

**Vanguard Oil and Service, Inc., and Vanco Heating, Plumbing and Welding Co. and Jack Fantauzzi and Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and James Howard.** Cases 29-CA-3871, 29-CA-3805, and 29-CA-4086

August 5, 1977

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On May 27, 1975, Administrative Law Judge Milton Janus issued his Decision in the above-entitled proceeding finding, *inter alia*, that Respondent had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily discharging employees James Howard and Eugene Hester. The Administrative Law Judge recommended that they be reinstated and made whole for any loss of earnings suffered by reason of the discrimination against them. No exceptions were filed to the Decision of the Administrative Law Judge. Thereafter, pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the National Labor Relations Board, on July 16, 1975, issued its Order<sup>1</sup> adopting the findings and conclusions of the Administrative Law Judge as contained in his Decision, and ordered that Respondent take the action set forth in the recommended Order of the Administrative Law Judge.

On February 23, 1976, the United States Court of Appeals for the Second Circuit issued its judgment<sup>2</sup> enforcing the Board's Order. Thereafter, on April 5, 1976, the Regional Director for Region 29 issued and served on the parties a backpay specification and notice of hearing. Respondent filed an answer on April 20, 1976. On July 1 and 20, 1976, a hearing was held before Administrative Law Judge Charles W. Schneider for the purpose of determining the issues and amounts of money due under the backpay specification.<sup>3</sup>

<sup>1</sup> Not reported in bound volumes of Board Decisions.

<sup>2</sup> Docket 75-4222.

<sup>3</sup> During the course of the hearing on July 1, 1976, an agreement was reached between the parties for the settlement of the backpay claim of James Howard.

<sup>4</sup> Not reported in bound volumes of Board Decisions. Member Jenkins was of the opinion that there was no need for a remand.

<sup>5</sup> Evidence adduced at the hearing revealed that Hester made approximately 10 trips for Clifton Bus Lines in 1974. However, it was found that only one of these trips, occurring on May 30, 1974, fell within the backpay period. Based on Hester's testimony that he was paid approximately \$35 per

On September 15, 1976, Administrative Law Judge Charles W. Schneider issued the attached Supplemental Decision in this proceeding fixing the amount of backpay due Eugene Hester. Thereafter, Respondent filed exceptions and a supporting brief.

By order dated January 26, 1977, the National Labor Relations Board<sup>4</sup> remanded the instant proceeding to the Administrative Law Judge for the purpose of receiving further evidence on the issue of Eugene Hester's interim earnings from Clifton Bus Lines, and for a reconsideration of Hester's credibility in light thereof. The Administrative Law Judge was ordered to prepare and issue "a supplemental decision containing any such findings of fact, conclusions of law, and recommendations . . . warranted by the additional evidence received during the course of the reopened hearing." On April 20, 1977, the Administrative Law Judge issued his Second Supplemental Decision, also attached hereto, in which he resolved Hester's credibility as a witness and reaffirmed, as modified by his Second Supplemental Decision,<sup>5</sup> his findings of fact, conclusions of law, and recommended Order as made on September 15, 1976. Thereafter, Respondent filed exceptions to the Administrative Law Judge's Second Supplemental Decision and a brief in support of its exceptions.

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 and Second Supplemental Decision in light of all of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>6</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order as stated in the Second Supplemental Decision.

**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, Vanguard Oil and Service, Inc., and Vanco Heating, Plumbing and Welding Co., Brooklyn, New York, its officers,

trip, the Administrative Law Judge accordingly deducted \$35 from the amount of money he had found was due Hester at the original backpay hearing.

<sup>6</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

agents, successors, and assigns, shall take the action set forth in the said recommended Order.

## SUPPLEMENTAL DECISION AND ORDER

### STATEMENT OF THE CASE

CHARLES W. SCHNEIDER, Administrative Law Judge: This supplemental proceeding to determine the amount of backpay due Eugene Hester, whose employment was discriminatorily terminated by the Respondent, was heard before me on July 1 and 20, 1976, at Brooklyn, New York, on the backpay specification of the General Counsel issued April 5, 1976, and the Respondent's answer filed April 20, 1976.<sup>1</sup> All parties were afforded full opportunity to be heard, to introduce and to meet material evidence, and to argue the issues on the record. A brief was filed by the Respondent on August 18, 1976, and has been considered.<sup>2</sup>

Upon the record made before me, and from my observation of the demeanor of the witnesses, and consideration of the contentions of counsel, I make the following:

### FINDINGS OF FACT

#### The Issues

The only issue raised is as to alleged willful loss of wages by Hester. The Respondent contends that Hester did not fulfill his obligation to seek employment, thus willfully lost earnings, and is therefore not entitled to any backpay.

#### The Applicable Principles

An employee claiming backpay under the National Labor Relations Act, as a result of discriminatory termination of his employment, must make reasonable effort to secure suitable new employment, and if he fails to do so he may not be reimbursed for wage losses willfully incurred. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *Harvest Queen Mill & Elevator Company*, 90 NLRB 320 (1950).

Pursuant to the Supreme Court's directive in the *Phelps Dodge* case to the effect that the Board "may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment" (313 U.S. at 199-200), it has been held that under certain circumstances a discriminatee may be required to "lower his sights" and accept available and comparable employment outside his trade. *N.L.R.B. v. Madison Courier, Inc.*, 505 F.2d 391 (C.A.D.C., 1974); *Florence Printing Co. v. N.L.R.B.*, 376 F.2d 216, cert. denied 389 U.S. 840 (1967); *Southern Silk Mills, Inc.*, 242 F.2d 697 (C.A. 6, 1957), cert. denied 355 U.S. 821 (1957).

The Court of Appeals for the Second Circuit has held that the General Counsel has the burden of producing testimony by each discriminatee that a willful loss of earnings was not incurred. *N.L.R.B. v. Mastro Plastics Corporation*, 345 F.2d 170 (C.A. 2, 1965), cert. denied 384

U.S. 972 (1966). However, that court, and apparently all other courts which have considered the point, has held that "the burden of persuasion as to willful loss . . . [remains] on the employer. . . ." *Mastro Plastics, supra* at 175-176.

The Court of Appeals for the District of Columbia put the controlling principles as to willful losses thusly in the case of *Oil, Chemical and Atomic Workers International Union (Angle, d/b/a Kansas Refined Helium Company) v. N.L.R.B.*, 92 LRRM 3185, 3188, 79 LC ¶ 11, 493 (C.A.D.C., 1976):

The Phelps Dodge Court made it clear that the willful loss of earnings doctrine was adopted not so much to effect "the minimization of damages" but rather to encourage "the healthy policy of promoting production and employment." . . .

The boundaries of the willful loss of earnings doctrine have been defined in subsequent opinions. Backpay may be reduced to the extent that the employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." . . . The burden of proving such willful loss of earnings is always upon the employer. . . .

The discriminatee is merely required to make "reasonable efforts" to mitigate his loss of income, and only unjustified refusals to find or accept other employment are penalized under this rule. . . . An employee need not "seek employment which is not consonant with his particular skills, background, and experience," or "which involves conditions that are substantially more onerous than his previous position." . . . He is not required to accept employment which is located an unreasonable distance from his home. . . . Efforts at mitigation need not be successful; all that is required is an "honest good faith effort. . . ."

In the instant case, the General Counsel produced the discriminatee, Eugene Hester, for examination and cross-examination as to his interim earnings and his efforts to find employment, and Hester so testified. His testimony, despite occasional lapses and uncertainties, establishes a *prima facie* basis for finding that he made reasonably diligent effort to find new employment. The burden is therefore on the Respondent to establish that Hester incurred willful loss of earnings.

The backpay period for Hester, a fuel oil truckdriver, began on January 14, 1974, and ended on November 3, 1975, when he was reemployed by the Respondent.

The fuel oil business is seasonal. The bulk of employment for drivers is from October to April or May. In the off period all but a skeleton force are laid off, and there is substantially no employment available for drivers. Drivers who are seasonally laid off are generally recalled in the fall.

Hester is married, his wife does not work, and he did not apply for welfare benefits.

<sup>1</sup> The order of the Board pursuant to which this hearing was held is dated July 16, 1975, and the judgment of the Court of Appeals for the Second Circuit enforcing that order is dated February 23, 1976.

<sup>2</sup> The complaint involved an additional issue as to the amount of backpay due James Howard, who had also been discriminatorily discharged

by the Respondent. However, during the course of the hearing on July 1, 1976, agreement was reached between the General Counsel, James Howard, and the Respondent for settlement of the claim as to Howard. Accordingly, his case is no longer involved.

Hester's uncontradicted and credited testimony is that upon being discharged by the Respondent he registered with the state unemployment office, which has a special section for drivers of fuel oil trucks. Hester reported there at subsequent intervals over the period of the next year. However, he was not referred to any job.

Hester's further testimony is that he also sought employment on his own during the backpay period. This effort consisted of inquiries of his friends as to possibilities of employment and applications to various identified employers. Most of these were fuel companies. Some, however, were in other forms of transportation. Among the companies were Heatmaster, Howard Fuel Oil, Stern Brothers (Peerless Utilities), Bergen Fuel Oil Company, Five Borough Fuel Oil Company, Allen Transportation, Automated Bread, Clifton (C and B) Bus Lines, Citgo Fuel, Island Transportation, Mobil Oil, Texaco, Barrow Fuel, Venable Fuel Corporation, East 51st Street Peoples Fuel, and Modern Fuel. At some of these places, according to Hester, he filled out written applications and was advised that if employment became available he would be called; at others applications were oral and he was told merely that there was nothing available. He also followed leads in newspapers and inquired at private employment agencies. His testimony is that he continued these efforts to find employment throughout the period of his unemployment. In addition, Hester considered the purchase of his own rig, but was unable to provide the necessary financing.

Hester did secure some employment as indicated hereafter.

Hester's gross backpay, the amount he would have earned with the Respondent if he had not been discharged (with appropriate deduction for seasonal layoffs, spring to fall), is conceded to be \$14,522.90. The General Counsel's specification of gross wages and interim earnings is given in the Appendix attached hereto. To be subtracted from that \$14,522.90 is \$1,178.42 in admitted interim earnings of Hester in other employment during the backpay period.

The employment secured by Hester is as follows.

In February 1974, shortly after his discharge by the Respondent, Hester obtained a job as a driver at Stern Brothers (Peerless Utilities). He worked about a month and was laid off in March.

During the spring of 1974 he obtained occasional employment "off the books" as a busdriver for Clifton Bus Lines (C and B Bus Company) on charter trips around the New York City or surrounding area. For these he was paid on a trip basis, usually a percentage of the charter fee. He also worked for Clifton on the same basis during the spring of 1974 and 1975. The amount of such earnings during the spring of 1974 is not established, hence no calculation can be made. The earnings from the summer work are not available as a setoff to Hester's gross backpay due, for the reason that they occurred in the third quarters of 1974 and 1975—a period when there is no charge of gross backpay. Hester would not have been working for the Respondent during those periods because of seasonal layoffs.

In addition, during the spring and summer of 1974, Hester received some employment on a share basis from

Five Borough Fuel Company, earning \$497 in that employment. He was ultimately laid off from that job. The exact dates of these earnings are not disclosed, but no issue appears to be raised as to them. The \$175 interim earnings for the second quarter of 1974, given in the General Counsel's specification, presumably represent a proper allocation of the \$497 as between deductible and nondeductible (seasonal and nonseasonal) earnings.

#### Contentions and Conclusions

As we have seen, the only issue raised by the Respondent is that Hester willfully lost wages. The Respondent contends that Hester did not fulfill his obligation to seek employment diligently, thus willfully lost earnings, and is therefore not entitled to any backpay.

Hester's testimony as to his efforts to find employment are in large part undenied. The Respondent contends that his testimony should not be credited. In support of this contention the Respondent offered testimony by officials of three of the fuel oil companies at which, according to Hester, he applied for employment. These were, respectively, Heatmaster, Venable Fuel, and East 51st Street Peoples Fuel.

Presumably the Respondent made an investigation at all 15 of the existent employers who were identified by Hester as places where he applied for employment.<sup>3</sup>

Since evidence was introduced by the Respondent as to only 3 of the 15 employers, it is to be inferred that the other 12 would either corroborate or not contradict Hester's testimony. Hester's testimony as to those 12 is therefore credited. We turn then to the other three.

#### Heatmaster

Hester testified that he applied to Michael Zucker of Heatmaster, a firm for which Hester had previously worked. Zucker testified that he had no record or recollection of Hester's applying to him for employment during the backpay period. However, Zucker's records were not complete, and his recollection was not definite. Thus he admitted that it was possible that Hester had checked with him through another driver as to the possibilities of employment, as Hester testified. In addition, Zucker admitted that he had a conversation with Hester at Heatmaster's premises during the backpay period in which, according to Hester, he asked for employment. Zucker's testimony as to that conversation is that he did not recall whether Hester asked for employment: Zucker did not think that he did, but he was not sure.

There appears no reason why Hester should have called on Zucker except to ask for employment. In view of the uncertain nature of Zucker's recollection, it is found that his testimony will not support a finding that Hester did not apply to Heatmaster for employment.

In any event, there is no evidence that Heatmaster had work available for Hester during the backpay period, or that it hired any new drivers during that period of time. James Howard, the discriminatee whose case was settled, testified that he applied at Heatmaster on several occasions

<sup>3</sup> The recess in the hearing from July 1 to July 20, 1976, was for the purpose of permitting the Respondent to investigate Hester's testimony in

that regard given on July 1. One of those employers, Automated Bread, is now out of business.

without success. In the light of these facts, it cannot be said that there was employment available at Heatmaster which Hester might have received, and that a failure to apply there resulted in a loss of wages, willful or otherwise, by Hester.

#### Venable Fuel Corporation

Hester testified that he called at Venable's office and applied for employment on the recommendation of a driver for Venable named Kasool, that he was told by Venable's receptionist that no work was available, and that he thereafter kept in touch with employment possibilities at Venable through Kasool, without results. That testimony is uncontroverted.

However, Alfred Reid, office manager of Venable, testified that he had no record of a written application from Hester, though he had one from James Howard dated September 1, 1974; and, further, that Venable's receptionist is under orders to take a written application from all applicants and to refer them to Reid for interview.

In view of Hester's specific testimony as to the circumstances of his application at Venable, his uncontroverted identification of the employee, Kasool, as his contact at Venable, and the fact that, as found, he made applications at other fuel oil companies, Hester's testimony that he applied at Venable is credited.

In any event, as in the case of Heatmaster, there is no evidence that Venable hired any new drivers in 1974 or 1975. James Howard applied in September 1974 and was told that he would get a call, but did not. Thus it cannot be said that there was employment available at Venable which Hester might have received, and that failure to apply there resulted in a loss of wages, willful or otherwise, by Hester.

#### East 51st Street Peoples Fuel, Inc.

Hester's original testimony, given on July 1, 1976, did not contain a representation that he made an application for employment at East 51st Street Peoples Fuel, Inc. However, about May 14, 1975, Hester filed a form with the Board's Regional Office, in connection with his backpay claim, in which he listed East 51st Street Peoples Fuel Inc., as one of the places where he applied and was told to "come back."

As part of its case, on July 20, 1976, the Respondent presented Kenneth Pollack, evidently an official of East 51st Street Peoples Fuel, Inc.

Pollack testified that he had no application for employment from Hester. Thereafter, Hester testified that he did not file a written application with East 51st Street Peoples Fuel, Inc., but that he telephoned them and was told that there was no work. Pollack's testimony is that, when persons telephone for employment and none is available, his secretary tells them that the Company is not hiring, but that the applicant can come in and file an application in writing; that such applicants are then interviewed by Pollack, and are given priority for any future vacancies. Pollack further testified that, if Hester had come in during the winter and filed a written application, he would have

received some part-time work. It is not disclosed how this would have been possible during a period of high unemployment, if Peoples had a full staff of regular employees.

In my opinion, the evidence as to East 51st Street Peoples Fuel establishes (1) that Hester made telephonic application and was told that no work was available and (2) that if he had come in and filed a written application during the winter, he might have received some part-time work of indeterminate amount. I do not regard that as substantial evidence of willful loss of wages. That there might be part-time employment available somewhere does not establish a failure to seek employment. What is required is reasonable effort. The evidence as to East 51st Street Peoples Fuel, Inc., does not disclose unreasonable lack of effort by Hester.

#### Employment as a Cab Driver

Hester's direct testimony on July 1, 1974, did not contain a representation that he applied for work as a taxicab driver. However, asked on cross-examination by the Respondent whether his vehicle operator's license permitted him to drive taxicabs, he replied that it authorized him to drive trucks, tractor-trailers, and taxicabs. Asked whether he applied for employment as a cab driver, he testified that he applied to Black Pearl, a "gypsy" cab company, apparently without success.<sup>4</sup> Hester sought employment as a truck and tractor driver at transportation companies.

During the backpay period advertisements appeared in the New York Times for medallion drivers. Hester did not apply for such employment, testifying that he did not consider himself to be a "qualified" taxi driver. From this the Respondent argues that Hester did not "lower his sights" and therefore should be denied backpay.

I do not deem that principle applicable here. Hester made reasonable attempts to find employment in his own field of endeavor and in the area of general and specialized trucking. In addition he drove for Clifton Bus Company, carrying bus passengers for hire. He applied for work as a gypsy cab driver, but did not feel himself qualified to be a medallion driver. I do not view his hesitancy in that regard as evidence of willful wage loss. Encouragement of the public policy of seeking gainful employment should not become a vehicle for allowing malefactors to transfer the economic burden of their offenses to their victims. The record establishes, in my opinion, that Hester made reasonable effort to find employment, thus effectuating the public policy. He was deprived of income by the Respondent's unfair labor practice, and was unable by reasonable effort to recoup. To hold that in such a circumstance a failure to seek employment in another field of activity, for which he felt himself unqualified, disqualifies him from recovery of any portion of his loss would, in my view, not effectuate public policy, but violate it, and seem little short of capricious. There is no evidence that Hester refused any offer of employment. To conclude, against the background of his demonstrated efforts, that, if he had applied for a job

<sup>4</sup> The evidence indicates that a gypsy cab is one which is permitted to respond to calls, but is not permitted to cruise for business, in contrast to "medallion" (conventional) cabs.

as a medallion cab driver, he would have been hired and would have earned sufficient money to liquidate the Respondent's financial obligations to him, is pure conjecture and speculation.

The Respondent also appears to urge that the small amount of interim earnings of Hester (\$1,178.42, and only \$175 from April 1, 1974, through November 3, 1975) indicates lack of diligent effort. It is to be noted, however, that 1974 was a year of high unemployment, and 1975 even more so. U.S. Bureau of Labor Statistics figures, of which I take judicial notice, disclose that in 1974 unemployment in New York City averaged 6.6 percent, and in 1975 averaged 10.6 percent. In contrast, unemployment in that area in 1968, 1969, and 1970, more normal years, averaged 3.1 percent, 3.6 percent, and 4.8 percent, respectively. In these circumstances the amount of interim earnings of Hester does not tend to establish a lack of diligent effort to find employment.

I therefore find that the Respondent has not sustained the burden of persuasion that Hester willfully lost wages.

I conclude that Hester is entitled to recover from the Respondent the sum of \$14,522.90, with interest, in order to make him whole in accordance with the Board's Order, for loss of earnings incurred by reason of the discrimination against him.

#### Recommendations

On the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### SUPPLEMENTAL ORDER<sup>5</sup>

Vanguard Oil & Service, Inc., and Vanco Heating Plumbing and Welding Co., its officers, agents, successors, and assigns, shall pay to Eugene Hester the sum of \$14,522.90, plus interest at the rate of 6 percent per annum on the basis of quarterly amounts of backpay due, in accordance with the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). There shall be deducted from the amount due any tax withholding required by law.

<sup>5</sup> 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.

#### APPENDIX

##### Computation of Backpay Due to Eugene Hester

Backpay Period: January 14, 1974 - November 3, 1975

<u>1974 - 1st Quarter (from 1/14 only)</u>	
11 wks. at \$190 per wk.	\$2,090.00
OT - 186.10 hrs. at 7.125	<u>1,325.96</u>
Gross backpay	3,415.96
Interim earnings	<u>1,003.42</u>
Net backpay	\$2,412.54

<u>1974 - 2nd Quarter</u>	
13 wks. at \$190 per wk.	\$2,470.00
OT - 13.31 hrs. at 7.125	<u>94.83</u>
Gross backpay	2,564.83
Interim earnings	<u>175.00</u>
Net backpay	\$2,389.83

<u>1974 - 3rd Quarter</u>	
Gross - layoff period	-0-

<u>1974 - 4th Quarter</u>	
13 wks. at \$200 per wk.	\$2,600.00
OT - 106.23 hrs. at 7.50	<u>796.73</u>
Gross backpay	3,396.73
Interim earnings	<u>-0-</u>
Net backpay	\$3,396.73

<u>1975 - 1st Quarter</u>	
13 wks. at \$225 per wk.	\$2,925.00
OT - 159.85 hrs. at 8.43	<u>1,347.54</u>
Gross backpay	4,272.54
Interim earnings	<u>-0-</u>
Net backpay	\$4,272.54

<u>1975 - 2nd Quarter</u>	
10 wks. at \$225 per wk.	\$2,250.00
(3 wks. were layoff)	
OT - 45.20 hrs. at 8.43	<u>381.04</u>
Gross backpay	2,631.04
Interim earnings	<u>2,000.00</u> 1/
Net backpay	\$ 631.04

<u>1975 - 3rd Quarter</u>	
Gross - layoff period	-0-

<u>1975 - 4th Quarter</u>	
5 wks. at \$260.00	\$1,300.00
OT - 12.33 hrs. at 9.75	<u>120.22</u>
Gross backpay	1,420.22
Interim earnings	<u>-0-</u>
Net backpay	\$1,420.22

Total Backpay Owed to Hester=\$14,522.90

1/ This \$2,000 represents a payment by the Respondent to Hester during the course of negotiations for a settlement of the matter.

#### SECOND SUPPLEMENTAL DECISION AND ORDER

##### STATEMENT OF THE CASE

CHARLES W. SCHNEIDER, Administrative Law Judge: On September 15, 1976, I issued a Supplemental Decision and Order fixing the amount of backpay due to Eugene Hester. On January 26, 1977, the Board ordered the record in the proceeding reopened and directed that a hearing be held before me for the purpose of receiving further evidence.

The essential portions of the Board's Order are as follows:

The record discloses that Hester, after his discharge from Respondent, performed services for and received compensation from Clifton Bus Lines. However, there is insufficient evidence in the record upon which to calculate the earnings received by Hester, which earnings are to be deducted as interim earnings from the gross backpay due him. The Administrative Law

Judge found that no such calculation could be made and therefore made no deduction from the gross backpay due to Hester. The Respondent excepts to this finding, claiming that there is sufficient evidence upon which to base an estimate of such earnings.

The Respondent further excepts to a ruling made at the hearing by the Administrative Law Judge regarding certain testimony of Hester. Hester testified that, at the time he received compensation from Clifton Bus Lines, he was receiving unemployment compensation from the State, and that, contrary to requirement of law, he did not report these earnings to the state agency. The Respondent excepts to the Administrative Law Judge's ruling that this testimony is of no probative value, arguing that such testimony is relevant in evaluating Hester's credibility as a witness.

The Board, having duly considered the matter, deems it necessary to reopen the record to receive further evidence bearing on the issue of Hester's interim earnings from Clifton Bus Lines, and for a reconsideration of Hester's credibility in light of any further evidence adduced at the hearing.<sup>1</sup>

Accordingly,

It is hereby ordered that the record in this proceeding be, and it hereby is, reopened, and that a further hearing be held before Administrative Law Judge Charles W. Schneider for the purpose of receiving further evidence relevant to Eugene Hester's earnings from Clifton Bus Lines and for reconsideration of Hester's credibility as a witness in light of such further evidence.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for the purpose of arranging such further hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, upon conclusion of such hearing, the Administrative Law Judge shall prepare and serve upon the parties a supplemental decision containing any such findings of fact, conclusions of law, and recommendations which the Administrative Law Judge finds warranted by the additional evidence received during the course of the reopened hearing, and that, following the service of such supplemental report upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Pursuant to the Board's Order a further hearing was held before me on March 1, 1977, at Brooklyn, New York. All parties appeared and were afforded full opportunity to be heard, to introduce and to meet material evidence, and to argue the issues on the record. A statement in the nature of a memorandum of law was submitted by the Respondent on March 29, 1977, and has been considered.

Upon the basis of the entire record, I make the following.

<sup>1</sup> Member Jenkins sees no need for a remand and would proceed to a determination of the backpay due to Hester.

### Further Findings

The scope of the supplemental proceedings, as stated in the Board's Order, is (1) the holding of a hearing for the purpose of receiving further evidence relevant to Hester's earnings from Clifton Bus Lines, (2) reconsideration of Hester's credibility as a witness in the light of such further evidence, and (3) the issuance of a supplemental decision containing any further findings, conclusions, or recommendations deemed warranted by the additional evidence. The hearing has been held and all further evidence offered relevant to Hester's earnings and employment at Clifton Bus Lines has been received. The Board did not specifically direct reconsideration of the Administrative Law Judge's ruling to the effect that Hester's failure to report his earnings at Clifton Bus Lines to the state unemployment compensation agency while receiving such compensation was of no probative value in evaluating Hester's credibility as a witness. However, in view of the Board's mention of the matter in the Order, and its direction to the Administrative Law Judge to report any findings or recommendations which he deemed warranted by the additional evidence, I conclude that the Board wishes that ruling to be reconsidered also, even though the Board did not directly say so.

I have therefore reviewed Hester's former testimony in that connection, as well as his other testimony in the reconvened hearing, and have reconsidered the question of his credibility pursuant to the Board's directive. In addition, I have reconsidered the amount of backpay due Hester as a consequence of the further evidence.

### The Evidence at the Reconvened Hearing

Prior to the reconvened hearing, the Respondent issued a *subpoena duces tecum* on John Logan, of Clifton Bus Lines, Inc., returnable at the hearing, for the production of the payroll and other records of Clifton Bus Lines concerning Eugene Hester, including applications for employment and reports to the governmental authorities. Logan did not respond to the subpoena. During the hearing, telephonic inquiries were made by counsel for the Respondent to ascertain whether the subpoena would be complied with, and what information Clifton or Logan could supply. Counsel for the Respondent reported that in a telephone conversation Mrs. Logan told him that John Logan was out of town and that she did not know when he would return. Counsel stated further that in that conversation Mrs. Logan advised him that Clifton had "no records of Hester's employment and that he did not work for them," although Hester had submitted an application for employment in 1975. Counsel further stated that in a prior conversation Mrs. Logan had told him that, as far as she recalled, Hester had not worked for Clifton in 1974, but had worked 2 or 3 days in 1975, that all payments made to him were off the books, and there were no official records of his employment. Counsel then stated his belief that further evidence to be adduced through Clifton Bus Lines would not be of any help in making a determination of the facts, and that he therefore did not deem it in the best

interests of justice to ask for an adjournment for the purpose of having the subpoena enforced.

#### Hester's Further Testimony

At the request of the Respondent, Hester further testified, as on cross-examination, at the reconvened hearing. At the time Hester was able to provide more definite information than he did at the original hearing, as to the extent of his employment by Clifton Bus Lines and his earnings there. Hester's additional testimony is as follows.

According to his best recollection, Hester worked for Clifton only in 1974, and not in 1975. On July 19, 1975, Hester filled out an application for employment with Clifton, but was not employed. His explanation is that he would have had to take ICC-required examinations, such as medical, at his own expense, at a cost of some \$50 to \$60, and that in view of the small amount of work he would be likely to receive in return "it didn't make sense to invest that kind of money." In the first hearing Hester testified that he worked for Clifton in the summer of 1975, "one or two trips," and (although his testimony as to this point is not quite clear) perhaps 3 days a week in September. Work in September 1975 for Clifton would not be within the backpay period, since there is no claim of backpay for Hester in the third quarter of the year (July, August, September). In the reconvened hearing, however, Hester indicated that that testimony given in the prior hearing was mistaken: he thought that he had the years "mixed up." Hester's testimony in the reconvened hearing in that connection was as follows:

A. I don't remember that [the former testimony]. I think what it was, is that I had the year mixed up because I didn't work for Clifton the year I went back to Vanguard. I went back to work for Vanguard in '75.

Q. Your impression is that you didn't work for Clifton during that year?

A. I'm almost sure of that.

That was the last of Hester's testimony on that subject.

The work for Clifton was irregular, Hester operating as a fill-in driver, Clifton having a regular staff of drivers. The employment was off the books, he was paid in cash, no deductions were made, and he was not given, nor did he have, any records of it. The pay averaged not over \$35 a trip, consisting of a percentage of the charter fee for the bus, which was from \$290 to \$350. The specific trips which Hester recalled, which he thought covered all his employment with Clifton,<sup>2</sup> were as follows.

(1) A trip from Central Avenue in which he took a rally group to a school in the Bronx.

(2) A senior citizens group to the Adam Clayton Powell Church in Manhattan.

(3) A day care children's group from the Bushwick Day Care Center to the zoo.

(4) The same or a different day care group to the Staten Island Zoo.

<sup>2</sup> Thus his testimony: "There may have been one or two more, I doubt it, though."

(5) A church group to Bear Mountain.

(6) A "private" group to the Westchester State Park.

(7) A senior citizens group to a picnic.

In addition, Hester twice took a bus to New Jersey for repairs. Hester was unable to recall the amount of money he received for those two trips.

Hester was unable to pinpoint the times of those trips other than that they were in warm weather, and sometime between April 1 and September 1. However, in the prior hearing Hester referred to a trip in which he took a group of children on an excursion on May 30. That trip would thus definitely fall within the backpay period. This makes a total of 10 trips.

As to the amount of earnings at Clifton, Hester's testimony at the reconvened hearing was, "I would say roughly about \$400."

#### Hester's Credibility

As before, the Respondent continues to question Hester's credibility, urges that he is not to be believed, and consequently says that it must be concluded that Hester did not make a diligent search for employment and thus forfeits his entire claim for backpay.

On the basis of the prior record, I concluded then that Hester was a reliable witness, and that his testimony should substantially be accepted. It is true that his recollection was, both then and now, at times faulty, but that is a failing common to many of us. When it is remembered that the events which Hester is asked to recall took place several years ago, and that there is little documentary evidence or records to assist him, it is not surprising that some of his testimony may be halting, uncertain, hesitant, and at times even inconsistent. Such failures may be more attributable to honesty than to its opposite. Hester was definitely not the glib, inventive, and self-assured liar.

Hester's testimony at the reconvened hearing is plausible. He has now recited the complete history of his employment by Clifton, including the specific trips, and his testimony in that regard is undenied. It is true that in the reconvened hearing he concluded that he had not worked for Clifton at all in 1975, whereas he had previously indicated that he had. However, I do not regard that retraction as evidence of mendacity. On the contrary, if Hester were the practiced liar the Respondent deems him, he would scarcely have provided so obvious an opportunity for the Respondent to attack him further. If we were to attribute to him the venality suggested by the Respondent, the record of the resumed hearing should show studied effort on Hester's part to conform his testimony to the prior record, to buttress his position, and, above all, to place all of his Clifton earnings in a time period not subject to deduction. If it be urged that his hesitations and his admissions against his own interest are merely disguises to deceive the hearer, that assumes a subtlety which, on observation, I deem quite beyond Hester.

In assessing the probabilities, it must be kept in mind that Hester's employment by Clifton was not something which the Respondent discovered in investigating his

actions, or reluctantly wrung from him in searching cross-examination. Hester volunteered the information on direct examination by the General Counsel on the first day of the hearing. If he were a fabricator, it clearly was against his interest to provide the Respondent with information which might decrease the Respondent's liability. Equally, he would, I think, have told a much more facile story about the Clifton employment both then and now, and particularly now after he has had opportunity to perfect any inventions. Thus, I do not find in Hester's testimony, as to additional facts of his employment by Clifton Bus Lines, any ground to question my original judgment as to his credibility.

We turn then to Hester's failure to report the Clifton employment to the unemployment compensation authorities.

Against the background recited above, and my own appraisal, based on observation and demeanor, that Hester appeared to be a reliable witness in the essential particulars, I do not regard the failure to report that employment as requiring a contrary conclusion as to his probity. There is no evidence that Hester's statements to the state authorities were under oath. His testimony before me, however, was. As a witness he readily admitted that he failed to report the Clifton interim earnings. He did not attempt to equivocate or to lie—as he might have done in order to avoid possible prosecution by local authorities, or to avoid diminution of his claim before the Board—in the hope that the evasion or the lie might escape detection. This frankness suggests to me an unwillingness to testify falsely under oath—a state of mind which reinforces credibility rather than impairs it. I am therefore of the view that, in the circumstances presented here, Hester's failure to notify the local unemployment compensation authorities of his interim employment does not reflect adversely on the credibility of his testimony before me.<sup>3</sup>

In the light of these various considerations, I conclude, upon the basis of the entire record, that Hester is a credible witness and that his testimony should be accepted.

#### The Amount of Backpay

The remaining question to be resolved is, what is the effect on the amount of backpay due Hester, of the new evidence as to his employment earnings with Clifton Bus Lines. As has been seen, Hester's estimate as to the amount of his earnings at Clifton is \$400. While the Respondent contends that Hester's testimony in the original hearing establishes that he worked 30 at a minimum of \$80 per week, and thus earned at least \$2,400 at Clifton, I find that contention not sustained. In my opinion, Hester's testimony in the prior hearing is not susceptible of the interpreta-

<sup>3</sup> Cf. *Enterprise Industrial Piping Company*, 117 NLRB 995 (1957), where examination of a discriminatee witness, for the purpose of affecting his credibility, as to whether he made false statements in his application for unemployment compensation, was held to have been properly foreclosed. And see *Birmingham Publishing Company*, 118 NLRB 1380, 1384-85 (1957); *Liberty Scrap Materials, Inc., et al.*, 152 NLRB 480, 484 (1965). In the latter two cases false statements by discriminatees to unemployment compensation agencies were found not to establish their incredibility.

tion given by the Respondent—particularly in view of the fact that the Respondent's calculation was based on the assumption that Hester worked at Clifton throughout the summer of 1975—an assumption that Hester's testimony in the reconvened hearing disclosed to be erroneous. Moreover, earnings in the third quarter are not deductible.

As of this date, the record evidence shows that Hester worked 10 trips for Clifton Lines, 2 of them consisting of driving a bus to New Jersey for repairs at a rate of pay Hester was unable to give. But if it be assumed that he was paid \$35 for each of those two, and the maximum \$35 for each of the other eight trips, the resulting sum, \$350, is short of \$2,400 as well as short of Hester's own estimate of \$400 from Clifton earnings. But, whatever the sum, the facts available do not provide a basis for apportioning more than \$35 of it to earnings during a period when backpay is applicable. That \$35 is the May 30 trip carrying school children to an excursion. As to the remainder of \$350 or \$400, whichever figure is used, it has not been established that it was earned during the backpay period. The burden being on the Respondent to establish any diminution of gross backpay, and that burden having been met only as to the \$35, it follows that the amount of interim earnings chargeable to Hester are to be increased by \$35 during the second quarter of 1974—leaving net back pay due him for that quarter in the amount of \$2,354.83, rather than \$2,389.83—as found in the appendix to the original Supplemental Decision and Order of September 15, 1976. Consequently, the sum \$14,522.90 stated in that decision to be due Hester should be reduced to \$14,487.90. In all other respects the findings and calculations made in that decision as to the amount due Hester are reaffirmed.

#### Additional Recommendation

On the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### SECOND SUPPLEMENTAL ORDER<sup>4</sup>

The Respondent, Vanguard Oil & Service Inc., and Vanco Heating Plumbing and Welding Co., its officers, agents, successors, and assigns, shall pay to Eugene Hester the sum of \$14,487.90, plus interest at the rate of 6 percent per annum on the basis of quarterly amounts of backpay due, in accordance with the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). There shall be deducted from the amount due any tax withholding required by law.

Manifestly, my conclusions do not affect the authority of the state agency to take whatever action it deems proper for the protection of its processes.

<sup>4</sup> 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.