

M Restaurants, Incorporated, d/b/a The Mandarin and San Francisco Local Joint Executive Board of Culinary Workers, Bartenders, Hotel, Motel and Club Service Workers, Hotel and Restaurant Employees and Bartenders International Union. Case 20-CA-9552

September 29, 1978

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS MURPHY AND TRUESDALE

On May 30, 1978, Administrative Law Judge George Christensen issued the attached Supplemental Decision in this proceeding.¹ Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in support of the Supplemental Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings,² findings,³ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, M Restaurants, Incorporated, d/b/a/ The Mandarin, San Francisco, California, its officers, agents, successors and assigns, shall pay to Billie Meng the wage losses he suffered as

¹ The Board has previously issued a Decision and Order in this matter at 221 NLRB 264 (1975) and a Supplemental Decision at 228 NLRB 930 (1977).

² The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

³ We hereby correct the following inadvertent errors in the Administrative Law Judge's Decision. These corrections do not detract from our agreement with the Administrative Law Judge's resolution of this case. First, we note, contrary to the Administrative Law Judge's intimations, that discriminatee Meng was let go by his brother-in-law in October 1976 for economic reasons. Secondly, and contrary to the Administrative Law Judge, we note that Meng did work in the first two backpay quarters of 1977 and that his earnings in those quarters were in fact taken into account in the backpay specification, whose amount the Administrative Law Judge has affirmed as being owed to discriminatee Meng.

a result of his unlawful discharge between October 1975 and October 1976 in the amount of \$6,088, with interest computed thereupon in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

MEMBER MURPHY, dissenting in part:

My colleagues are granting backpay to the claimant for the full period following his discriminatory discharge, including the time he worked in Taiwan. The majority found that he did not leave the labor market of California and render himself unavailable for work during the period he was in Taiwan. I cannot accept this fiction; hence I dissent from the award of backpay for the approximately 13 months he was out of the United States.

Meng was a citizen of the Republic of China whose parents reside in Taipei, Taiwan. He came to the United States to visit his sister and, according to the record, was issued a "green card" entitling him to work here. He was employed by the Respondent and after his termination on September 11, 1974, sought work in California. In October 1975, Meng's brother-in-law, a businessman in Hong Kong, offered Meng a job as his agent in Taiwan, selling watches to retailers and wholesalers there. Meng accepted, moved to Taipei, and lived with his parents for 13 months, returning to San Francisco on October 31, 1976. The Administrative Law Judge held that his backpay included the 13-month period, and my colleagues have adopted this holding without comment.

However, the undisputed facts are that Meng removed himself not only from California but from the entire United States. He also accepted another type of work. It is well settled that a discriminatee who removes himself or herself from the job market and is not available for work for the employer is not entitled to backpay for such period. Cf. *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209, 1216 (1961); *Gary Aircraft Corporation*, 210 NLRB 555, 557 (1974).

Under no interpretation of Board precedent or court decision is Meng entitled to backpay for the 13 months he spent with his parents in Taipei.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On January 31, 1978, I conducted a hearing at San Francisco, California, to hear issues raised by a backpay specification issued on October 28, 1977, following the publication of the Board's Decision on October 31, 1975, finding M Restaurants, Incorporated, d/b/a The Mandarin,¹ violated Section 8(a)(1) and (3) of the National Labor Relations Act, as

¹ Hereafter called the Employer or Respondent.

amended (hereafter called the Act), by discharging waiter Billie Meng, and directing Meng's reinstatement with backpay for his lost earnings since his discharge (with interest)² and its publication of a Supplemental Decision on March 21, 1977, finding Meng's publication of a letter criticizing his employer did not disqualify him from reinstatement and backpay.³

Meng was discharged in September 1974 and reinstated (pursuant to the Board's Orders) in April 1977. The Employer has reimbursed Meng for his wage losses between September 1974 and October 1975 and between October 1976 and his April 1977 date of reinstatement, but challenges Meng's entitlement to any recoupment of wage losses between October 1975 and October 1976 on the ground Meng, by absenting himself from the United States to accept employment in Taiwan during the period in question, failed to mitigate the Employer's damages. The Employer did not question the method of computation of the amount due to Meng during the period in question, the total amount derived by such calculation (\$6,763), the amount earned by Meng during the period (\$675), or the net loss figure (\$6,088).

The issue before me for resolution is whether Meng's acceptance of employment in Taiwan between October 1975 and October 1976 warrants an Order barring him from backpay during that period.

I. FINDINGS AND CONCLUSIONS

A. Facts

At all times pertinent Meng has been a citizen of Taiwan, and his parents have continuously resided there. He came to the United States in 1971 on a temporary nonimmigrant visa to visit his sister in San Francisco. His mastery of the English language was (and is) limited. In early 1974, the Department of Immigration granted him "green card" status, which enabled him to accept employment by the Respondent as a waiter. In April that same year, he was discharged by the Employer for engaging in activities in support of the Union. While Meng applied for positions at various restaurants and registered with the California Department of Human Resources for employment referral between the date he was discharged by the Employer and October 1975, he was unsuccessful in finding work and his sole income was a \$34 weekly unemployment check.

In October 1975, Meng's brother-in-law, C. C. Poon, the owner of a company engaged in the business of assembling watches in Hong Kong (Argentronic International Traders), offered Meng the opportunity to act as his agent, selling his line of watches in Taiwan to retailers and wholesalers there. Poon agreed to pay Meng \$75 a month plus a commission on sales in excess of 200 within each month. Meng lived with his parents in Taiwan; during his stay, they provided him with food and lodging without cost. Meng was unable to exceed the 200 watches per month sales quota, so he never earned more than \$75 per month during his Taiwan stay (which amount approximated the wages paid to waiters in Taiwan). Dissatisfied with Meng's

performance, in October 1976, Poon terminated Meng's employment. Meng thereupon returned to San Francisco. He was unsuccessful in securing employment on his return until his April 1977 reinstatement by the Employer. During his Taiwan stay, Meng preserved his reentry privilege for the purpose of residence and employment by securing a 1-year reentry permit from the Immigration Department in October 1975 and a later extension thereof to January 1977.⁴

B. Analysis and Conclusions

As the Supreme Court has noted, it is "the broad command of Section 10(c) of the National Labor Relations Act . . . that upon finding that an unfair labor practice has been committed, the Board shall order the violator 'to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies' of the Act."⁵ The Court has held such remedial power is "a broad" discretionary one, subject to limited judicial review,⁶ and denied certiorari of a decision of the Court of Appeals for the Second Circuit, holding "the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed."⁷

Thus, the General Counsel in a backpay proceeding meets his *prima facie* burden of proof when he demonstrates "what would not have been taken from [the employee] if the Company had not contravened the Act."⁸

In this case the General Counsel has proved that, but for Meng's unlawful discharge, he would have earned \$6,763 in the Respondent's employment over the disputed October 1975-October 1976 period and that Meng suffered a net loss over the period of \$6,088 due to the setoff of his Taiwan earnings during that period.

It is well settled that in this posture the burden is upon Respondent "to establish facts which would negative the existence of liability of a given employee or which would mitigate that liability."⁹

The Employer bases its entire position on Meng's testimony recited heretofore, contending that, by going to Taiwan to accept and perform work, Meng removed himself from the local job market and thereby failed to mitigate the Employer's damages to the degree he might have had he remained in San Francisco and secured employment there.

It is evident from Meng's wages while working for the Employer that had Meng been able to secure employment in San Francisco in a facility similar to that operated by the Employer, the Employer's damages would be less; however, Meng's inability to secure such employment over the year and a half immediately following his unlawful discharge

⁴ The findings in this paragraph are based upon Meng's testimony which, while halting at times due to Meng's difficulty with the English language, nevertheless impressed me as sincere and creditable. Meng's testimony was not refuted or contradicted by any evidence produced by the Employer.

⁵ *N.L.R.B. v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 262-263 (1969).

⁶ *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964).

⁷ *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 179, 178 (C.A. 2, 1964), cert. denied 384 U.S. 972 (1965).

⁸ *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 544 (1942).

⁹ *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8, 1963); *N.L.R.B. v. Mastro Plastics Corp.*, *ibid.*

² 221 NLRB 264.

³ 228 NLRB 930.

fails to support an inference he would have secured such employment within the subsequent year he was in Taiwan. It is also evident the Board will not permit a wrongdoer to evade liability to a discriminatee who has left the local job market to secure employment in another area and lessen his expenses when he has been unable to find employment in the area of his unlawful discharge.¹⁰

Thus, while Meng's Taiwan earnings were low in comparison with his earnings while he worked for the Employer, it is clear Meng hoped to better his financial condition by lowering his living expenses and exceeding his monthly sales quota; the fact the only employer who offered him that opportunity required his relocation to Taiwan and the fact persons there permitted him to lower his living expenses is hardly reason for permitting the Respondent to escape financial liability for his unlawful conduct.

I therefore find and conclude the Employer failed to sustain his burden of proving that Meng did not exercise sufficient diligence in mitigating the Employer's liability to him for backpay for the full period between the date the Em-

ployer unlawfully discharged him and the date it reinstated him by Board Order.

Thus, on the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹¹

M Restaurants, Incorporated, d/b/a The Mandarin, San Francisco, California, its officers, agents, successors, and assigns, shall pay to Billie Meng the wage losses he suffered as the result of his unlawful discharge between October 1975 and October 1976 in the amount of \$6,088, with interest computed thereupon in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁰ *Champa Linen Service Co.*, 222 NLRB 940 (1976); *International Trailer Co., Inc.*, 150 NLRB 1205 (1965).