Woonsocket Health Centre *and* United Health Care Employees, a Division of Rhode Island Workers Union, Local 76, Service Employees International Union, AFL-CIO-CLC. Cases 1-CA-13014, 1-CA-13057, 1-CA-13230, 1-CA-13282, 1-CA-13425, 1-CA-13486, and 1-CA-13998

September 21, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On June 25, 1981, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge to the extent consistent herewith.

Discriminatees Donna D'Agostino and Alice Sabourin were residing in Florida and were not present at the backpay hearing. Therefore, Respondent and the General Counsel did not have the opportunity to examine them with respect to their interim earnings or expenses. One month prior to the hearing the General Counsel informed Respondent that the General Counsel would not subpoena D'Agostino or Sabourin but he furnished Respondent with the names and addresses of the discriminatees. Neither the General Counsel nor Respondent subpoenaed D'Agostino or Sabourin and they did not appear at the hearing.

In its backpay specification, as amended at the hearing, the General Counsel set out the gross backpay allegedly owing to D'Agostino and Sabourin, along with interim earnings and expenses known to the General Counsel through correspondence with the two discriminatees. However, the Administrative Law judge found that too many factual uncertainties remained as to the amount of backpay due these two discriminatees because of their failure to appear and testify. He therefore refused not only to issue a backpay award, but also to order that an estimated award as set out in the specification be placed in escrow. Instead, he granted the two discriminatees 1 year within which to communicate with the Board's Regional Office, at which time the General Counsel could issue a correct specification and arrange for a reopened hearing. Thus, the Administrative Law Judge has resolved the uncertainties against the discriminatees and has placed the burden on them, and at least implicitly on the General Counsel, to establish the amount of net backpay due the discriminatees. We do not agree, and we find merit in the General Counsel's exception to the failure of the Administrative Law Judge to place the estimated amount of backpay due in escrow, as required by Board policy.

Once a maximum backpay figure has been determined based on the amount a discriminatee would have earned in the absence of discrimination by the respondent, the burden is on the respondent to demonstrate that its backpay liability should be some amount less than that figure. Further, under Board law the General Counsel does not have the obligation to produce the discriminatees at the hearing to testify in this regard.[2] Here, although the General Counsel informed Respondent of the whereabouts of the two discriminatees, and advised that the General Counsel would not be issuing subpoenas to the discriminatees, Respondent did nothing on its own to assure their appearance at the hearing.[3]

We are not willing to assume, as did the Administrative Law Judge, that the discriminatees do not care enough about this matter to assert their rights. Whether it was the cost of voluntarily traveling from Florida for the hearing which they were not willing to incur on their own, or some other reason, there is nothing to show that they would have refused to appear in compliance with a subpoena from Respondent.

We also do not agree that the backpay specification, as amended by the General Counsel, is too uncertain factually to preclude the amounts set forth therein from being placed in escrow. Respondent has contended that the discriminatees did not conduct an adequate search for interim em-

[1] We agree with the Administrative Law Judge's finding that Paula Suffoletto should not be awarded backpay during the second and third months of her discharge. In so finding we do not infer, as did the Administrative Law Judge, that merely because Suffoletto did not consider herself bound to the nursing care profession she was limiting her search to a more prestigious job.

[2] See, e.g., *Steve Aloi Ford, Inc.*, 190 NLRB 661 (1971), wherein the Board noted that it did not acquiesce in the view of the Second Circuit as expressed in *N.L.R.B.* v. *Mastro Plastics Corporation*, 354 F.2d 170 (1965), cert. denied 384 U.S. 972 (1966), that the burden is on the General Counsel to produce the discriminatee to testify.

[3] The dissent erroneously places not only the burden upon the General Counsel of producing the two discriminatees, but also the burden of proving that they conducted a reasonable search for employment during the backpay period. That is a burden clearly borne by Respondent. See, e.g., *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5th Cir. 1966).

ployment, and that they voluntarily removed themselves from the job market. However, it has not shown that the amount of gross backpay set forth in the specification is inaccurate, or that the interim earnings, as presented by the General Counsel, are inaccurate.[4]

Therefore, consistent with Board policy,[5] we shall award D'Agostino and Sabourin the amount of backpay set out in the specification and shall order Respondent to pay it to the Regional Director for Region 1 to be held in escrow for a period not exceeding 1 year from the date of this Supplemental Decision and Order. The Regional Director is instructed to make suitable arrangements to afford Respondent, together with the General Counsel, an opportunity to examine D'Agostino, Sabourin, and any other witnesses with relevant testimony, and to introduce any relevant and material evidence bearing on the amount of backpay due. The Regional Director shall make a final determination whether any interim earnings or other amounts, in excess of those shown in the specifications, or any other factors are revealed which may reduce the amount of backpay due under existing Board precedent. In the event the Regional Director determines that deductions are warranted, the amount so deducted shall be returned to Respondent. The Regional Director, when this matter has been finally resolved, shall promptly, and no later than 1 year from the date of this Supplemental Decision and Order, report to the Board the status of this matter.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Woonsocket Health Centre, Woonsocket, Rhode Island, its officers, agents, successors, and assigns, shall pay to the Regional Director for Region 1 as net backpay due Donna D'Agostino and Alice Sabourin the amount set forth in the General Counsel's backpay specifications to be held in escrow pursuant to the provisions of the foregoing Supplemental Decision, and shall pay to Ulrike Ledoux, Tina Cotnoir, Paula Suffoletto, and Anita Calascibetta the amounts as set forth in the Administrative Law Judge's Decision.

CHAIRMAN VAN DE WATER, dissenting in part:

The majority requires Respondent to pay into escrow a total of $13,561.81 for the benefit of discriminatees Donna D'Agostino and Alice Sabourin, pursuant to backpay specifications which are based on incomplete and patently unreliable information as to their interim earnings. As neither D'Agostino nor Sabourin appeared at the hearing to substantiate their claims, contrary to my colleagues, I can find no basis on which to justify such disposition of their backpay claims.

With respect to Sabourin and D'Agostino, my colleagues, rather ill-advisedly, state:

> We also do not agree that the backpay specification, as amended by the General Counsel, is too uncertain factually to preclude the amounts set forth therein from being placed in escrow. Respondent has contended that the discriminatees did not conduct an adequate search for interim employment, and that they voluntarily removed themselves from the job market. However, it has not shown that the amount of gross backpay set forth . . . is inaccurate, or that the interim earnings, as presented by the General Counsel, are inaccurate.

The Administrative Law Judge found that "there is a paucity of information on the critical facts" as to backpay for D'Agostino and Sabourin and "[t]hat the picture portrayed in the specifications as to these two women cannot be relied upon." He further stated that "the overall specifications in this case is guess work, speculation, or pure fantasy." The record herein fully supports this conclusion.

As noted by the Administrative Law Judge, the original specification as to D'Agostino showed no earnings during her backpay period and was amended by the General Counsel at the hearing to show earnings in the period from June through October 1978 although the General Counsel conceded that his information was incomplete. In addition, the backpay specification seeks $835.68 for Sabourin for moving expenses to Florida. Lastly, the specification seeks backpay for both D'Agostino and Sabourin *after* they had moved to Florida and clearly had removed themselves from the labor

[4] The dissent mistakenly states that D'Agostino and Sabourin removed themselves from the labor market by moving to Florida, thereby terminating the period for backpay. We do not know the reasons behind their moving to Florida, and, thus, we cannot determine at this time whether the backpay period should be tolled by such an event. See *M Restaurants, Incorporated d/b/a The Mandarin* v. *N.L.R.B.*, 621 F.2d 336, 338 (9th Cir. 1980); *N.L.R.B.* v. *Robert Haws Company*, 403 F.2d 979, 981 (6th Cir. 1968) (leaving the area in search of comparable employment does not terminate the backpay period). Thus, this case is distinguishable from *Mastro Plastics Corporation*, 145 NLRB 1710 (1964), and *N.L.R.B.* v. *Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966), cited by the dissent, where the Board and the court, respectively, had evidence before them that the discriminatees left the area in which they had been employed by the respondents for personal reasons unrelated to their search for comparable employment. Further, we see no relevance in the discriminatees' not responding to offers of reinstatement from Respondent in November 1979, more than a year following their discharges, nor their not appearing at the backpay hearing, as evidence of their unavailability for reemployment following their discharges.

[5] *Brown and Root, Inc. et al.*, 132 NLRB 486, 497–498 (1961); *Mastro Plastics Corporation*, 136 NLRB 1342, 1347–48 (1962); *Steve Aloi Ford, Inc.*, 190 NLRB 661; *Coast Delivery Service, Inc.*, 198 NLRB 1026 (1972).

market. Despite these absurdities in the backpay specification, my colleagues find little or no reason for challenging it and unhesitatingly award both employees a total of $13,561.81.

Perhaps a more fatal flaw is the fact that Respondent has raised the issue of whether either D'Agostino or Sabourin has made a reasonable search for other employment during the backpay period. At that point it is incumbent upon the General Counsel to prove the claimants' entitlement to backpay by showing that they had conducted a reasonable search for employment during the backpay period. Thus, the General Counsel's failure to produce these claimants has a significant impact on D'Agostino's claim.

As noted by the Second Circuit in *N.L.R.B.* v. *Mastro Plastics Corporation*, 354 F.2d 170 at 177 (1965):

> On the other hand, information relevant to whether the discriminatees willfully incurred a loss of earnings is within the knowledge of the discriminatees, not the employer. While the employer must raise this issue of mitigation of damages in its pleadings, it does not follow that the employer should be required to come forward with evidence by producing the discriminatees.

Further on, the court noted:

> The Board has produced the discriminatees for testimony in almost every case where the employer has raised this defense. [willful loss of earnings] Indeed the Board has denied awards to employees when their testimony demonstrated a willful loss of earnings, even if the employer did not produce the discriminatees or offer additional extrinsic evidence on this question. . . . Because the Board does customarily produce the discriminatees at backpay hearings, we conclude that a rule requiring a discriminatee to testify before his award becomes final is not an undue burden on the Board and would not undermine the efficacy of the backpay remedy.

In any event, both D'Agostino and Sabourin removed themselves from the labor market by moving to Florida and any entitlement to backpay ceases at that point.[6] D'Agostino left for Florida in late 1978 or early 1979 whereas Sabourin quit her job at Penthouse Sales on or about November 23, 1978. With respect to Sabourin, her entitlement to backpay ended much sooner, namely, November 8, 1977, at which time she became employed at Penthouse Sales where her income was slightly higher than what she had been earning at Respondent. There is nothing in the record to indicate any justification (onerous working conditions or offer of better pay elsewhere) for Sabourin's quitting of her job. In fact, the Administrative Law Judge found, "When she [Sabourin] quit that job, where they wanted to keep her on, she told that employer her reason was to go away to Florida." Rather obviously, Sabourin was not forced to leave the area to seek comparable employment since she was already gainfully employed and her move to Florida was simply for personal reasons. Cf. *N.L.R.B.* v. *Robert Haws Company*, 403 F.2d 979, 981 (leaving the area in search of comparable employment does not terminate the backpay period).

I would note that a backpay proceeding is not considered an adversary proceeding and it is part of the General Counsel's responsibility to see that backpay determinations are correctly made. I would suggest that it does not require a touch of inspirational genius to utilize the Agency's existing offices in Florida (offices at Miami, Coral Gables, and Tampa) to interview and depose the claimants with respect to critical elements in their backpay claim and based on such information to work out their backpay claims with the Respondent.

For all of the above reasons the Administrative Law Judge's conclusion to defer to later hearing the claims as to D'Agostino and Sabourin is fully justified. Alternatively, the procedure previously suggested can be utilized to insure that the claimants do not lose all backpay merely from failure to appear at a hearing. The majority opinion may serve as a disincentive to discriminatees in future cases to appear at backpay hearings, since they can receive excessive awards based solely on inadequate specifications. I believe that, before awarding backpay to a discriminatee who is unavailable at the hearing, the General Counsel must present a complete backpay specification which is at least minimally credible. As this is not the case here, I must dissent.[7]

[6] When an individual renders himself unavailable for reemployment with the respondent whether it be by virtue of service in the Armed Forces, illness, or, as here, by moving from Massachusetts to Florida, the respondent's liability for backpay terminates. This is corroborated here by the fact that neither responded to offers of reemployment on or about November 12, 1979, nor did they appear at the hearings herein in November 1980. *Mastro Plastics Corporation*, 145 NLRB 1710, 1711 (1964); see also *N.L.R.B.* v. *Rice Lake Creamery Company*, 365 F.2d 888, 891 (D.C.Cir. 1966).

[7] The Administrative Law Judge did not foreclose an award of backpay to D'Agostino or Sabourin but simply required them to appear at a hearing and justify the award. I believe that this remedy is more reasonable and just than that ordered by my colleagues. A reopened hearing could be set for one of the Board's Florida offices or, as noted earlier, the discriminatees could be personally interviewed and deposed.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: This is a backpay proceeding in which a hearing was held on November 17 and 18, 1980, in Woonsocket, Rhode Island. In 1979 the National Labor Relations Board issued two Decisions in these cases, finding that six employees had been unlawfully discharged, and ordering reinstatement plus reimbursement in backpay for any loss of earnings suffered by them in consequence of the unfair labor practices committed. Briefs were filed after the close of the hearing by both parties.

Preliminary Statements

The Board Decisions, finding that the Respondent had unlawfully discharged six nurses aides, issued on September 28, 1979. Shortly thereafter the Company made adequate offers of reinstatement to each of the six women. On April 19, 1980, the Respondent agreed to comply with the Board's orders, but the parties were unable to agree as to the amount of backpay properly due each of the discriminatees. As a result, on May 5, 1980, the Regional Director issued his backpay specifications in the usual very detailed fashion. The hearing in this proceeding opened on November 17, 1980; the next day, after further testimony and exhibits were received, the hearing was continued to be resumed at a later date. Instead of resuming the hearing the parties then—on February 6, 1981—signed a stipulation and joint motion to close record. Pursuant to that agreement further exhibits were received and the record was closed without further testimony.

In the course of the proceeding the General Counsel no less than four times made changes in the specifications. The first amendment was made by written notice served on the Respondent a few days before the hearing opened. A second amendment was made during the first day of the hearing and a third during the second day. The fourth amendment was made as an integral part of the post-hearing stipulation to close the record. All these changes were substantial, in some instances to bring the written specifications into conformity with the oral testimony of the discriminatees themselves. The result of these constantly changing claims of money due is a confusing picture.

During the first day of the hearing, counsel for the Respondent offered to prove that four of the employees involved had been offered proper reinstatement a week or so before the dates set opposite their names in the original specifications. It seems the Company had written letters to the four ladies in question on October 27, 1979, mailed to the addresses they had left when last with the Employer. When these letters were returned undelivered because the ladies had moved, the Company's managing agent turned to the Board's compliance office for assistance, who then supplied the new addresses, and second letters offering reinstatement were sent out. Counsel for the Respondent explained at the hearing that he only learned of the first offers after filing his answer to the initial specifications, in which he did not take issue with the reinstatement offer dates set next to those four names. He offered copies of the four letters involved into evidence. Counsel for the General Counsel objected to this attempt to change the answer as filed. At the hearing I sustained the objection.

The basis of the General Counsel's argument is that it was too late for the Respondent to make any changes in its pleading. Practically in the same breath, at the very opening of the hearing and 6 months after issuing his own specifications, he withdrew a claim of over $10,000 for a single claimant, and instead admitted full employment where first it had been alleged she found no work for seven full quarters—21 months! And long after the second day of hearing had ended, the General Counsel made a further change as to that same employee, now saying she had earned nothing during two of those quarters—October 1, 1978, through March 31, 1979—where previously he had said she did earn $2,600 during that period. In place of the previously earned interim earnings, he now added the words "willful loss of earnings." If the objection to the Employer's desire to make a small change in its answer is valid, it means that, when the General Counsel learns something new from his client, the specification must be changed to conform with what the employees really did during the backpay period, but when counsel for the Employer becomes better informed about what the Employer really did in offering reinstatement, never mind justice. I reverse my ruling and hereby receive into evidence the carbon copies of the four letters dated October 27, 1978, sent to four of the discriminatees.[1]

Ulrike Ledoux

At the close of the hearing the parties stipulated that Ledoux "is entitled to $1,146.39 plus interest . . . ." Accordingly, I find that Ledoux is entitled to $1,146.30 backpay plus interest accrued to the date of payment minus tax withholdings.

Tina Cotnoir

The ever-changing figures in the specifications, and the resultant confusion and ambiguities, are especially illustrated in the case of Cotnoir, discharged on July 9, 1977. As originally issued, the specification said she did not earn a penny until late in the spring of 1979, and therefore for that period—or for those seven quarters—was entitled to over $10,000. At the start of the hearing this was changed to admit she had, instead, again during that same period, earned over $8,000. The amendment, in writing, set out exactly $1,305.90 as having been earned during both the fourth quarter of 1978 and the first quar-

[1] Actually, the material effect of this ruling in my final decision is very minor. As to one of the four women, Ulrike Ledoux, the parties have agreed by stipulation just how much her correct net backpay is. As to two others, Donna D'Agostino and Alice Sabourin, the record shows that each of them withdrew from the labor market in northeast United States, with the result that their backpay period in all probability ended as early as 1978. There remains only Tina Cotnoir, the fourth woman, whose net backpay is lessened by about 1 week. If the General Counsel desires to dispute the Company's lawyer's assertion that the four letters involved were in fact sent out as on their face appears, he can move to reopen the record to litigate that issue.

ter of 1979. But next to each of those figures—related to each of those quarters—appeared the statement: "Willful loss of earnings." How could a Board specification say the discriminatee was guilty of having willfully refused to work and at the same time have earned so much money? What this means is that in part the overall specifications in this case is guesswork, speculation, or pure fantasy. While it is true, as has been said, that in these proceedings "any uncertainty is resolved against the wrongdoer whose conduct made certainty impossible" (*Fibreboard Paper Products Corp.*, 180 NLRB 142 (1970)), it does not mean the offending employer may be subjected to the imagination of the Board's compliance officer. I stress this matter here because two of the six women moved out of Massachusetts—"residence" included, according to the specification—to Florida and refused the General Counsel's invitation to come to the hearing to answer questions about any backpay claim they may have. If the written specification cannot be relied on as to how much a woman earned in Massachusetts, can it be used against the Employer on the subject of how much the two now Floridians earned after going away? In the circumstances, I will rely on the figures that are not contradicted by counsel for the Respondent and on the oral testimony. Discharged on July 9, 1977, Cotnoir first found a job in August, the next month. She said she applied at three nursing homes, "restaurants, different stores, different mills." I do not think that her testimony that she did not look in the local newspapers for other nursing home ads suffices to hold she did not make a reasonable search during that period. As there is no dispute either about her gross backpay—$1,257.00—during the third quarter of 1977, or her interim earnings at Woonsocket Polishing Co. that same quarter of 1977—$512.90—I find her net backpay was $744.10 for that first period.

Cotnoir continued steadily at work at the Woonsocket Polishing Company until September 1, 1978, when she quit because she became pregnant and could not work.

The Respondent does not dispute the correctness of the figures as to her gross backpay for the next four quarters—1977, IV; 1978, I; 1978, II; and 1978, III—$5,608.43. For the third quarter of 1978 gross backpay is limited to 9 weeks, instead of the original 13 claimed. This because the lady said she was unable to work after September 1. There also is no dispute that during that four-quarter period she earned $4,618.71. I therefore find that Cotnoir's net backpay for those four quarters amounts of $989.72.

The confusion continues. With the lady now admittedly falling in the category of "willful loss" beginning at September 1, 1978, the next question is: On what date can it be said she again became entitled to any backpay because of her original unlawful discharge? Her baby was born on April 1, 1979, and, as she testified, she was unable to work for 3 more weeks because she had to take care of the child. She again started to work on May 8, 1979. Here, a place called Narragansett Knitting, she stayed until June 14, 1979, when she again voluntarily quit because she had to stay home to care for the child. At Narragansett Knitting she earned a total of $649.60; at least this is the figure in the last amendment to the specification on that particular point. Originally the stipulation said she earned only $464 at Narragansett Knitting. In its final position with respect to this quarter, the specification says she would have worked weeks with the Respondent, during that quarter, and would have earned $1,449.74. On the record now before me, I do not understand how the General Counsel arrives at this gross backpay amount. The lady said she first started to look for work again on April 22 and quit on June 14 because she could not continue to work. But April 22 to June 14 spans only 7-1/2 weeks at best, and not 10 weeks. Counsel for the Respondent does not get into this question because in his brief he contends Cotnoir is entitled to nothing at all after September 1, 1978, when she first entered upon the willful loss status. I find no merit in that blanket contention. Merely because a woman cannot work for a while because she has a baby is not reason to hold, as a matter of law in this proceeding, that she thereafter removed herself permanently from the labor market. Indeed, at times like these the assumption would do violence to reality.

Still, the facts of record—that is, the more reliable facts shown by sworn testimony—cannot be ignored. Cotnoir testified that beginning on April 22 she started to look for work. "I went back to the stores and places around where I live." She also recalled having applied at "Bancroft, Sargent's Diner . . . Bakery . . . ." She went several times to the Narragansett Knitting Company until they took her. I see no reason for denying her the gross earnings she would have had from April 22, when she started her search for work, until May 8, when she found it.

Accordingly, on this entire record, I find that for the second quarter of 1979—April 1 to June 30—her gross backpay period is 7-1/2 weeks, April 22 to June 14, which at $146.65 per week comes to $1,099.87. As her interim earnings were $649, I find her backpay for 1979, II, is $450.87.

We come to the last two quarters involved in Cotnoir's story—July 1 to December 31, 1979. After having quit on June 14 from Narragansett Knitting because she had no one to take care of her baby, she started work again at Woonsocket Polishing, but just when this record does not show. On September 27 she left Woonsocket Polishing and went back again to Narragansett Knitting. The reinstatement date with Respondent is said to have been November 5.

Again, a constant changing of figures for these two quarters—first saying Cotnoir earned $812 at Woonsocket Polishing during 1979, III, and an amendment later, without explanation, lowering this to $763.50. As to Cotnoir's later employment at Narragansett Knitting, the specification first says she earned $487.20 there, and then, by amendment, drops it to $448. Her gross backpay for 1979, IV, is first said to be $784.37. The lady then testified she was out sick from October 16 through 29. With this, a further amendment reduced the gross backpay figure to $455.52.

As stated above, Cotnoir was sent a letter dated October 27, 1979, asking her to return to work on October 30. I therefore make her cutoff date October 30. As she

admittedly was unable to work starting on October 16, it means at most her backpay period for 1979, IV, becomes 2-1/2 weeks; at $150.85 per week this is $377.15. As she had interim earnings of $448 in that quarter, there is no net backpay due her for her last period.

The third quarter of 1979 presents another problem on this record. When can it be said she again began a reasonable search for work after leaving Narragansett Knitting on June 14 because, her mother-in-law having gone to Texas, there was no one at home days to look after her baby? On the evidence before me it is simply not possible to say with precision.

When an employer argues, as does the Respondent in this case, that whenever a dischargee voluntarily quits one job, albeit in the early part of a 2-year long make-whole period, she is forever thereafter precluded from claiming any more money from the employer, it goes too far. The reasons why the lady leaves one job—a matter of personal choice or to adjust to forces beyond her control—have a bearing upon the question. It is one thing for the dischargee to prefer another part of the country for its more desirable social ambience, climate, freedom from local income tax burdens, etc., but it is something else again to leave work for a while to have a baby, or to care for the child, or because of illness. These reasons fall in the normal experience of all working people, whether illegally discharged or not.

But while this is true, and Cotnoir therefore had a right to leave Narragansett Knitting on June 14 without prejudice to any later make-whole rights to her benefit, it does not mean there can be an assumption she started to look for work elsewhere right away, or on July 1, when the next quarter started, or on any particular day thereafter. For the least the General Counsel is required, in such a situation, to establish exactly on what day she again began a reasonable search for work, or started on another job. Instead, the specification says the lady's gross backpay for the third quarter of 1979 was $1,960.92—exactly 13 weeks at $150.84 per week. There is no probative evidence on this record that Cotnoir was back in the regular labor market on July 1.

At one point in her testimony she said she started at Woonsocket Polishing on September 27. This had to be wrong, because the specification says she earned $763.50 there before the end of September. The General Counsel just said on the record that Cotnoir started at Woonsocket Polishing on August 6 instead. Again, how do I know that to be a fact? It is not set out in the specifications. Cotnoir also testified she did look for work before going to Woonsocket Polishing but only for night work, so her husband, who worked days, could look after the baby. She also said she limited her search to walking distance from her home because she had no car of her own. The Respondent's health center, where she had worked before, is 4 miles away from where she lives. Cotnoir also said she did not look at any of the newspaper want ads.

Rational decision can only rest on the facts shown. On her new job Cotnoir was paid $2.90 an hour. I will assume she did the usual 40 hours a week as she had done with the Respondent, and earned $116 per week. For the $763.50 she was paid before the end of September, it follows she worked 6-1/2 weeks. Had she worked for the Respondent instead, where the pay was $150.84 per week, she would have earned, as gross backpay, $980.46 for those 6-1/2 weeks. I find that her net backpay for the third quarter of 1979 amounts to $216.96. Where all the record shows in a backpay proceeding is that the dischargee for her own convenience quit a job, the burden does not shift right away to the employer to prove affirmatively that she did not start making a reasonable search for work within the next 2 weeks, or even 2 months. The employee herself having chosen to go into the category of "willful loss," it is the duty of the General Counsel to come forth with something credible to show when she went back to work, or when she started to try to go back to work.

Accordingly, I find that Cotnoir's net backpay is as follows:

1977—III	$744.10
1977—IV and 1978—I, II, and III	989.72
1978—IV and 1979—I	0
1979—II	450.87
1979—III	216.96
1979—IV	0

Paula Suffoletto

Suffoletto was discharged on June 6, 1977, and offered adequate reinstatement on October 29, 1979. As to where she worked during the backpay period, and what she earned at those places, there is no dispute. Early in September 1977 she started work at Hopkins Health Center, as a part-time nurses aide, just as she had worked 9 months for the Respondent. After about a year there, she changed for a better paying job at a restaurant, 30 miles away from her home. Because of dangerous driving conditions from that location—she used to finish work at 1 a.m. and later—she left the restaurant in January 1979 and started looking for another job. After several interviews she started on a new job with the city of Woonsocket on March 2. When that work ended because the program she participated in was terminated, she found another job, where she remained until the end of her backpay period.

The Respondent raises two issues with respect to Suffoletto. It says she is entitled to nothing at all before the day she started with the Hopkins Nursing Home in September 1977 because she made no reasonable search for work before that time. It also says her backpay period should be cut off entirely in January 1979 because she quit the restaurant job without just cause. Holding in abeyance for the moment the first issue, I find no merit in the second contention advanced.

Suffoletto credibly testified that "two or three times . . . too close for comfort," she was "almost run off the road" at night while driving the necessary 50 minutes to reach her home from the restaurant. "I felt that working at this place wasn't worth getting myself hurt and that is the reason I quit Gregory's." From a woman who had been earning only between $400 and $600 every 3 months for almost a year and who then chose to travel 30 miles each way to earn $1,149 in one 3-month

period—greatly to the advantage of the Respondent in this proceeding—such testimony about looking after her physical well being ought not be taken lightly. I find the Respondent has not proved affirmatively that from the moment Suffoletto started at the Hopkins Nursing Home in September 1977 she either failed to make a reasonable search for work or willfully rejected work opportunities without just cause.

As to what happened between the date of her discharge until she first went to work at the Hopkins Nursing Home in September, a very questionable situation is presented. Can it be said affirmatively, on this record, that she really did not make a reasonable search for work? Again, decision must rest on undisputed facts plus her testimony. It is a fact, as the Respondent's exhibits show, that at that time there were many newspaper ads in the general area—many, of course, quite distant from Woonsocket—for nurses aides. The Hopkins Health Center, where she did go to work in September, is 18 miles from her home. Suffoletto testified that during June, July, and August she did see the newspaper ads but did not answer any of them throughout those 3 months. All she did affirmatively during that period was register with the United States Employment Service (USES) and receive unemployment benefits. She made application to the Hopkins Health Center only a week before they hired her. Suffoletto also stated flatly that she sought work nowhere during the entire months of June and July.

Close as this question of Suffoletto's search or no search for work then may be, I think it must be resolved in favor of the Respondent's position in the light of the lady's final statement at the hearing. "I didn't feel that it was necessary that just because I worked at Woonsocket Health Center as an aide that I must necessarily stay in this profession. . . . Prior to Woonsocket Health Center, I never worked as a nurses aide . . . and I didn't feel that it was necessary that I solely seek employment in the nurse care field." If it can be said that a backpay claimant must lower his sights when he cannot find a job on as high a level as the one he unjustly lost, certainly it can be said she may not limit her search to a more prestigous job than the one she had to give up.

Suffoletto was entitled to a period of adjustment after being fired. I will therefore deduct from her gross backpay whatever she would have earned from about July 6, a month after her discharge, to the first week in September, when she decided to go to Hopkins Health Center—a period of 8 weeks. As, according to the specifications, she would have been earning $69.30 a week with the Respondent, $554.40 will be deducted from her overall gross backpay.

Aside from these questions, there is no other factual issue raised with respect to Suffoletto. In the specifications her net backpay is set out as $5,401.95. Subtracting $554.40 it becomes $4,847.55. Accordingly, I find her net backpay now is $4,847.55.

Anita Calascibetta

The story about this lady presents the other side of the coin as to where the burden lies with respect to the relevant facts. When an employer commits an unfair labor practice by discharging a woman 60 years old, it runs the risk that she may not be able to find another job as easily as a younger person in her heyday. Calascibetta was fired on September 26, 1978, and only started work again the following May. For a month she was assured by a Board investigator that she would be recalled by the Respondent because the facts showed she had been illegally dismissed. Nothing happening, in late October she registered with the "unemployment," or "to job placement . . . you're required to give your name, your address, and what kind of work you're looking for," as she testified. She also placed her name "two or three times" with a nursing service that provides nursing help, called Homemakers. She also listed several nursing homes where she applied directly during 1978—Friendly, Holiday, and Blackstone Nursing homes. At one of these places, where she was asked to fill out a written application, one question was why had she left her prior employment. When she wrote down she had been fired for union activity, she was refused the job for that reason. The lady said she had similar experiences elsewhere, and I have no reason not to believe her.

In support of its contention that Calascibetta did not make a reasonable search for work, the Respondent relies on a great number of ads appearing during that period in newspapers throughout the greater Providence area. Most of the many nursing homes mentioned are located outside of the city of Woonsocket, some at considerable distances. The Respondent also points to the lady's admission she limited her search to places close to her home. Considering the realities of the position in which Calascibetta found herself then, I do not think the Respondent's defense position is persuasive. To start with, Calascibetta left her earlier employment to go to work for the Respondent for the very reason that it was close to her home—about 1-1/2 miles away. She had a car which was then functioning. Given her age, this is understandable. She went on to testify that, with the coming of the winter season, her car froze and she had no money to repair it with until the spring. She was not accustomed to riding public buses any great distances and was afraid to start doing that now—so that all the nursing homes located in distant municipalities have nothing to do with this case.

In May 1979 she did find work as a private nurse, at $115 a week.[2] Five weeks later the private patient died and she started to look for work anew. Again it took her 3 months, and then, through some other source, she obtained a replacement job, as a nurses aide, through a large company. There she earned more during the fourth quarter of 1979 than she would have earned with the Respondent.

If ever a case fit the Board's longstanding and very "pertinent rule of law in all backpay proceedings, this is it. "[I]n a backpay proceeding the burden is upon the

[2] As originally issued, the General Counsel's specifications said that at this private nursing job Calascibetta earned $150 during the second quarter and $45 during the third quarter of 1979. I have no idea where those numbers came from. After the lady had testified that she had earned exactly $115 a week for 5 weeks, the General Counsel amended the stipulation to conform precisely with her testimony!

General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963). Moreover, "any uncertainty is resolved against the wrongdoer whose conduct made uncertainty possible." *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5th Cir. 1966). The lady was fearful of going too far from her home in the winter snow of Massachusetts. But the Employer should have known that when it chose to fire her without just cause.

I find, in keeping with the figures appearing in the final specifications, that Calascibetta is entitled to $5,747.31 in net backpay for the entire period applicable to her.

Donna D'Agostino and Alice Sabourin

There is a paucity of information on the critical facts insofar as both D'Agostino and Sabourin are concerned. Discharged on July 9 and 2, 1977, respectively, each was offered adequate reinstatement on November 12, 1979, at the latest. Sometime in late 1978 or early 1979 both of them changed their residences, moving from Massachusetts to Florida to live. The General Counsel asked them to come to Woonsocket for this hearing but they refused. The Second Circuit once said: "Information relative to whether the discriminatees willfully incurred a loss of earnings is within the knowledge of the discriminatees, not the employer." *N.L.R.B.* v. *Mastro Plastics Corporation*, 354 F.2d 170, 177 (1965). With D'Agostino and Sabourin so far away, there is very little on this record to support any significant factual findings, either as to how much they in fact earned in the interim, or why they suffered loss of earnings.

There are a few other facts, conceded by the parties during the hearing or indicated by uncontested clear statements appearing in the specifications. Insofar as the Respondent was informed, D'Agostino did not file for unemployment benefits with the USES and she earned no money at all between the day of her discharge until some day during the second quarter of 1978, i.e., between July 9, 1977, and June 30, 1978. Sabourin did no work at all until November 8, 1977, and for the next year earned just about as much as she would have earned with the Respondent. When she quit that job, where they wanted to keep her on, she told that employer her reason was to go away to Florida. Among other things, the General Counsel asks that the Respondent be ordered to pay Sabourin $835.68 for expenses she suffered to move her "residence" to Florida!

All things considered, I make no findings on this record about any backpay award to the benefit of either of these two women—payable either into their hands or into the hands of the Regional Director for safekeeping. In his originally issued specifications the General Counsel said D'Agostino had had no interim earnings at all throughout her entire 2-year backpay period, and therefore had over $12,000 coming to her. During the hearing he changed this, and listed various amounts she earned during five quarters beginning in April 1978 and ending in June 1979. Repeating, on the record, the specification entries indicating no earnings at all during the earlier three quarters, he kept saying that those were correct to the extent "that we have" information. This was the General Counsel admitting his own information was uncertain, not really reliable. But if a respondent in these proceedings is to be deemed presumptively bound by whatever is written in the specifications, the Board agent who writes them must at least "know" what the facts are. If he is unsure, and if the claimant moves 1,400 miles away and does not care enough about the whole proceeding to appear and assert her own right, there is simply no way of "knowing," and therefore making factual findings, about what happened. When to this is added the further facts, not disputed, that each of these women earned nothing at all for 5 or 6 months after leaving the Respondent, and quit their jobs in Woonsocket in order to move to Florida, the uncertainty about the whole picture is most obvious.

That the picture portrayed in the specifications as to these two women cannot be relied on is further indicated by the continuously changing assertions by the General Counsel in many other respects already mentioned above. One last indication of the vagaries running throughout the specifications will suffice. When testimony was being received from employee Cotnoir, and she admitted having voluntarily quit a job on September 1, 1978, attention was called to the specification entries saying she had had interim earnings of $1,606.93 and $1,743.04 during the next two quarters. The General Counsel's explanation of this oddity follows:

> JUDGE RICCI: Now, continue with me on what's in this specification. Still looking at the third quarter of 1978 which started on July 1. You tell me, Mr. General Counsel. What is that specification intended to specify? On what day did she quit?
>
> MR. GALLAUDET: September 1, 1978.
>
> JUDGE RICCI: Am I to read it as meaning that for the months of July and August, she earned $1,305?
>
> MR. GALLAUDET: No, not that much. She earned something less than that.
>
> JUDGE RICCI: Well, how do I read the specification. How does the company know how much she has coming if the specification does not say it?
>
> MR. GALLAUDET: She worked less than that. We raised the amount based upon what she would have earned had she not quit.
>
> JUDGE RICCI: In other words, under your interim earnings, this item is not true. Correct? She did not earn $1,305 during that third quarter of 1978? Right?
>
> MR. GALLAUDET: She didn't earn precisely that. What we have to do is estimate what she would have earned if she had . . . .
>
> JUDGE RICCI: But is interim earnings in the specification intended to mean what a woman would have earned but did not earn?
>
> MR. GALLAUDET: Correct.

If D'Agostino or Sabourin have an interest in pursuing their claim for backpay in this proceeding, they may

within a year of this date communicate with the Board's Regional Office, which will then issue a correct specification and arrange for a reopened hearing.

On the basis of the foregoing findings of fact, conclusions of Law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, there is hereby issued the following recommended:

SUPPLEMENTAL ORDER[3]

The Respondent, Woonsocket Health Centre, Woonsocket, Rhode Island, its officers, agents, successors, and assigns, shall pay to each of the employees found above to be entitled to backpay awards the amounts set opposite their names in this Decision, with interest. *Florida Steel Corporation*, 231 NLRB 651 (1977).

[3] 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.