

Auburn Foundry, Inc. and Local 322, International Molders and Allied Workers Union, AFL-CIO-CLC. Case 25-CA-13889

15 June 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 29 March 1985 the National Labor Relations Board issued its Decision and Order in the above-titled proceeding, finding, *inter alia*, that the Respondent had discriminatorily discharged George Sanchez in violation of Section 8(a)(3) and (1) of the Act, and directed Respondent to offer him reinstatement to his former job, or (if he was permanently replaced prior to 6 August 1981) to place him on a preferential hiring list, and to make him whole.¹ The Court of Appeals for the Seventh Circuit enforced the Board's Order on 5 May 1986.²

On 17 December 1986 Administrative Law Judge Frank H. Itkin issued the attached supplemental decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Auburn Foundry, Inc., Auburn, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ 274 NLRB 1317

² 791 F.2d 619, rehearing denied (June 25, 1986) (unpublished)

³ 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ We agree with the General Counsel that the Respondent's backpay obligation continues until a valid offer of reinstatement is made. However, we find it unnecessary to modify the judge's recommended Order because the Respondent's continuing obligation is contained in the Board's original Order in the underlying unfair labor practice case, which the court of appeals enforced.

Ann Rybolt, Esq., for the General Counsel.
George Dodd, Esq., for Respondent Employer.

Kevin Wallace Esq., for the Charging Party.

SUPPLEMENTAL DECISION

FRANK H. ITKIN, Administrative Law Judge. This is a backpay proceeding. On May 29, 1985, the National Labor Relations Board issued its Decision and Order in the above case (274 NLRB 1317) finding, *insofar as pertinent here*, that Respondent Employer had discharged employee George Sanchez on August 6, 1981, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.¹ The Board's Order directed the Employer to, *inter alia*:

Offer employee George Sanchez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, if he was not permanently replaced before August 6, 1981, dismissing if necessary any replacement hired after that date; and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision, as modified. If no employment is available for such employee, he shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as a job becomes available.

Thereafter, on May 30, 1986, the United States Court of Appeals for the Seventh Circuit enforced the Board's Order. (See *Jt. Exhs. 1(a), (b), and (c).*)

A controversy subsequently arose over the amount of backpay due to the discriminatee under the Order. Consequently, a supplemental hearing was held in Auburn, Indiana, on August 27, 1986. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the terms of the Board's Order, as the parties stipulated, employee Sanchez first became entitled to reinstatement on September 14, 1983. The Employer, however, never offered employee Sanchez reinstatement. The Employer contends that its reinstatement and backpay obligation to employee Sanchez was terminated shortly after November 17, 1983, when Sanchez was convicted of possession of a controlled substance and incarcerated until May 1, 1984. The General Counsel agrees that the Employer's backpay obligation should be tolled while employee Sanchez was thus unavailable for employment; however, the General Counsel contends that this 6-month incarceration does not terminate the Employer's reinstatement and backpay obligation. The Employer, on the other hand, acknowledges that employee Sanchez, by

¹ As the Board stated, no exceptions had been filed by the Employer to the administrative law judge's specific finding in his decision issued on May 22, 1982, that Sanchez had been unlawfully discharged.

this criminal conviction, was not rendered unfit for further employment. Instead, the Employer solely argues that employee Sanchez—if he had been offered reinstatement—would have been lawfully terminated while incarcerated because he would have been in violation of the Employer's absenteeism policies. (Tr. 9-16.)

It is settled law that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed" (*NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), and the General Counsel's burden is limited to showing "what would not have been taken" from the employee "if the Company had not contravened the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943). And, as the court explained in *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963),

[I]n a backpay proceeding the burden is upon the General Counsel to show the gross amounts of back pay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.

Of course, as the Supreme Court recently observed in *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984):

[A] backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices

Consequently, the Board must "give due consideration to the employee's responsibility to mitigate damages" and "deduct from the backpay award any wages earned in the interim" (*ibid.*). Likewise, the Board must determine whether an employee's "being out of the country, incarcerated or ill" during the pertinent period should result in any tolling of the backpay obligation. Cf. *Overseas Motors*, 277 NLRB 552 (1985). In like vein, the Board may be required to tailor its remedy "where the jobs affected by the illegal discharge would have been phased out anyway regardless of the unfair labor practices" Cf. *NLRB v. Vancouver Plywood Co.*, 604 F.2d 596, 601-603 (9th Cir. 1979). For, "only actual losses should be made good." *Sure Tan*, *supra*.

A somewhat different situation arises, however, where an unlawfully discharged employee is later rendered unfit for further employment. See *Allied Letter Craft Co.*, 272 NLRB 612 (1984). In such circumstances, as the Board explained in *Gifford-Hill Co.*, 188 NLRB 337 (1971), the discriminatee "need not be offered reinstatement" and "his backpay should end as of the time he became unavailable for employment." In *Gifford-Hill Co.*, *supra*, the discriminatee had been convicted of five armed robberies and was then "serving 15 years in prison."

In short, it is the employer who has the burden of showing in a backpay case circumstances that would either toll backpay or terminate the reinstatement and backpay obligation. And, as discussed below, remote, speculative, and unsubstantiated assertions by an employer about what might have happened if it had complied with an outstanding Board and court order will not meet

this burden. The evidence adduced here by the Employer in support of its contention is summarized below.

John Phillips became director of industrial relations at the Employer's facility in July 1982.² Phillips recalled that employee Sanchez, following his discharge, wrote the Employer in early 1982 requesting a copy of his W-2 forms. Later, in 1984, Sanchez wrote the Employer "asking the Foundry to consider giving him a chance upon his release" from prison. Then, "after his release, Sanchez wrote another letter again asking for consideration to be rehired." Phillips added: "There was a third letter from . . . the attorney indicating roughly the same thing." Phillips did not respond to employee Sanchez. Phillips "really didn't think it was necessary to make any response assuming that he [Sanchez] was going to be reinstated by the Board."

Phillips then asserted:

[H]e [Sanchez] certainly would have been terminated after his alleged rehiring in September [1983]; he would have taken himself out of the work force by being terminated when he went to prison in November 1983, and just wouldn't have been eligible for rehire.

Phillips, in support of his assertion, cited the absenteeism policies of the Employer, testifying as follows:

Q. If Mr. Sanchez had been an employee of the Company on November 17, 1983, and incarcerated on that date through approximately May 1, 1984, what if any rules or regulations of Auburn Foundry would have been applicable to his situation?

A. Well, two things could or would have happened at that time. We have a policy, a contractual policy, that if an employee absents himself from work for three consecutive days without calling in, he is considered a voluntary quit. Had Mr. Sanchez gone to prison and [n]either he nor somebody else called in for him, he would have fallen into that category.

The second alternative, assuming that he or somebody would have called in and said he was off for whatever reason, he would have fallen into our progressive discipline procedure, which goes from a contact . . . through four written warnings. And the way that works is, back at that time, if you missed three days within a 30 day period, you were subject to a disciplinary action. And assuming he missed three consecutive days and called in, they would have been considered unexcused. He would have been given a contact for absenteeism.

Assuming further the next three days somebody called in, he would have again been counted unexcused and another warning would have been issued—or the first warning would have been issued. And you go on to the next three, to the next

² As noted, employee Sanchez had been unlawfully discharged on August 6, 1981. The administrative law judge's decision issued on May 22, 1982. No exceptions were filed to his specific finding that employee Sanchez had been unlawfully discharged. The Board's Decision and Order issued on May 29, 1985.

three, till you finally come up with the fourth three, and at that time he would have compiled four written warnings within a one year period and therefore would have been subject to discharge and would, in fact, have been discharged. [Cf. R. Exh. 7.]

Phillips recalled "examples of employees whose absence while incarcerated caused or contributed to their termination." Respondent's Exhibit 8 is the file pertaining to former employee James Conley. Conley was terminated for a "three-day no call" absence. Phillips asserted that he had been told that "Conley was in jail" at the time. Phillips acknowledged that this additional information "is not in the folder"—no "notation is made" in the records "as to jail time for any absence of any employee."

Respondent's Exhibit 9 is the file of former employee Dwight Pinson. Pinson was fired following warnings for "poor workmanship" and "poor attendance." Phillips asserted:

On March 9, [Pinson] left early . . . the police came and removed him from work . . . and then on the 10th he called in and said he was in jail . . . that led to three days unexcused [absence] and he was terminated the next day.

Again, no "notation is made" with respect "to jail time for any absence of any employee."³ Phillips insisted that there are no "exceptions to the discharge policy concerning excessive absenteeism." Phillips further insisted that employee Sanchez would not have been granted "a leave of absence to serve his sentence" and "we would not rehire anybody that had been terminated."

Elsewhere, Phillips acknowledged that the Employer's "work rules" (R. Exh. 7, sec. 1) provide that "a conviction of a felony is grounds for a discharge" and this rule has not been enforced. Concededly, the Employer "would not have terminated Mr. Sanchez because of his conviction." The Employer employs convicted felons. Phillips also acknowledged that the Employer has "granted leaves of absences to employees who were given an option of receiving medical treatment in a drug or alcohol dependency clinic in lieu of jail." Some of these "were voluntary admissions" to such clinics and "others were under the auspices of the court." (See R. Exh. 15.) Finally, Phillips acknowledged that the Employer's "three day no call absence policy" was "oral . . . at the time"; Phillips was unaware "whether Mr. Sanchez would have known about that policy"; an "employee who is absent three or more consecutive days without telephoning the Foundry is deemed to have voluntarily resigned his employment"; and, under the Employer's progressive discipline policy of four warnings for, inter alia, excessive absenteeism, it would take about 3 weeks to fire an employee. Phillips recognized the "difficulty in applying such a rule to a person who is waiting an offer of reinstatement."⁴

³ R Exhs 10, 11, 12, and 13 are also personnel records of former employees Danny Smith, Rick Fugate, Dean Fuller, and Linton Barger. These employees were discharged because of excessive absenteeism

⁴ According to Phillips

Elsewhere, Phillips claimed that he did not learn of the pending unfair labor practice case involving employee Sanchez until June 1984. He acknowledged that this "case was pending," however, "there was other things . . . all kinds of things that were going on." He asserted:

I didn't know George, nor did I care about George. All I was dealing with was a former employee that was terminated, rightfully or wrongfully, I didn't know.

He added:

All I can say is that in June of 1984, the only thing that the record showed was that George Sanchez was terminated for strike violence in August 1981. When I saw that, he was in my opinion ineligible for rehire for that reason. He had been fired.

Phillips was asked: "You then learned . . . more about Mr. Sanchez. What if any change did that bring to your determination whether or not to offer him reinstatement?" Phillips answered:

The only change that took place was that instead of not rehiring him because of his discharge in August 1981, it would have been because of the discharge in November 1983.

Phillips agreed that this so-called November 1983 discharge of Sanchez, to which he had referred, was a "pretend discharge." No such entries were made in Sanchez' personnel file at the time. Sanchez had never been reinstated or scheduled to work.⁵

Discussion

On this record, I reject Respondent Employer's contention that discriminatee Sanchez—had he been offered reinstatement in compliance with the Board and court order—would have been discharged for violating its absenteeism policy. I find the testimony of industrial relations director Phillips, in support of this assertion, to be incredible, remote, and speculative. Thus, as detailed supra, Phillips initially relied on the Employer's so-called oral 3-day no-call absenteeism policy. Phillips asserted that, because Sanchez would not have called in for 3 days, he would have been terminated. First, there is nothing in this record to suggest that Sanchez was made aware of such a policy or advised of its application to him as a discriminatee. Second, it is clear that the purpose of such a policy was to remove personnel who were scheduled to work and were absent without notice of any kind for 3 consecutive days. Such employees

The three day rule, putting it in proper context, at the time Sanchez would have been eligible for rehire, he would have received a registered letter from me advising him that he had x amount of days to return to work or at least contact me and make arrangements for his return to work ***, and at the time it would have been discussed as to, you know, whatever he was asking could be accommodated

⁵ Jack Gambill, president of the Union and an employee of Respondent, testified that during his 10 years of employment, neither Phillips nor any other representative of the Company has ever told him "that an employee who is absent for three or more consecutive days and who fails to call into the Foundry is automatically ineligible for rehire."

were deemed by the Employer to have voluntarily quit. Clearly, such a policy was never intended, or could have been intended, to apply to an unlawfully discharged employee who was waiting an offer of reinstatement, in compliance with a Board and court order.

Phillips then shifted to the Employer's so-called progressive discipline policy and argues that Sanchez—if he had been offered reinstatement—would have received four warnings for unexcused absences and discharged. This would take about 3 weeks. Here, too, this policy was intended to apply to employees scheduled to report for work. It was clearly not intended to apply to a discriminatee who was waiting compliance with a Board and court order. It is true, as counsel for Respondent notes, the Employer has maintained a vigorous absenteeism policy. This policy, however, was applied to employees who were scheduled to report to work at specified times. In fact, the Employer has granted leaves and been more tolerant when dealing with personnel drug and alcohol treatment problems. (See R. Exh. 15.)

In sum, I do not believe Phillips' testimony to the effect that he would have fired Sanchez about December 1983, if he had offered Sanchez reinstatement because Sanchez would have been in violation of the company absenteeism policies. I am persuaded here that Phillips, in an attempt to diminish the Employer's backpay obligation, has seized on this pretext. Further, I find this cited reason to be both remote and speculative. We really have no way of knowing what would have happened if the Employer in fact had offered Sanchez reinstatement, as it was obligated to do under law. If one must speculate, or "pretend," as Phillips testified, one may speculate that the authorities incarcerating Sanchez, in the face of an offer of reinstatement, may have worked out some reasonable accommodation with the Employer. In view of the nature of the offense, such a possibility is less speculative and remote than Phillips' assertion.⁶

⁶ As noted, I find Phillips' testimony, recited supra, to be incredible. His testimony was at times incomplete, contradictory, vague, and un-

There is no remaining dispute here regarding the gross and net backpay allegations of the specification. Accordingly, an order will be entered for the alleged amount due with interest. The Employer therefore owes in total net backpay to Sanchez, \$14,131.03, together with interest, as alleged in the specification.⁷

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Auburn Foundry, Inc., Auburn, Indiana, its officers, agents, successors, and assigns, are ordered to pay George Sanchez the amount of \$14,131.03, as net backpay due, plus interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws.

clear. Insofar as his testimony contradicts the testimony of Gambill, I credit the testimony of Gambill as more forthright, reasonable, and reliable.

⁷ Counsel for Respondent, in his posthearing brief, relies on cases such as *Jacob E. Decker & Sons*, 244 NLRB 875 (1979), and *Marne Welding & Repair*, 202 NLRB 553 (1973). *Decker* involved the question whether a reinstatement remedy was appropriate in view of the postdischarge felony convictions of the employees. As discussed above, Respondent Employer does not contend here that discriminatee Sanchez' conviction rendered him unfit for further employment. *Marne Welding* involved the question whether an employee's "backpay period should be terminated because his employment with respondent would have ceased due to an interplay of [his] misconduct and respondent's personnel policies." The administrative law judge found: "I am not convinced that respondent would have severed [the employee] from its employment rolls under its work rule that employees must report for work on a Saturday or suffer discharge on the following Monday because of the absence." Under the circumstances, *Decker* and *Marne Welding* are not controlling here.

⁸ 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.