

**Sumco Manufacturing Co., Inc., Summit Grinding Company and United Steelworkers of America, AFL-CIO-CLC. Case 8-CA-11702**

22 August 1983

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND ZIMMERMAN

On 25 August 1980 the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding<sup>1</sup> finding, *inter alia*, that Respondent had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily selecting for layoff, out of seniority, employees Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, and Betty Hoover and by hiring new employees and/or transferring Summit employees to Sumco before recalling employees Sheila Smith, Dale Carder, Phyllis Young, Jayne Freiman, Diane Fridley Hahn, Connie Votaw, Mary Adamson, Linda Booth, John Mesko, and Bonnie Thomas and by making invalid offers of reinstatement to the above-named employees. The Board ordered that valid offers of reinstatement be made to them and that they be reinstated and made whole for any loss of earning suffered by reason of the discrimination against them.

On 11 June 1982 the United States Court of Appeals for the Sixth Circuit, in an unpublished decision, issued its judgment enforcing the Board's Order. Thereafter, the Regional Director for Region 8 issued and served on the parties a backpay specification and notice of hearing on 31 August 1982. Respondent filed an answer on 13 September 1982, denying in part and admitting in part certain allegations of the specifications.<sup>2</sup>

On 1 and 2 November 1982 a hearing was held before Administrative Law Judge Michael O. Miller for the purpose of determining the amount of money due under the backpay specification. On 15 February 1983 Administrative Law Judge Michael O. Miller issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's 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.

<sup>1</sup> 251 NLRB 427.

<sup>2</sup> On 24 September 1982 Respondent's president filed a duplicate answer.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>3</sup> 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, Sumco Manufacturing Co., Inc., Summit Grinding Company, Mogadore, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>3</sup> 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*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**SUPPLEMENTAL DECISION—BACKPAY**

**STATEMENT OF THE CASE**

MICHAEL O. MILLER, Administrative Law Judge: On August 25, 1980, the National Labor Relations Board, herein called the Board, issued its Decision and Order<sup>1</sup> in the above-entitled proceeding wherein it directed that Sumco Manufacturing Co., Inc. Summit Grinding Company, herein called Respondent, its officers, agents, successors, and assigns, offer reinstatement to and make whole 16 named employees for any loss of earnings they incurred as a result of Respondent's discrimination against them. The Board's Order was enforced by the United States Court of Appeals for the Sixth Circuit in an unpublished decision issued on June 11, 1982. Controversies over the dates upon which the backpay entitlement of certain employees began and the amounts of backpay to which they are entitled having arisen, the Regional Director for Region 8 of the National Labor Relations Board, on August 31, 1982, issued and duly served a backpay specification and notice of hearing upon Respondent. Respondent filed a timely answer admitting certain allegations of the specification and denying others.

Upon the entire record, including my observation of the witnesses and their demeanor, and upon consideration of the briefs filed by the General Counsel and Respondent, I make the following:

<sup>1</sup> 251 NLRB 427.

## FINDINGS OF FACT

## I. THE BOARD'S DECISION

Following a hearing before then Administrative Law Judge (now Board Chairman) John C. Miller on January 23-26, 1979, and a Decision issued by him, the Board found, *inter alia*, the following:

1. Summit and Sumco constitute a single employer.
  2. The layoff of January 4, 1978, was economically motivated.
  3. Six employees, Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, and Betty Hoover, were discriminatorily selected for inclusion among those to be laid off, out of seniority, in violation of Section 8(a)(3) and (1) of the Act. The Board determined that they are entitled to backpay from the date of their layoff until they receive valid offers of reinstatement.
  4. Respondent discriminated against 10 laid-off employees, Sheila Smith, Dale Carder, Phyllis Young, Jayne Freiman, Diane Fridley Hahn, Connie Votaw, Mary Adamson, Linda Booth, John Mesko, and Bonnie Thomas, by hiring new employees, or by transferring employees from Summit, to work in the jack division of Sumco before recalling them. As to these discriminatees, the backpay period was determined to begin with the date that employees from Summit were transferred in or new employees were hired to fill the jobs which they, in accordance with seniority, should have been recalled to fill. It was to run until they received valid offers of reinstatement.
  5. The Board found that Respondent had offered to consider the laid-off employees of Sumco for employment with Summit as new probationary employees without their prior benefits. That offer, it was concluded, did not constitute a valid offer of reinstatement and was itself discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act. Respondent was directed to make valid offers of reinstatement to all of the above-named employees. At least four employees, Tanner, Hoover, Adamson, and Mesko, were expressly found to have rejected offers of employment because they were unlawfully conditional.
- The Board's findings and conclusions in the underlying unfair labor practice case are binding and may not be relitigated in a subsequent backpay proceeding.<sup>2</sup>

## II. GROSS BACKPAY AND INTERIM EARNINGS

The General Counsel alleged gross backpay for the discriminatees for 1978 based on the hourly wage rates they had last been paid, with an adjustment for a 15-cent-per-hour general wage increase granted by Respondent as of July 1, 1978. Gross backpay for all subsequent quarters was determined by utilizing the average of the earnings of named employees. Respondent's

<sup>2</sup> *Schorr Stern Food Corp.*, 248 NLRB 292, 295 (1980); *Brown & Root*, 132 NLRB 486, 492 (1961), *enfd.* 311 F.2d 447, 451 (8th Cir. 1963). Respondent's efforts to relitigate substantial portions of the underlying case, on this record and in its brief, are to no avail and must be disregarded. Similarly entitled to no weight are its accusations of bias directed against both the Administrative Law Judge who heard the unfair labor practice case and the court which granted enforcement to the Board's Order.

answer to the backpay specification, given its most liberal interpretation, might be deemed to generally deny the gross backpay formula and computation. Its answer did not state the basis for any disagreement or detail any position as to the formula which it would contend to be appropriate. Neither did it, at the hearing, seek to establish any alternative gross backpay formula or figures. Accordingly, the General Counsel's motion for summary judgment on the issue of gross backpay, based on the requirements of Section 102.54(b) and (c) of the Board's Rules and Regulations,<sup>3</sup> was granted. The gross backpay is found to be as alleged in the specification.

The specification, as amended, sets forth the interim earnings of the discriminatees and the General Counsel made the discriminatees available to Respondent for examination at the hearing.<sup>4</sup> Respondent, who bears the burden of proof on the affirmative defense that discriminatees willfully incurred losses by unjustifiable refusals to seek or accept new employees,<sup>5</sup> made no contention that the employees failed in their obligation to seek or accept interim employment and did not dispute the interim earnings put forth by the General Counsel.

## III. THE BACKPAY PERIODS

As noted, the Board found that the backpay period for six named employees, Ruth Duncan, Sandra England, Agnes Tanner, Beverly Claar, Sheryl Legg, and Betty Hoover, began on January 4, 1978, when these employees were discriminatorily selected out of seniority for layoff. The Board found that the backpay periods for the remaining employees, Sheila Smith, Dale Carder, Phyllis Young, Jayne Freiman, Diane Fridley Hahn, Connie Votaw, Mary Adamson, Linda Booth, John Mesko, and Bonnie Thomas, began on the dates when they were replaced either by newly hired employees or by employees transferred from Summit; they would have been recalled from the January 4 layoff according to their seniority but for the discrimination.

Comparing Joint Exhibit 1, the January 1, 1978, Sumco seniority list, with General Counsel's Exhibit 2, the record of those hired by Summit between January 1, 1978, and January 1, 1979, in light of other employment

<sup>3</sup> In relevant part, the Board's Rule, Sec. 102.54(b), states:

As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

Sec. 102.54(c) states, *inter alia*:

If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

<sup>4</sup> Except for Jayne Freiman and Sheila Smith, who were not present at the hearing.

<sup>5</sup> *Inland Empire Meat Co.*, 255 NLRB 1306 (1981); *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644 (1976).

records (G.C. Exhs. 3(a) and (b)) and the Board's Decision,<sup>6</sup> it is clear that the General Counsel has established, as the dates upon which the backpay periods commenced, the following:

1. Mary Adamson, who was hired on July 30, 1975, was entitled to recall on February 15, 1978, the date that Virginia Richmond was hired.

2. Connie Votaw, who was hired on May 13, 1976, was entitled to recall on February 15, 1978, when Connie Earley was hired.<sup>7</sup>

3. Linda Booth, hired June 1, 1976, was recalled on February 13, 1978, ahead of the reinstatement date to which her seniority would have entitled her.

4. Jayne Freeman, who was hired June 1, 1976, was entitled to recall on March 1, 1978, the date that Jesse Bibby was hired. Respondent contended that Bibby had been hired to operate a tow motor, a job which Respondent would not give to a woman. Public policy precludes giving any credence to a defense based on an admitted predilection to violate Title VII of the Civil Rights Act of 1964. Moreover, the record established that his job was basically that of stock clerk.

5. Dale Carder, who was hired on September 14, 1976, was entitled to recall on March 3, 1978, the date on which Trena Eldridge was hired.

6. Sheila Smith, who was hired on March 28, 1977, was entitled to recall on March 6, 1978, when Patricia Gaines was hired.

7. Diane Fridley Hahn, who was hired on April 20, 1977, was entitled to recall on March 6, 1978, the date on which Rhonda Russell was hired.

8. John Mesko, who was hired on June 2, 1977, was entitled to recall on March 21, 1978, the date on which Narda Sullivan was hired.<sup>8</sup>

<sup>6</sup> The Board specifically found that the following named individuals were hired to work in the jack division on the dates following their names: Jesse Bibby—March 1, 1978; Trena Eldridge—March 3, 1978; Patricia Gaines—March 6, 1978; and Rhonda Russell—March 6, 1978.

<sup>7</sup> Respondent's contention that Connie Earley, as well as Trena Eldridge, Patricia Gaines, Rhonda Russell, Narda Sullivan, Nancy Reeves, and Vickie Johnson were hired on a temporary basis in order to perform a timestudy on an experimental jack line at Summit must be rejected. This issue was fully litigated in the underlying proceeding and Respondent's contentions in regard thereto were rejected. See, for example, the Decision of Administrative Law Judge John C. Miller, *supra*, pp. 436-441, where this defense was discussed and rejected and a specific finding was made that Eldridge, Gaines, and Russell were hired to work in the jack division, which jobs "could have been filled by the Sumco employees on layoff." Additionally, Administrative Law Judge Miller found that Sullivan and Johnson were hired and the record herein establishes that they filled jobs on the jack line in the same manner as did Eldridge, Gaines, and Russell. See also pp. 725-728 of the transcript in the underlying case and Respondent's brief in support of exceptions to the Administrative Law Judge's Decision, p. 11. It should be noted that Respondent's personnel records, in evidence as G.C. Exhs. 3(a) and 3(b), establish that Bibby, Eldridge, Gaines, and Russell were hired to work in the jack division on the first shift and contain no reference to any experimental program or timestudy.

<sup>8</sup> The General Counsel had contended that Mesko was entitled to recall on March 28, 1978, the date that Vickie Johnson had been hired. G.C. Exh. 2, however, establishes the hire of Narda Sullivan on the earlier date to work on the first shift in the jack division. No explanation is furnished for why Mesko would not have been entitled to the job Sullivan filled on that date. The substitution of Sullivan for Johnson in the backpay calculation has a domino effect, moving up the date on which the next most senior employee was entitled to recall.

9. Phyllis Young, who was hired on August 15, 1977, was entitled to recall on March 28, 1978, the date Vickie Johnson was hired.<sup>9</sup>

10. Bonnie Thomas was the least senior of the discriminatees, having been hired on August 31, 1977. She returned to work on February 13, 1978.

All of the above-named newly hired employees filled jobs in the jack division. The Board has already found (The Remedy, p. 441) that the "jobs in the jack division could have been filled by the Sumco employees on layoff." Assuming that this issue is even open to further consideration, I find this conclusion to be amply supported by the record herein. The discriminatees had worked in that division at Sumco. A number of them testified herein that they had worked at all or nearly all of the jobs within the division; they further testified that the jobs within the jack division were easily learned. No contrary evidence was offered.

The Board concluded, as previously noted, that valid offers of reinstatement had not been made to the discriminatees prior to the hearing before Administrative Law Judge John C. Miller and directed, as part of its remedy herein, that such offers be made. The General Counsel contends that no such offers have been made. Therefore, he argues, the backpay periods for these employees have yet to toll; their entitlement to backpay continues. Respondent does not contend that it made any offers of reinstatement to the discriminatees subsequent to the hearing on the underlying case. It merely reiterates the contentions, previously rejected, that the reinstatement offers it had earlier made were valid. I am bound by the underlying decision herein and must find, in agreement with the General Counsel, that Respondent has never made valid offers of reinstatement to these employees. The backpay periods, except as may be indicated herein with regard to individual employees, continue.<sup>10</sup>

<sup>9</sup> See fn. 8, above. The General Counsel had contended that her entitlement to recall began on April 3, 1978.

<sup>10</sup> Were the issue before me, I would most certainly find that Respondent's letters to the employees, inviting them to submit new applications for jobs at Summit and promising them consideration for job openings commensurate with their abilities, constituted, at best, limited and conditional offers. I note herein, as Administrative Law Judge John C. Miller earlier pointed out, that two employees received different letters, letters purporting to offer them employment at Summit at the rate of pay which they had received at Sumco. One of these employees, Mary Adamson, had testified in the initial proceeding that she had been told that her employment at Summit would be as a new employee, without benefits or seniority; the letter which she received is not inconsistent with such a statement and my colleague credited her testimony, finding that she had expressly rejected Respondent's offer because of its limited nature. The second employee to receive such a letter, Sandra England, had testified in that proceeding that, while she had worked on the first shift during her entire employment at Sumco, the only job Respondent offered her was on the second shift. This would not have constituted an offer of reinstatement to the same or a substantially equivalent position. I note further that while England's testimony before me, to the effect that she had received the letter which only invited the employees to make application at Summit and indicating that she had never been offered a job, conflicts both with the copy of the letter sent to her which is contained in the original record and with her testimony in that hearing, no contrary conclusion would be warranted. Whichever version of her testimony is credited, the offers made to her, if any, were conditional and Respondent never contradicted any of her assertions.

*Continued*

#### IV. DIMINUTION OF BACKPAY LIABILITY

On January 1, 1979, just prior to the economic layoff, Sumco had approximately 51 employees and Summit had 85. Respondent submitted lists, allegedly prepared from the Summit payroll records (in May 1982), which purport to show a generally decreasing trend in the number of Summit employees through May 30, 1982. Comparison of those lists against the January 1, 1978, payroll lists for both Sumco and Summit indicate the following:

A. As of June 30, 1978, there were 103 employees (and 2 supervisors) listed. Of these, 51 had been employed by Summit prior to January 1, 1978, and 20 had transferred from Sumco to Summit, including 3 with less seniority than several of the discriminatees. Four were reinstated discriminatees and the remainder, 28, had apparently been hired in the first 6 months of 1978.

B. On July 1, 1979, according to Respondent's list, there were 79 employees at Summit. Of these, 43 were employees from prior to July 1, 1978, 3 were reinstated discriminatees, 7 were employees hired during 1978, and the remainder were presumably hired in the first 6 months of 1979.

C. By January 1, 1980, according to Respondent's summary of payroll records, only 61 persons were employed by Summit. Of these, 29 had been employed prior to January 1, 1978, 2 were reinstated discriminatees, 4 had been hired during 1978, 19 other were hired before July 1, 1979, and 8 had presumably been hired since July 1, 1979.

D. Summit's employee complement fell even further, to 47, by July 1, 1980. Of these, 32 were employees from the period prior to January 1, 1978, 1 was a reinstated discriminatee, 5 had been hired during 1978, and the remaining employees, 9, had apparently been hired sometime after January 1, 1979. At least one of those employed since prior January 1, 1978, Avalina Rogacs, had less seniority than at least one of the discriminatees.

E. By January 1, 1981, Respondent's employee complement had increased to 57. Included in those 57 are 34 from the period prior to January 1, 1978, 1 reinstated discriminatee, and 11 who had been hired during 1978. The remainder were apparently hired sometime later. At least two of the employees who transferred from Sumco to Summit during 1978, who were on payroll as of January 1, 1981, had less seniority than at least one of the unreinstated discriminatees.

F. The payroll summary as of May 30, 1982, purports to show that there were but 34 employees as of that date. Of these, 20 were employed by the joint employer prior to January 1, 1978, 2 were among those who had been hired in 1978, and 12 apparently were hired subsequent to that date.

Moreover, it is worth noting that in the original hearing, Summit's plant manager, Wilford Jones, testified that, when the Sumco employees were filling out their applications for employment at Summit, "They were told they were hiring into a new company and starting out new again." This policy, he contended, was changed in March 1978, but he acknowledged that any employees who "quit before we got around to telling them that they had received all their other benefits, et cetera . . . would not have known that they received their benefits when they came back." While he testified that subsequent to March 1978 everyone did get their insurance, earlier wages, and seniority, he never expressly stated when, if ever, the employees were told of this policy change.

Aside from certain handwritten notes on the list of employees hired during 1978 and on the list of Sumco employees as of January 1, 1978, the records submitted by Respondent do not show what jobs the employees held or were capable of performing or in what division they worked. Harvey Rector, Respondent's labor relations consultant, testified that of the 34 employees on the May 31, 1982, payroll, "only about 6 or 7" worked in the jack division.

Pointing to the foregoing records, Respondent argues on brief that it has "established the fact that the jack division never reached a second shift after the layoff and both the jack division and Summit continued to lose business and made layoffs throughout the years 1978-79-80-81 and 82."<sup>11</sup> To the extent that Respondent intended to show that there were no jobs available for the discriminatees at various times during the backpay period, the General Counsel argues that "it has fallen woefully short" of meeting its burden of proof. I must agree. Respondent's records, such as they are, do not indicate that there were any jobs which the discriminatees could have filled, particularly jobs in the jack division but also in other divisions, where some discriminatees were placed when they did return, at least until May 28, 1982. For each period shown, it is clear that there were a sufficient number of jobs being filled by employees hired since January 1, 1978, to have provided work for all of the discriminatees. There is no indication whether the employee complements in the periods between the dates of the summaries were greater or less than shown on those dates. There was no testimony regarding whether any layoffs which may have occurred between January 4, 1978, and May 28, 1982, were permanent or temporary. Rector's testimony, concerning the size of the jack division as of May 28, 1982, even if credited and deemed adequate to otherwise carry its burden of proof, would only establish the employee complement as of that week. One cannot glean from Respondent's evidence when, if ever, there ceased to be available work which could have been performed by the discriminatees.

As Respondent has failed to sustain its burden of proving that it no longer had work which some or all of the discriminatees could have performed, I must reject its implicit contention that its backpay liability must be reduced in some manner in relation to the reduction in its work force.

#### V. DISCRIMINATEES WHO ACCEPTED REINSTATEMENT AND SUBSEQUENTLY TERMINATED THEIR EMPLOYMENT

Nine employees returned to work at Summit prior to the initial hearing herein. Of these, two, Ruth Duncan and Bonnie Thomas, have remained in Respondent's employment since that time (Thomas until April 23, 1982) and the General Counsel concedes that whatever "short-

<sup>11</sup> These records say nothing about a second shift and Rector offered no testimony on that subject in the hearing on the backpay specification. Moreover, this statement in Respondent's brief is contradicted by the testimony of Elmore Hamrick in the original hearing, wherein he acknowledged that a second shift was operating at the time that Sumco employees were transferred to Summit.

comings were present in the terms of [their] reinstatement have been recitified." As to them, the General Counsel seeks no backpay beyond the dates of their reinstatement. Similarly, the General Counsel concedes that Beverly Claar and Jane Freiman, who respectively worked for Respondent for 22 and 8 months following their reinstatements, removed themselves from the labor market for reasons unrelated to the conditions of their reinstatement. The General Counsel seeks no backpay for either of them beyond the first quarter of 1978.

Five employees, Linda Booth, Sheryl Legg, Diane Fridley Hahn, Sheila Smith, and Agnes Tanner, all returned to work at Summit prior to the initial hearing and all terminated their employments, the General Counsel contends, for reasons related to the inadequacy of their reinstatement. As to each of them, the General Counsel seeks backpay not only for the periods prior to their reinstatement but also for the periods following their terminations.<sup>12</sup> Respondent appears to contend that the reinstatement of these employees ends Respondent's backpay liability and that any subsequent termination of them cannot be considered in this proceeding because, at most, these would have been terminations in the nature of constructive discharges requiring the filing of new charges and the issuance of new complaints.

As the General Counsel pointed out in his brief, discriminatees Booth, Hahn, Legg, and Smith had all returned to work and quit prior to the date of the unfair labor practices hearing. Their terminations and the circumstances surrounding them were fully explored on the record which was before the Board. The Board specifically ordered that valid offers of reinstatement be made to these employees. However, that Order went on to state, "In the event any of said employees have been re-employed, the remedy as to them will be modified accordingly." The General Counsel asserts that the foregoing quoted language refers only to Duncan and Thomas who were still working. If that is so, then the Board's Order precludes reconsideration of this question as to the other four.<sup>13</sup> However, as the Board's Order might be deemed ambiguous in regard to the intended remedy for these employees, I shall treat the issue herein.

Linda Booth had worked at various jobs in the jack division prior to the discrimination against her, including jack building which she characterized as the most difficult job on the line. Jack building was not the job she was doing at the time she was laid off. She returned to

the jack division at Summit on February 13 as a jack builder and worked just a few days more than 1 month. On her return, she had been told that she was considered as a new employee and that she did not retain her original seniority date. Summit's personnel record for Booth, which reads: "Start 2-13-78" and which refers to Sumco as "Other Experience," fully corroborates her testimony.<sup>14</sup> She quit on March 17, 1978, because Respondent rejected her request to be assigned to some work other than building jacks and because of her understanding, never corrected by Respondent, that she was a new employee.

Diane Fridley Hahn was reinstated to a position in Summit's machine division on April 11. She was told by whomever was responsible for the hiring at Summit that it was a new job, that she was starting over, and that she did not retain the seniority she had acquired during her employment at Sumco. She was also told that she would have to wait 30 to 60 days to pick up her insurance benefits. While she had been paid \$2.80 per hour when she was laid off, her starting wage at Summit was only \$2.65 per hour.<sup>15</sup> Fridley Hahn worked until July 25, 1978, when she quit. She claimed that she was motivated to do so by the fact that she was making less money than she had made at Sumco and because she had lost her seniority. The payroll record indicates that she had received a wage increase to \$2.85 per hour on May 15, 1978, and another to \$3 per hour on July 3, 1978. That same record bears a notation following the date of her quit: "quit-moving back to W. Virginia, would not rehire." Fridley Hahn denied telling Respondent that she was quitting for this reason; according to her testimony, she had only mentioned visiting in West Virginia when she informed her foreman of her termination. Her testimony is uncontradicted. She also testified that it was her belief that the loss of seniority would affect how fast she would receive raises and her eligibility for vacations.

Sheryl Legg filled out a new application at Summit Grinding and was told by Hamrick and by the individual who took her application that she would be starting as a new employee, on a new job, with a new company, as if she had never been there before. Moreover, she was told that she would have to wait 90 days to be covered by hospitalization insurance.<sup>16</sup>

<sup>14</sup> I credit her testimony in this regard, noting that it is consistent with the testimony of Wilford Jones in the original hearing.

<sup>15</sup> I credit her testimony as it is both consistent with the testimony of Jones, described above, and supported by the Summit payroll record which indicates a lower starting wage, lists a starting date of April 11, 1978, and refers to Sumco under prior employment. While Respondent points to Hamrick's denial that he told employees that they would be starting anew, I note that Fridley Hahn did not attribute the statement to him and Hamrick, himself, testified that he did not do the hiring at Summit.

<sup>16</sup> When asked by Respondent whether the waiting period was not 30 days, Legg denied it. Respondent offered no affirmative evidence to establish that there was only a 30-day waiting period or that the existence of such a shortened waiting period would not still establish that these individuals were being treated as new employees. When shown a copy of Respondent's payroll records, (Resp. Exh. 4(k)), which purported to show that Respondent was giving her credit for a May 27, 1975, seniority date, Legg concisely summoned up the situation as follows: "What this says and what I was told is two different things." Finally, I note that this

*Continued*

<sup>12</sup> The General Counsel also seeks a further order that Respondent offer them, and the other discriminatees, reinstatement. Such a request falls outside the purview of the backpay specification and hearing before me. Inasmuch as the Board's Order, requiring that Respondent make valid offers of reinstatement to these employees, has been enforced and as Respondent's noncompliance is clear, it would seem that the appropriate avenue to secure this relief lies in an action before the enforcing court.

<sup>13</sup> This contention is supported, at least in part, by the Remedy section of the Administrative Law Judge's Decision. Therein it was specifically recommended that Respondent be ordered to offer reinstatement to Smith, Fridley Hahn, Legg, and Tanner. Backpay was ordered for those (and others) as well as Booth, Claar, and Thomas. As Booth had returned and quit in the same manner as Smith, Fridley Hahn, and Legg, and as Tanner was still employed by Respondent at the time of the hearing, like Claar and Smith, it would appear that the Administrative Law Judge's inclusion of Tanner with, and exclusion of Booth from, group of employees to whom Respondent was obligated to make valid offers of reinstatement was an inadvertent error.

Legg started at Summit, working in a separate building, filing the welds on jack stands. This job, which she had never done before, required her to carry hot pieces of metal, without any gloves being provided, and exposed her to repeated burns from flying sparks generated by the nearby welding work. She quit on June 7 because of her dissatisfaction with the conditions of her employment.

Sheila Smith was hired by Summit on April 27, 1978. She received the same hourly rate that she had received at the time of her layoff from Sumco. Her personnel record indicates that she was assigned to Summit's die shop. Like the Summit personnel records of the above-discussed employees, Smith lists her starting dates as April 27, 1978, and Sumco as her prior experience. She quit on May 27. Smith was unavailable to the General Counsel at the time of the backpay hearing and thus offered no testimony to explain her quit. In the original hearing she had testified that she quit because she "was mad at being cussed at and my production being up and a job under impossible conditions, and I couldn't handle it."

Agnes Tanner was one of those employees found to have been discriminatorily selected for layoff. She returned to Summit on April 3, 1978, and, as with the other employees involved herein, her personnel record for Summit shows that date as the start of her employment; it also shows Sumco as her prior experience. These entries support the conclusion that she returned as a new employee. She was not told anything about her seniority when she returned except that there would be a waiting period before her hospitalization insurance would become effective. In February 1979, she took a leave of absence for 2 months and returned from that leave in mid-April 1979. Sometime later, she asked to be allowed to take her vacation on what she understood to be her anniversary date, June 10, based on the date on which she started working in 1972. Plant Manager Jones denied her request, informing her that because of the layoff (found to be discriminatory) and because of the leave of absence she had taken her anniversary date as being changed to a date later in the year. Tanner's testimony is uncontradicted.

As the General Counsel correctly points out, an offer of reinstatement to a job which is not substantially equivalent to that held prior to the discrimination does not toll backpay even when, as here, the employee accepts the offer, if that employee subsequently quits because of dissatisfaction with the inadequate reinstatement. *J/B Industries*, 245 NLRB 538 (1979) (employee worked 2 months at a nonequivalent job before quitting); *Marlene Industries*, 234 NLRB 285 (1978) (employee worked 2 or 3 weeks at the nonequivalent position); *Glass Guard Industries*, 227 NLRB 1140 (1977). Moreover, as the Board noted in *Marlene Industries*, *supra* at 291, the reinstatement of an employee without according her the seniority she had acquired prior to the discriminatory discharge

record does not show what Respondent contended. Legg was shown one page, which was her Sumco record. Attached to that was Summit's personnel record for Legg which expressly states, "Start: 4-17-18" and lists under "Other experience" the following, "Sumco—layoff die Shop." This entry fully corroborates Legg's testimony.

does not satisfy a Respondent's obligation to reinstate an employee to a substantially equivalent position. Based on all of the foregoing I must conclude that neither Booth, Fridley Hahn, Legg, nor Tanner was reinstated to substantially equivalent employment. As evidenced by the statements made to them by Respondent's agents and by their personnel records, each was reinstated without the seniority to which she was entitled. Moreover, Booth and Fridley Hahn were reinstated to jobs different from and more difficult or onerous than the jobs they had been on when they were laid off. Moreover, I am satisfied that the job evidence establishes that each of these employees terminated her employment because of dissatisfaction with the inadequate reinstatement. The case of Agnes Tanner warrants no different conclusion notwithstanding that she worked for 14 months before quitting. It was not until shortly before she quit, when Jones told her that the period covering her discriminatory layoff was being deducted from her accumulated seniority, that she knew of the inadequacy of her reinstatement. It was as a direct result of the acquisition of that knowledge that she quit.

Accordingly, I find that the acceptance of employment at Summit by Booth, Fridley Hahn, Legg, and Tanner did not toll Respondent's backpay liability. That liability continues until such time as Respondent makes these employees valid offers of reinstatement. Such earnings as they may have received from Respondent, of course, are set off against the backpay liability. As Sheila Smith did not testify herein, the question of whether her backpay tolled will be held in abeyance pending resolution at a subsequent proceeding in the event that she becomes available as a witness within a reasonable time.

#### VI. CONCLUSIONS

Based on the foregoing and the entire record herein I conclude that Respondent has not made valid offers of reinstatement to any of the discriminatees involved herein. I further find that the total net backpay due these discriminatees through the end of the second quarter in 1982 is as follows:<sup>17</sup>

Mary Adamson	\$3,395.19 <sup>18</sup>
Linda Booth	8,704.55
Dale Carder	2,268.77
Beverly Claar	616.00 <sup>19</sup>
Ruth Duncan	2,154.45
Sandra England	7,924.74
Jane Freiman	515.20
Diane Fridley Hahn	15,483.23

<sup>17</sup> The backpay is based on the computations set forth in the Appendix which is attached to this Decision. The gross backpay figures in the Appendix are based on those set forth in the specification, on which summary judgment was granted. Minor adjustments, consistent with this Decision or to correct the General Counsel's computations, have been made. The net interim earnings in the Appendix are based on those set forth in the specification as amended at hearing by the General Counsel, which were not challenged by Respondent.

<sup>18</sup> Adamson's gross backpay has been reduced by 1 week, in quarter one of 1978, to reflect that she lost 7 rather than 8 week's backpay from February 13, 1978, until March 31, 1978.

<sup>19</sup> Claar's backpay has been adjusted to correct inadvertent computational errors in the backpay specification.

Betty Hoover Morhidge	14,166.92
Sheryl Legg	18,301.45
John Mesko	6,233.74 <sup>20</sup>
Sheila Smith	25,442.58 <sup>21</sup>
Agnes Tanner	7,510.85
Bonnie Thomas	0
Connie Votaw	1,248.76
Phyllis Young	3,133.20 <sup>22</sup>

The total backpay due under the terms of this recommended Order is \$117,099.33, plus interest.

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

**ORDER<sup>23</sup>**

The Respondent, Sumco Manufacturing Co., Inc., Summit Grinding Company, Mogadore, Ohio, its officers, agents, successors, and assigns, shall make the employees named above whole by the payment to them of the net backpay due through June 30, 1982, in the total amount of \$117,099.33,<sup>24</sup> plus interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977), accrued until payment of all backpay due. The backpay obligation shall continue until such time as Respondent makes valid offers of reinstatement to the above-named employees, the amounts of such backpay to be determined by further supplemental proceedings, if necessary.

<sup>20</sup> Mesko's backpay has been adjusted to reflect his entitlement to reinstatement on March 21, 1978, rather than March 28, 1978. It is further adjusted to delete 4 weeks of gross backpay erroneously included in the calculations for the first quarter of 1978.

<sup>21</sup> Sheila Smith was not available to be examined by Respondent at the backpay hearing. Accordingly, it will be recommended that Respondent be required to pay the gross backpay amount due Sheila Smith to the Regional Director to be held in escrow for a reasonable period of time while further efforts are made to locate her. Jurisdiction will be retained for 1 year from the date of the Order herein and the General Counsel is herewith granted permission to move to reopen this matter with regard to her. If, after 1 year, Sheila Smith has not been located and made available for examination by the Respondent, the backpay claim in regard to her shall be dismissed unless good cause is shown to the contrary.

<sup>22</sup> Young's backpay has been adjusted to reflect her entitlement to reinstatement on March 28, 1978, rather than April 3, 1978. She was not available to be examined by Respondent at the backpay hearing. Accordingly, it will be recommended that Respondent be required to pay the gross backpay amount due Phyllis Young to the Regional Director to be held in escrow for a reasonable period of time while further efforts are made to locate her. Jurisdiction will be retained for 1 year from the date of the Order herein and the General Counsel is herewith granted permission to move to reopen this matter with regard to her. If, after 1 year, Phyllis Young has not been located and made available for examination by Respondent, the backpay claim in regard to her shall be dismissed unless good cause is shown to the contrary.

<sup>23</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.

<sup>24</sup> The amounts due each employee being set forth in the Conclusions section of this Decision, above, and in the Appendix, attached hereto.

**APPENDIX<sup>1</sup>**

		<i>I.</i>	<i>II.</i>	<i>III.</i>	<i>IV.</i>
		<i>YR./QTR.</i>	<i>GROSS BACK-PAY</i>	<i>INTER-IM EARN-INGS</i>	<i>NET BACK-PAY</i>
<b>1. Mary Adamson</b>					
1978	1		\$748.00	\$0	\$748.00
	2		1,456.00	1,061.61	394.39
	3		1,534.00	1,061.61	472.39
	4		1,534.00	652.33	881.67
1979	1		\$1,630.00	1,472.42	158.37
	2		1,941.05	1,472.42	468.63
	3		1,583.72	1,472.42	111.30
	4		1,596.86	1,472.42	124.44
<b>Total</b>					<b>\$3,395.19</b>
<b>2. Linda Booth</b>					
1978	1		\$448.00	242.09	206.31
	2		1,456.00	0	1,456.00
	3		1,534.00	422.45	912.55
	4		1,534.00	802.77	731.23
1979	1		\$1,630.79	\$1,019.40	\$611.79
	2		1,941.05	1,225.95	715.10
	3		1,583.72	1,456.07	127.65
	4		1,596.86	433.13	1,163.73
1980	1		\$1,624.14	\$206.78	1,417.46
1981	2		\$1,749.19	\$1,681.06	\$68.13
	4		1,738.95	1,190.17	548.78
1982	1		\$1,489.00	\$898.15	\$590.85
	2		1,433.33	1,278.36	154.97
<b>Total</b>					<b>\$8,704.55</b>
<b>3. Dale Carder</b>					
1979	3		\$1,583.72	\$664.00	\$ 919.72
	4		1,596.86	1,184.00	412.86
1981	2		\$1,749.19	\$1,632.00	\$117.19
1982	1		\$1,489.00	\$670.00	\$819.00
<b>Total</b>					<b>\$2,268.77</b>
<b>4. Beverly Claar</b>					
1978	1		\$616.00	0	\$616.00
<b>Total</b>					<b>\$616.00</b>
<b>5. Ruth Duncan</b>					
1978	1		\$1,339.20	\$0	\$1,339.20
	2		\$799.20	16.05	\$815.25
<b>Total</b>				(ex-penses)	<b>\$2,154.45</b>
<b>6. Sandra England</b>					
1978	1		\$1,240.00	\$0	\$ 1,240.00
	2		1,300.00	0	1,300.00
	3		424.00	0	424.00
1979	3		\$1,218.25	\$346.04	\$872.21
	4		1,596.86	324.11	1,272.75
1980	1		\$1,624.24	\$410.43	1,213.81
	2		998.76	986.75	12.01
	3		1,215.45	1,113.60	101.85
	4		1,259.89	1,113.60	146.29
1981	2		\$1,749.19	\$1,323.00	\$426.19
	3		1,591.55	1,239.00	\$352.55

APPENDIX<sup>1</sup>—Continued

I. YR./QTR.	II. GROSS BACK- PAY	III. INTER- IM EARN- INGS	IV. NET BACK- PAY
4	1,471.38	1,057.00	414.38
1982 1	\$1,489.00	\$1,366.63	\$122.37
2	1,433.33	1,407.00	26.33
Total			\$7,924.74
7. Jayne Freiman			
1978 1	\$515.20	\$0	\$515.20
Total			\$515.20
8. Diane Fridley Hahn			
1978 1	\$456.00	\$0	\$456.00
2	165.60	0	165.60
1979 2	\$1,941.05	\$0	\$1,941.05
3	1,583.72	0	1,583.72
4	1,596.86	0	1,596.86
1980 1	\$1,624.24	\$0	\$1,624.24
2	998.76	886.02	112.74
1981 2	\$1,749.19	\$0	\$1,749.19
3	1,591.55	0	1,591.55
4	1,738.95	0	1,739.95
1982 1	\$1,489.00	\$0	1,489.00
2	1,433.33	0	1,433.33
Total			\$15,483.23
9. Betty Hoover Morhidge			
1978 1	\$1,240.00	\$0	\$1,240.00
2	1,300.00	0	1,300.00
3	1,365.00	0	1,365.00
4	1,365.00	0	1,365.00
1979 1	\$1,630.79	\$520.40	\$1,110.39
2	1,941.05	1,642.00	299.05
3	1,096.00	126.33	969.67
4	737.00	0	737.00
1980 1	\$1,624.24	\$0	\$1,624.24
2	998.76	0	998.76
3	1,215.45	0	1,215.45
4	1,259.89	0	1,259.89
1981 2	\$1,749.19	\$1,466.00	\$283.97
3	1,591.55	1,466.00	125.55
4	1,738.95	1,466.00	272.95
Total			\$14,166.92
10. Sheryl Legg			
1978 1	\$1,302.00	\$0	\$1,302.00
2	567.00	0	567.00
3	1,495.00	0	1,495.00
4	1,495.00	0	1,495.00
1979 1	\$1,630.79	\$0	\$1,630.79
2	1,941.05	0	1,941.05
3	1,583.72	0	1,583.72
4	1,596.86	0	1,596.86
1980 1	\$1,624.24	\$0	\$1,624.24
2	998.76	0	998.76
3	1,215.45	0	1,215.45
4	1,259.89	0	1,259.89
1981 1	\$1,053.44	\$1,339.00	\$0

APPENDIX<sup>1</sup>—Continued

I. YR./QTR.	II. GROSS BACK- PAY	III. INTER- IM EARN- INGS	IV. NET BACK- PAY
2	1,749.19	1,339.00	410.10
3	1,591.55	1,339.00	252.55
4	1,738.95	1,339.00	399.95
1982 1	\$1,489.00	\$960.00	\$529.00
2	1,433.33	1,560.00	0
Total			\$18,301.45
11. John Mesko			
1978 1	\$194.40	\$0	\$194.40
2	1,404.00	0	1,404.00
3	1,534.00	0	1,534.00
4	1,534.00	1,191.00	342.57
1979 1	\$1,630.79	\$1,190.58	\$440.21
2	1,941.05	793.72	1,147.33
3	1,583.72	445.26	1,138.46
4	1,596.86	1,564.09	32.77
Total			\$6,233.74
12. Sheila Smith			
1978 1	\$440.00	\$0	\$440.00
2	1,166.00	0	1,166.00
3	1,534.00	0	1,534.00
4	1,534.00	0	1,534.00
1979 1	\$1,630.79	0	1,630.79
2	1,941.05	0	1,941.05
3	1,583.72	0	1,583.72
4	1,596.86	0	1,596.86
1980 1	\$1,624.24	\$0	\$1,624.24
2	998.76	0	998.76
3	1,215.45	0	1,215.45
4	1,259.89	0	1,259.89
1981 1	\$1,053.44	\$0	\$1,053.44
2	1,749.19	0	1,591.55
3	1,591.55	0	1,591.55
4	1,738.95	0	1,738.95
1982 1	\$1,489.00	\$0	\$1,489.00
2	1,433.33	0	1,433.33
Total			\$25,442.58
13. Agnes Tanner			
1978 1	\$1,413.60	\$0	\$1,413.00
1979 4	\$1,106.00	\$0	\$1,106.00
1980 1	\$1,624.24	\$1,589.00	\$5.24
1981 1	\$1,053.44	\$0	\$1,053.44
2	1,749.19	0	1,749.19
3	1,591.55	0	1,591.55
4	1,738.95	1,300.00	438.95
1982 2	\$1,433.33	\$1,309.85	\$123.48
Total			\$7,510.85
14. Bonnie Thomas			
Total	\$0	\$0	\$0
15. Connie Votaw			
1978 1	\$828.80	\$0	\$828.80

APPENDIX<sup>1</sup>—Continued

<i>I.</i> YR./QTR.	<i>II.</i> GROSS BACK- PAY	<i>III.</i> INTER- IM EARN- INGS	<i>IV. NET</i> BACK- PAY
1980 4	\$1,259.89	\$839.93	\$419.96
Total			\$1,248.76
	16. <i>Phyliss Young</i>		
1978 1	\$91.20	\$0	\$91.20
2	1,482.00	0	1,482.00

APPENDIX<sup>1</sup>—Continued

<i>I.</i> YR./QTR.	<i>II.</i> GROSS BACK- PAY	<i>III.</i> INTER- IM EARN- INGS	<i>IV. NET</i> BACK- PAY
3	1,560.00	0	1,560.00
Total			\$3,133.20

<sup>1</sup> Omitted from this Appendix are all quarters for which no backpay is due.