirmative defenses that would mitigate its backpay liability. *Atlantic Limousine*, supra at 258; *Hacienda Hotel & Casino*, supra at 603.

The Respondent contends that Horton deliberately concealed from the Region earnings in the form of "sweat equity" in Priest's truck and, for that reason, should be denied backpay from the third quarter of 2001 on. However, Horton's testimony reflects that Priest gave no specifics of when Horton would get the truck and, moreover, set the condition that Horton still be working for him at the time the loan was paid off. Since Horton quit, such condition precedent was not satisfied. I conclude, therefore, that any potential interest in the truck did not constitute compensation and that Horton was not obliged to raise it to the Region.

Moreover the Respondent avers that Horton attempted to conceal the true nature of his agreement with Priest, to wrongfully charge the Respondent with what Priest had not paid him. I do not find the evidence sufficient to support such a strong accusation. From Horton's testimony, it is evident that the agreement he had with Priest was oral and never reduced to writing, and it contained only broad terms lacking specificity. In these circumstances, Horton cannot be faulted for lacking a clear understanding of its precise terms. Further, in light of the fact that Horton did not receive what Priest owed him, Horton reasonably might have concluded such moneys did not constitute interim earnings.

The Respondent also contends that discrepancies between Horton's testimony and/or his log books and Bennett's W-2 for him for 2000 establish that he concealed earnings for the second quarter of 2000 and should disqualify him for receiving backpay

[15] Tr. 88.

for that quarter. Further, the Respondent argues, Horton's concealment makes impossible an accurate determination of his wages for Bennett in 2000 and 2001. However, as previously stated, any uncertainties in the amount of backpay due are resolved in favor of the backpay claimant rather than the respondent, who is responsible for the underlying unfair labor practices that have led to the uncertainties. *United Aircraft Corp.*, supra; *Alaska Pulp Corp.*, supra. In light of these precepts, and noting that the Respondent did not attempt to subpoena any witnesses or records from Bennett, I will not look behind the figures contained in Bennett's W-2's as far as what it paid Horton during those years. I conclude that the Respondent has failed to demonstrate that Horton engaged in willful concealment of wages from Bennett or that the Region's calculations of interim earnings, based on those W-2's, should not be accepted.

The last remaining issue is how to treat the $4,000 to $6,000 of unpaid wages owed to Horton by Priest. Had Horton taken legal action against Priest and been unsuccessful in receiving his unpaid wages, an argument could be made that the Respondent should bear the financial burden rather than Horton and not receive an offset for such unpaid interim earnings. However, here Horton took absolutely no action to get the money from Priest, not even asking Priest for it at the time Horton returned Priest's truck. It is true that the Respondent put Horton in the position of having to work for Priest in the first place. However, it would seem that Horton had an obligation to have first sought recourse from the primary party responsible for his not being paid (Priest), before the Respondent should, in essence, reimburse him for unpaid wages.

There is little precedent to rely on for analysis, the matter of unpaid interim earnings apparently being an unusual situation. In *Sterling Furniture*, 108 NLRB 602, 607 (1954), enforced, 227 F.2d 521 (9th Cir. 1955), cited by the Respondent, the claimant never asked for the amount due him from an interim employer and otherwise made no effort to recoup it, because of their friendship and because the employer had gone out of business. In reversing the trial examiner and finding such amount was properly considered interim earnings, the Board noted that there was no evidence that such a request would have been futile.

I conclude that the facts presented here are similar to those in *Sterling* and that what Priest owed but did not pay Horton should be added to Horton's interim earnings. The exact amount of such unpaid earnings is impossible of ascertainment and can only be approximated, since Horton testified it ranged from approximately $4,000 to $6,000, after allowance for the advances he received from Jaro and used for his personal expenses. Accordingly, I conclude that it is reasonable to use the median figure of $5,000 as the amount of Horton's putative earnings from Priest and to add half of it to Horton's interim earnings for the last quarter of 2000 and the other half to his interim earnings for the first quarter of 2001.

Conclusion

For the reasons I have stated, I accept in all respects the General Counsel's final backpay specification as set out in General Counsel Exh. 1(c), Appendix M, save the

addition of $5,000 in interim earnings. Accordingly, the backpay owed Horton is $60,744 less $5,000, or $55,744.

On the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

IT IS HEREBY ORDERED that Respondent Bowling Transportation, Inc., its officers, agents, successors, and assigns, shall pay Jeffrey L. Horton $55,744 for the period from December 23, 1999 to March 19, 2002, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment and minus tax withholding required by law:

Dated, Washington D.C., September 10, 2004

IRA SANDRON
Administrative Law Judge

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