George Webel d/b/a Webel Feed Mills & Pike Transit Company *and* Local 217, American Federation of Grain Millers, AFL–CIO. Cases 14–CA–7884 and 14–CA–7952

June 27, 1978

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On April 10, 1978, Administrative Law Judge Jerry B. Stone issued the attached Second Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified.[1]

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, as modified herein, and hereby orders that the Respondent, George Webel d/b/a Webel Feed Mills & Pike Transit Company, Pittsfield, Illinois, its officers, agents, successors, and assigns, shall pay to Earl L. Hull a sum of money equal to the composite sum of the following amounts indicated, minus such deductions as may be required by Federal or state law and which are appropriately paid to such governments:

1. 1976—2d Quarter—$1,203.67, plus interest thereon from the end of day of June 30, 1976, to date of payment, at the rate of 6 percent per annum.
2. 1976—4th Quarter—$2,011.47, plus interest thereon from the end of day of December 31, 1976, to date of payment, at the rate of 6 percent per annum.
3. 1977—1st Quarter—$3,294.85, plus interest thereon from the end of March 31, 1977, to date of payment, at the rate of 6 percent per annum.
4. 1977—2nd Quarter—$1,774.15, plus interest thereon from the end of June 30, 1977, to date of payment, at the rate of 6 percent per annum.

[1] Administrative Law Judge Stone ordered Respondent to pay Earl L. Hull specified sums of money for each of four quarters during certain periods in 1976 and 1977, with interest added to each of the four sums computed in accord with *Florida Steel Corporation*, 231 NLRB 651 (1977). Inasmuch as the court of appeals, in enforcing the Decision and Order of the National Labor Relations Board, 217 NLRB 815 (1975), adopted a remedy providing, *inter alia*, that interest shall be added to net backpay at the rate of 6 percent per annum, the recommended Order of Administrative Law Judge Stone is modified to specify an interest rate of 6 percent per annum.

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This backpay proceeding involving the determination of backpay due to discriminatee Earl L. Hull for the period of time April 1, 1976, through May 14, 1977, was held at St. Louis, Missouri, on February 28, 1978. The only issue in this case is whether or not the Respondent made a proper offer or offers of reinstatement to Hull on July 19, 1976, and on July 20, 1976, and thereby tolled liability for backpay due to Hull after such offer.[1]

All parties were afforded full oppurtunity to participate in the proceeding. Arguments were made by the parties, and a brief has been filed by the General Counsel. Arguments and brief have been considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

[1] The National Labor Relations Board, in its Decision and Order issued on May 7, 1975, directed the Respondent herein to reinstate Hull to his former position and to make Hull whole for loss of wages resulting from a found discriminatory discharge of Hull on May 18, 1974. Said Board Decision and Order is reported at 217 NLRB 815. The Court of Appeals for the Seventh Circuit issued its decree on April 16, 1976, enforcing said Board Decision and Order. On July 19 and 20, 1976, Administrative Law Judge Ladwig conducted a backpay hearing concerning backpay due Hull from May 18, 1974, to March 31, 1976. In said hearing the parties litigated the question of whether Respondent's backpay obligation was terminated as of January 15, 1975, by a purported settlement between Respondent and Hull involving payment of a sum of money to Hull purportedly for "backpay" and "other" matters and wherein Hull executed a waiver of reinstatement. Administrative Law Judge Ladwig found, in effect, that such purported settlement did not properly determine the amount of backpay due and did not eliminate the remedial reinstatement rights of Hull. Administrative Law Judge Ladwig determined the amount of backpay due to Hull by the Respondent up to March 31, 1976, and issued a recommended Order that Respondent pay Hull the amount of backpay due to March 31, 1976. Thereafter, the National Labor Relations Board, on April 21, 1977, in a case reported at 229 NLRB 178, adopted Administrative Law Judge Ladwig's rulings, findings, conclusions, and recommended Order as its own. The Respondent has petitioned the Seventh Circuit Court of Appeals for review of the April 21, 1977, Board Order. The General Counsel has cross-applied to the said Circuit Court of Appeals for enforcement of said April 21, 1977, Board Order. The instant backpay proceeding is based upon backpay specifications issued by the Regional Director on November 15, 1977. The Respondent's answer to such backpay specifications was duly filed and continues to contend that backpay and reinstatement rights were complied with as of January 15, 1975, and furthermore that proper offers of reinstatement were made to Hull on July 19 and 20, 1976, and that no backpay is due Hull accordingly. The Respondent does not dispute the mathematical computation of backpay due Hull otherwise.

FINDINGS OF FACT

I. INTRODUCTION

The National Labor Relations Board's Decision and Order, issued on May 7, 1975, directing Respondent to make whole Hull for loss of wages and to reinstate Hull to employment adopted the following recommended Order and reference to remedy of Administrative Law Judge Silberman as set forth as follows (217 NLRB at 825–826):

> (b) Offer to Earl Hull immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."
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> * * * * *
>
> VI. THE REMEDY
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> Having found that Respondent unlawfully laid off its employee, Earl Hull, on May 18, 1974, I shall recommend that Respondent offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of his layoff to the date of Respondent's offer of reinstatement, less his net earnings during such period. The backpay provided for herein shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest at the rate of 6 percent per annum shall be added to such net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

II. HULL'S ENTITLEMENT TO REINSTATEMENT

The essential dispute is whether Respondent's July 1976, offer of reinstatement to a "mixer position" on the night shift, the position that Hull was working in when discriminatorily terminated, is a proper offer of reinstatement, or whether Hull's entitlement to reinstatement without prejudice to his seniority and other rights and privileges reveals that the proper position to be reinstated to was that of pellet mill operator on the day shift.

The Board's remedial Order utilized in the Board's May 7, 1975, Decision and Order is the normal remedial order utilized in discrimination cases. It is designed to place the discriminatee in the same position he would have been had there been no discrimination against him. Thus, if the discriminatee would have been promoted, or would have received raises or other benefits, reinstatement and backpay is to be determined accordingly. Basically, this is the meaning of the words "without prejudice to his seniority and other rights and privileges." In this case we are not presented with a consideration of whether there is a substantially equivalent position. Both the pellet mill operator position and the mixer position continue in existence.

In the Board's May 7, 1975, Decision (217 NLRB 815), it was determined that Hull had been discriminatorily terminated on May 18, 1974, when Respondent had laid off its night shift. The discrimination was based upon a finding that absent discrimination the Respondent would have found a job elsewhere for Hull. Thus, it is clear that in making Hull whole for loss of wages and reinstatement purposes a reconstruction of what would have happened to Hull, absent discrimination, is in order.

The General Counsel contends that seniority played a part in the original placement of Hull on the night shift and plays a part in the Respondent's placement of employees on jobs. The Respondent contends that seniority has no bearing upon its determination of placement of employees on jobs.

Considering the evidence presented with respect to this issue, I am persuaded and conclude and find that seniority did and does have a bearing upon the placement of employees in positions. Thus, the findings in the initial unfair labor practice case reported at 217 NLRB 815, the findings in the initial backpay proceeding reported at 229 NLRB 178 (1977), Hull's credited testimony as to what he was told about his 1974 transfer to the night shift relating to his being a less senior employee, and Webel's conflicting testimony as to the utilization of seniority, convince that Respondent did consider seniority in the job assignment of employees; and that, absent discrimination against Hull, Hull would have been performing the pellet mill operator's work at the time of the July 19 and 20, 1976, offers of reinstatement.

As to Webel's testimony relating to the usage of seniority, I note that his original testimony was to the effect that no consideration of seniority was made in the assignment of employees to work.

The most objective evidence on such point, in my opinion, is the fact that Hull was told in 1974 when transferred to the night shift several months before the May 18, 1974, layoff that it was because he was a less senior employee. At the time of such transfer, Hull had been working on the day shift as the pellet mill operator.

At the time of the discriminatory termination of Hull on May 18, 1974, employees and/or supervisors who were senior to Hull performed the work of the pellet mill operator. After the termination of Hull, a new employee has been hired and was working as the pellet mill operator at the time of Respondent's July 19 and 20, 1976, offers of reinstatement to Hull as a mixer operator on the night shift.

The July 19, 1976, offer of reinstatement was made on the record at the backpay proceeding of July 19 and 20, 1976, involving determination of backpay due from May 18, 1974, to March 31, 1976. At such proceeding there had been questions and answers relating to the purported settlement of backpay and reinstatement obligations on Janu-

ary 15, 1975. The July 19, 1976, offer of reinstatement made on the record is revealed by the following excerpts from the transcript of such proceeding.

> Q. Now, let me resolve the misunderstanding. This company, I am authorized to say to you, that you can come back to work for this company next Monday, the 26th of July, to work on the night shift, the same shift that you were working on when you left the company's employ, operating the mixer and working on a tonnage basis, on the same basis that Mr. Conkright is working, do you understand that?
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> * * * * *
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> JUDGE LADWIG: Sustained. The witness has the right to consult with the union representative.
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> I recognize that the offer is being made. Would you repeat the offer that you are now making.
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> Q. (By Mr. Sullivan) I offer you, on behalf of the Webel Company, reinstatement in the company's employ effective a week from today, Monday, the 26th of July, 1976, to work on the night shift, to work on the mixer, and to work on a tonnage basis on the same basis on which Mr. Conkright is compensated.
>
> I think you have indicated you understand the basis on which he is compensated?

The record in the proceeding of July 19 and 20, 1976, reflected statements by the General Counsel as to whether the Respondent would offer reinstatement to Hull's job on the day shift, the one Hull worked on shortly before transfer to the night shift, which occurred several months before his 1974 termination. The record also revealed a question by Administrative Law Judge Ladwig as to whether Respondent was trying to get Hull to waive his right to the day-shift job as relates to the "without prejudice to his seniority and other rights and privileges" part of the remedial Order.

On July 20, 1976, the Respondent sent Hull the following letter:

> Confirming what we said at the Labor Board hearing yesterday, we are offering you reinstatement to our Company's employ. We request that you report for work at 5:00 p.m. on Monday, July 26, 1976. You will be assigned to the night shift, running the mixer, which is the job you often ran and the one on which you were working when you were laid off. You will be compensated on a tonnage basis at 45 cents per ton for your tonnage produced at the mixer. As you know, this is the same basis on which the other man who runs the mixer is paid. If you are willing to make the effort, there is no reason why you cannot make good earnings on this job—substantially more than you were earning in 1974.
>
> This is an unconditional offer of reinstatement to your job on a permanent basis. Your seniority and other rights and privileges will be respected. If at any time in the future the night shift should be eliminated, we will offer you a transfer to the day shift.
>
> If you are unable to report for work next Monday, please let us know as soon as convenient when you can report for work. We will keep this offer open for two weeks from the time you receive this letter.

Considering all of the foregoing, I am persuaded and conclude that absent the discrimination against Hull on May 18, 1974, that as of July 19 and 20, 1976, Hull would have been employed as a pellet mill operator on the day shift. In addition to the facts previously set forth, I note that it was litigated in the supplemental backpay proceeding (reported at 229 NLRB 178) and found that the appropriate measure of wages that would have been earned by Hull during the backpay period consisted of the wages earned by general mill hands Cawthorne and Mulford;[2] and that general mill hands helped one another and worked when needed on all of the machines (including the drive, mixer, pellet mill, driers, and bagger), handled incoming and outgoing grain, cleaned the pits and the legs, and did other cleaning and maintenance work. It is clear that a general mill hand job, the operator of the pellet mill, existed on the day shift as of July 19 and 20, 1976, that such position was filled by an employee less senior than Hull, and that Respondent did give consideration of seniority in the filling of jobs. Respondent's obligation in this case is one of remedy. In discrimination cases, the placement of a discriminatee in his former job often requires displacement of the employee hired as his replacement. Respondent cannot bypass its obligation because of the asserted inability of Furnance, the less senior employee, to perform "mixer" work. The remedial responsibility was to reinstate Hull, and Respondent was required under the circumstances to reinstate Hull to the position occupied by Furnance.

Considering the foregoing, I conclude and find that the Respondent's offers of July 19 and 20, 1976, of reinstatement to the night mixer position did not constitute a proper remedial reinstatement offer to Hull within the meaning of the court-enforced, Board remedial Order.

III. COMPUTATION OF BACKPAY DUE EARL L. HULL APRIL 1, 1976–MAY 14, 1977[3]

Earl L. Hull
Gross Backpay
April 1, 1976—May 14, 1977

Calendar Quarters	Weeks and Pay Rates 4/	= Gross Backpay
1976—2	12.4 at $253.45	$3,142.78
1976—3	13 at 253.45	3,294.85
1976—4	13 at 253.45	3,294.85
1977—1	13 at 253.45	3,294.85
1977—2	7 at 253.45	1,774.15

[2] Apparently referred to in the record of this proceeding as Mofford (instead of Mulford).

[3] It is undisputed that Respondent's backpay obligation terminated on May 14, 1977. The Respondent does not dispute the basis of or the mathematical computation of backpay set forth in the backpay specifications. I have noted several mathematical errors in such computations made, and they are hereby corrected.

The sole issue presented in this proceeding concerned the validity of Respondent's July 19 and 20, 1976, offers of reinstatement. Such offers have been found not to constitute proper offers of reinstatement, and therefore Respondent's obligation as to backpay continued until May 14, 1977, where an admitted proper offer of reinstatement was made. Respondent's other contentions as to whether a January 15, 1975, "settlement" eliminated the continuing backpay obligation is not in issue before me, and I am bound by the current status of the instant case's decisional law on such point.

[4] The parties are in agreement as to the weeks and pay rates for the respective quarters.

Earl L. Hull
Net Interim Earnings

Calendar Quarters	Gross Earnings	-	Travel and Expenses	=	Net Interim Earnings
1976—2	$2,219.61		$280.50		$1,939.11
1976—3	4,135.69		378.00		3,757.69
1976—4	1,409.38		126.00		1,283.38
1977—1	None		None		None
1977—2	None		None		None

Earl L. Hull
Net Backpay

Calendar Quarters	Gross Backpay	-	Net Interim Earnings	=	Net Backpay
1976—2	$3,142.78		$1,939.11		$1,203.67
1976—3	3,294.85		3,757.69		None
1976—4	3,294.85		1,283.38		2,011.47 5/
1977—1	3,294.85		None		3,294.85
1977—2	1,774.15		None		1,774.15 6/

Considering all of the foregoing, I conclude and find that the amount of backpay due Earl L. Hull for the period of time April 1, 1976, to May 14, 1977, pursuant to the Board's remedial Order previously referred to is as set out above as net backpay plus interest quarterly computed. Accordingly, I hereby issue the following recommended:

[5] Corrected from $2,136.47 in backpay specification.
[6] Corrected from $1,174.15 in backpay specification.

ORDER [7]

Upon the basis of the foregoing findings and conclusions, it is ordered that George Webel d/b/a Webel Feed Mills and Pike Transit Company, Pittsfield, Illinois, its officers, agents, successors, and assigns, shall pay to Earl L. Hull a sum of money equal to the composite sum of the following amounts indicated, minus such deductions as may be required by Federal or state law and which are appropriately paid to such governments.

The backpay due Earl L. Hull on a quarterly basis is as follows with all interest to be computed in accord with the Board's decision in *Florida Steel Corporation*, 231 NLRB 651 (1977):[8]

1. 1976—2d Quarter—$1,203.67, plus interest thereon from the end of day of June 30, 1976, to date of payment.
2. 1976—4th Quarter—2,011.47, plus interest thereon from the end of day of December 31, 1976, to date of payment.
3. 1977—1st Quarter—$3,294.85, plus interest thereon from the end of day of March 31, 1977, to date of payment.
4. 1977—2d Quarter—$1,774.15, plus interest thereon from the end of day of June 30, 1977, to date of payment.

[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).