

**United States Steel Corporation and William Van Swenson** Case 32-CA-4835

April 11, 1989

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND CRACRAFT

On January 13, 1988, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and denies backpay for William Van Swenson for the period of November 1, 1982, through September 2, 1986.

MEMBER CRACRAFT, dissenting.

My colleagues apply a *per se* rule in finding that a discriminatee while in the military service during a backpay period is considered unavailable for work. I believe the rule is outdated and should be modified.

The facts of this case illustrate the unfairness of a *per se* approach in today's world. Charging Party William Swenson was discriminatorily denied employment in May 1982. He unsuccessfully sought employment as a mechanic and mineworker. Finally, Swenson, a member of the army reserve since

1967, obtained employment as a recruiting officer for the reserve by agreeing to enter active duty from November 1982 until November 1985. Near the end of the 3 years, his exploration of nonmilitary employment opportunities led him to extend his active duty agreement until January 1989.

On March 31, 1986, the Board ordered the Respondent to offer Swenson employment and make him whole for any loss of pay he suffered as a result of the discrimination. When Swenson learned in May 1986 that the Board had ordered the Respondent to employ him, he sought his release from active duty. On August 22, 1986, Swenson was released from active duty, and on September 3, 1986, he began work for the Respondent.

The Board's compliance casehandling manual, Section 10618.2, states that "discriminatees are to be regarded as unavailable for work when they are in the Armed Forces." In *J. D. Brock*, 42 NLRB 547 (1942), the Board withheld backpay from a discriminatee after he had been inducted into the military.

The Board's *per se* approach, fashioned in war time, does not reflect today's reality. The Respondent's unlawful conduct forced Swenson's search for employment, which eventually led him to enter active military duty as a recruiter. He, however, was able to terminate his active duty after he learned that the Board had ordered the Respondent to offer him employment.<sup>1</sup> This is analogous to interim employment, in which a discriminatee has a reasonable period of time in which to accept or reject a reinstatement offer,<sup>2</sup> rather than the situation Section 10618.2 was designed to cover.

In recognition of today's reality, I would modify the rule<sup>3</sup> to treat military service as interim employment unless the respondent can show that the discriminatee's service removed him from the work force. Thus, rather than a *per se* rule, I would allow litigation as a decision on the merits regarding the issue of whether a discriminatee was available to work in this situation.

<sup>1</sup> We find it unnecessary to rely on the judge's discussion of *Kawasaki Motors Corp.* 282 NLRB 159 (1986).

<sup>2</sup> In voting to overrule the holding of *J. D. Brock*, 42 NLRB 547 (1942) with respect to the treatment of military service in calculating backpay, our dissenting colleague contrasts today's reality of military service with conditions prevailing during World War II when the Board first began the practice of tolling backpay while a discriminatee was serving in the Armed Forces. Notwithstanding that conditions of military service have changed since then, the essential feature for our purposes remains unchanged—once a person has enlisted, he is under orders for a fixed term and can be released early only at the discretion of his employer. As the judge pointed out, this contrasts vividly with civilian endeavors in which the obligation of continuing is either non-existent or contractual at best. Thus, a member of the Armed Services on active duty has removed himself from availability for civilian employment during the period of his service. We also note that the Board has consistently applied the rule of *J. D. Brock* *supra* during periods of war and peace in subsequent decades. See e.g. *Diversified Case Co.* 263 NLRB 873, 875 fn. 8 (1982) and cases cited therein from 1960 and 1961.

<sup>1</sup> Apparently Swenson was available even during his active duty service to work for the Respondent on the night shift.

<sup>2</sup> See *Miami Coca Cola Bottling Co.* 151 NLRB 1701, 1706-1707 (1965).

<sup>3</sup> As my colleagues do not share my view, I need not decide whether I would apply the modified rule in this case or prospectively only.

Daniel F. Altemus, Jr., for the General Counsel  
Robert E. Hilton, of San Francisco, California, for the Respondent

## SUPPLEMENTAL DECISION

## STATEMENT OF THE CASE

DAVID G HEILBRUN, Administrative Law Judge This case concerns the character and effect of service in the United States Army Reserve (Reserve) by a discriminatee, in relation to the correct amount of net backpay he is owed to comply with the monetary remedy contained in a Board Order

In 1967 William Van Swenson commenced Reserve service on inactive status obligating him to the traditional weekend assemblies once a month and an annual 14 day span of training By 1982 his latest reenlistment into this service was due to expire in August 1987 Under circumstances to be associated below with his employment career, Swenson applied for active duty in June 1982 and 5 months later was ordered to this status for an initial 3 year period at his sergeant first class E 7 rank with a duty station in Provo, Utah His function was to recruit at this location for the Reserve in a position supervised directly by a regular Army officer, and as to which a monthly recruitment quota applied Swenson successfully completed an initial training period and fulfilled expectations of the incumbent during the pertinent 3 year span He extended this active duty commitment twice initially for only 3 months into January 1986 and following this for another 3 year period

Occupationally Swenson had first become employed by Respondent (now USX Corporation) in 1968, and enjoyed continuous employment at different facilities for over 10 years thereafter, during which time he became a journeyman machinist In June 1980 Swenson experienced the first of three successive layoffs from the Geneva plant near Provo, Utah, and on the first and second occasions was recalled to work His second recall occurred around October 1982, lasting for only about a month and leading to a third and final layoff after which he never again worked at the Provo facility

Although on layoff during the year from October 1981 to about October 1982 Swenson officially applied for transfer to Respondent's Pittsburg, California facility This application was blocked within Respondent's management hierarchy at Provo An ensuing unfair labor practice charge went to the Board on the issue of whether Swenson was unlawfully denied employment at Pittsburg California, about mid May 1982, because of his past union or protected concerted activity while employed at Provo The Board so found in its Decision and Order issued on March 31, 1986, as 279 NLRB 16

In approximately May 1986 Swenson learned of the Board Order On this impetus he initiated paperwork for a release from Reserve active duty, and the request was routed through a chain of command to the Army Reserve Personnel Center (ARPERCEN) in St Louis Missouri Swenson was notified by telephone around August 1, 1986, that his release from active duty had been granted He had kept Respondent continually apprised during the process, and from this groundwork Swenson began employment at the machine shop of the Pittsburg facility around September 2, 1986

As part of compliance steps Respondent has already paid Swenson approximately \$14 000 in net backpay with

interest for the period June 13–October 31, 1982, based on typical quarterly calculations as prescribed by *F W Woolworth Co*, 90 NLRB 289 (1950) and using the replacement employee's method of measuring lost income from job discrimination By so doing Respondent is considered to have fully met its backpay liability to Swenson for that timespan The administrative law judge's decision and recommended Order dated July 19, 1983, had noted Swenson's induction into the Armed Forces and specifically held that the appropriate portion of net backpay be liquidated immediately without awaiting a final determination of the full amount of his award The Board's modifying Decision and Order picked up on this factor, by, at footnote 2, expressly leaving for a compliance stage the issue of whether Respondent's backpay liability was tolled as of the date Swenson entered the armed forces

## Contentions

Against this background the General Counsel contends that additional backpay is due Swenson if his period of active service in the Reserve may be considered to escape the doctrine of an individual being removed from the work force during a backpay period The General Counsel believes that military service here and generally should not interrupt normal backpay approaches On a subsidiary point the General Counsel contends that if she prevails Swenson should not be penalized by departure from *Woolworth* principles for any portion of the backpay period

Respondent contends that settled law deems Swenson as unavailable to work for Respondent while on Reserve active duty and alternatively that application of the *Woolworth* formula to the disputed monetary portion of the Board Order would be impermissibly punitive under controlling law

From these respective contentions controversy has arisen over whether and in what amount Swenson is owed additional net backpay In May 1987 the parties reached a stipulation whereby Respondent waived its right to contest the propriety of the Board's Decision and Order or the findings of fact and conclusions of law underlying it The matter was heard as a supplemental proceeding at Oakland California, on October 5 1987

## Analysis

The essential precept to apply is found simply and directly stated in 48 NLRB Annual Report 1983 Here an introductory passage about Backpay Matters at page 99 states, The Board's usual remedy for discrimination against individual employees is an order that the employees be made whole for any losses resulting from the discrimination An individual is made whole when effects of discrimination are finally redeemed using a blend of juridical principles relating to mitigation of damages,<sup>1</sup> as influenced by the Board's experience with employment realities Plainly the law has long been that military service constitutes a timespan which is excluded from any larger backpay period *John D Brock* 42 NLRB 457

<sup>1</sup> See 5A Corbin *Contracts* § 1039 at 242–243 (1964)

(1942) *Baltimore Transit Co.*, 47 NLRB 109 (1943), *Humble Oil Co.*, 48 NLRB 1118 (1943), enfd 140 F 2d 777 (5th Cir 1944). Essentially a concept of tolling is involved and it is unavailing to draw out implementing verbiage in which the notion has been termed "not available for immediate reinstatement,"<sup>2</sup> present when aggravation of loss has been "willfully incurred"<sup>3</sup> or done without excuse,<sup>4</sup> the individual is generally absent from the work force, or where the Board would decline to speculate about how remunerative other possible earnings could have been and simply assume that gross back pay would be "canceled for a same time period."<sup>5</sup>

The concept is rooted in fundamental historical character of military service, and not in niceties of language or logic. Although current-day images are of a liberalized American military apparatus in regard to pay, integration of citizenry, lessened regimentation, and other facets of unformed life, the fact remains that the individual is subject to a unique authority which transcends personal decision making. The General Counsel complains that a rationale for so holding has never been explained,<sup>6</sup> yet the purposes of a military capability, with all attendant ramifications of discipline, obedience, and special military justice, are their own explanation when case by case implementation of national labor policy is done in a "civilized legal system allowing consideration of every socially desirable factor." *Phelps Dodge*, supra at 198. Nothing in Titles 10 or 32 of the United States Code and the Code of Federal Regulations, as respectively cited by the parties, gives any reason to vary this outlook. What is found, however, in the sweeping coverages of this source material is the emphatic notion of remaining legitimately commenced military service until completion of the statutory obligation.<sup>7</sup> This contrasts vividly with civilian endeavors in which the obligation of continuing is either nonexistent or contractual at best. The range of variables involved is so great as to make the General Counsel's corollary argument that the Board's policy penalizes military service too speculative to be of controlling force.

Similarly it is unavailing to point at conjectural factors in Swenson's own case such as his potential early out from recruitment quota failure, possible freedom to 'moonlight' should night shift work have been available to him, or conditional entitlement to transfer in Reserve recruiting work from Provo to a station adjoining Pittsburgh. All such prospects fail to meet the essential test that a person must be free of active military constraints before he can be thought of as routinely, ordinarily and acceptably available for the typical obligations and va-

garies of private sector civilian employment. In this very vein it was recently popularly written that the trend of American "defense strategy" has been to increase readiness of the Reserve and related forces. During a hearing in March 1987 before the U.S. House of Representatives Armed Services Committee, Secretary of the Army John O. Marsh Jr. was quoted as saying, "We are relying more than ever on our National Guard and on Army Reserves in building our total defense." Zanger Montgomery, *New Minutemen*, Common Cause Magazine, Nov-Dec 1987 at 21.

In *Raderman v. Kaine*, 411 F.2d 1102, 1104, 1106 (2d Cir 1969), the court set out a forceful rationale regarding even the situation of an inactive reservist as follows:<sup>7</sup>

[P]laintiff asks: Does being in the Army curtail or suspend certain Constitutional rights?, the answer is unqualifiedly yes." Of necessity he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice and will cease to exist. He acts at the command of some person—not a representative of his own choice—who gives commands to him which he does not like to obey. He is assigned to a squad and forced to associate with companions not of his selection and frequently the chores which he may be ordered to perform are of a most menial nature. Yet the armed services, their officers and their manner of discipline do serve an essential function in safeguarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty.

The problem with a reservist, such as Raderman, is that he is neither a civilian nor a full-time soldier. In effect he must live in two worlds, one military and one civilian and attempt to satisfy the requirements of both. As in this case, the demands of each may conflict and while the result may appear harsh he made the choice some time ago to join a reserve unit. Concomitant with that decision was the knowledge that he would be subject to Army rules and regulations for six years.

The General Counsel concededly brings this case as a direct test of contrary thinking yet in so doing gives insufficient weight to a quite recent pronouncement by the Board. In briefing the matter the General Counsel observes that in *Kawasaki Motors Corp.*, supra, no exceptions were filed on the point of an administrative law judge's finding a discriminatee to have "removed himself from the work force" by virtue of a stint on active duty with the Air Force National Guard. However in that decision the Board was constrained to modify an associated theory used by the administrative law judge in his backpay cal-

<sup>2</sup> *J. D. Brock* supra at 468.

<sup>3</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).

<sup>4</sup> *NLRB v. Harbison Walker Refractories Co.*, 137 F.2d 596 (8th Cir 1943).

<sup>5</sup> *Lauster Kauffmann Aircraft Corp.*, 63 NLRB 1367 (1945). Cf. *Shell Oil Co.*, 218 NLRB 87 (1975).

<sup>6</sup> Focused writings of an authoritative or extensive nature on the subjects of the Board's remedial powers generally or the "make whole" phenomenon specifically withhold comment on the narrow point of presuming that military service tolls backpay. McCulloch, *An Evaluation of the Remedies Available to the NLRB — Is There Need for Legislative or Administrative Change?*, 15 Labor L.J. 755 (1964). Fuchs & Kelleher, *Back Pay Remedy of the National Labor Relations Board*, Boston College Industrial & Commercial L.R. 829 (1968).

<sup>7</sup> A comparable conclusion was reached on methodical discussion of the various components comprising the American armed forces. *Week-end Warrior and the Uniform Code of Military Justice: Does the Military have Jurisdiction over Week-end Reservists?*, 7 Cal. Western L.R. 238 (1970).

culations, expressly and unmistakably reiterating its position that such active duty military service should be excluded from the backpay period." Id. at fn. 3.

Finally it is settled that an administrative law judge is to apply Board law, and departures however heartfelt, are not favored.<sup>8</sup> Thus I have no real recourse except to write that should the General Counsel's position ultimately come to be adopted as a major policy change by the Board, logic would dictate that the *Woolworth* formula also attach to such change unless some countervailing interest is present. Were the Board to now declare this instance of military service akin to interim employment, the action would be so wrenching as to invoke principles persuasively argued by Respondent. In such a case the unprecedented and unpredictable shift would warrant only prospective application to avoid a punitive impact

<sup>8</sup> *Iowa Beef Packers*, 144 NLRB 615 (1963)

of what is to be essentially remedial authority. Cf. *Carpenters Local 60 v NLRB*, 365 U.S. 651 (1961), *NLRB v Carpenters Iron Workers Local 378*, 532 F.2d 1241 (9th Cir. 1976).

#### Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation<sup>9</sup>

#### ORDER

William Van Swenson is due no additional backpay from Respondent.

<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.