

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

April 21, 1977

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND WALTHER

On November 22, 1976, Administrative Law Judge Marion C. Ladwig issued the attached Supplemental Decision in this proceeding. Thereafter, the Respondent filed 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 in light of the exceptions and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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, George Webel d/b/a Webel Feed Mills & Pike Transit Company, Pittsfield, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge: This is a supplemental proceeding to determine any backpay due employee Earl L. Hull, who was the Union's chief contact at the Company's mill until he was discriminatorily laid off on May 18, 1974, and never recalled. The Board's May 7, 1975, Decision and Order, 217 NLRB 815 (1975), was enforced by a summary judgment of the Court of Appeals for the Seventh Circuit on April 16, 1976, ordering the Company to offer Hull reinstatement to his former job with backpay.

On January 15, 1975, without the knowledge or approval of the Regional Office, the Company paid Hull \$7,300 (an amount greatly in excess of his accumulated backpay at the time), but without reinstatement, as a settlement. The Company contends that the settlement complies with the court decree and extinguishes any further right to backpay. The General Counsel refused to recognize the settlement

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and applied the \$7,300 to the continuing backpay, contending that there was no valid offer of reinstatement, that the Company used its financial power to coerce the unemployed Hull to waive reinstatement, and that the excessive payment constituted a "bribe" to keep this key union supporter out of the mill.

The Regional Director issued the backpay specification on June 11, 1976, and on June 24 the Company filed an answer (amended on July 2 and 19), raising this and other issues. The backpay hearing was held in St. Louis, Missouri, on July 19 and 20, 1976.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the arguments at the hearing and the General Counsel's brief, I make the following:

FINDINGS AND CONCLUSIONS

A. Background

Earl Hull (as found by the Board, 217 NLRB 815, adopting the Administrative Law Judge's Decision) initiated the Union's organizational campaign at the Company's mill, testified for the Union in the representation proceeding, acted as the union observer at the April 30, 1974, election, and served as a member of the Union's negotiating committee after the Union's May 8, 1974, certification. Meanwhile on March 23, the Company reassigned him—over his protest—from his regular job as general millhand on the day shift (working primarily as the pellet mill operator) to a temporary, two-employee night shift which was continued for 8 weeks. Then on May 18, as found by the Board, the Company discriminatorily laid off Hull instead of reassigning him to the day shift, in violation of Section 8(a)(3).

As further found by the Board, Company Owner George Webel told a job applicant on May 4 (4 days before the Union's certification) that "the union has been voted in here and . . . we are going to fight it." (Emphasis supplied.) Thereafter, between the May 14 and 20 bargaining sessions, the Company unilaterally changed the drivers' pay arrangement, and later refused to retract or negotiate about the change, "to disparage the Union in the eyes of the unit employees," in violation of Section 8(a)(5). The Board also found additional 8(a)(1) violations before and after the election.

The Union went on an economic strike on June 20, over a month after Hull's layoff or discharge. Hull remained unemployed during this time, despite his diligent efforts to find employment. The Company contested his eligibility for unemployment compensation, which he did not receive until after he found employment in August.

The strike was unsuccessful, and about the first week in August, the Union "called the strike off"—as credibly testified by general millhand Jerry Cawthon, who returned to work "a little bit" thereafter (on August 8, 1974).

Later in August, after the strike and picketing ended, Hull obtained employment with Edgar Houchens, a painting and sandblasting contractor, most of whose work was done at the Company's mill. Hull was not permitted to work at the mill because (as Hull testified without

objection) "my employer told me that [Owner] George Webel did not want me there."

On October 11, the Union met in negotiations with the Company, without the participation of any of the employees. As credibly testified to by International Representative Lloyed Freilinger, the Company advised that "there was no way they could even talk about a contract or get a settlement with Mr. Hull and have him come back to work." Management Consultant Charles Merideth admitted that in the meeting Freilinger said "he would rather that Mr. Hull would stay as a future employee since he was a *key part of the union structure.*" (Emphasis supplied.)

On December 9, 1974, upon advice of counsel, International Representative Freilinger sent the Company a formal notice, advising it that the employees "have terminated their strike and hereby make an unconditional offer to return to work." As Freilinger credibly testified, the strike had terminated long before that, as was quite obvious when the employees quit picketing.

The Company still failed to recall Hull. I find that the Company had no intention of recalling him, and that his "layoff" was clearly a discharge.

B. *Compliance or Bribe?*

The credible evidence clearly shows that the Company at no time in January 1975 made Hull a valid offer of 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," as required by the court judgment. Instead, in several meetings held between January 10 and 15—without consulting the Board's regional office—the Company bargained directly with Hull for an amount he would accept to waive reinstatement, while seeking "justification" for a payment in excess of lost earnings in order that the settlement would "go past" the Board and not be considered a "bribe."

When Management Consultant Merideth and General Manager John Teuscher first met with Hull near his father's home on January 10, 1975, Merideth asked him (as Hull credibly testified), "Earl, would you be willing to make a settlement in lieu of returning to Webel's?" Merideth told Hull that the mental strain and anguish would be too much for him. Hull, who was then unemployed, "explained to them that that wouldn't bother me," but that he would be willing to settle without reinstatement if "they would go ahead and negotiate a workable contract with Mr. Freilinger." He first told them that he would take \$6,000 or more. Merideth invited Hull to his office the next morning for further conversation.

On Saturday morning, January 11, Hull told Merideth and Teuscher "that I had been doing some figuring and that I had come up with a figure of \$10,000." Both Merideth and Teuscher said no. Merideth added that it would look like a bribe if the payment were too high, and stated that the amount had to be "justified" because the Board required him to show exactly the basis on which Hull was claiming the money. Merideth also "informed me that the only alternative that he had was to give me a letter of reinstatement, and I told him that that would be fine. I was unemployed at the time, and I was ready to go back to

work." (Thereafter, Hull stated his willingness to return each time Merideth mentioned the alternative of reinstatement. On each occasion, Merideth would change the subject without actually making the offer.) At one point that morning, Merideth stated "that if I did go back, that it would probably be on the night shift," and that "it would be rather risky or dangerous working by myself at night," that "Anything could happen to anyone working at night alone." Hull responded that "it didn't bother me, that I could take care of myself." (Merideth admitted telling Hull that his reinstatement would be to the night shift. Although Hull last worked at night, that assignment was only temporary. In the absence of the discrimination against him, he would have been reassigned to his former job as general millhand on the day shift.) They failed to reach an agreement on a settlement figure, and Hull stated he wanted to contact his attorney (meaning International Representative Freilinger).

Before meeting again with Merideth and Teuscher on Monday, January 13, Hull talked with Freilinger. As Freilinger credibly testified, "I told Earl that he was the mainstay in the organizing attempt and that he was the contact I had with the people there, that he was on the negotiating committee and if he was gone I would lose all contact with the people and that the union needed him . . . and that was probably why the company wanted to tempt him with the money offer, so he wouldn't go back to work." (Freilinger credibly testified that without Hull, "We wouldn't have a leader" at the mill or "anyone to handle the situation because he was the one the people depended on and went through and used as their leader or contact man.") Freilinger further told Hull "I don't really think this [settlement] is appropriate and I don't know whether the Board would approve it. I can understand your feeling . . . being you have been without a job. . . . That's up to you," but "I would like to go along to the meeting," without getting into the discussion. (Freilinger impressed me as an honest, trustworthy witness.)

At the meeting in Merideth's office that Monday, Merideth stated that George Webel did not want Hull back. However, Merideth stated that the company attorney would not let them offer Hull any more than \$4,300 because any larger amount "wouldn't go past" the Board, which would look at it as a bribe. (The Company had found that Hull's lost earnings since May 18, based on his earnings the previous year for that period, were \$5,499. The \$4,300 offer was evidently a net figure, after deduction of the estimated interim earnings.) In an attempt to find "justification" for a larger settlement, Merideth and Hull discussed various amounts for interest, insurance, travel expenses, social security and income taxes, and future unemployment compensation. Freilinger stated he was there only as a witness. He advised Merideth that he did not know whether it was appropriate or not for Merideth to be negotiating with Hull on the settlement "and I was not going to get involved in it." Finally, Hull stated that he would take the (net) amount of \$7,600; Merideth offered \$7,000; and Hull said he would compromise at \$7,300 (net). When Merideth offered the \$7,000, he said that was as far as the Company could go, and that the alternative was to reinstate Hull. As Freilinger credibly testified, Hull "said

he would be ready to go back to work." Merideth never made the reinstatement offer.

Although no agreement was reached at this meeting and no waiver papers were signed, Company Owner Webel signed a letter dated January 13, telling Hull that under the terms of the Administrative Law Judge's (December 18, 1974) order, "we were directed to offer you reinstatement to your former job or reasonable equivalent. We would be prepared to offer you reinstatement, *except* that we understand that you do not wish to come back to our company's employ and waive your right to be reinstated" (Emphasis supplied.) I discredit Merideth's testimony that on January 10 he did offer to reinstate Hull, and the testimony by Merideth and Teuscher that Hull stated that he would return only on the condition that the Company agreed to a union contract. Of course Webel would not have signed the January 13 letter (stating the Company "would" be prepared to reinstate him) if Merideth had already offered to reinstate Hull. Moreover, Teuscher's did not corroborate Merideth's testimony of such an offer. Instead, Teuscher's testimony was that Merideth "asked Earl if he would want to be reinstated." (Emphasis supplied.) When giving this and other testimony (for example, their testimony that Hull first requested \$25,000), both Merideth and Teuscher appeared to be fabricating testimony to help the Company's cause. (I note that the Board specifically discredited some of Merideth's testimony in the earlier hearing herein, and found that Teuscher gave contradictory testimony.)

On January 15, the Company and Hull reached an agreement for Hull to be paid the total of \$8,068, consisting of a check for \$7,300 plus the amount of \$768 deducted for social security and income taxes. The January 15 memorandum incorporating these terms read:

EARL L. HULL PAYMENT IN ACCORDANCE WITH NLRB
DECISION

Back Pay	\$5499.25
Interest	165.00
Insurance Pay Back	567.00
Other	1068.75
	\$7300.00

Social Security and Income Taxes of \$768.00 paid by Webel Feed Mills.

This settlement was grossly in excess of Hull's accumulated backpay. The cash payment of \$7,300 included \$5,499.25 for gross backpay, *without* any reduction for interim earnings. The backpay specification shows gross backpay of \$4,724.68 (from May 18 through the first 2 weeks of 1975), less gross interim earnings of \$2,772.03, leaving only \$1,952.65—far less than half of the \$5,499.25 figure. The so-called "Other" figure (referring to travel and expenses) was in the amount of \$1,068.75—which was \$944.75 in excess of the \$124 shown in the backpay specification. And instead of the Company deducting the taxes, it agreed to pay them separately. Thus, even assuming that the \$165 in interest and \$768 in taxes were correctly figured and the \$567 for unpaid insurance

premiums was properly added, the total agreed amount of \$8,068 was almost 4 times the actual accumulated backpay of \$2,040.65 (gross backpay \$4,724.68, minus gross interim earnings \$2,772.03, plus travel and expenses \$124 and insurance \$567, minus taxes \$768, plus interest \$165, equal \$2,040.65).

In exchange for this excessive payment, Hull executed a company-prepared form, stating that he did not desire, and waives, his right of reinstatement, and acknowledging receipt of the \$7,300 check in full payment of all backpay due him.

I find it clear that the purported settlement—without the Regional Office's participation or approval—did not extinguish any further right to backpay, or comply with the court judgment. In the first place, the Company failed to offer Hull reinstatement. He "had not been put to a true test of having to make a reinstatement decision," and "it could not effectuate the policies of the Act to terminate" his backpay rights as of that time. *Burnup and Sims, Inc.*, 157 NLRB 366, 368 (1966), *enfd.* 383 F.2d 987 (C.A. 5, 1967). In the second place, under all the circumstances (including Owner Webel's postelection threat, "we are going to fight" the Union), I find that the payment to Hull of the excessive amount for his backpay was intended to coerce him to sign the waiver of reinstatement, for the purpose of keeping this union leader out of the mill. Thirdly, the Company failed to live up to its bargain in the settlement agreement, by renegeing on its promise to pay the \$768 in payroll taxes. I therefore find that the General Counsel properly refused to sanction the waiver, and properly applied the amount of the payment to the continuing backpay.

Moreover, even if the Company had in fact made a reinstatement offer to Hull, the offer would have been to the night shift—not an offer of reinstatement to his "former job," which was that of a general millhand on the day shift (to which the Board held he would have been assigned if he had not been discriminatorily laid off). Admittedly, the Company assigned the temporary night work as mixer operator to a qualified employee with the *least* seniority. The court judgment ordered "full reinstatement to his former job . . . without prejudice to his seniority and other rights and privileges." Hull's seniority, dating from June 1971, was of course greater than the seniority of junior employees and strike replacements who had been working in the mill since Hull's discriminatory discharge.

C. Other Issues

1. Average weekly wages

In its amended answer, the Company admits that the measure of weekly wages which Hull would have earned is an appropriate measure of backpay, but contends that an appropriate period for measuring average weekly wages would be the quarter period prior to his layoff, rather than the prior year. In view of the admitted seasonal nature of the operation, this contention clearly lacks merit. Moreover, the Company itself used a longer period—from May until December—when determining the higher weekly average in support of the settlement figure paid Hull on January 15, 1975.

I find that Hull's weekly average of \$140.31 is the correct figure for computing his backpay through February 15, 1975, as alleged in the backpay specification.

2. Tonnage basis after February 16, 1975

On February 16, 1975, the Company placed two other general millhands, Gerald Cawthon and David Mulford, on an incentive basis, paying them at the rate of 30 cents per ton on the mill's production, thereby raising their average weekly wage (during the 1-year period from February 16, 1975, through February 15, 1976) to \$246.13. The backpay specification bases Hull's backpay from February 16, 1975, through March 31, 1976, on this average weekly wage. (Hull's backpay after March 31, 1976, remains subject to subsequent proceedings.)

Until shortly before general millhand Hull was terminated on May 18, 1974, he was being paid at a higher hourly rate than general millhands Cawthon and Mulford, even though Hull had less seniority. The three general millhands worked together on the day shift, producing the feed. Although each of the three spent more time on certain operations than others, they 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.

Inasmuch as Hull's regular job as general millhand was comparable to the jobs of general millhands Cawthon and Mulford before his termination, and his hourly pay had been higher than theirs, I find that in the absence of his support of the Union and this discriminatory discharge, he would also have been placed on the same tonnage basis for his compensation. I therefore find, contrary to the Company's contention, that the tonnage earnings of Cawthon and Mulford, averaging \$246.13 per week beginning February 16, 1975, constituted the most appropriate basis for computing Hull's backpay from that date. (Gerald Conkright, the regular mixer operator on the day shift, is paid on an individual tonnage basis. However, his work is not comparable to the work of the general millhands, and the parties stipulated that his earnings would not afford a reasonable basis for computing Hull's backpay.)

3. Backpay during and after strike

Finally, the Company contends that although Hull was discriminatorily terminated prior to the strike, and was not recalled or offered reinstatement during the time, he is not entitled to any backpay from June 20, 1974, when the strike began, until December 9, 1974, when the Union formally notified the Company that the strike had terminated. The Company belatedly raised this issue at the backpay hearing, after having included his backpay for this entire period when reaching its purported settlement with him on January 15, 1975.

It is "well settled that employees who are discriminatorily discharged prior to a strike are entitled to backpay for the entire duration of the strike." *Polynesian Cultural Center, Inc.*, 222 NLRB 1192, 1194, fn. 12 (1976). In *Winn Dixie Stores Inc.*, 206 NLRB 777, 778 (1973), enfd. 502

F.2d 1151 (C.A. 4, 1974), where three discriminatees had been "very active" in the Union, had "participated in negotiations," and had voted to join the strike, the Board rejected the Administrative Law Judge's ruling that "their backpay should be tolled for the period that they participated in this strike," reaffirming that:

The Board has consistently held, in cases involving employees who have been unlawfully discharged before an economic strike is called, that the entire duration of the strike is includible in the backpay award period because the employer's own discrimination against the claimant makes it impossible to ascertain whether such claimant would have gone out on strike in the absence of the discrimination and the resulting uncertainty must be resolved against the employer. . . . To hold that an employer who has wrongfully discharged an employee prior to a strike may escape the consequences of his misconduct by simple inaction in failing to offer reinstatement to the employee would reward the employer for his misconduct. To require the fired employee to apply to the employer who has evinced no retreat from his unlawful conduct appears hardly reasonable, and also contrary to the well-established legal principle that a condition once established—the employer's refusal to employ the employee—is presumed to continue in the absence of evidence showing a change has occurred.

Accordingly, the Board there found that the employer failed to sustain its contention that the three discriminatees were not available to work.

Here, Hull was discriminatorily discharged (although told he was "laid off") on May 18, 1974. Being unemployed when the strike began on June 20, he did his share of the picketing and acted as the strike leader. However, he had been diligently seeking employment and, after the strike began, continued to seek employment and to register at the Illinois unemployment office, where he was required to fill out a card each week, explaining his efforts to find employment. After the Union informally terminated the strike about the first week in August 1974, Hull continued seeking employment until he succeeded in finding work later that month. He was again unemployed in January 1975 when he accepted a sum of money for waiving reinstatement—despite being told by International Representative Freilinger that the Union needed Hull in the mill and that if he did not return to work, the Union would lose all contact with the employees.

The company counsel argues that Hull was "a leader of the Union . . . was the Union's contact in the shop . . . was, you might say, the leader in the strike movement," and it would be a "fanciful thing to assume" that Hull "would have come back before December 9." The counsel added that such an assumption is "consistent with what the General Counsel has done throughout this pleading and throughout the hearing: that is, try to soak this employer with as many dollars and give it to this claimant as possible." However, Hull had been unemployed for over a month when the strike began on June 20, 1974, and he did turn his back on the Union when he was again unemployed in January 1975 and accepted money for waiving reinstatement.

ment—despite being told that the Union would no longer have any contact in the mill without him. Under these circumstances, I find it uncertain whether he himself would have gone on strike, or how long he would have remained on strike during the approximately 6 weeks of picketing, if the Company had offered to end his unemployment by recalling or reinstating him. I also find it unlikely that Hull would have refused recall or reinstatement between the time the Union informally terminated the strike early in August and the time it gave formal notice of the strike termination on December 9. During this 4-month period, other union supporters were returning to work and the Union was seeking Hull's reinstatement. I therefore find that the evidence does not establish that Hull was unavailable for work during the 6-week strike or thereafter.

Accordingly, I reject the Company's defenses and find that the backpay specification accurately sets forth the

Company's backpay liability from May 18, 1974, through March 31, 1976.

Upon the foregoing findings, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹

Respondent, George Webel d/b/a Webel Feed Mills & Pike Transit Company, Pittsfield, Illinois, its officers, agents, successors, and assigns, shall make Earl L. Hull whole through March 31, 1976, by paying him the amount of \$6,350.30, plus interest at 6 percent per annum in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), until the backpay is paid, less the tax withholdings as required by law.

¹ 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.