

Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc., Worldwide Electric Construction Corporation, and James A. Carfora, individually and as an alter ego of Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc., and Worldwide Electric Construction Corporation and Ronald Giambrone and David Khoury and Gerry Illiano and Miguel Rodriguez and Frank LaRosa. Cases 2-CA-17448, 2-CA-17449, 2-CA-17450, 2-CA-17451, and 2-CA-17452

29 September 1986

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND
STEPHENS

On 31 January 1985 Administrative Law Judge Howard Edelman issued the attached supplemental decision¹ setting forth the backpay he found due pursuant to an unpublished 1981 Order and Direction in this proceeding.² The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.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 exceptions and briefs and has decided to affirm the judge's rulings,³ findings,⁴

¹ On 7 March 1985 the judge issued an erratum correcting an error in fn. 4 of his decision. The judge, however, inadvertently omitted reference to Case 2-CA-17452 in the erratum's caption. We correct this error.

² The Board on 25 September 1981 adopted Administrative Law Judge Raymond P. Green's 20 August 1981 decision and recommended Order in this proceeding, and his 17 September 1981 erratum. No exceptions had been filed to Judge Green's decision. On 23 March 1982 the United States Court of Appeals for the Second Circuit enforced the Board's Order in an unpublished decision.

³ The Respondents except to the judge's failure to note in his decision that the Respondents filed a posthearing motion to continue the hearing "so that [a] substantial discrepancy in the testimony of the witness [discriminatee Gerry] Illiano can be corrected." The Respondents proffered additional documentary evidence in support of their motion, but did not contend the evidence was newly discovered or that the Respondents could otherwise adequately explain why they did not present the evidence at the hearing. Also, the Respondents' motion actually sought to "correct[]" the figure given for Illiano's gross backpay in the backpay specification, not Illiano's testimony. The Respondents claimed the specification should have been based on Illiano's having earned \$6.25 per hour in July 1980, not \$6.50, and on Illiano's having worked less than 55 hours per week. The Respondents, however, had withdrawn their answers to the specification in relevant part in a stipulation they entered with the General Counsel. On 30 July 1984 the judge issued an Order denying the Respondents' motion. We affirm the judge's ruling.

⁴ The Respondents except to the judge's determination of discriminatee Gerry Illiano's gross backpay. The Respondents contend the judge erred in basing Illiano's backpay determination on 55-hour weeks, rather than 40-hour weeks, and by assuming that Illiano would have received a 25-cent-per-hour wage increase each yearly quarter. The judge based his determination on the General Counsel's backpay specification. As discussed above, the Respondents withdrew their answers to the specification in relevant part in a stipulation they entered with the General Counsel. Accordingly, we adopt the judge's determination.

and conclusions and to adopt the recommended Order as modified.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc., Worldwide Electric Construction Corporation, and James A. Carfora, individually and as an alter ego of Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc., and Worldwide Electric Construction Corporation, New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for the second paragraph of the judge's recommended Order:

The Respondents shall pay to the Regional Director for Region 2 the net backpay found due employees David Khoury, Jose Gonzales, Robert Brinkman, and Frank LaRosa. The Regional Director shall place this backpay in escrow for a period not exceeding 1 year from the date of this Decision and Order to afford the General Counsel an opportunity to locate and examine these employees as to their interim earnings. Should the Regional Director determine that deductions are warranted, the amount so deducted shall be returned to the Respondents and the remainder paid to the employees. In the event the General Counsel at the end of the 1-year escrow period has failed to locate any of the employees, the awards for the employees not located shall lapse and the full net backpay for those employees shall be returned to the Respondents.

⁵ We shall modify the judge's recommended Order pursuant to our decision in *Starlite Cutting*, 280 NLRB 1071 (1986). Accordingly, the backpay awards to unavailable discriminatees David Khoury, Jose Gonzales, Robert Brinkman, and Frank LaRosa shall lapse at the end of the 1-year escrow period that the Order establishes in the event the General Counsel has failed to locate the discriminatees by that time.

Member Stephens recognizes that under the Board's recently announced policy in *Starlite Cutting*, the foregoing modification of the judge's recommended Order is warranted. However, were his concurring and dissenting opinion in *Starlite* the prevailing view, the awards would not lapse at the end of the escrow period. Further, the Regional Director would be permitted to apply to the Board for a 1-year extension of the escrow period and would impose upon the Respondents the burden to establish a justification for the extinction of backpay liability to the discriminatees or a reduction in the amount owed.

Sandra Grossfeld, Esq., for the General Counsel.
H. Elliot Wales, Esq., for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on July 2 and 3, 1984, in New York, New York.

On September 25, 1981, the National Labor Relations Board issued an Order and Direction directing Respondents Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc., Worldwide Electric Construction Corporation, and James A. Carfora, individually and as an alter ego of Ace Electrical Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc., and Worldwide Electric Construction Corporation (the Respondents) to reinstate employee discriminatees Gerry Illiano, David Khoury, Miguel Rodriguez, Ronald Giambrone, and Jose (Gonzales)¹ and to make whole the above-named discriminatees and Robert Brinkman and Frank LaRosa² for their losses resulting from unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

On March 23, 1982, the United States Court of Appeals for the Second Circuit entered a judgment enforcing in full the reinstatement and backpay provisions of the Board's Order. On March 9, 1983, a controversy having arisen over the amount of backpay due the above-named employee discriminatees under the Board's Order as enforced, the Regional Director for Region 2 issued the instant backpay specification and notice of hearing.

On July 2, 1984, at the beginning of the instant hearing, the General Counsel moved to amend the backpay specification to delete from the specification the allegation that Ace Electric Power Corp. is a successor and alter ego of the Respondents,³ and to delete the reference to Ace Electric Power Corp. as such in the caption of the specification. The motion was granted without objection by the Respondents' counsel.

A brief was submitted by the General Counsel. On consideration of the entire record, the above brief, and the demeanor of the witnesses I make the following

FINDINGS OF FACT

I. NET BACKPAY OF MIGUEL RODRIGUEZ AND RONALD GIAMBRONE

During the course of the hearing the Respondents stipulated the net backpay at the time of the hearing to be \$2115 for Rodriguez and \$364 for Giambrone.

II. THE BACKPAY LIABILITY OF THE RESPONDENTS AS TO DISCRIMINATEES GIAMBRONE, KHOURY, GONZALES, AND RODRIGUEZ

The specification sets forth backpay figures for the above-named discriminatees for the period of August 5,

1980, through December 31, 1982. The amended specification sets forth backpay figures for Khoury and Gonzales from January 1, 1983, to June 30, 1984. The Respondents' counsel by a written stipulation withdrew their answer and amended answer with the exception that it was stipulated and agreed by the parties on the record that the only issue to be litigated was the interim earnings of the discriminatees.

Accordingly, I conclude that paragraph I of the specification which sets forth that the backpay periods of Giambrone, Khoury, Gonzales, and Rodriguez commence on August 5, 1980, to the date of the hearing and in futuro until the Respondents make a valid offer of reinstatement, is admitted. In this connection the Respondents did not introduce evidence of any offer of reinstatement to the above-named discriminatees. As noted above Brinkman and LaRosa were previously reinstated. Therefore their backpay period is from August 5 to 30, 1980, the date of their reinstatement.

I further conclude that the measure of gross backpay, paragraph II of the specification, which is calculated on a projection of the discriminatees' weekly salary and based on a 25-cent-per-hour increase per quarter is admitted.

With respect to discriminatees Giambrone and Rodriguez, the Respondents stipulated that the total net backpay due them at the time of the hearing was \$364 and \$2115 plus interest respectively. Accordingly, I conclude that the net backpay due Giambrone at the time of the hearing is \$364, backpay to continue in futuro until a valid offer of reinstatement be made to him. I also conclude that the net backpay due Rodriguez is \$2115, backpay to continue until a valid offer of reinstatement is made to him.⁴

Discriminatees LaRosa, Khoury, Brinkman, and Gonzales did not appear at the hearing although the General Counsel asserts she issued subpoenas to all of them but Gonzales, whose address was unknown. It does not appear that the Respondents' counsel made any attempt to subpoena the above-named discriminatees. The Respondents contend that the above-named discriminatees should not receive any backpay or, in the alternative, the proceedings be severed until such time as they appear. The Board has consistently held that the burden falls on the respondent to establish facts which will mitigate its backpay liability. Included in this burden is the respondent's responsibility to subpoena those discriminatees whose backpay it disputes and wishes to litigate. *Woonsocket Health Centre*, 263 NLRB 1367 (1982); *Brown & Root*, 132 NLRB 486, 497-498 (1961).

Therefore, consistent with Board policy, I shall award the above-named discriminatees the amount of backpay set forth in the specification,⁵ and shall order the Respondents to pay such amounts to the Regional Director for Region 2, to be held in escrow for a period not exceeding 1 year from the date of this decision. In the event any or all the above-named discriminatees appear

¹ At the time the above decision issued, Jose Gonzales' last name was unknown.

² Brinkman and LaRosa were discharged on August 4, 1980, and reinstated by the Respondents on August 30, 1980.

³ Par. VI(C) of the specification.

⁴ Rodriguez and Brinkman were present at the hearing although their presence is not indicated in the record.

⁵ As to all of the above-named discriminatees, the net backpay set forth in the specification equals the gross backpay.

to collect this backpay, the Respondents will be offered an opportunity by the Regional Director to produce evidence and/or examine such discriminatees concerning their interim earnings, *Woonsocket Health Centre*, supra. As set forth in the specification, the backpay to be held in escrow by the Regional Director is set forth below:

LaRosa	\$ 1,102
Khoury ⁶	52,258
Brinkman	646
Gonzales	44,800

III. BACKPAY—GERRY ILLIANO

As set forth above, the Respondents withdrew their answer and amended answer with the exception that the issue of interim earnings of the discriminatees could be litigated. During the course of this hearing, the Respondents thereafter attempted to challenge the gross backpay of Illiano by the introduction of a paycheck to Illiano dated August 5, 1980, which sets forth a pay rate of \$6.25 per hour. The specification and amended specification set forth a pay rate beginning August 6 of \$6.50 per hour. It is the Respondents' contention that the \$6.50-per-hour pay rate set forth in the specification should instead be \$6.25 per hour and that each quarterly pay rate thereafter be reduced by 25 cents. An examination of the Respondents' answer and amended answer did not raise this alleged error in connection with Illiano's August 5, 1980 pay rate and therefore he cannot do so now. *Michael M. Schaefer*, 261 NLRB 272, 274 (1982). Moreover, when the Respondents withdrew their answers, the allegations set forth in the specification were in fact admitted and cannot now be litigated. *Summerfield Industries*, 240 NLRB 180 (1979). In any event, I find the Respondents' evidence inconclusive. Accordingly, I conclude that Illiano's gross backpay is as set forth in the specification and amendment thereto.

At the hearing, the Respondents stipulated to the gross interim earnings as set forth in the specification and amended specification. The Respondents contest Illiano's travel expenses set forth in these specifications. It is this limited issue that was litigated during the course of the hearing.

Illiano credibly testified without contradiction that during his employ with the Respondents he incurred no travel expense as his apartment was located directly over the Respondents' facility. Therefore, any travel expenses incurred during his interim employment would be deducted from his interim earnings. *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644 (1976).

Illiano further credibly and without contradiction testified that for the third quarter of 1980 through August 31, 1981, he incurred travel expenses of \$15 per week or \$195 per quarter. For the period October 1 to December 31, 1981, his average travel expense was \$25 per week or \$325 per quarter. For the entire year 1982 and for the first three quarters of 1983, Illiano's interim earnings exceeded his gross backpay. For the fourth quarter of 1983

and the first two quarters of 1984, Illiano testified his travel expenses were \$25 per week or \$325 per quarter. The following sets forth a computation of Illiano's gross backpay, his interim earnings, and net backpay.

Computation of Gross Backpay for Gerry Illiano Based on His Projected Earnings

Backpay Period	Gross Back-pay
1980	
3d Q (8/6-9/30) (8wks. x 55 hrs. x \$6.50).....	\$2860
4th Q (13 wks. x 55 hrs. x \$6.75).....	4826
1981	
1st Q (13 wks. x 55 hrs. x 7.00).....	5005
2d Q (13 wks. x 55 hrs. x 7.25).....	5184
3d Q (13 wks. x 55 hrs. x 7.50).....	5363
4th Q (13 wks. x 55 hrs. x 7.75).....	5541
1982	
1st Q (13 wks. x 55 hrs. x 8.00).....	5720
2d Q (13 wks. x 55 hrs. x 8.25).....	5899
3d Q (13 wks. x 55 hrs. x 8.50).....	6078
4th Q (13 wks. x 55 hrs. x 8.75).....	6256
1983	
1st Q (13 wks. x 55 hrs. x 9.00).....	6435
2d Q (13 wks. x 55 hrs. x 9.25).....	6614
3d Q (13 wks. x 55 hrs. x 9.50).....	6792
4th Q (13 wks. x 55 hrs. x 9.75).....	6971
1984	
1st Q (13 wks. x 55 hrs. x 10.00).....	7150
2d Q (13 wks. x 55 hrs. x 10.25).....	7328

Computation of Interim Earnings for Gerry Illiano

Period	Interim Employer	
1980		
3d Q		
(8/6-9/30)...	Turner (9/1-9/30) (6.75/hr x hrs.).....	\$967
	Less travel expenses	-60
	Net Earnings	907
4th Q	Turner (10/1-12/24)(6.75/hr x hrs.).....	3273
	Remark (12/26-12/31) (6.75/hr x hrs.).....	-128
		3393
	Less travel expenses	-195
	Net Earnings	3198
1981		
1st Q.....	Remark	3247
	Less travel expenses	-195
	Net Earnings	3052
2d Q.....	Remark	\$3174
	Less travel expenses	-195
	Net Earnings	2979
3d Q.....	Remark	4910
	Less travel expenses	-285
	Net Earnings	4624
4th Q.....	Exceeded Gross Backpay	0

⁶ The amounts set forth opposite discriminatees Khoury and Gonzales reflect the backpay period from August 5, 1980, to June 30, 1984, as set forth in the specification and amended specification

Computation of Interim Earnings for Gerry Illiano—Continued

Period	Interim Employer	
1982		
Interim earnings exceeded gross backpay for each quarter in 1982.		
1983		
Interim earnings exceeded gross backpay for quarters 1-3 in 1983.		
4th Q	Remark	6894
	Less travel expenses	-325
	Net Earnings	6569
1st Q	Remark	7159
	Less travel expenses	-325
	Net Earnings	6834
2d Q	Remark	7357
	Less travel expenses	-325
	Net Earnings	7032

Computation of Net Backpay for Gerry Illiano

Period	Gross Backpay	Interim Earnings	Net-Backpay
1980			
3d Q	\$2860	\$ 907	\$1954
4th Q	4826	3198	1628
1981			
1st Q	5005	3052	1953
2d Q	5184	2979	2205
3d Q	5363	4625	738
4th Q	—	—	—
1982			
1st Q	—	—	—
2d Q	—	—	—
3d Q	—	—	—
4th Q	6971	6569	402
1983			
1st Q	7150	6834	316
2d Q	7328	7032	296
Total Net Backpay			\$9491

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondents, Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric

⁷ 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.

of New York, Inc., Worldwide Electric Construction Corporation, and James A. Carfora, individually and as an alter ego of Ace Electric Construction Corporation, Advance Electric of New York, Inc., Ace Electric of New York, Inc. and Worldwide Electric Construction Corporation, their officers, agents, successors, and assigns, shall pay to the employees involved in the proceeding the sums set opposite their names, together with interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977), less any tax withholdings as are required by Federal and state laws. The amounts ordered to be paid the several discriminatees, subject to the foregoing deductions, are as follows:

Miguel Rodriguez	\$2,115 and in futuro until a valid offer is made to him by the Respondents.
Ronald Giambrone	\$364 and in futuro until a valid offer is made to him by the Respondents.
David Khoury	\$52,258 and in futuro until a valid offer is made to him by the Respondents.
Jose Gonzales	\$44,800 and in futuro until a valid offer is made to him by the Respondents.
Gerry Illiano	\$9491 and in futuro until a valid offer is made to him by the Respondents.
Robert Brinkman	\$646
Frank LaRosa	\$1102

The backpay due discriminatees Khoury, Gonzales, Brinkman, and LaRosa shall be paid to the Regional Director for Region 2 and will be held in escrow for a period not exceeding 1 year from the date of this decision. In the event any or all the above-named discriminatees appear to collect this backpay, the Respondent will be offered an opportunity by the Regional Director to produce evidence and/or examine such discriminatees concerning their interim earnings.

In connection with discriminatees Rodriguez, Giambrone, Khoury, Gonzales, and Illiano, their backpay will continue from July 1, 1984, until the date that a valid offer of reinstatement has been made to the discriminatee. In this regard, the Respondents shall be ordered to present evidence to the Regional Director for Region 2 that such valid offer of reinstatement has been made. Additional backpay owing by the Respondents shall be computed pursuant to the same formulas set forth in the instant specification. The Regional Director will provide the Respondents an opportunity to produce evidence and/or to examine such discriminatees concerning their interim earnings for this period.