**Franchi Bros. Construction Corp. *and* Local 535, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.** Case 1–CA–11529

September 1, 1978

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On May 24, 1978, Administrative Law Judge Norman Zankel issued the attached Supplemental Decision in this proceeding. Thereafter, General Counsel, the Union, and Respondent filed exceptions and supporting briefs.

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, findings, 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, Franchi Bros. Construction Corp., Newton, Massachusetts, its officers, agents, successors, and assigns, shall pay Louis Pisano and Gary Moore the sums set out in the said recommended Order.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me at Boston, Massachusetts, on March 31, 1977, based upon a backpay specification issued December 28, 1977, for purposes of resolving a controversy over the amount of backpay due to Louis Pisano and Gary Moore under the terms of an order of the National Labor Relations Board issued on September 20, 1977 (232 NLRB 179).

In relevant part, the Board affirmed Administrative Law Judge Julius Cohn's findings that Franchi Bros. Construction Corp. (herein the Respondent) discriminated against Pisano and Moore in violation of Section 8(a)(3) and (1) of the Act by discharging them on December 19, 1975. Also, the Board adopted Administrative Law Judge Cohn's recommendation that Franchi make whole each discriminatee for money losses suffered as a result of the unlawful discrimination.

On March 14, 1978, an amended backpay specification was issued (G.C. Exh. 1(i)) which was further amended at the hearing. A stipulation (G.C. Exh. 1(e)) between Franchi and the General Counsel establishes the principal issue herein as the amount of backpay due Moore and Pisano.

Franchi's timely answers to the backpay specification, as amended, (1) challenge the propriety of the backpay computation; (2) claim that backpay should be tolled on January 31, 1976,[1] when, Franchi alleges, Pisano and Moore would have been laid off for lack of work or, in the alternative, backpay should be tolled on or about May 1, when the work for which they had been originally hired was completed; and (3) claim that the backpay period should be tolled between June 14 and September 30, during the time that the Charging Party maintained a picket line at Respondent's work location from which Pisano and Moore had been discharged.

The parties sitpulated the dates of picketing. On this issue, I sustained objections to all Respondent's efforts to establish that there existed some constitutional, bylaw, or other union rule or regulation prohibiting members of the picketing Union from crossing such a picket line. It was my view at the hearing, as it remains, that such evidence is irrelevant and also conjectural.

The evidence reveals Pisano picketed only on the first day of picketing and that Moore personally did not picket at all, his father having done so in his stead for but one day. Even if both discriminatees had participated in the picketing for its entire length, or there existed prohibited rules and regulations preventing them from crossing the picket line, those factors would not necessarily indicate their unavailability to be employed by Respondent in the situation where the unlawful discharges occurred prior to the establishment of the picket line. *Winn Dixie Stores, Inc.*, 206 NLRB 777 (1973), enfd. 502 F.2d 1151 (C.A. 4, 1974); *Cone Brothers Contracting Company,* 161 NLRB 937 (1966). Even assuming my exclusion of this evidence is improper, no prejudice befalls Respondent in view of my conclusions, *infra,* that the backpay period ended on May 1, prior to the initiation of picketing. Moreover, because of this finding, I conclude it would serve no useful purpose to further explicate Respondent's admittedly novel theory relating to the effect of the picketing or to describe the rather extensive efforts to adduce evidence in its support.

All parties were afforded full opportunity to participate in the hearing, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Upon the entire record in this case and from my observation of the demeanor of witnesses, and having carefully considered the oral arguments and the briefs submitted by counsel for the General Counsel and the Respondent, I make the following:

[1] All dates hereinafter refer to 1976 unless otherwise stated.

## Findings and Conclusions

### A. *The Backpay Computation*

The General Counsel's projection of gross backpay is based upon the average adjusted weekly hours of employees Bridges, Paquette, Standing, and Lord.

The General Counsel asserts his backpay computation is appropriate because it takes into account the wages paid to each employee working within the backpay period claimed appropriate on work identical to that performed by Moore and Pisano prior their discriminatory discharges.

Respondent does not specifically challenge the utilization of the so-called "representative" employee formula but claims that the earnings of such representative employees should be divided equally among those employees and the discriminatees. Thus, Respondent's method would result in each discriminatee receiving but one-half the sum claimed due by the General Counsel for any backpay period found appropriate herein.

The evidence reveals the following work history of the four "representative" employees (mentioned in the backpay specification) after the December 19 discharges:

> *Bridges*—worked each week beginning with the week ending January 3 through the week ending May 1 as a rough carpenter, for varying numbers of hours.
>
> *Standing*—worked in a rough carpenter's job, during the weeks ending December 31, 1975, through January 31, when he was laid off.
>
> *Paquette*—worked as a rough carpenter from the payroll week ending March 27 through the week ending May 1.
>
> *Lord*—worked as a finish carpenter from the week ending September 4 through the week ending May 7, 1977.[2]

Additionally, Carpenter Foreman and Job Superintendent Amendola helped on rough carpentry at various times from Standing's January 31 layoff until May. Apparently, the General Counsel concedes such help had insignificant impact and/or was performed as part of his regular duties, as Amendola is not included as a representative employee in the backpay specification.

While the General Counsel argues that Standing's layoff does not toll the backpay period, there is no dispute that Respondent's contention that that layoff was economically justified is correct. In this posture, Respondent urges that Standing's layoff justifies the tolling of the backpay period on January 31 (a matter discussed hereinbelow) or, in the alternative, warrants the numerical division of backpay into smaller segments than alleged by the General Counsel. Respondent concedes Bridges, Paquette, and Standing performed work similar or identical to Pisano and Moore.

From the above, I conclude the record is clear that from the week ending December 31, 1975, through at least the week ending May 1 Respondent had employees working in the same, or substantially equivalent, positions as Moore and Pisano.

In assessing the General Counsel's claim, my duty is to make recommendations as to the most accurate method of determining backpay *(American Manufacturing Company of Texas*, 167 NLRB 520 (1967) ). In doing so, it is not appropriate to prorate the earnings of the representative employees among them and the discriminatees. *(American Casting Service, Inc.*, 177 NLRB 105, 106 (1969) ). Thus, Respondent's position that both the discriminatees and those employees who remained at work after the discharges should equally share in the average earnings of the representative employees is without merit.

Inasmuch as the backpay specification is based upon average hours worked by employees in similar classifications to the discriminatees, I find that the General Counsel's general formula provides a fair and reasonable computation of the sums due *(Rice Lake Creamery Company*, 151 NLRB 1113, 1118–19 (1965), affd. 365 F.2d 888 (C.A.D.C., 1966). Accordingly, my backpay recommendation will be based upon the general formula used by the General Counsel.

### B. *The Tolling Issues*

As noted, Respondent disputes the length of the period during which the General Counsel claims backpay is due to Moore and Pisano. Specifically, Respondent contends the backpay period should terminate when they would have been laid off on January 31 or, in the alternative, on May 1 when (as Respondent asserts) the rough carpentry work had been completed.

#### 1. January 31 issue

Respondent predicates its position that backpay should be tolled with the week ending January 31 upon a claim of economic necessity which required the layoff of Standing.

The General Counsel contends the evidence shows that work to which Moore and Pisano were entitled remained to be done after January 31, and thereby Respondent cannot enjoy the fruits of its earlier discrimination by asserting it would have laid off all rough carpenters but Bridges on January 31.

The evidence reveals that work was slow during January due to weather conditions. Bridges worked but 59.5 total hours and Standing 82.5 total hours during the payroll weeks ending during Janaury.[3] Respondent asserts, and is not challenged in this regard, that Standing was required to be laid off on January 31 because of the weather conditions. Work continued to be slow during February, the record revealing Bridges worked but 81 hours during that month and no other rough carpenter was employed during February.

Respondent adduced evidence through testimony of Domenic Franchi, Respondent's treasurer, that his criteria for layoff would have resulted in Bridges' retention over Pisano, Moore, and Standing. Specifically, Franchi said his selection for layoff would be based upon the following factors: (a) dedication to Respondent; (b) whether an

[2] As I shall find the backpay period terminates on May 1, Lord's history is not considered further in this section.

[3] These hours would be somewhat reduced to reflect hours worked in January, because they reflect some work performed during the previous month.

employee provided Respondent with a full day's work; (c) an employee's interest in Respondent; and (d) the relative wage rates paid to the employees. It is clear that the first three factors permit wide latitude in evaluation, each being totally subjective. Only the element of the relative wages may be considered an objective standard. In the context of the earlier-practiced unlawful discrimination against Moore and Pisano, I cannot, and do not, rely upon Franchi's testimony to establish Respondent's position that all the rough carpenters but Bridges would have been laid off on January 31. Even measured by the single objective standard, wages, it is clear Respondent has not met its burden. The record reveals that Moore had been paid 50 cents more per hour than Bridges. This fact belies the validity of Respondent's contention.

Upon all the foregoing I conclude that Respondent has not sustained its burden *(Colonial Corporation of America,* 171 NLRB 1553, 1554, fn. 4 (1968) ) of proving that Pisano and Moore would have been laid off on January 31 had they been working for Respondent at that time.

2. The May 1 issue

The thrust of Respondent's argument that its backpay obligation should terminate in the week ending May 1 is founded on its contention that the rough carpentry work substantially had been completed and that all such employees then employed would have been laid off for lack of work. Also, Respondent, differentiating between the jobs of rough and finish carpenters, urges that Lord's employment, which was effective with the payroll week ending September 4, is not appropriately considered in resolving this tolling issue.

The General Counsel claims Lord's employment demonstrates Respondent's continued need for carpenters after May and that Respondent failed in its burden of proving that Pisano and Moore would have been laid off during the week ending May 1, because Lord's employment shows carpenter's work was available after that date and because Bridges and Paquette continued working after that date until some time in January and April 16, 1977, respectively.

As already noted, Bridges and Paquette had worked as rough carpenters during the entire month of April.

Paquette credibly testified that about the first week of May there was "very little" rough carpentry work remaining and Respondent "was going to lay me off." Pacquette said he "asked . . . (Respondent) . . . if I could stay on as a laborer," and Respondent agreed. Thereafter, until Respondent's work on the jobsite was finally completed during the week ending May 16, 1977, Paquette worked as a laborer, raking loam, laying sod, planting shrubs and performing miscellaneous other tasks. He performed no carpentry work whatever between May 1, 1976, and April 16, 1977.

Bridges testified[4] that "somewhere in May" the rough carpentry work ended "and then I just asked . . .(Respondent) . . . if I could just stay on and work as a laborer." That request was granted, and after the payroll week ending May 1, Bridges' work consisted of working on the grounds, pipe work, grading inside of buildings for floors, painting, cleaning forms, and general laborer work. Bridges said that "every now and then" when Respondent needed a footing or form for such items as a patio, he would be engaged in rough carpentry work. This latter function, Bridges recalled, was performed "maybe once every 2 weeks for a couple of hours." As already observed, Bridges ceased his employment with Respondent in January 1977.

It is undenied that Lord started work as a finish carpenter during the week ending September 4.

Additionally, the record contains evidence which I conclude demonstrates that finish carpentry is a more skilled job than rough carpentry and also that Pisano possessed the qualifications to perform finish carpentry work.[5] All witnesses who testified upon the subject were consistent in narrating that the rough carpentry work had been completed by the week ending May 1, except for the sporadic work of this character performed by Bridges after that date.

No evidence was adduced, nor is the argument made, that Bridges and Paquette's observations they were to be laid off that week are inaccurate. Instead, the General Counsel, in essence, argues that it is reasonable to conclude the assignment of Bridges and Pquette to laborers work by inference precludes the validity of Respondent's asserted defense. Thus, the General Counsel in his brief, comments "Respondent produced no evidence tending to establish that, absent its discrimination against Pisano and Moore, it would not also have offered them laborers work." I conclude this contention is ill-conceived because reliance upon the laborers' assignment alone does not direct itself to the critical issue of whether there existed work (after May 1) in the job classification and work activities formerly performed by Pisano and Moore. Also, this position ignores the evidence which reveals that it was Bridges and Paquette, *not Respondent,* who took the initiative resulting in the laborers' assignment.

I view the instant issue to require an answer to the question: Has Respondent sustained its burden of proving Pisano and Moore would have been terminated from their positions on May 1, had there been no earlier discrimination against them? As the issue is explicated in Respondent's brief, I am called upon to conclude that Lord's finish carpentry work is so different from the rough carpentry performed by Pisano and Moore as to transgress the literal content of the Board's remedial order. I do not concur in Respondent's formulation of this issue, particularly where the record shows that Pisano (at least) was qualified to work as a finish carpenter.

My disagreement with the positions expressed by both the General Counsel and Respondent, however, does not preclude resolution of the issue as I perceive it. In reiteration, and simply stated, if the record shows that Pisano and

[4] On cross-examination, the General Counsel sought to discredit Bridges by showing that his prehearing affidavit given June 25, 1976, described him as a carpenter, not a laborer. On redirect examination, it was demonstrated that Respondent Attorney Coven physically wrote Bridges' affidavit and Bridges could not recall whether or not Coven specifically asked for his job title. I do not consider these circumstances sufficient to discredit Bridges, particularly where, as herein, he is corroborated in virtually every other respect.

[5] No elaborate review of the evidence supporting both these conclusions is necessary, because that evidence is uncontroverted.

Moore would have been terminated in May, their rights to backpay would terminate at that time. *(Poloron Products of Indiana, Inc.*, 177 NLRB 435, 439 (1969); *Fast Chemical Products Corp.*, 170 NLRB 1571, 1578 (1968); see *Ellis and Watts Products, Inc.*, 143 NLRB 1269, 1271 (1963), enfd. 344 F.2d 67 (C.A. 6, 1965) ). The burden is on the Respondent to show that the discriminatees would not have remained in its employ for nondiscriminatory reasons, and this burden is satisfied by a showing of what would have happened to them *(W. C. Nabors d/b/a W. C. Nabors Company,* 134 NLRB 1078, 1088 (1961) ).

I conclude that the credible, and essentially uncontradicted, evidence presented by Bridges and Paquette, who testified on behalf of Respondent, fulfills the requisite burden of proof. Based upon the composite of their testimony, I find that the rough carpentry work had been substantially completed on May 1; that Bridges and Paquette would have been laid off on that day but for their individual and unsolicited requests to convert to laborers work; and that no carpentry work was performed at all during the period May 1 to the week ending September 4, except for the intermittent carpentry work performed by Bridges. Bridges' carpentry activities, performed for "a couple of hours" at approximately 2-week intervals after May 1, was simply incidental to his then principal assignment as a laborer. Accordingly, I find the existence of such insubstantial carpentry work in the period immediately following May 1 does not effectively rebut Respondent's contention that the rough carpenters would have been laid off on May 1.

Further support for the conclusion that Respondent has fulfilled its evidentiary burden is derived from the General Counsel's reliance upon the laborers' assignment to Bridges and Paquette. The inferences which I would be required to make to establish the General Counsel's *prima facie* case proceed from a basis which I find factually absent herein. Thus, even authority cited by the General Counsel, *Flora Construction Company and Argus Construction Company d/b/a Flora and Argus Construction Company,* 149 NLRB 583 (1964), enfd. 354 F.2d 107 (C.A. 10, 1965), which permits the inferences sought by the General Counsel, nonetheless requires that the record reveal that *work remained to be done after May 1* in the classification to which Pisano and Moore previously had been assigned. The Board noted, "As long as the General Counsel establishes . . . that work *remained to be done* in the classification to which the discriminatees had been assigned" [149 NLRB at 586; emphasis supplied], then the General Counsel establishes that but for the discrimination, the terminated individuals would have been retained. As indicated, I find the essential factual element of available carpentry work missing herein.

Furthermore, with respect to the General Counsel's contention that Respondent did not treat Pisano and Moore as it did Bridges and Paquette, I have already observed that the evidence does not demonstrate that Respondent instituted the action by which Bridges and Paquette were transferred to laborers' work. To the contrary, it is uncontroverted that both Bridges and Paquette volunteered themselves for the new jobs. In the absence of direct evidence to rebut those facts, I am unwilling to draw adverse inferences against Respondent. The fact that Bridges and Paquette were retained as laborers by virtue of their fortuitous requests for those jobs does not diminish the validity of any of my conclusions. It is speculative to consider that at the conclusion of the rough carpentry work either Pisano or Moore would have sought or accepted work as laborers.

Finally, in view of the conclusion that the rough carpenters would have been laid off on May 1, I find it is remote and speculative to consider the advent of the finishing work performed by Lord as a basis for resumption of backpay computation.

Upon all the foregoing, I find that Pisano and Moore are entitled to receive backpay only through the week ending May 1,[6] and the backpay specification will be revised in accordance with Appendixes A and B, attached hereto, which adopt the General Counsel's "representative employee" formula and relevant computations during the backpay period found appropriate herein.

Upon 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:

## ORDER [7]

The Respondent, Franchi Bros. Construction Corp., Newton, Massachusetts, its officers, agents, successors, and assigns shall make whole Louis Pisano by paying him $2,096.50 and Gary Moore by paying him $822.75, in accordance with the computations set forth in Appendixes A and B, attached hereto. The total backpay thus due is $2,919.25.

The sums due each discriminatee shall be paid with interest computed in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB 651 (1977).[8] There shall be deducted from each of the amounts due the discriminatee's social security taxes and income tax withholdings as required by Federal, state, and local laws.

[6] In reaching my conclusions herein, I do not at all rely upon any evidence adduced by Respondent to show that Pisano and Moore were incompetent to perform either the laborers' or the finish carpenters' jobs.

[7] 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.

[8] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

APPENDIX A

LOUIS PISANO

| YEAR & QUARTER | REPRESENTATIVE EMPLOYEE | WEEK ENDING | REGULAR HOURS | OVERTIME HOURS | TOTAL ADJUSTED HOURS |
|---|---|---|---|---|---|
| 1975-4 | Harold Bridges | 1/ 3/76 | 24 | 0 | 24 |
| | | | | TOTAL | 24 |
| 1976-1 | Harold Bridges | 1/ 3/76 | 8 | 0 | 8 |
| | | 1/10/76 | 13 | 0 | 13 |
| | | 1/17/76 | 15.5 | 0 | 15.5 |
| | | 1/24/76 | 16 | 0 | 16 |
| | | 1/31/76 | 8 | 0 | 8 |
| | | 2/ 7/76 | 8 | 0 | 8 |
| | | 2/14/76 | 24 | 0 | 24 |
| | | 2/21/76 | 9 | 0 | 9 |
| | | 2/28/76 | 40 | 0 | 40 |
| | | 3/ 6/76 | 16 | 0 | 16 |
| | | 3/13/76 | 32 | 0 | 32 |
| | | 3/20/76 | 14 | 0 | 14 |
| | | 3/27/76 | 40 | 0 | 40 |
| | | | | TOTAL | 243.5 |
| 1976-2 | Harold Bridges | 4/ 3/76 | 36.5 | 0 | 36.5 |
| | | 4/10/76 | 40 | 0 | 40 |
| | | 4/17/76 | 40 | 1 | 41.5 |
| | | 4/24/76 | 40 | 0 | 40 |
| | | 5/ 1/76 | 40 | .5 | 40.7 |
| | | | | TOTAL | 198.7 |

PISANO'S COMPUTATION

| CALENDAR QUARTERS | HOURS 1/ & PAY RATE | GROSS BACKPAY | NET INTERIM EARNINGS | NET BACKPAY |
|---|---|---|---|---|
| 1975-4 | 24 @ $7.50/hr. | 180.00 | 0 | 180.00 |
| 1976-1 | 243.5 @ $7.50/hr. | 1,826.25 | 1,000.00 | 826.25 |
| 1976-2 | 198.7 @ $7.50/hr. | 1,490.25 | 400.00 | 1,090.25 |
| | | | TOTAL NET BACKPAY | $2,096.50 |

1/ Adjusted to straight (or regular) time basis by converting all overtime hours to straight time at the rate of 1 overtime hour equaling 1-1/2 straight-time hour

APPENDIX B

GARY MOORE

| YEAR & QUARTER | REPRESENTATIVE EMPLOYEE | WEEK ENDING | REGULAR HOURS | OVERTIME HOURS | TOTAL ADJUSTED HOURS |
|---|---|---|---|---|---|
| 1975-4 | Henry Standing | 12/ 3/76 | 24 | 0 | 24 |
| | | | | TOTAL | 24 |
| 1976-1 | Henry Standing | 1/ 3/76 | 8 | 0 | 8 |
| | | 1/10/76 | 22.5 | 0 | 22.5 |
| | | 1/17/78 | 16 | 0 | 16 |
| | | 1/24/76 | 16 | 0 | 16 |
| | | 1/31/76 | 20 | 0 | 20 |
| | George Paquette | 3/27/76 | 22 | 0 | 22 |
| | | | | TOTAL | 104.5 |
| 1976-2 | George Paquette | 4/ 3/76 | 32 | 0 | 32 |
| | | 4/10/76 | 40 | 0 | 40 |
| | | 4/17/76 | 40 | .5 | 40.75 |
| | | 4/24/76 | 40 | 0 | 40 |
| | | 5 1/76 | 40 | .5 | 40.75 |
| | | | | TOTAL | 193.5 |

MOORE'S COMPUTATION

| CALENDAR QUARTERS | HOURS 1/ & PAY RATE | GROSS BACKPAY | NET INTERIM EARNINGS | NET BACKPAY |
|---|---|---|---|---|
| 1975-4 | 24 @ $4.50 | 108.00 | 0 | 108.00 |
| 1976-1 | 104.5 @ $4.50 | 470.25 | 520.00 | 0 |
| 1976-2 | 193.5 @ $4.50 | 870.75 | 156.00 | 714.75 |
| | | | TOTAL NET BACKPAY | $822.75 |

1/ Adjusted to straight (or regular) time basis by converting all overtime hours to straight time at the rate of 1 overtime hour equaling 1-1/2 straight-time hour