



In the Matter Of

CALVIN CREEKMORE,

CASE NO. 93-ERA-24

COMPLAINANT,

DATE: June 20, 1996

v.

ABB POWER SYSTEMS ENERGY  
SERVICES, INC.,

RESPONDENT.

BEFORE: The Administrative Review Board<sup>1/</sup>

#### SECOND SUPPLEMENTAL ORDER CONCERNING REMAND

The Deputy Secretary of Labor found that Respondent, ABB Power Systems Energy Services, Inc. (ABB PSESI), violated the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988), when it laid off Complainant, Calvin Creekmore. The Deputy Secretary ordered ABB PSESI to reinstate Creekmore and remanded the case to the Administrative Law Judge (ALJ) for a recommended decision on the amount of damages and certain remedies to which Creekmore is entitled.

While the case was pending before the ALJ on remand, Creekmore filed a petition with the Deputy Secretary for reconsideration of the Remand Order and seeking additional remedies. Creekmore raised the issue of the appropriate corporate entity that should offer him reinstatement because of Respondent's earlier statement that Combustion Engineering, Inc. retained liability in this complaint. At the time the issues in this case arose, Creekmore was employed by ABB PSESI, which was owed by Combustion Engineering. In turn, Combustion Engineering is a

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<sup>1/</sup> This matter was filed before the Secretary of Labor pursuant to the Energy Reorganization Act and 29 C.F.R. Part 24. The Secretary recused himself in this case. The Deputy Secretary issued a remand order in this case on February 14, 1996 and a Supplemental Order Concerning Remand on Apr. 10, 1996. On April 17, 1996, the Secretary delegated jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board (the Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached). The Board reviewed the remand order, supplemental order, and the entire record in this case prior to issuing this order.

wholly owned subsidiary of Asea Brown Boveri Inc. (ABB). In 1994, Combustion Engineering sold all of the capital stock of ABB PSESI to Octagon, Inc.

In response to Creekmore's inquiry about the appropriate entity to offer reinstatement, the Deputy Secretary stated:

Respondent has explained that after the sale, ABB-CE retained liability arising from this complaint. \* \* \* In ordering PSESI to reinstate Creekmore, however, I did not mean to obligate a corporation that did not retain liability in this cause of action. Rather, it is appropriate that ABB-CE has the obligation to reinstate Creekmore to a substantially similar position.

Supplemental Order at 3.

Respondent now asks for reconsideration of the Supplemental Order because it contains "a reinstatement order . . . against an entity that is not a party to the current action," meaning Combustion Engineering. Respondent states that, in the context of the sale of the capital stock of ABB PSESI, Combustion Engineering entered into an indemnification agreement concerning Mr. Creekmore's outstanding complaint against ABB PSESI that "is limited to providing defense and indemnity to Octagon, Inc. against monetary damages that may be incurred by PSESI as a result of this complaint." Pet. for Recon. at 2. Respondent argues that a remedial order for reinstatement "should be made against PSESI." *Id.*

Respondent is correct that, as the named Respondent and the entity that was found to have violated the ERA, ABB PSESI has the obligation to offer reinstatement to Creekmore. If a separate contractual obligation exists that requires another entity to assume ABB PSESI's reinstatement obligation, and if there is a dispute as to that obligation, the proper means to resolve that dispute is through an enforcement action.

Although the Department of Labor usually would not be concerned with any private indemnity agreement such as that described by Respondent, in this case our responsibility to enforce the whistleblower provision of the CAA is implicated. The Petition for Reconsideration informs us that Combustion Engineering has "contractually retained responsibility for defense" of this case. Pet. for Recon. at 4. It is now apparent, however, that Combustion Engineering's interests have diverged from those of the named Respondent, ABB PSESI, at least with regard to the issue of reinstatement of Creekmore. In light of this Department's obligation to enforce the employee protection provision and ensure that *bona fide* reinstatement is offered, we direct the ALJ on remand to notify Octagon, Inc., of the position taken by Combustion Engineering regarding reinstatement and to give Octagon, Inc. an opportunity to be heard on this issue. We deem this step necessary because of the divergence of interest between the entity that apparently has contracted to provide the defense in this case and the named Respondent, ABB PSESI.

We remind the parties that ABB PSESI's back pay liability continues until Creekmore is reinstated or declines a *bona fide* offer of reinstatement. *Asst Sec. and Phillips v. MJB Contractors*, Case No. 92-STA-00022, Final Dec. and Order, Oct. 6, 1992, slip op. at 4-5. To be

*bona fide*, the offer must be to a comparable position with the same compensation, benefits, and privileges that Creekmore enjoyed prior to his discriminatory layoff. *See Smith v. Littenberg*, Case No. 92-ERA-52, Sec. Dec. and Limited Remand Ord., Sept. 6, 1995, slip op. at 9 and *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Sec. Dec. and Ord. on Damages, Oct. 30, 1991, slip op. at 21, *aff'd in relevant part and rev'd on other grounds*, 982 F.2d 125 (4th Cir. 1992).

#### CONCLUSION

Consistent with this Order, on remand, the ALJ shall give Octagon, Inc. the notice described above, and an opportunity to be heard in this matter.

SO ORDERED.

DAVID A. O'BRIEN  
Chair

KARL J. SANDSTROM  
Member

JOYCE D. MILLER  
Alternate Member