JD(NY)-22-04
Bronx, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WESTCHESTER IRON WORKS CORP.

and Case 2-CA-31494

JUAN CABRERA, an Individual

Audrey Eveillard, Esq. for the General Counsel.
Dorothy Rosensweig, Esq. for the Respondent.
Leonard Lombardi, Esq. for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: On April 5, 2001 the National Labor Relations Board issued a Decision and Order[1] directing that Westchester Iron Works Corp. ("Respondent") make whole Juan Cabrera and Cesar Barillas for losses resulting from Respondent's unfair labor practices. On September 30, 2002 the United States Court of Appeals for the Second Circuit issued its judgment enforcing the Board's Order.

Controversy having arisen over the amount of backpay due under the Board's Order, on May 28, 2003 the Regional Director for Region 2 issued a Compliance Specification and Notice of Hearing. On June 27 the Regional Director issued a Corrected Compliance Specification and on October 2, 2003 the Specification was amended. Respondent filed an answer to the Specification and hearings were held before me on October 7 and October 20, 2003.

All parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by General Counsel and by Respondent on January 30, 2004.

Upon the entire record[2] of the case, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

1. Calculation of Gross Backpay

Gross backpay was calculated on a quarterly basis. Respondent contends that it should have been calculated on an annual basis. In *F.W. Woolworth Co.,* 90 NLRB 289, 292-93 (1950), the Board stated: "We shall order, in the case before us and in future cases, that the loss of pay be computed on the basis of each separate calendar quarter…". The Board continued,

[1] 333 NLRB 859

[2] Respondent's Exhibits 2, 9 and 10 are admitted into evidence.

"Earnings in one particular quarter shall have no effect on the back-pay liability for any other quarter".

The Board has consistently calculated backpay on a quarterly basis. Respondent has presented no valid reason why this long-standing practice should be abandoned. I find that the Backpay Specification used the appropriate measure of gross backpay.

2. Backpay Period

Respondent maintains that as of October 1998 it began using union labor exclusively. Respondent argues that because neither discriminatee was licensed or a member of the locals from which it drew its labor force, they were no longer qualified for the positions subsequently available at Respondent. Accordingly, it is Respondent's position that the backpay period should end in October 1998.

Respondent argues that after October 1998 all of its outside work required that it use union employees and neither Cabrera nor Barillas were so qualified. The underlying Decision found that Cabrera installed beams, welded, painted and cut metal inside and outside the shop. He also maintained the company's vehicles (333 NLRB at 861-62). Barillas performed welding and cutting work, installed beams and columns and tied bolts (id. at 862).

Vincent Sergi, president of Respondent, was asked during the hearing whether those employees who were not union members continued working for Respondent. He testified that they were never laid off. I find that had Cabrera and Barillas not been discriminatorily discharged, they, too, would not have been laid off. Even had they not been able to do outside work, they would have been retained by Respondent doing inside work. As the underlying Decision pointed out, they were qualified to do much of the inside work. Accordingly, I find that the backpay period appropriately runs from the date of discharge until December 31, 2002, the date Respondent ceased operations.

3. Efforts to Obtain Employment

Respondent maintains that the discriminatees did not make adequate efforts to obtain employment. Barillas credibly testified that he looked for ironwork once or twice a week in Westchester, Connecticut and Brooklyn. Cabrera credibly testified that he "went to many companies", read newspaper ads and searched for work on the computer located in the unemployment office. He testified that he visited employer sites, looking for work, three or four times a week.

An employer may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment". *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 199-200 (1941). This, however, is an affirmative defense and the burden is upon the employer to prove the necessary facts. *NLRB v. Mooney Aircraft, Inc.,* 366 F. 2d 809, 813 (5th Cir. 1966); *Sioux Falls Stock Yards Co.,* 236 NLRB 543, 551 (1978); *ABC Automotive Products Corp.* 319 NLRB 874, 877 (1995). As stated above, the record contains evidence detailing the efforts by the discriminatees to obtain employment. I find that Respondent has not sustained its burden of showing that Cabrera and Barillas did not "make reasonable efforts to find interim work". *NLRB v. Miami Coca-Cola Bottling Co.,* 360 F. 2d 569, 575-76 (5th Cir. 1966).

4. Intermetal Fabricators

In November 1998 Cabrera accepted a job with Intermetal Fabricators, doing ironwork. Intermetal was located at 2121 R Street, Brooklyn, NY. Cabrera testified that he worked there for 4-5 weeks. His salary was $475 per week. He testified that he quit the job voluntarily because "it was too far away" and that he had to get up too early in the morning. He testified that he took the "D" train, made one change at 42nd Street, and that the trip took him about two hours.

Respondent submitted a New York City subway map.[3] Intermetal was located in close proximity to the Kings Highway station in Brooklyn. Both the "D" and the "Q" are express trains and the Kings Highway station is an express stop on the "Q" line. Respondent argues that since both the trains that Cabrera would have used are express, it is unlikely that the trip took two hours. I agree. Since both trains are express, and since the Kings Highway station is an express stop, it is likely that the trip did not exceed one and one-half hours.

In *Ozark Hardwood Co.,* 119 NLRB 1130 (1957), remanded on other grounds, 282 F.2d 1 (8th Cir. 1960), the discriminatee quit an interim job after eight days of work, because of the job's location. The Board stated (at 1139), "Having obtained jobs substantially equivalent to the ones they lost with Respondent, the Claimants could not abandon them except for justifiable cause, without incurring a willful loss of earnings …". The Board continued (id.):

> While these Claimants were not obligated, in the first instance, to leave the Clarksville area in their quest for work, they could not, having obtained employment of the type described above, voluntarily relinquish such employment to return home…without incurring what constitutes a willful loss of earnings for the period subsequent to their quitting.

See *Standard Materials, Inc.,* 862 F. 2d 1188, 1192 (5th Cir. 1989).

In *Holiday Radio, Inc., d/b/a KSLM-AM,* 275 NLRB 1342 (1985), the discriminatee quit his interim employment because travel to work was too onerous. The Board held that quitting the job constituted a willful loss of earnings. The Board stated (at 1343):

> [T]he consequences of a claimant's willful decision to…terminate suitable interim employment for personal convenience unrelated to securing other equivalent interim employment or to the nature of the departed interim employment should reasonably be borne by the claimant and not by the Respondent.

Similarly, in *Sorenson Lighted Controls,* 297 NLRB 282 (1989), the discriminatee found interim employment 45 minutes away. Her brother-in-law had been driving her to work. She quit her interim job because "she did not want to depend on her brother-in-law all the time" (id. at 283). The Board stated (id.): "Because that decision was based solely on personal reasons, we find that her quitting Arbor Acres was not justifiable and constituted a willful loss of earnings".

Cabrera quit his job with Intermetal voluntarily. He testified that he quit because he had

[3] This is admitted into evidence as Respondent's Exhibit 13.

to get up too early in the morning and that the job was "too far away". He took the subway to work and I find, that in all likelihood, the commute did not exceed one and one-half hours. In accordance with the above cited cases I find that quitting the job at Intermetal was not justifiable and constituted a willful loss of earnings.

Pursuant to *Knickerbocker Plastic Co.,* 132 NLRB 1209, 1215 (1961), where a discriminatee unjustifiably quits an interim job, Respondent's backpay is reduced by the amount the discriminatee would have earned had he continued to work at the interim job. However, where the discriminatee has secured other employment during the time that the offset is applicable and he earned a greater amount than the offset, the offset will not be applied, but the actual interim earnings will be deducted from gross backpay.

Cabrera earned $475 per week at Intermetal. This amounts to $6175 for each quarter. As reflected in the Appendix attached to this Supplemental Decision, in accordance with the above described formula, beginning the first quarter of 1999, except for the third and fourth quarters of 1999 and 2002, interim earnings for each quarter are $6175. For each of the third and fourth quarters of 1999 interim earnings are $9648, and for each of the third and fourth quarters of 2002 interim earnings are $8064. The total backpay due Cabrera is $17,063.

5. Respondent's Other Contentions

Cabrera attended a computer class during the fourth quarter of 2000. Respondent maintains that because he was only available for work part-time, backpay should be reduced for this quarter. Since, under the revised calculation, there is no backpay due for this quarter, the issue need not be resolved.

In addition, Respondent argues that Cabrera's backpay should be reduced during 2001 and 2002 because he was engaged in self-employment. The law is clear that self-employment is an adequate and proper way to mitigate loss of wages. *Heinrich Motors, Inc.,* 403 F. 2d 145, 148 (2d Cir. 1968); *Kansas Refined Helium Co.,* 252 NLRB 1156, 1157 (1980), enfd. 683 F. 2d 1296 (10th Cir. 1982). Cabrera provided tax returns for 2001 and 2002 which show income of $18,600 and $21,200, respectively. As detailed above, the Appendix shows interim earnings of $24,700 for 2001 and $28,478 for 2002. I conclude that no further offsets are warranted due to Cabrera's self-employment.

Conclusions of Law

I find that the backpay computations, as amended, are appropriate. Respondent has not sustained its burden of showing that there should be any additional offsets. *NLRB v. Brown & Root,* 311 F. 2d 447, 454 (8th Cir. 1963).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[4]

[4] 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.

ORDER

Respondent, Westchester Iron Works Corp., its officers, agents, successors, and assigns, shall pay to each of the following employees as net backpay, the amount set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), less tax withholdings required by federal and state laws:

Cesar Barillas	$7,437
Juan Cabrera	$17,063

Dated, Washington, DC, May 21, 2004.

D. Barry Morris
Administrative Law Judge

Appendix

Juan Cabrera

Year	Quarter	Average Quarterly Wages	Interim Earnings	Net Backpay
1998	2nd	$930	$0	$930
	3rd	$1,429	$0	$1,429
	4th	$3,158	$2,290	$868
1999	1st	$6,960	$6,175	$785
	2nd	$4,312	$6,175	$0
	3rd	$3,380	$9,648	$0
	4th	$4,654	$9,648	$0
2000	1st	$1,753	$6,175	$0
	2nd	$4,435	$6,175	$0
	3rd	$4,305	$6,175	$0
	4th	$2,608	$6,175	$0
2001	1st	$8,316	$6,175	$2,141
	2nd	$8,660	$6,175	$2,485
	3rd	$3,200	$6,175	$0
	4th	$5,984	$6,175	$0
2002	1st	$8,871	$6,175	$2,696
	2nd	$10,193	$6,175	$4,018
	3rd	$6,953	$8,064	$0
	4th	$9,775	$8,064	$1,711
Total				$17,063