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

GREENHECK FAN CORPORATION

and Case 30-CA-087881

KEITH ALFT, JR., An Individual

Andrew S. Gollin, Esq.,
for the General Counsel.
James F. Hendricks, Jr., Esq. and
Michael P. MacHarg, Esq.,
for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This supplemental proceeding was tried in Milwaukee, Wisconsin, on September 26, 2013, pursuant to a compliance specification and notice of hearing issued on July 30, 2013.[1] The compliance specification alleges the amount of backpay due under the terms of the National Labor Relations Board's Order (the Board's Order) dated May 2, 2013, adopting the findings and conclusions set forth by Administrative Law Judge Paul Bogas in his decision, issued March 21, 2013.

Judge Bogas' decision in the above-captioned unfair labor practice proceeding directed Greenheck Fan Corporation (Respondent), its officers, agents, successors, and assigns, to take certain affirmative action, including offering former employee Keith Alft, Jr., reinstatement to his former position and making him whole for any loss he may have suffered as a result of Respondent's unlawful discharge in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). With respect to that remedy, Judge Bogas ordered that the backpay be computed on a quarterly basis from the date of the discharge to the date when the offer of reinstatement was made, less any net interim earnings, in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's Brief; and "GC Br." for the General Counsel's Brief.

Judge Bogas further ordered Respondent to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and to compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Respondent timely filed an answer, and later a first amended answer,[2] to the compliance specification, admitting many of the allegations made therein. However, Respondent denied certain of the calculations in the compliance specification in its answer and raised two affirmative defenses.[3] After carefully considering the briefs of the parties and the entire record, for the reasons set forth below, I find that Respondent owes $40,851.49 to Alft, plus interest and applicable tax liability.

THE COMPLIANCE SPECIFICATION

Although Respondent reinstated Alft to his former position on April 22, 2013, a controversy has arisen over the amount of backpay due to make Alft whole under the terms of the Board's Order. Accordingly, based upon the calculation of Richard Neuman, Region 18's compliance officer, the compliance specification alleges that Alft is due accrued backpay from the date of his discharge on August 14, 2012, until April 21, 2013, the day before his reinstatement. The compliance specification proposed to measure the backpay due Alft based upon the hours and earnings of comparable employees (comparators) who performed similar work during the backpay period. According to the compliance specification, Alft had no interim earnings during the backpay period.

In addition to backpay, the compliance specification alleges that Alft is entitled to reimbursement for medical insurance replacement coverage, 401(k) contributions, and earnings on the 401(k) contributions.[4] The compliance specification alleges that Respondent owes Alft $38,529.46 in backpay, $1,184.96 for medical expenses, and $1,137.07 in 401(k) contributions and earnings; for a total of $40,851.49, plus daily compounded interest and excess tax liability accrued to the date of the payment pursuant to the Order.

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[2] The General Counsel did not object to Respondent's filing of its first amended answer. For the sake of brevity, Respondent's first amended answer shall be referred to herein as its answer.

[3] Prior to the hearing, the General Counsel moved to strike portions of Respondent's answers, arguing that the answers lacked support. (GC Exh. 1(h).) On August 30, 2013, I issued a notice to show cause and on September 5, 2013, Respondent filed its opposition to the notice to show cause. (GC Exhs. 1(i) and (j).) At the outset of the hearing, I denied the General Counsel's motion, finding that Respondent's answer served as a denial of the gross backpay calculation, on which the General Counsel bears the ultimate burden of proof. (Tr. 7.)

[4] Respondent and Sheet Metal Workers International Union, Local Union 565 (the Union) were parties to a collective-bargaining agreement effective August 13, 2007, through August 11, 2012, which provided for medical insurance and contributions to a 401(k) retirement plan for Respondent's employees. (GC Exh. 1(b), par. 7.) A new collective-bargaining agreement, effective August 12, 2012, to August 11, 2015, provides similar benefits.

RESPONDENT'S AFFIRMATIVE DEFENSES AND OBJECTIONS TO THE COMPLIANCE SPECIFICATION

Respondent, in its answer, denied that: the nine comparators used to calculate backpay were appropriate; Alft exercised reasonable diligence to mitigate his backpay loss; Alft is entitled to reimbursement for medical insurance premiums; 401(k) contributions increased 10 percent; *Latino Express* is correctly decided; it owes incremental tax liability, and; the overall calculations are correct.[5] (GC Exh. 1(e).)

In addition, Respondent has asserted two affirmative defenses. (GC Exh. 1(e).) First, Respondent stated "on information and belief" that Alft did not exercise reasonable diligence to mitigate his backpay loss. Second, Respondent stated "on information and belief" that Alft had interim earnings from a self-owned business and failed to report those earnings. As correctly stated by counsel for the General Counsel, Respondent bears the burden of establishing facts that would reduce the amount of its backpay liability. (GC Br. p. 7.) *Atlantic Limousine, Inc.,* 328 NLRB 257, 258 (1999), enfd 243 F.3d 711 (3d Cir. 2001).

GENERAL STANDARDS IN COMPLIANCE PROCEEDINGS

Compliance proceedings restore the status quo ante by restoring circumstances that would have existed had there been no unfair labor practices. *Hubert Distributors, Inc.,* 344 NLRB 339, 341 (2005). The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Beverly California Corp.,* 329 NLRB 977, 978 (1999). The General Counsel's burden in backpay cases is to show the amount of gross backpay due the discriminatee. *Hansen Bros. Enterprises,* 313 NLRB 599, 600 (1993). Once the General Counsel has introduced the gross backpay due to the discriminatee, the burden shifts to the respondent to establish affirmative defenses that would eliminate or otherwise reduce its backpay liability. *Church Homes, Inc.,* 349 NLRB 829, 838 (2007); *Centra, Inc.,* 314 NLRB 814, 815-820 (1994).

Earnings during the backpay period from a business or job which a discriminatee held during his employment with the respondent are not deductible from gross backpay as interim earnings. *Rice Lake Creamery Co.,* 151 NLRB 1113 fn. 4 (1965).

When a respondent argues that a discriminatee has failed to adequately search for interim work, the respondent must satisfy a burden of coming forward with evidence that substantially equivalent jobs existed in the relevant geographic area during the backpay period. *St. George Warehouse,* 351 NLRB 961, 967 (2007). If the respondent does so, the burden shifts to the General Counsel to produce evidence of the reasonableness of the discriminatee's job search. Id. It is not enough that the respondent thinks an employee should have been able to secure a job; suspicion and surmise are no more valid bases for decision in a backpay hearing than in an unfair labor practice hearing. *Laidlaw Corp.,* 207 NLRB 591, 594 (1973), enfd 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975).

[5] At the hearing, Respondent's counsel admitted that Respondent owed Alft reimbursement for medical insurance premiums. (Tr. 31.)

BACKPAY PERIOD

The compliance specification alleges that Alft's backpay period began when he was unlawfully discharged on August 14, 2012, and ended on April 21, 2013, the day before he was reinstated by Respondent. (GC Exh. 1, par 4.) A dispute has arisen as to whether Alft was paid for his last day of work on August 14, 2013. Respondent contends that Alft was partially compensated for his last day of work, August 14, 2012; the General Counsel maintains he was not. (GC Exh. 1(e), par. 3; Tr. 34-35.)

The General Counsel invited Respondent to provide Alft's payroll records from January 1, 2011, through August 14, 2011. (GC Exhs. 2, 5; Tr. 34.) This information was never provided. (Tr. 34.)

Respondent has offered no proof that Alft was paid any amount for his work on August 14, 2012. As such, I find that the appropriate backpay period for Alft runs from August 14, 2012, to April 21, 2013, a period of 38.6 weeks, as alleged in the compliance specification.

GROSS BACKPAY

The Board has applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. *Alton H. Piester, LLC,* 357 NLRB No. 116 slip op. at 4 (2011), citing *Performance Friction Corp.,* 335 NLRB 1117 (2001). The General Counsel may utilize any method that places the discriminatee in the same position he would have been absent the unlawful actions of the employer, so long as the method is not unreasonable or arbitrary. *Alton H. Piester, LLC,* 357 NLRB No. 116 slip op. at 4 (2011), citing *La Favorita, Inc.,* 313 NLRB 902, 903 (1994), enfd mem. 48 F.3d 1232 (10th Cir. 1995). Any ambiguities, doubts, or uncertainties in the backpay calculation are resolved against the respondent. Id. citing *Minette Mills, Inc.,* 316 NLRB 1009, 1010-1011 (1995).

Given these principles, I find the General Counsel's backpay computation method reasonable. Initially, Neuman sought Alft's payroll records and information concerning his medical insurance coverage and other benefits. (GC Exhs. 2 and 5.) This information was never produced. (Tr. 29.) Neuman later learned that there may have been considerable overtime worked by other welders during the backpay period and, therefore, he sought payroll records for other welders during the backpay period. (GC Exh. 3.) Neuman calculated gross backpay using the hours and earnings of the comparators, based upon payroll records of other welders provided by Respondent. (GC Exhs. 1(b) App. A and 7; Tr. 29.)

Neuman testified to two logical reasons for employing the comparable employee method of calculating Alft's backpay during the trial. First, Neuman learned from Alft that other welders worked more overtime hours during the backpay period than he did prior to his discharge. (Tr. 28-29.) Second, Respondent used this method in its own attempt to calculate Alft's backpay.[6]

[6] In seeking to objectively reconstruct backpay amounts as accurately as possibly, the General Counsel may properly adopt elements from the suggested formulas of the parties. *Performance Friction Corp.,* 335 NLRB 1117 (2001), citing *Hill Transportation Co.,* 102 NLRB 1015, 1020 (1953).

(GC Exh. 4; Tr. 29.) Neuman also provided reasonable testimony as to why he did not employ other methods of calculating Alft's backpay.[7] (Tr. 29.)

In selecting appropriate comparators, Neuman relied on the payroll records produced by Respondent for nine comparable welders. (GC Exh. 7; Tr. 29.) These comparators worked an average of 352.96 hours of straight time during the backpay period (39.22 average hours per week). (GC Exh. 1(b), App. A.) The comparators also worked an average of 42.02 hours of overtime during the backpay period (4.67 hours per week). (Id.)

Alft earned $20.95 per hour, plus $1 per hour for working as a skilled welder, plus a $0.70 per hour shift differential at the time of his discharge. (GC Exh. 1, par. 2.) Alft's total hourly wage rate of $22.65 did not change during the backpay period. (Id.) Respondent admits that this wage rate is correct. (GC Exh. 1(e).)

Neuman multiplied Alft's hourly wage rate by the average number of hours worked by the comparable employees to determine Alft's gross backpay. (GC Exh. 1(b), App. B.) According to Neuman's calculations, Alft was owed $38,529.46 gross backpay.

I find that the Region's comparable employee method of calculating backpay is neither unreasonable nor arbitrary under the circumstances. Respondent has not offered an alternative method of calculating backpay or made a showing that the method used by Neuman was unreasonable. Therefore, I find that Respondent owes Alft gross backpay of $38,529.46, plus interest.

INTERIM EARNINGS

Respondent asserts that Alft failed to reasonably mitigate his backpay losses. Respondent offered no evidence to support this contention. Relying upon *Grosvenor Resort,* 350 NLRB 1197 (2007), Respondent argues that the General Counsel bears the burden of establishing the reasonableness of Alft's search for interim employment. Respondent's argument in this regard is both without support and without merit.

Respondent's reliance on *Grosvenor Resort* is misplaced. In *Grosvenor Resort,* supra, the Board found that if a discriminatee unreasonably delays an initial search for work, the Board will toll the backpay period for that period, and will commence it if and when a reasonably diligent search begins. 350 NLRB at 1198, citing *Marlene Industries,* 183 NLRB 50, 54-55, and 59 (1970). The *Grosvenor Resort* Board found the discriminatees' 2-week delay in beginning their initial search for interim work to be unreasonable. 350 NLRB at 1199.

However, the Board's finding in *Grosvenor Resort* does not change the burden shifting analysis regarding interim earnings set forth in *St. George Warehouse*, 351, NLRB 916 (2007). In that case, the Board held that where a respondent raises a job search defense to its backpay

[7] Neuman did not use a replacement employee method because no replacement employee was ever identified by Respondent. (Tr. 29.) Neuman did not use a historical hours' method of calculating Alft's backpay because he was never provided information regarding Alft's hours, despite his request for this information. (GC Exh. 2; Tr. 29.)

liability and *produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period*, the burden is on the General Counsel to produce evidence concerning the discriminatee's job search. (Emphasis added.) 352 NLRB at 964. The *St. George Warehouse* Board noted, however, that the ultimate burden of persuasion remains on the respondent. Id.

In the instant case, Respondent produced no evidence that there were substantially equivalent jobs in the relevant geographic area available to Alft during the backpay period. (R. Br. p. 3.) Respondent merely asserted on "information and belief" that Alft failed to mitigate his backpay losses. On brief, Respondent argued that the issue of whether suitable jobs are available on the market is secondary to the question of whether Alft made efforts to mitigate his backpay losses. (R. Br. p. 3.) However, this misstates the test set forth by the Board in *St. George Warehouse*, 352 NLRB at 964. The Board requires that Respondent first come forward with evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period. Id. Only after this showing has been made must the General Counsel produce evidence concerning the reasonableness of the discriminatee's job search. Id. Respondent's failure of proof on this point results in a finding in favor of the General Counsel.

Furthermore, I reject Respondent's contention that Alft had unreported interim earnings. (GC Exh. 1(e).) Respondent's counsel raised this issue in a letter to Neuman on June 11, 2013. (GC Exh. 9.) Respondent was aware that Alft had worked as a farmer during the day and for Respondent at night prior to his discharge. (Id.) Neuman replied to Respondent stating that Alft's farm operated at a loss during the backpay period and, therefore, he had no interim earnings. (GC Exh. 11.) Furthermore, it is well established that moonlighting-type jobs constitute an exception to the general rule regarding interim earning deductions and such supplemental earnings are not properly deducted if the employee had the moonlighting job prior to his unlawful discharge. *Birch Run Welding,* 286 NLRB 1316, 1318 (1987), enfd mem. 860 F.2d 1080 (6th Cir, 1988). In any event, Respondent produced no evidence to support its contention that Alft had any interim earnings or to refute that Alft's farming business operated at a loss. Any unresolved doubt regarding interim earnings is resolved against the respondent and in favor of the discriminatee. See *Atlantic Veal & Lamb, Inc.,* 358 NLRB No. 74, slip op. at 4 (2012). Therefore, I find that Alft had no interim earnings during the backpay period that would serve to reduce Respondent's backpay obligation in this case.

MEDICAL AND INSURANCE EXPENSES

A discriminatee should be made whole for expenses incurred due to the loss of medical insurance due to a respondent's unlawful actions. Reimbursement includes costs discriminatees pay for medical services that would have been reimbursed under terms of a respondent's medical insurance plan. *Goya Foods of Florida,* 356 NLRB No. 184, slip op. at 4 (2011). Additionally, respondents must reimburse discriminatees for premiums paid to maintain comparable health insurance, to the extent the premiums exceeded those paid when employed prior to the unlawful conduct. See *RMC Constructors,* 266 NLRB 1064, 1066 (1982).

Alft was entitled to reimbursement for medical insurance premiums for replacement coverage he obtained during the backpay period, less the amount Alft would have paid in

medical insurance premiums for medical coverage through Respondent. Alft paid $42.20 per week to be covered by his wife's insurance during the backpay period. (GC Exh. 1(b), App. B.) Alft would have paid $10 per week for coverage by Respondent during the same period. Respondent denied in its answer that the General Counsel's calculation of the amount owed for reimbursement of medical insurance premiums was proper. (GC Exh. 1(f).) However, Respondent's counsel orally amended the answer at trial and admitted that this calculation was proper. (Tr. 31.) Therefore, I find that Alft is owed $32.20 per week, a total of $1,184.96, for his replacement medical insurance coverage during the backpay period.

401(K) PLAN CONTRIBUTIONS AND EARNINGS

According to the collective-bargaining agreement between Respondent and the Union, Respondent was to contribute $0.64 per hour paid to Alft to the company 401(k) retirement plan. As I have already found, comparable employees worked an average of 43.68 hours per week during the backpay period. I have further found that the backpay period was 36.8 weeks long. Therefore, Alft is owed 401(k) contributions for 1,615.152 hours. Accordingly, I find that Respondent owes Alft $1,033.70 for 401(k) contributions.

Furthermore, Alft is entitled to any earnings on these 401(k) contributions. Respondent asserted in its letter of June 11, 2103, that these contributions have seen an increase of 10 to 15 percent during the backpay period. (GC Exh. 9, p. 2.) As such, the General Counsel accepted the lower figure and assumed that the funds would have increased 10 percent during the backpay period. (Tr. 33.) Respondent has produced no evidence to refute this assertion. As such, I find that Alft is owed $103.37 for the profit he would have received on the 401(k) contributions.

TAX LIABILITY AND ADVERSE TAX CONSEQUENCES

In accordance with *Latino Express, Inc.,* 359 NLRB No. 44 (2012), Alft is entitled to be compensated for the adverse tax consequences of receiving the lump-sum backpay award for a period over 1 year. The backpay in this case should have been earned in 2012 and 2013. The General Counsel determined that there was no excess tax liability or incremental tax liability at the time that the compliance specification issued. (GC Exh. 1(b), App. C.) However, excess taxes and incremental tax liability will be owed on the interest once payment to Alft is made. (Id.)

I reject Respondent's argument that *Latino Express*, *Inc.,* supra, is incorrectly decided. It is well settled that administrative law judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores, Inc.,* 342 NLRB 378 fn. 1 (2004). As such, I am bound to follow the Board's holding in *Latino Express*, and relevant cases cited therein.

Therefore, I find as alleged in the compliance specification, that Respondent owes Alft $38,529.46 in backpay, $1,184.96 for medical expenses, and $1,137.07 in 401(k) contributions and earnings; for a total of $40,851.49, plus daily compounded interest and excess tax liability accrued to the date of the payment pursuant to the Order.

Accordingly, based on the above findings and on the record as a whole, I issue the following recommended supplemental[8]

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ORDER

The Respondent, Greenheck Fan Corporation, Schofield, Wisconsin, its officers, agents, successors, and assigns, shall make whole discriminatee Keith Alft Jr., as follows:

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1. Pay to Alft $40,851.49 net backpay and expenses, plus interest computed and compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.[9]

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2. Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

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Dated, Washington, D.C. December 11, 2013

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Melissa M. Olivero
Administrative Law Judge

[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.

[9] As noted above, this lump-sum amount covers backpay, interest, and tax liability through July 30, 2013. Interest and tax liability shall continue to accrue until the actual date of payment.