

**E & L Plastics Corp. and Steven D. Zidek and John Laut.** Cases 30-CA-10725 and 30-CA-10725 (2)

September 9, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On November 19, 1993, Administrative Law Judge Richard A. Scully issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E & L Plastics Corp., Lannon, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent contends that interest on any backpay awarded to discriminatees John Laut and Steven Zidek should be tolled from January 22, 1993 (the day after the compliance hearing) through August 6, 1993 (the date the judge formally closed the record in this proceeding). This argument appears not to have been raised to the judge and the Respondent offers no explanation for its failure to do so. In any event, we find the argument to be without merit and we shall not toll the interest on the backpay awarded.

*Paul Bosanac, Esq.*, for the General Counsel.  
*Donald J. Cairns, Esq.* and *Gerald A. Einsohn, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On January 14, 1992, the National Labor Relations Board (the Board) issued its Decision and Order (305 NLRB 1119) directing E & L Plastics Corp. (the Respondent) to make whole Steven Zidek, John Laut, and Peter LaJoice for losses incurred as a result of the unfair labor practices found to have been committed by the Respondent. The parties being unable to agree on the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 30 issued a backpay specification, dated August 14, 1992.

This case was heard on January 21, 1993, in Milwaukee, Wisconsin, pursuant to a notice of hearing, dated November 5, 1992. Briefs submitted by counsel for the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

There is no dispute as to the length of the backpay periods,<sup>1</sup> the average weekly earnings of the discriminatees prior to their terminations, or the hourly rates they would have received had they continued their employment with the Respondent. The Respondent does challenge the amounts of backpay alleged to be due in the General Counsel's backpay specification and contends that its liability should be reduced in the cases of Laut and Zidek because of the failure of each to engage in a reasonable and diligent search for employment at times during the backpay period and because the overtime computations for all of the discriminatees were incorrectly computed.

A. *John Laut*

Laut was employed by the Respondent as a milling machine operator working with plastics. He had previous employment involving operating table saws and milling machines and unloading trucks. Laut testified that he registered with the Wisconsin Job Service immediately after he was terminated. He went to the Job Service office and examined printouts and microfilm lists of available jobs on about four occasions during the first 6 months after his termination but found nothing available at plastics machine shops. He also testified that within a week of his termination he sought jobs at an apartment management company run by a friend of his family, a repair shop, and Bradley Corp., a manufacturing company that did machining of brass and plastic, but he was not successful. He acknowledged that the first two companies did not have positions for milling machine operators, but said that he was looking for something that he could start right away. He also said that he had done some work repairing machines which he felt might be useful at the repair shop and that he might be able to start at the bottom even if he lacked the necessary experience. He said that Bradley had no openings and was not accepting applications, but told him to "come back" which he did each month in an effort to be recognized and "make a good impression." In September 1989, he was referred by the Job Service to Harnischfeger Corp. which had available only jobs involving machining steel which he was not qualified to do. He testified that he contacted at least three other employers during the summer of 1989 but that he could not remember their names when he filled out a report for the Board in 1990. At the hearing he recalled applying to Triangle Tool on two occasions, Accurate Machine near the airport, and another place "on 124th in Silver Spring," possibly called Remington Manufacturing. Between October and December 1989, he inquired again at Bradley Corp., the property management company, and the repair shop but found no openings. He had been told that the repair shop work was demanding and that there was a large turnover and that he should "keep in touch." During this period he was referred by the Job Service to Ludell Manufacturing but found that the position involved machining steel rather than plastic. He said that he also applied at Hurker Screw Machine in Germantown during this period, which he

<sup>1</sup>The backpay period for Laut extends from June 22, 1989, to November 29, 1991; Zidek's from June 29, 1989, to December 30, 1991; and LaJoice's from June 22, 1989, to November 8, 1991.

understood was expanding, but it was not accepting applications.

In January 1990, he was referred by the Job Service to A & M Tooling but when he applied found that he was not qualified as they did steel machining. That month he applied at Schoeneck Containers, which produces plastic materials, but the work required experience in injection molding rather than machining plastic and he was not qualified. He also applied at a machine shop, Roband Manufacturing in Menominee Falls, but it did no machining of plastic or fiberglass which was all he had experience doing.

On January 21, 1990, he was offered and accepted a job with Metropolitan Holding Co., a property management business, where he did caretaker, cleaning, and maintenance work. After starting at Metropolitan, he made no further effort to find another job until May 1990, when he applied at Five Star Manufacturing after seeing an ad in the newspaper. He began working there as a CNC operator on the second shift but continued to work at Metropolitan until June or July as he was not always working a full shift at Five Star. He worked at Five Star until June 1991, when it moved to a new location which was far from his home. When Five Star moved, he got a job with Mantel Manufacturing which bought the building Five Star had been occupying. He remained with Mantel through the end of the backpay period.

#### Analysis and Conclusions

Once the General Counsel has established the gross amount of backpay the discriminatees would have earned in the absence of discrimination by the employer, less net interim earnings, an employer can mitigate its liability for backpay by establishing that a discriminatee willfully incurred loss by a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199-200 (1941). This is an affirmative defense and the burden is on the employer to prove the necessary facts. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966); *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). This burden is not met by evidence of the employee's lack of success in obtaining interim employment or low earnings. The employer must affirmatively establish that the employee failed to make reasonable efforts to find interim work. *December 12, Inc.*, 282 NLRB 475, 477 (1986); *Big Three Industrial Gas*, 263 NLRB 1189, 1197 (1982). I find that the Respondent has not borne that burden with respect to Laut.

The Respondent seeks to minimize its backpay liability by concentrating on the search for work report that Laut subsequently supplied to the Board and on specific periods in which it contends that he did not make "a reasonable effort to secure a substantially equivalent position to that from which he was discharged." However, this is not the appropriate test. The entire backpay period must be looked at "to determine whether throughout that period there was, in the light of all the circumstances, a reasonably continuing search such as to foreclose a finding of willful loss." *Cornwell Co.*, 171 NLRB 342, 343 (1968). The testimony of Laut concerning his search for interim employment, which I found to be credible and uncontradicted, establishes that it began immediately after his discharge when he registered with the Job Service. Such registration is a factor to be considered in determining whether there has been a willful loss of earnings. *Avon Convalescent Center*, 219 NLRB 1210, 1211 fn. 5

(1975); *Southern Silk Mills*, 116 NLRB 769, 770 (1956). Contrary to the assertion in the Respondent's brief, his testimony establishes that he visited the Job Service at least four times during the first 6 months after his discharge and that he examined the available jobs listed there on each occasion and found none which involved machining plastics. During the same period, he applied to at least three different machine shops pursuant to referrals from the Job Service. In addition, at the hearing he identified three other machine shops where he sought work during the summer of 1989. This testimony was consistent with the information he had provided to the Board wherein he indicated that he had been to other employers but could not recall their names. Poor record-keeping or uncertainty of memory do not disqualify him. *December 12, Inc.*, supra. The fact that he also sought work in areas other than machining, when he found nothing comparable to his job with the Respondent available, does not, under the circumstances, indicate that he failed to utilize the skills and qualifications he developed during that employment. On the contrary, it indicates that when despite his efforts he was unable to find something comparable, he sought anything that might be available. His credible testimony establishes that he made a consistent good-faith effort to obtain desirable new employment from the time he was discharged until he was successful in obtaining a maintenance job in January 1990.

I find that Laut is not disqualified from receiving backpay during the period that he worked for Metropolitan doing building maintenance until he went to work for Five Star as a machine operator. As noted above, the backpay period must be looked at in its entirety and a claimant will not be found to have incurred a willful loss of earnings "merely because the search for interim employment was not made in each and every quarter" of that period. *December 12, Inc.*, supra, at 477. The evidence indicates that Laut took the first job he was offered after an extensive search. A discriminatee is not required to meet the highest standard of diligence nor exhaust all possible job leads. *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). In any event, the Respondent has failed to establish that Laut could have done better than he did by taking the job with Metropolitan or that at any time he clearly and unjustifiably refused to take desirable new employment.

In summary, I find that the evidence establishes that Laut made a good-faith effort to secure interim employment after being terminated by the Respondent and that he is entitled to backpay for the entire period between June 22, 1989, and November 21, 1991.

#### B. Steven Zidek

Zidek was employed by the Respondent from 1985 until June 1989. He testified that he worked as a machine operator and when the company acquired some computer mills he learned on his own how to operate them and trained others to use them. He said that these machines were "outdated" by the time he was discharged. His final position was as an inspector and that while company had gotten some new "CNC" machines before he left, he had no idea how to operate them. He had previously worked at Die Electric for 7 years operating manual mills, drill presses, and table saws. While at Die Electric, for a period of about 2 years, part of his time was spent driving a delivery truck.

Zidek testified that he registered with the Job Service the day after he was discharged by the Respondent. According to his uncontradicted testimony, each week through the end of March 1990, he visited or telephoned the Job Service to inquire about available employment on Monday, he called the Job Service recording of available jobs on Wednesday, and visited a library to check job listings. The evidence shows that during the period from July through September 1989, he sought different types of employment with at least ten different employers without success. Several of these jobs involved delivery truck driving, others manufacturing and security positions, while with others Zidek could not recall what they involved. He applied and took a test for a meter repair job with Milwaukee County which involved machining. During the period from October through December 1989, he applied and tested for carpenter and plumbing apprenticeship programs and applied for several jobs, including some with building contractors that were involved with the carpenter apprenticeship program. Between early January and March 1990, he applied for additional carpenter jobs, delivery driver jobs, laborer and police jobs, and interviewed for the electricians apprenticeship program. He also tested for a job with the U.S. Census Bureau and eventually went to work there although he was unsure of when he started. He worked a second-shift job until late July 1990. In late July 1990, he began working full time for E. D. Wesley Co. in the plumbers apprenticeship program. He worked there until being laid off in January 1991. About a month later he went to work for another plumbing contractor, Grunau, where he is still employed. Zidek testified that he applied for some machining jobs that he heard about through friends and inquired about some that were advertised in the newspaper but found that his experience with analog computers was outdated and that he would have qualified only for operating a milling machine at a wage much below what he had been receiving. He did not apply for any milling machine operator jobs because of this wage discrepancy. He has not looked for other work since beginning his plumbing apprenticeship.

#### Analysis and Conclusions

The Respondent contends that Zidek is not entitled to any backpay because he made no reasonable search for employment utilizing his skills and abilities at any time during the backpay period. I find that it has not borne the burden of establishing that to be the case. Again, the Respondent seeks to break down the backpay period into quarterly periods in which it contends Zidek's efforts to secure employment were inadequate by its standards. Its approach is unacceptable for several reasons. As noted above, the entire backpay period must be looked at to determine if the claimant has made a continuing search for work so as to foreclose a finding of willful loss. Also, there is no requirement that the claimant must seek "precisely the same type of interim employment as that from which he was discharged." *Associated Grocers*, 295 NLRB 806, 810 (1989). The Respondent did not establish that Zidek had such extensive experience in a specialized field that in his search for interim employment it was incumbent upon him to seek to work within that specialty. Cf. *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1219 (1961). On the contrary, according to Zidek's credible and uncontradicted testimony, he was not a skilled machinist capable of operating a variety of machines. His experience with

the Respondent involved work mainly as an operator of a basic milling machine. While he had some experience with the Respondent's computer operated machines, he testified that they were outdated and that when he inquired about CNC machine operator jobs he saw advertised in the newspaper, he found he knew nothing about running them and that, he "wouldn't even know how to start the machine." I find that the evidence fails to establish that Zidek had a specialized skill in machining that would have generally qualified him for anything above an entry level position in that industry. However, it does establish that throughout the period between his discharge and his employment in the plumbing apprenticeship, Zidek made a continuing and concerted effort to find work in a variety of areas, including, delivery truck driving, something he had previous experience doing. It is true that it had been some years since he had regularly driven a delivery truck, but given the nature of the job, there is no reason to believe he was less skilled or qualified as a delivery truck driver than as a machine operator. I find that Zidek's efforts to obtain employment during that period meet the reasonable standard of diligence required by the Board.

The Respondent introduced copies of several Milwaukee area newspaper classified advertisements, covering the period from July 1989, through February 1990, which it contends show there were machinist or machine operator jobs available for which Zidek was qualified. This is not sufficient to meet the Respondent's burden of proof that there were jobs available or that Zidek would have been successful in obtaining one. *Arthur Young & Co.*, 304 NLRB 178, 179 (1991). It also does not establish that Zidek failed to make a reasonable search for employment. He testified that he regularly read the newspaper ads, that his inquiries indicated that he was not qualified for some of the machinist work advertised and that much of he was qualified for was entrance level, at a wage rate well below what he was earning when terminated. He also credibly testified that many of the advertisements he was questioned about involved temporary agencies. There is nothing in the record to support the Respondent's claim that while these jobs may have been temporary they could have led to permanent employment.

The Respondent also contends that Zidek was disqualified from receiving any backpay after the date he entered the plumbing apprenticeship program and made no further search for a job outside of that program since this amounted to voluntarily absenting himself from the comparable labor market. I do not agree. The record is clear that Zidek made a reasonable search for work which was largely unsuccessful until he found a job with the Census Bureau, a job he testified he took because he could work the second shift and keep his days free to seek permanent employment. It must be noted that the principle underlying the requirement that a backpay claimant make a reasonable effort to find work and mitigate backpay liability is "not so much the minimization of damages as the healthy policy of promoting production and employment." *Phelps Dodge Corp. v. NLRB*, supra at 200. Here, after an extended period in which, despite his reasonable efforts he was unable to find comparable work, Zidek sought a new career which promised to eventually provide him with earnings well above what he would have received had he remained employed by the Respondent. There is no evidence that this career change prolonged his unemployment or increased the Respondent's backpay liability. This is not

a situation similar to that involved in *Big Three Industrial Gas*, supra, cited by the Respondent, where a claimant was denied backpay for periods in which he was found to have willfully chosen to pursue a lower paying job as an equipment handler with a traveling rock band and in which he voluntarily moved to an admittedly inferior labor market thereby forgoing substantially greater earnings available in his former area of employment. In the present case, from all that appears Zidek's decision to enter the plumbing apprenticeship was not a matter of indulging his personal enjoyment, to the Respondent's detriment, but was a reasonable attempt to increase his employability and productivity. Under the circumstances, he should be entitled to backpay for the entire period.

### C. The Overtime Issue

The backpay specification calculated the backpay due Laut, Zidek, and LaJoice using a workweek of 40 hours, plus 5 hours of overtime. This was based on the fact, as stipulated by the Respondent at the hearing, that each claimant was working 45 hours a week prior to his discharge. The Respondent disputes that the claimants would have continued to work 45 hours per week had they remained in its employ. It presented the testimony of its president and part owner Frank Esser that during the backpay period all three of the claimants would have operated a milling machine. Laut and LaJoice did so prior to their discharges. Zidek had been an inspector prior to his discharge but that position was eliminated and he would have gone back to operating a milling machine. According to Esser, although the milling machine operators worked 45 hours a week prior to their discharges, thereafter, business declined and mill operators did not work that many hours. The hours worked by employee Ron Swosinski, who worked as a mill operator throughout the backpay period, were representative of the hours the claimants would have worked. The Respondent contends that backpay should be limited to the actual hours the claimants would have worked as indicated in the summary of Swosinski's actual hours attached as "Appendix A" to its answer to the backpay specification.

### Analysis and Conclusions

I find that the Respondent has not carried the burden of establishing that the backpay specification is incorrect with respect to the overtime the claimants would have worked had they continued to be employed by it. I find Esser's self-serving testimony is insufficient to prove that they would have worked the same hours as Swosinski. There is nothing to establish that in the instances Swosinski worked less than 45 hours a week it was because there was no work available. There is no way of knowing from the Respondent's summary of his hours when Swosinski was off due to illness, vacation, or other reasons unrelated to workload. Beyond this, Esser testified that there were at least six milling machines operated by various employees at various times during the backpay period and that those employees worked overtime although he did not know when or how much. He said he would have to look at the payroll records in order to determine this and he had not done so. I find the Respondent's failure to produce the records concerning its volume of business and the overtime worked by the milling machine operators creates the inference, which I draw, that they do not support its contention that the claimants would not have worked 45 hours per week throughout the backpay period.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### ORDER

The Respondent, E & L Plastics Corp., its officers, agents, successors, and assigns, shall pay the following sums to the claimants listed herein, plus interest,<sup>3</sup> as follows:

Steven D. Zidek	\$44,129
John Laut	28,592
Peter LaJoice	8,453

<sup>2</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.

<sup>3</sup>Interest shall accrue until the date of payment and shall be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).