

U. Antoci, an apparent reference to a recent incident

safety director, Vito Mecca, followed and videotaped first time Rodriguez had ever been monitored by the that Mecca told him at the end of the drive that that he had made a "small mistake." Later that day, 3, which showed that the right tire of Rodriguez's bus the roadway. According to Rodriguez, Mecca told him violation but that "he had orders from the top to presently issued a written warning for a safety violation. I Rodriguez to take a 19A test following his morning test on October 31, 2002, and thus was not scheduled 04. He failed the March 19 test and was immediately

Safety Director Joe Antoci why he had been retested d expired. Antoci explained that under New York State nently as it considered necessary. When Local 854' n-mentioned Antoci about the March 19 test, Antoci ex- , written safety violation, in combination with an ac- June 21, 2002—four months prior to his last successful ter the 19A test off-schedule.

a grievance with Local 854 alleging that the March 19 ncerted activities in support of TDU. That same day, ther TDU activist employees to the New York State ain about CBT's retaliatory surveillance, work assign ul 854 was effectively controlled by CBT management. ssentative from the Department of Education with-ak the 19A test, which he again failed. Rodriguez with z testified that Antoci told him that he was "disquall "had to take the road test again at the Department of ation.

by DMV officials that CBT "had let [Rodriguez] go," any explanation why. issued a complaint alleging that CBT had discouraged charged Rodriguez in retaliation for, engaging in pro

f the Board, unanimously adopted the ALJ's findings rices through coercive interrogation and videotaped t for testing and issuing him a written safety warning. riguez reinstated to his previous position upon proof within a reasonable time of CBT's reinstatement offer. ez would not have failed the 19A tests or been required unlawful discrimination, the Board reasoned that tification did not, as the ALJ suggested, preclude but a n-acknowledged, however, that even absent CBT's unlawful red to take a 19A test on October 31, 2004. The Board of Rodriguez's discharge, March 27, 2003, to October dled 19A test.

petition for enforcement of its Order with this Court, petition for review of that Order.

which he was not legally authorized to be employed as a bus driver.

The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer. Furthermore, where a worker has been the victim of unlawful discrimination under the Act, as is the case here, the Board is empowered to grant the amount of "gross backpay" that will "restore the situation as nearly as possible, to that which would have been obtained but for the illegal discrimination." A back pay award is therefore "an approximation, necessitated by the employer's wrongful conduct," which attempts to make a victim of discrimination as close to economically whole as possible.

The remedy is crafted to consider Rodriguez's employment status had he not been singled out for off-schedule testing. Absent the unlawful targeting, Rodriguez presumably would have remained licensed at least between March 27, 2003, the date of the second failed test, and October 31, 2004, the date of his next regularly-scheduled test. He therefore would have retained his salary for that approximately nineteen-month period. This is the very time-frame for which the Board awarded Rodriguez back pay, thus restoring, "as nearly as possible," the economic conditions that "would have been obtained but for the illegal discrimination."

In sum, our consideration of the policies underlying the Board's authority to issue back pay to redress discrimination suggests that the Board's remedy was appropriate, even though CBT must pay Rodriguez for a period in which he was not licensed to operate a bus. Restoring the economic status quo upset by violations of the Act is the very purpose of the back pay remedy, and allowing CBT to escape the financial consequences of its discriminatory acts because those acts additionally caused Rodriguez to lose his license would not further this policy.

For the foregoing reasons, the Board's application for enforcement of its Order is GRANTED.

### Case Commentary

The U.S. Circuit Court of Appeals, Second Circuit, ruled that Rodriguez was unlawfully discharged and, thus, entitled to back pay.

### Case Questions

1. Are you in agreement with this case?
2. Why should the CBT have to give Rodriguez back pay for the period that he was not licensed?
3. Do you believe that the CBT should have to pay punitive damages to discourage it from subjecting others to this form of retaliation in the future?

## United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO v. NLRB

544 F.3d 841; 2008 U.S. App. LEXIS 19562 (U.S. Court of Appeals Seventh Circuit)

The issue is whether the employer had violated the NLRA by hiring replacement workers as permanent employees, therein refusing to reinstate strikers.

RIPPLE, CIRCUIT JUDGE.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO ("Union") filed a charge with the National Labor Relations Board ("NLRB" or "Board") in which it alleged that Jones Plastic and Engineering Company ("Jones Plastic") had violated the National Labor Relations Act ("NLRA" or "Act"). The Union claimed that Jones Plastic had violated the NLRA by hiring replacement workers as permanent employees, therein refusing to reinstate strikers.

