STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Local 8A-28A Metal Polishers, Sign & Display, Novelty Workers, Automotive Equipment Painters,	)	
Charging Party,	)	
and	)	Case No. L-CA-01-017-C
Chicago Transit Authority,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED COMPLIANCE DECISION AND ORDER

I. Background

On October 12, 2000, Local 8A-28-A Metal Polishers, Sign & Display, Novelty Workers, Automotive Equipment Painters (Union or Charging Party or Local 8A) filed an unfair labor practice charge against the Chicago Transit Authority (CTA or Respondent) with the Local Panel of the Illinois Labor Relations Board (Board) alleging that CTA had violated Sections 10(a)(2) and (1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010). In that underlying case, in relevant part, the Union alleged that CTA had unlawfully transferred and disciplined Bill Foster, one of the painter foremen in the painters' bargaining unit.

On July 13, 2004, after a hearing on the complaint, Administrative Law Judge (ALJ) John Clifford, in a Recommended Decision and Order (Order), determined that CTA had engaged in unfair labor practices. He recommended a number of remedies. Neither party filed exceptions to the Order.

On February 3, 2005, the Board issued a General Counsel order in the case stating that the decision was final and binding on the parties. In a letter dated February 11, 2005, CTA's Deputy General Counsel, Kent Ray, sent a letter to the Board's General Counsel, Jacalyn J. Zimmerman and to Charging Party's attorney, Martin Barr, listing the remedial actions CTA had taken to comply with the order.

On April 5, 2010, five years later, the Union filed a Petition for Enforcement of the

Board's Order, asserting that CTA had failed to fully comply with it.

On May 9, 2012, the compliance officer issued a Compliance Order, ordering CTA to pay Foster additional money but rejecting Charging Party's assertion that CTA owed Foster $25,253.33, a sum which represented Charging Party's hourly wage for the increased travel time to and from the work location to which he had been discriminatorily transferred.

On May 15, 2012, the Charging Party filed objections to the Compliance Order, arguing that the compliance officer erred in denying Foster's claim for $25,253.33.

On June 26, 2012, the undersigned ALJ informed the parties that there were no issues of fact for hearing and that an Order would resolve the issues of law.

II. Issues and Contentions

The issue is whether the compliance officer erred in denying Charging Party's claim for $25,253.33, Charging Party's hourly wages for the increased travel time to and from the location to which he was discriminatorily transferred by CTA.

III. Facts

On July 13, 2004, Administrative Law Judge (ALJ) John Clifford determined in his Order that CTA had engaged in unfair labor practices. He recommended the following remedies:

1. Restore Bill Foster to his geographic area and designated reporting facility (i.e. North side and North shops) as that area and reporting facility existed on or before May 9, 2000, and make him whole for any losses incurred as a result of his May reassignment, including back pay if any caused by his changed assigned area and reporting facility with interest computed at the rate of seven percent per annum as allowed by the Act, calculated from the date of his reassignment until the date he is reinstated to his assigned area and reporting facility as they existed on or before May 9, 2000.
2. Reinstate Bill Foster to his schedule of work days in the office and in the field as they existed on or before July 13, 2000, and make him whole for any losses incurred as a result of that July change in work schedule, including back pay if any caused by his changed schedule of work days with interest computed at the rate of seven percent per annum as allowed by the Act, calculated from the date of

his changed work day schedule until the date he is reinstated to his work day schedule as it existed on or before July 13, 2000.

3. Make Bill Foster whole for any losses incurred by the unpaid suspension issued to him on or about September 5, 2000, and by the unpaid suspension issued on October 10, 2000, and the denial of overtime on the subsequent weekend, including back pay with interest computed at the rate of seven percent per annum as allowed by the Act, each such loss calculated from the date of serving the particular suspension and denial of overtime until the date of being made whole.
4. Expunge from the Respondent's files any references to the suspensions issued to Bill Foster on or about September 5, 2000, and October 10, 2000, as well as disciplinary notices and warnings associated thereto, and other supplementary documents such as related unusual occurrence reports or other memoranda or statements, including employee referral programs, and notify him and Charging Party in writing, both that this has been done and that evidence of those unlawful adverse actions will not be used as a basis for future personnel actions against him.
5. Preserve, and upon request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of back pay due under the terms of this decision.
6. Post at all places where notices to employees are ordinarily posted, copies of the notice attached hereto and marked "addendum." Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places, and shall be so maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that these notices are not altered, defaced, or covered by any other material.
7. Notify the Board in writing, within 20 days from the date of this decision, of what steps the Respondents have taken to comply herewith.

Neither party filed exceptions to the Order and on February 3, 2005, the Board issued a General Counsel order in the case stating that the decision was final and binding on the parties. In a letter dated February 11, 2005, CTA's Deputy General Counsel, Kent Ray, sent a letter to the Board's General Counsel, Jacalyn J. Zimmerman and to Charging Party's attorney, Martin Barr, stating that CTA had taken the following remedial acts in response to the Order:

1. Restored Bill Foster to his geographic area and designated reporting facility;
2. Reinstated Bill Foster to his schedule of work days in the office and in the field;
3. Processed payroll forms to issue Bill Foster payment for losses incurred by the September 5, 2000, and October 10, 2000, unpaid suspension, including backpay with interest;
4. Expunged from Bill Foster's personnel and work location files all references to the suspensions and supplementary documents;
5. Reserved all records, reports and other documents requisite to analyze the amount of backpay;
6. Posted copies of the notice and addendum and shall be so maintained for a period for 60 consecutive days.

On April 5, 2010, the Union filed a Petition for Enforcement of the Board's Order, asserting that CTA failed to fully comply with it. On May 9, 2012, the compliance officer issued a Compliance Order. The compliance officer made a number of finding, which are summarized below.

First, he ordered CTA to pay Foster a total of **$5,451.77**. This figure included $3,092.67 in backpay for the additional miles Charging Party had to travel as a result of the discriminatory transfer.

Second, he ordered CTA to make the appropriate pension contributions on the backpay amounts and to request the CTA Pension Fund to credit Foster's pension account with the additional back wages for the purposes of calculating his retirement benefit. Further CTA was ordered to supply a copy of the documents that indicate such action had been taken.

Third, he ordered CTA to make Foster's personnel file available to Foster and or his agent to review its contents. He likewise ordered Foster or his agent to review Foster's personnel file by May 31, 2012, to determine if CTA had cleansed the file of all material that the Board ordered to be removed which related to Foster's unlawful suspension and the involuntary transfer. He instructed the parties that if they disagreed as to whether documents were covered by the Board's order, they were required to provide the documents to the compliance officer for a determination as to whether they should be expunged. Likewise, he instructed the Charging

Party that if the parties agreed that all offending documentation was removed from Charging Party's personnel file, the Charging Party was required to notify CTA and the Board of that fact, as of a date certain.

Finally, he denied Charging Party's claim that CTA owed Charging Party $25,253.33, Charging Party's hourly wages for the increased travel time to and from the location to which he was discriminatorily transferred. The compliance officer emphasized that the $3,092.67 CTA was required to pay for Foster's travel expenses adequately addressed the harm caused by the discriminatory transfer and, in conjunction with the backpay award, properly reconstructed Foster's economic life as it existed prior to CTA's unfair labor practice. He concluded that awarding Foster his hourly wage for that travel time was unnecessary to make Foster whole when "there [was] no evidence CTA employees are on the clock and receive remuneration for their 'windshield time' when they drive to and from work."

On May 15, 2012, Charging Party filed an Objection to the Compliance Order which took issue only with the compliance officer's conclusion that CTA was not required to pay Charging Party $25,253.33, a figure which represents Charging Party's hourly wages for the increased travel time to and from the location to which he was discriminatorily transferred. Charging Party did not object to any of the compliance officer's factual findings, including the determination that "there is no evidence [that] CTA employees are on the clock and receive remuneration for their 'windshield time' when they drive to and from work." Notably, Charging Party asserted that the contested matter concerned a pure issue of law, the resolution of which required no hearing.

CTA filed no response.

IV. **Discussion and Analysis**

Charging Party is not entitled to $25,253.33 for hourly wages representing the increase in travel time to and from the work location to which he was discriminatorily transferred because he never earned wages for travel time prior to CTA's unfair labor practice and, as such, CTA's failure to pay those wages after the unfair labor practice does not constitute an actual loss which must be repaid to make Charging Party whole.

The purpose of the backpay order is "to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.'" Sure-Tan, Inc. v. N.L.R.B., 467

U.S. 883, 899 (1984) (citing (Phelps-Dodge Corp. v. NLRB, 313 US 177, 194 (1941)). The proposed remedy must be tailored to the unfair labor practice it is intended to redress and, as a result, must make good only actual losses. Phelps-Dodge Corp, 313 US at 198 ("only actual losses should be made good."); Sure-Tan, Inc., 467 U.S. at 900. In other words, remedies should make the discharged employee whole, but they should not place the employee in a better position than he would have been in had the unfair labor practice not occurred. Diamond Walnut Growers, Inc., 340 NLRB 1129 (2003); Freeman Decorating Co., 288 NLRB 1235 (1988). Thus, determining the remedy requires a comparison between the employee's terms and conditions of employment prior to the discriminatory action and those after that action occurred.

Here, the Charging Party is not entitled to wages for the increased time of his commute because there is no evidence that he received wages for his travel time before CTA committed its unfair labor practice against him. Indeed, the compliance officer specifically found that "there is no evidence [that] CTA employees are on the clock and receive remuneration for their 'windshield time' when they drive to and from work."[1] Thus, under these circumstances, awarding Charging Party $25,253.33 in wages for travel time would not compensate him for an actual loss, necessary to make him whole, and would instead improperly confer a windfall, placing him in a far better position than he would be in had the unfair labor practice not occurred.

Contrary to the Union's contention, the NLRB has not held that an employer must always pay an employee's wages for time spent commuting where the employer has discriminatorily transferred him to a different location. Instead, the Board has applied the tenets set forth above and has found that granting an employee wages for that travel time properly effectuates the make whole remedy where the employer previously compensated the employee for that travel time.

For example, in Mathews Ready Mix, Inc, 259 NLRB 739 (1981), the Board required the Respondent to compensate a discriminatorily transferred employee for his travel time when the employee was explicitly "'on the clock' during the trip to and from his home" prior to the transfer, and when the employer required him to "go at his own expense and on his own time" after that transfer. Mathews Ready Mix, Inc, 259 NLRB 739, 743 and Fn. 17. Thus, unlike Foster, the employee in Mathews Ready Mix, Inc, had earned wages for commuting prior to the

[1] The Charging Party, by failing to specifically object to this factual finding, waived its objections to it. See, 80 Ill. Adm. Code § 1220.80(f) ("any objection to a finding, order or omission not specifically urged shall be deemed waived.")

discriminatory transfer and the Respondent's withdrawal of those wages consequently constituted an actual loss which contributed to a finding that the Respondent acted unlawfully.[2]

In contrast, the NLRB has declined to explicitly grant employees wages for their travel time caused by discriminatory transfers under circumstances where it is not readily apparent that those employees were previously compensated for such time. See, Action Carting Environmental Serv. Inc., 354 NLRB No. 84 (2009)(commuting expenses that employee incurred as a result of the unlawful transfers were included in Board's remedy, but no mention of granting wages for commuting time); Illinois Institute of Technology, 201 NLRB 941 (1973) (requiring reimbursement for additional travel costs resulting from discriminatory transfers, but not explicitly providing for payment of hourly wages for travel time).

Consequently, the Charging Party is not entitled to $25,253.33 in wages for the increased time he spent commuting as a result of CTA's discriminatory transfer because that figure does not represent an actual loss.

V. Conclusions of Law

The compliance officer did not err in denying Charging Party's request for $25,253.33, Charging Party's hourly wage for the increase in travel time to and from the work location to which he was discriminatorily transferred by CTA.

VI. Recommended Order

I recommend that the Respondent, CTA, comply with the Compliance Order, as written.

VII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file

[2] Similarly, Jen Holdings, Inc. illustrates that the Board requires respondents to pay employees wages for travel time when such wages were owed and paid prior to the respondent's unfair labor practice. See, Jen Holdings, Inc., 357 NLRB No. 11 (2011) (In a default judgment, the Board held that Respondent unilaterally changed terms and conditions of employment when it ceased paying employees for their travel time as required by the collective bargaining agreement; remedy included back wages for travel time.)

responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 2nd day of July, 2012

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Local 8A-28A Metal Polishers, Sign & Display, Novelty Workers, Automotive Equipment Painters,	)	
Charging Party	)	
and	)	Case No. L-CA-01-017-C
Chicago Transit Authority,	)	
Respondent	)	

AFFIDAVIT OF SERVICE

I, Melissa McDermott, on oath state that I have this 2nd day of July 2012, served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED COMPLIANCE DECISION AND ORDER LOCAL PANEL** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

Martin Barr
Carmell Charone Widmer Moss & Barr
One East Wacker Drive, Suite 3300
Chicago, IL 60601

Carole Corns
Labor Policy and Appeals
Chicago Transit Authority
567 W. Lake Street
Chicago, IL 60661

SUBSCRIBED and **SWORN** to
before me this **2nd day**
of July, 2012.

NOTARY PUBLIC

NOTARY PUBLIC OFFICIAL SEAL STATE OF ILLINOIS
CARLA STONE
MY COMMISSION EXPIRES
OCTOBER 25, 2014