

Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J.V.) and Mac Westmoreland and Millard Dale Cook

Laborers' International Union of North America, AFL-CIO; and Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO and Alvin Stewart and Millard Dale Cook and Tom Mitchell. Cases 16-CB-1258, 16-CB-1416, 16-CB-1260-3, 16-CB-1260-4, and 16-CB-1285

26 October 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 21 February 1980 the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding¹ finding, inter alia, that Respondent Local 38 violated Section 8(b)(2) of the Act by unlawfully causing the discharge of employee Mac Westmoreland and violated Section 8(b)(1)(A) of the Act by discriminatorily refusing to refer Local 38 members Millard Dale Cook, Tom Mitchell, Alvin Stewart, and Westmoreland for work; and that Respondent Laborers' International Union, through the conduct of Local 38's business manager during its trusteeship over that Local, similarly violated Section 8(b)(1)(A) of the Act by refusing to refer Mitchell and Stewart for work. The Board ordered that the discriminatees be made whole for any loss of earnings they suffered by reason of the discrimination practiced against them. On 13 November 1981 the United States Court of Appeals for the District of Columbia entered its judgment² enforcing the Board's Order.

A dispute having arisen over the amount of backpay due the discriminatees and pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 16, a hearing thereafter was held before Administrative Law Judge Richard J. Linton for the purpose of determining the amount of backpay due the discriminatees. On 10 June 1983 the judge issued the attached supplemental decision in this proceeding. Thereafter, the Respondents filed exceptions and a supporting brief.

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

¹ 247 NLRB 1250.

² *Laborers Local 38 v. NLRB*, 673 F.2d 552.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,³ and conclusions of the and to adopt the recommended Order.⁴

ORDER

The National Labor Relations Board adopts as the recommended Order of the administrative law judge and orders that the Respondents, Laborers' International Union of North America, AFL-CIO; and Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Order.

³ The Respondents have requested oral argument. Their request is denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

⁴ The Respondents have 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 the findings.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This backpay proceeding was heard before me in Fort Worth, Texas, on February 22-25, 1983, pursuant to the November 9, 1982, backpay specification issued by the General Counsel of the National Relations Board through the Regional Director for Region 16 of the Board.

On February 21, 1980, the Board issued its Decision and Order¹ directing Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Respondent Local 38), and Laborers' International Union of North America, AFL-CIO (Respondent International), inter alia, to make whole, with interest, Mac Westmoreland, M. Dale Cook, Alvin Stewart, and Tom Mitchell.² On November 13, 1981, the United States Court of Appeals for the District of Columbia Circuit entered its judgment enforcing in full the Board's Order.³

When the parties could not agree on the amount of backpay due the Charging Parties, the Regional Director for Region 16 of the Board issued the backpay specification alleging the amounts of backpay due under the Board's Order. The Respondents filed an answer, a first amended answer, and a second amended answer denying certain material allegations.

¹ 247 NLRB 1250.

² The International is jointly and severally liable only as to Stewart and Mitchell.

³ The court's per curiam Order is reported at 673 F.2d 552 (D.C. Cir. 1981).

Upon the entire record, including the briefs submitted on behalf of the General Counsel, the Respondents, and Charging Party Westmoreland, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. INTRODUCTION TO PRIMARY ISSUES

One of the principal issues concerns the gross backpay formula. Paragraph 1 of the backpay specification alleges:

The quarterly gross backpay of discriminatees Cook, Stewart and Westmoreland is the product of the annual hours worked by each discriminatee, the last full calendar year worked prior to discrimination, divided into calendar quarters multiplied by the wage rate each of the discriminatees would have received.

The Respondents' basic position is set forth in their first amended answer (answer, hereinafter) of February 1, 1983, in which they admit the correctness of the foregoing gross backpay formula.⁴ Although the formula is admitted, the parties dispute certain standards to be applied under the formula. More specifically, the parties dispute the factor for number of hours worked during the comparison year, and, in the cases of Millard Dale Cook and Alvin Stewart, there is a further issue whether the appropriate hours should include those of a steward.

On this latter point the Respondents contend that the representative hours utilized in the backpay specification for Millard Dale Cook and Alvin Stewart are distorted because they include the hours of stewards. Stewards, it is argued, work more hours than an ordinary laborer and, consequently, earn more. Since they would have not have been stewards during the backpay period, the representative hours shown in the backpay specification are inflated and therefore improper. The backpay specification does not take into consideration⁵ that Cook was a

⁴ In an all-party prehearing conference call conducted on February 16, 1983, and at the beginning of the hearing, I denied the General Counsel's motion that the Respondents be precluded from introducing evidence controverting the allegations of the backpay specification on the grounds that its original answer of December 3, 1982, in denying the allegations of the backpay specification, failed to "specifically state the basis of his disagreement, setting forth his position as to the applicable premises and furnishing the appropriate supporting figures" as required by Sec. 102.54(b) of the Board's Rules and Regulations. Counsel for the General Counsel renews that motion in his brief. I reaffirm my ruling. By explaining that their delay in furnishing the detailed information was because they had to obtain the underlying data from other sources, the Respondents "adequately explained" their failure to deny with specifics. It therefore would be inappropriate to preclude them, under Sec. 104.54(c) of the Board's Rules, from amending their original answer and offering evidence controverting the backpay specification. To the extent that the General Counsel argues that a respondent's position is locked in by its original answer, and that any deficiencies cannot be cured in an amended answer, I reject such contention.

⁵ Compliance Officer Billy Gibson testified that the hours used in the backpay specification as the average hours of the discriminatees made no allowance (deduction) for the possibility that some of such hours were earned because the discriminatee was a steward.

steward during all of 1976, his representative year, yet he admittedly served as a steward the entire year. Similarly, Alvin Stewart concedes that he served as a steward 50 percent of his representative year, 1975. The General Counsel does not address the steward factor in his brief.

Mitchell's formula is addressed separately in paragraph 2 of the backpay specification as:

The quarterly gross backpay of Mitchell is the product of the average annual hours as reported by Mitchell for the years 1971, 1972, 1973, 1974 and 1975 divided into calendar quarters multiplied by the wage rate he would have received.

The Respondents deny the allegation regarding Mitchell and argue that he should be included in the formula for the other three discriminatees.

Paragraph 3 of the backpay specification alleges that a multiplier factor should be applied, as follows:

Quarter hours have been multiplied by a factor of 1.167 to adjust the straight time hours to overtime hours based on the industry practice of six ten hour days with time and a half for hours over eight in one day and hours over 40 in one week.

The Respondents deny the foregoing allegation and contend that there is no fixed industry practice as described because the requirements of each job determine the number of hours worked.

In addition to the foregoing areas of dispute, there are various points of contention pertaining to the individual cases. They are treated below.

II. APPLICABLE LEGAL PRINCIPLES

A. *The Gross Backpay Formula*

As stated in *Kansas Refined Helium Co.*, 252 NLRB 1156, 1158 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982), citations and footnotes omitted:

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed . . . and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct Once that has been established, "the burden is upon the employer to establish facts which would . . . mitigate that liability" It is further well established that any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances In *Bagel Bakers Council of Greater New York, et al. v. N.L.R.B.*, 555 F.2d 304 (2d Cir. 1977), the court, in granting the Board's petition for enforcement of a backpay order, stated:

In framing a remedy, the Board has wide discretion, subject to limited judicial scrutiny. We can reverse only if we find that the method chosen was so irrational as to amount to an abuse

of discretion. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 . . . (1964). . . .

A back pay award is only an approximation, necessitated by the employer's wrongful conduct. In any case, there may be several equally valid methods of computation, each yielding a somewhat different result The fact that the Board necessarily chose to proceed by one method rather than another hardly makes out a case of abuse of discretion.

Thus, it is seen that the Board is vested with broad discretion in selecting a backpay formula appropriate to the circumstances of a particular case. Where awards may be only close approximations, the Board may adopt formulas reasonably designed to produce such approximations. . . .

Another well-established principle is that, where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer In *United Aircraft Corporation*, 204 NLRB 1068 (1973), the Board stated that "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved.

B. Willful Loss of Earnings

In *Highview, Inc.*, 250 NLRB 549 (1980), the Board, through Administrative Law Judge Norman Zankel, restated the applicable legal test as follows at 550-551, citations omitted:

The applicable legal principles were correctly restated by Administrative Law Judge Shapiro in his Board-approved decision in *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646 (1976), as follows:

An employer may mitigate his backpay liability by showing that a discriminatee "wilfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment" . . . but this is an affirmative defense and the burden is upon the employer to prove the necessary fact The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or a low interim earning; rather the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable assertion in this regard, not the highest standards of diligence". . . . Success is not the measure of the sufficiency of the discriminatees' search for interim employment; the law "only requires an honest good faith effort." . . . And in determining the reasonableness of this effort, the employee's skill and qualifications, his age, and the labor

conditions in the area are factors to be considered. . . .

The Board confirmed the validity of these principles by adopting the decision of Administrative Law Judge Robert M. Schwarzbart in *Sioux Falls Stock Yards Company*, 236 NLRB 543 (1978). In determining whether an individual claimant has made a reasonable search for employment, the test is whether the record as a whole establishes that the employee had diligently sought other employment during the entire backpay period. . . .

It is also well established that any uncertainty in the evidence is to be resolved against Respondent as the wrongdoer. . . .

C. Expenses and Interim Earnings

Over the General Counsel's hearing objections as to relevance, the Respondents were permitted to elicit testimony from several witnesses concerning board and lodging expenses in relation to the backpay calculation. The Board recently reiterated in *Central Freight Lines*, 266 NLRB 182 (1983), that expenses in seeking interim employment are deductible from interim earnings. The Respondents argue that, by analogy, they are entitled to an offset representing the expenses the discriminatees did not incur because they were not referred.

As the record reflects, the job referrals made by Local 38 are rarely for an employee's hometown. Employees must travel sometimes hundreds of miles to work at the jobsites because Local 38's geographical jurisdiction covers the entire State of Texas plus all of New Mexico from Interstate Highway 40 south. Some share motel rooms and frequently eat sparingly in order to reduce expenses. Others live in the trailers they bring.

The pipeliners deduct such travel expenses (lodging, food, and transportation) as employee business expenses in preparing their Federal income tax returns. Compliance Officer Gibson testified that he did not take these expenses into account in computing either backpay or net interim earnings.

The Respondents argue that the gross backpay should be reduced by such expenses or else the discriminatees, rather than being made whole, would make a profit.⁶ To the General Counsel's response at the hearing that a similar deduction should therefore be made from interim earnings, the Respondents countered that the backpay specification failed to allege any such deductions. Although in their briefs the General Counsel (pp. 15-16) and the Respondents (pp. 12-15) expand upon their positions, the General Counsel cites no case authority to support his generalized argument that backpay should not be reduced by such travel expense.

There is no need to summarize all the evidence on this point because the Respondents have misperceived the applicable law by relying on *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), to argue that operating expenses here, as there, should be deducted. The Board in

⁶ The story would be different, of course, for any pipeliner who, rather than maintaining a home base, lived in a mobile home which he drove from job to job.

Golden State, as affirmed by the Supreme Court, utilized net profits of independent contractors merely as a method of determining what the discriminatees there would have earned had they remained and been converted to independent contractors. The Respondents here, unlike the employer in *Golden State*, did not convert employee jobs into independent contractor positions. At all times here, the positions the discriminatees would have held through referrals by the Respondents would have been positions conferring the status of employees. *Golden State* therefore is inapplicable.

Although the cases frequently speak of restoring the economic status the discriminatees would have enjoyed absent the illegal discrimination they suffered, that broad language is subject to misunderstanding. For example, a discriminatee is not entitled to be reimbursed because he loses his home, automobile, tools, or other personal possessions in a distress sale during the interim period, for capital losses are not recoverable in a compliance proceeding.⁷ No doubt this rule prevails because the statute itself, specifically Section 10(c), allows for recovery only of "back pay."

The Board has long held that personal or domestic economies resulting from the discrimination do not redound to the respondent's benefit. *Myerstown Hosiery Mills*, 99 NLRB 630, 632 (1952) (child care expenses discriminatee did not incur during the interim period may not be used as an offset against backpay due). And more in point, the Board has held that a respondent is not entitled to reduce the gross backpay by the amount of extra transportation expenses a discriminatee would have incurred by traveling to the respondent's plant had the employee not been discriminated against. *East Texas Steel Castings Co.*, 116 NLRB 1336, 1341-43 (1956), *enfd.* 255 F.2d 284 (5th Cir. 1958). Rather, the discriminatee may deduct his expenses in seeking and maintaining interim employment only to the extent that such expenses exceed the expenses he would have incurred absent the discrimination, *id.* at 1341-42, and only as a deduction from interim earnings.⁸ *Central Freight Lines*, 266 NLRB 182 (1983).

In light of the foregoing, as the backpay specification contains no claim for interim expenses, I reject the Respondent's contention that it is entitled to a credit, against any backpay found to be due, for whatever expenses the discriminatees saved by virtue of not traveling to jobs during the interim period.

III. THE EVIDENCE

A. Introduction and Resolution of Average Hours and Multiplier Issues

As his only witness, the General Counsel called Billy M. Gibson, the compliance officer for Region 16 of the Board. Under direct and cross-examination, Gibson explained how he arrived at the formulas, hours, rates, and

⁷ See the Board's Casehandling Manual (Part 3), Compliance Proceedings, sec. 10610.

⁸ Thus, a discriminatee who incurs big expenses in an unsuccessful search for interim work during a particular quarter is unable to recover any of those costs where he has no interim earnings during that quarter. Sec. 10610 of the Board's Compliance Manual, above.

dollar amounts set forth in the 17-page backpay specification. His testimony covers some 116 pages of the transcript. Gibson's demeanor impressed me, and I credit him completely. Following Gibson's testimony, the General Counsel rested, as did the Charging Parties.

The Respondents called the other 14 witnesses who testified, including the 4 discriminatees.

The Respondents contend that the backpay specification erroneously utilizes the annual hours of the discriminatees for their representative years rather than the average hours of a pipeliner. That is, the Respondents argue that the hours worked by all pipeliners during the backpay period should be averaged, and multiplied by the relevant number of hours, weeks, or months in order to arrive at the appropriate gross backpay figure. In support of this argument, the Respondents offered their exhibit 21 which lists nearly 700 members of Local 38 and the hours each worked for the years 1977 through 1981. A figure is given at the end of the exhibit for the average hours worked during each year by all the pipeliners. The figures were compiled and extracted from the Laborers National Pension Fund reports. Neither the pension reports nor the exhibit identifies which laborers served as stewards.

Compliance Officer Gibson testified that in calculating the benchmark hours he chose the year preceding discrimination and, utilizing the Laborers National Pension Fund reports, he selected the hours reported there for reach of the discriminatees except for Mitchell. In Mitchell's case Gibson utilized actual check stubs Mitchell possessed to ascertain the hours. After applying the multiplier factor, Gibson projected the hours and earnings over the backpay figure to arrive at the figures shown in the backpay specification.

I reject the Respondent's contention in this respect. Aside from the fact that Gibson's choice has a rational basis, it is apparent that the average of all pipeliners would be distorted by the figures of many who worked but a few hours during the interim period. It is unlikely that the reduction factor of so many of these laborers would be offset by any higher number of hours for a few stewards. In any event, a great deal of speculation would be required. Gibson chose the more appropriate formula.

Testimony concerning the multiplier factor is conflicting. Compliance Officer Gibson testified that he based the multiplier factor on what he was told by the discriminatees as corroborated by letters in evidence, which he received from two pipeline contractors. Discriminatee Tom Mitchell testified that he has been a pipeliner for 36 years, and that a majority of the workweeks consist of six (days) tens (hours per day),⁹ although he did work 2 or 3 weeks of six nines and some seven tens. Mitchell explained that the weather, of course, could determine how many hours the crews actually worked.

The record reflects that Compliance Officer Gibson had a rational basis for selecting and applying the multiplier factor, and I so find.

Discriminatee Millard Dale Cook testified that he began work as a pipeliner in 1973 and that he worked on

⁹ That is, a workweek consisting of 60 hours.

jobs as a steward. He testified that he was not aware of any standard of less than six tens.

Several of the Respondents' witnesses, including Business Manager David Solly and Business Agent Lyle Arnett, testified that there was no standard workweek in the industry and that the workweeks vary from job to job and extend from five eights (40 hours) to seven tens (70 hours).

While the industry practice doubtlessly has examples of shifts differing from six tens, I do not credit the Respondents' witnesses in their testimony that there is not a normal standard for the industry of six tens. That there is such a normal standard, and I find that there is, does not mean that there will be no variations for the normal, or usual, practice. Nor does the fact that weather conditions sometimes interrupt activities so that 60 hours are not worked does not mean that 60 hours were not contemplated or scheduled.

B. Cook, Stewart, and Westmoreland

1. Millard Dale Cook; resolution of the steward factor

In the underlying case Administrative Law Judge Marion C. Ladwig found, as adopted by the Board, that on April 3, 1978, Respondent Local 38 violated the Act when Business Manager David Solly pistol-whipped Dale Cook. "I therefore find that as a consequence of Solly's attack on Cook on April 3, 1978, Cook was prevented from further seeking job referrals and was thereafter deprived of pipeline employment through job referrals from the local." 247 NLRB at 1257. Paragraph 10, A of the backpay specification alleges that Cook's backpay period began April 3, 1978, and ended March 15, 1982.

In their brief the Respondents contend that, although the backpay formula, set out earlier herein, is based on the hours worked "the last full calendar year" prior to the discrimination, the backpay specification erroneously measures Cook's backpay by basing calculations on hours worked in 1976 rather than 1977.

Compliance Officer Gibson testified that he used the year 1976 for Cook because there was evidence of discrimination against Cook in 1977, but that it could not be alleged or found illegal because it was barred by Section 10(b) of the Act. Gibson therefore used the year 1976 "in which there was no evidence of discrimination and used that as an average and projected it through the backpay calculations." This accords with the procedure set forth at section 10562 of the Board's Casehandling Manual (Part 3), Compliance Proceedings:

10562 Effect of Unfair Labor Practice on Gross Backpay Computation: Often, immediately preceding the occurrence of an unfair labor practice, there will be a certain amount of turmoil and disturbance in a plant which has an adverse effect on the earnings and hours of employees. Where this is the case, such earnings and hours must not be used in computing averages on which gross backpay will be based.

If such abnormal conditions occur after the unfair labor practice and are fairly attributable to the plant

turmoil related to the unfair labor practice or organizational activities or other temporary influence, it is proper, in computing the gross backpay, to ignore actual earnings, hours, jobs, etc., during such time and project to the period a normal set of data from a close (in time) untroubled period.¹

¹ E.g., *Hill Transportation Co.*, 102 NLRB 1015, 1021.

In light of the foregoing quotation, and all the circumstances, it is immaterial that there was no finding in the underlying case of discrimination against Cook in 1977. 247 NLRB 1250 fn. 3, 1262. Clearly 1977 was, at the very least, a year of "turmoil and disturbance," and the Respondents have not shown why the General Counsel should be precluded from using the year 1976 as the representative year in Cook's case. As the year 1976 was shown by Gibson to be a rational selection, I find that it is appropriately used as a basis for calculating Cook's backpay.

The next formula factors to consider after the representative year are the hours. The backpay specification alleges that Cook worked 2,873 hours in 1976 based on reports to the Laborers National Pension Fund. After applying the multiplier figure, the backpay specification alleges a quarterly adjusted figure of 848.2 hours per quarter as a "laborer" at \$5.905 per hour.

There is no dispute that Cook served as a steward during all of 1976. That is, he worked as a laborer but also served Local 38 in the capacity as a job steward. The record reflects that a steward frequently has the opportunity to work more hours than the other laborers. This result derives from the fact that when the steward's regular crew finished work for the day another crew, perhaps performing a different function on the job, may work several more hours. It therefore is theoretically possible for a steward to work several more hours a week because the steward has the option to work the extra hours with the other crew.

The Respondents argue that the gross backpay formula is excessive in that it does not take into consideration the steward factor. As Local 38 ceased referring Cook as a steward, his backpay must be based on a laborer's hours for there was no allegation in the underlying case that Local 38 violated the Act by not referring Cook as a steward.

The record evidence falls short of clearly establishing the amount of the steward factor. Cook did not testify concerning the extra hours, if any, he worked as a steward. Although Louis Alvin Stewart, who also had been a steward, testified at one point that he probably worked an extra 12 hours a week by virtue of a being a steward, he also testified that over the course of a year he received only a few hours more because the contractors sought to hold the workweek to 60 hours. I do not credit Solly and other witnesses of the Respondents that stewards work many more hours.

As the record supports the conclusion that Stewart did work somewhat more hours than laborers, if not from extra hours per day then from the privilege of being the first hired and the last laid off, I find that a steward factor is appropriate. While a precise figure is not possi-

ble to ascertain on this record, it appears that a figure of 10 percent is a reasonable approximation, and I so find. Accordingly, I shall reduce Cook's gross backpay by 10 percent and recalculate the balance.

Turning now to the defense the Respondents assert regarding Cook, we see that they generally fall into two categories. First, Cook admittedly would not have accepted referrals from Local 38 after his beating by Business manager Solly, and, secondly, his reported income during the interim period has gaps with no adequate explanation or supporting records.

As for the first ground, it is sufficient to note that the finding in the underlying case that "as a consequence of Solly's attack on Cook on April 3, 1978, Cook was prevented from further seeking job referrals and was thereafter deprived of pipeline employment through job referrals from the local." 247 NLRB at 257. Cook testified before me that it was fear of a further beating by Solly which has caused him to be unwilling to accept referrals by Local 38. Indeed, Cook credibly testified that International Vice President R. P. "Bud" Vinall told him that he would not guarantee Cook that he would not be beaten again. I note that at all times since May 1, 1977, David Solly has remained as Local 38's business manager. In light of the foregoing, I reject the Respondent's first ground.

Respecting the Respondents' second argument pertaining to gaps in Cook's record and memory concerning interim earnings, the record reflects that Cook attempted to earn a living by selling used cards as self-employment. He testified that he turned over all his records, including those showing any profits, to the "tax lady."

The backpay specification reflects that Cook had no interim earnings during 1978, that during 1979 he earned \$101.72 per quarter, and that he had no earnings in either 1980 or 1981. From August 1981 to the end of the backpay period on March 15, 1982, Cook, as the backpay specification states, was out of the labor market because of illness.

I find that Local 38 has failed to carry its burden of showing that Cook had earnings different from those shown in the backpay specification for the interim period.

As earlier noted, I shall recalculate Cook's backpay by reducing the gross backpay by the 10-percent steward factor.

2. Louis Alvin Stewart

As the Board found in the underlying case, the Respondents discriminatorily refused to refer Louis Alvin Stewart subsequent to November 30, 1976. 247 NLRB at 1251. Stewart also was included among the objects of threats by Business Manager David Solly. The backpay specification sets 1975 as the representative year for Stewart. It alleges that the backpay period for Stewart opens November 30, 1976, and closes March 15, 1982. In footnote 6 of the underlying Decision, the Board stated, "Whether Stewart or Mitchell mitigated their loss of pay or to what extent they were available for work is, of course, a matter that must be ascertained at the compliance stage of the proceedings."

One of the Respondent's first defenses respecting Stewart is based on a letter he wrote March 20, 1977, to International Vice President Vinall. The letter is referred to by Judge Ladwig in the underlying case, 247 NLRB at 1261, and was received in evidence there as Respondents' Exhibit 3. In the absence of the General Counsel's furnishing a copy of that letter-exhibit for our use here,¹⁰ the Respondents offered secondary evidence of what Stewart told Vinall in the letter. Based on Judge Ladwig's brief description of the letter, and the testimony of Stewart herein in which he acknowledged the description in the transcript of certain lines of his testimony in the first case, it seems clear that Stewart told Vinall that Solly had "threatened my life throughout the pipelines." Stewart would not accept a job referral from Local 38 without assurance that he would be protected from being beaten to death.¹¹ Stewart was one of Solly's political opponents within Local 38.

The former case establishes that Business Manager Solly would, and did, resort to acts of violence against his political opponents. I therefore find that Stewart's refusal on March 20, 1977, and thereafter to make himself available for job referrals by Local 38, where David Solly was and is the business manager, does not constitute a basis for terminating or reducing the Respondent's backpay liability.

As Judge Ladwig found, Stewart did request in July 1977 that his name be placed on the out-of-work list. Because of discriminatory conduct by Local 38, Stewart was denied referral on August 25, 1977, to a good job for Cap-Con. 247 NLRB at 1262.

The backpay specification reflects that Stewart worked for several employers during the backpay period and at times earned substantial amounts of money in his efforts to mitigate his losses. He credibly testified that during the times he was out of work he was always looking for work. This is not contradicted by the fact that for about a week and a half he accepted lower than union scale while driving a truck for a friend, nor by his helping his contractor father without pay during part of 1977 when Stewart was out of work.¹²

Stewart's Federal tax return for 1977 is in evidence as Respondents' Exhibit 24. Two W-2 forms are attached, one from Kelley-Coppedge, Inc., for \$3,337.50 and the other from Clyde Construction Company for \$1,215.50 for a total of \$4,553. Yet his form 1040 reflects total wages of \$5,475.44, showing that he earned an additional \$922.44 for some employer(s). He credibly testified before me that it was Smithy Truck Lines (owned or operated by a friend) for whom he drove in 1977, and that although no W-2 form was attached to his return for that

¹⁰ R. Exh. 26 was reserved for the document on the basis that counsel for the General Counsel would seek to obtain a copy of the letter from the record in the underlying case. Such copy has not been provided.

¹¹ As part of the background, I take note of the September 29, 1976, incident, outside the 10(b) period by less than 2 months, described by Judge Ladwig, in which Solly threatened to kill Stewart and would have thrown Stewart over the railing of the stairs of a motel but for the fact that Stewart saved himself by "holding a grip around Solly's neck and the metal railing." 247 NLRB at 1255.

¹² There is no basis in the record for the Respondents' contention in their brief that Stewart "lied about working for his father."

employer, the earnings have "got to be" reflected on the tax return.¹³

In their brief, the Respondents assert that Stewart "should be denied backpay because he lied about driving a truck and earning money until confronted with the transcript of the prior proceeding." This is a reference to Stewart's driving for Smithy Truck Lines. It is unclear on what basis the Respondents assert that Stewart "lied." At one point Stewart stated that he could not recall driving a truck in 1977, but he immediately corrected this to say that he did drive a truck then but could not recall how much he earned. The testimony then went to his tax return for 1977 and the lack of a W-2 form from the trucking company. While the Respondents' counsel appeared at the hearing not to be aware that the attached W-2 forms did not come to the total wages shown on Stewart's form 1040, no basis is given by the Respondents for asserting in their brief that Stewart *lied* on this matter. To the contrary, I find that Stewart appeared to be a truthful and honest witness who testified in good faith to the best of his ability on this and all other matters.¹⁴

The other points raised by the Respondents are equally lacking merit. One of these, however, deserves further comment. On December 13, 1977, the Respondents and the attorney for at least some of the discriminatees "stipulated" that on Saturday, November 19, 1977, attorney Robert Gritta, on behalf of the discriminatees, at page 2587 of the underlying transcript, had accepted attorney Menaker's offer on behalf of the Respondents to place the discriminatees on the out-of-work list.

Before me the General Counsel objected to the Respondents raising the matter on the grounds that they are precluded by the Board's decision finding that it would be futile for Charging Party Westmoreland to have sought referral through the Local. Elaborating on his position, the General Counsel contended that, in effect, any referrals would have been made in bad faith,¹⁵ and that the underlying decision so establishes that fact until, in effect, the Respondents indicated their willingness to comply with the court's judgment. The General Counsel's position appears correct, and I reject the Respondents' arguments pertaining to any attempt by Local 38 to offer job referrals to the discriminatees during the back-

¹³ By his unopposed motion dated March 4, 1983, the General Counsel moves that a posthearing letter, dated February 26, 1983, from Stewart to Compliance Officer Gibson be received in evidence. The letter essentially reaffirms Stewart's testimony on the point. In the absence of objection by the Respondents, I grant the motion. I have marked the entire document, being the 2-page motion and the 3-paragraph letter, as G.C. Exh. 7, and hereby receive it in evidence and physically insert it in the exhibit folder.

¹⁴ This includes my finding that he credibly testified that he lost money when, during part of 1977, he was self-employed as a car dealer. The Respondents, in their brief, assert that Stewart *lied* on his 1977 tax return "about being a car dealer and did not report the amounts of money earned for such car business." Yet the tax return clearly shows a \$1,713.92 loss by Stewart in the operation of "Century Motors & Detail," just as Stewart testified that he thought the return included the information. Respondents' unsupported assertions that Stewart *lied* are inappropriate.

¹⁵ Meaning, apparently, that the offer would have been to a highly undesirable job, such as wrapping pipe with hot dope, or to one several hundreds of miles away. In fact, one evening Solly, as we shall see, offered Westmoreland a job 800 to 900 miles distant in New Mexico on the condition that he be there the next morning.

pay period, especially during the years tainted by discrimination.

In conclusion, I shall recommend that the Respondents be ordered to pay Stewart and the appropriate funds the amounts set forth in the backpay specification, as reduced by one half of the 10-percent steward factor.¹⁶

3. Mac Westmoreland

Mac Westmoreland's backpay period spans the time of May 3, 1977, to March 15, 1982. The first point of contention relates to factors in the gross backpay formula. The Respondents contend that the General Counsel has erred by alleging 1975 as the representative year rather than 1976. For his part, Westmoreland vigorously contends that his representative hours should be based on those of a steward, not merely a laborer, since Local 38 caused him to be discharged while a steward.

Westmoreland's contention is unpersuasive. As Judge Ladwig observed in the earlier case, the General Counsel did not allege Local 38's removal of Westmoreland as steward to be a violation of the Act. 247 NLRB at 1257. His removal from the steward position was an event separate and distinct from his discharge. I therefore reject Westmoreland's contention.

Turning now to the Respondents' argument, we see that paragraph 4 of the backpay specification alleges Westmoreland's representative year to be 1975. His hours for that year, based on reports to the Laborers National Pension Fund, are 1721. The quarter hours are 430.25 with an increase to 502.1 when adjusted by the multiplier factor. It is undisputed that Westmoreland's 1976 hours, shown by the pension fund reports (R. Exhs. 3 and 13) were 794. The Respondents contend that the General Counsel has erred by not following his gross backpay formula, set forth in paragraph 1 of the backpay specification, which is based on "the last full calendar year worked prior to discrimination."

When asked why he used 1975 rather than 1976 as the base year for Westmoreland, Compliance Officer Gibson testified:

Because there was evidence, as I read my reading of the record, that discrimination was occurring in that period of time, although there was no finding in the case of the backpay period until 1977; therefore the year immediately preceding does not provide a relevant backpay period and would not truly represent what the employees would have been referred to absent the overall discrimination. That was my reason for selecting that period as opposed to the other period.

And again:

I think I testified to that previously. Based on my analysis of the underlying case involving the one we are presently receiving testimony, it appeared that a discrimination had occurred prior to the time that the actual backpay period commenced, and if I

¹⁶ Stewart testified that he served as a steward for about 50 percent of 1975.

were to take the period immediately after the year with approximately 1,700 hours in it, that would not have been a fair measure of the backpay because, based on my knowledge of his underlying record, that would not have been a representative year.

It is clear that Gibson's testimonial reference to "discrimination" in 1976 was to events outside the 10(b) period. These events, as covered by Judge Ladwig, related to internal union politics dating at least as early as March 1, 1976. Thus, at 247 NLRB 1261 Judge Ladwig quotes from internal union charges filed by discriminatee Stewart in which Stewart accuses Solly of committing a series of acts injurious to best interests of Local 38 "between March 1, 1976 through September 30, 1976." Solly first became acting business manager on May 25, 1976, and previous to that he had been a business agent for the Local making "some of the job referrals." 247 NLRB at 1254, 1257.

While it is true that Westmoreland is not specifically described in the earlier decision as experiencing Solly's disfavor before 1977, it is clear that 1976 was a tainted year by virtue of the various incidents involving threats of retaliations by Solly, and actual violence by him (against Stewart on September 29, 1976, at a motel). In such circumstances it appears that the General Counsel, through Compliance Officer Gibson, made a rational choice in selecting 1975 alone rather than either combining 1975 and 1976 to obtain an average, or in selecting 1976 alone. I therefore reject the Respondents' contention respecting this point.

The Respondents contend that Westmoreland should be denied backpay because he declined referrals by Local 38 in September and October 1977, and because of the "stipulation" at the earlier hearing that the discriminatees would be placed on the out-of-work list around November 1977. Such contentions have no merit in view of the Board's underlying decision. As argued by the General Counsel here, until Local 38 mailed copies of the notice to each member of the Local in compliance with the court's judgment, it would have been futile for the discriminatees to have obtained good-faith referrals.¹⁷

Indeed, as Westmoreland points out in his brief, when he did ask in September 1980 to be placed on the out-of-work list the response he received from Solly was predictable. Solly first called Westmoreland to confirm that he was serious. Two nights later, around 9 p.m., Solly reached Westmoreland by telephone at the latter's home in Mena, Arkansas, and advised him to be on the job at 7 a.m., the following morning, in New Mexico.¹⁸ West-

¹⁷ Compliance Officer Gibson testified that this was not accomplished or completed until March 15, 1982, the date he chose to terminate the backpay period.

¹⁸ In his own testimony Solly admitted that the job probably was one for Majestic Wiley in Farmington, New Mexico. As a map reveals, the distance from Mena, Arkansas, to Farmington, New Mexico, is about 900 miles if not more. In light of Solly's unfavorable demeanor on the stand, I specifically do not credit his testimony that he told Westmoreland he would call the contractor and let him know that Westmoreland was en route so that Westmoreland would have a job if he got there by the afternoon. Earlier, Solly admitted that he told Westmoreland to be there by 7 a.m., and he later stated that he told Westmoreland that if he did not arrive at a "reasonable" time the job would probably be filled. In short,

moreland told Solly that it was impossible for him to make the trip by 7 a.m. Solly then inquired several times if Westmoreland wanted his name removed from the out-of-work list, and each time Westmoreland responded no. Solly never called again. I find that Solly tendered the job, not as a good-faith referral, but as an attempt to dash Westmoreland's interest and desire for working through Local 38. By so acting, Solly graphically demonstrated why the General Counsel's argument herein is valid—until Local 38 entered into compliance with the judgment of the court of appeals, its conduct would be discriminatorily motivated.

The Respondents next contend that (1) Westmoreland removed himself from the labor market in 1977, particularly in the May to August time frame, and that (2) no backpay is due after Westmoreland found substantially equivalent employment with Goodner Brothers Tractor Company in the first quarter of 1978.

The removal-from-labor market point (an argument of willful failure to mitigate damages) refers initially to 1977 but also to the final months of the backpay period which began in the third quarter of 1980. During both of these time frames Westmoreland was self-employed. Westmoreland acknowledged his 1977 testimony that during the 3- to 4-month period of May to August 1977 he worked on family cars and that either he could not say whether he was looking for work or he was not looking for work. Before me Westmoreland credibly testified that he was looking for work in August 1977, that he thought he was drawing unemployment benefits at the time, that he recalled two specific locations where he inquired for work, including Goodner Brothers Tractor (where he ultimately secured employment), and that he is sure he sought work at other places "but I just can't recall at this time every specific place I checked." Although he had no "interviews" for employment during 1977, the backpay specification reflects that he earned \$255.21 during the second quarter of 1977, and \$306.25 during each of the final two quarters while "self employed." This self-employment was not satisfactorily clarified at the hearing, for the earnings obviously came from something other than working on his family automobiles.

Although Westmoreland's attempts during 1977 to mitigate his losses do not involve a high degree of diligence, they do appear to pass the threshold of acceptability. Thus, it must be assumed that he registered for employment with the Arkansas State Employment Office in order to be eligible for unemployment benefits. He sought work at a few locations on his own, ultimately securing employment beginning in 1978 at Goodner Brothers Tractor Company, and he earned a total of \$867.71 through his own self-employment. I find that he did not incur a willful loss of earnings during any part of 1977.

As for the Respondents' final point, that Westmoreland found substantially equivalent employment in 1978 at Goodner Brothers Tractor Company, that argument is without merit. At all times after he began such employ-

Solly was sending Westmoreland on something akin to a snipe hunt in which Westmoreland would travel some 900 miles only, in all likelihood, to discover on arrival that he was holding an empty bag rather than a good-faith referral.

ment, Westmoreland's interim earnings, as shown in paragraph 13,D of the backpay specification, fall short of the money he would have earned absent his unlawful discharge.

Before passing from Westmoreland, we must consider his contention that his interim earnings from self-employment during and after the third quarter of 1980 were overstated in the backpay specification because the Federal tax returns he submitted during the compliance investigation contained his wife's earnings and the backpay specification figures were based on such joint income. On brief, as at the hearing, Westmoreland submits a recalculation of the corresponding entries in the backpay specification and concludes that such recalculation would reduce his interim earnings by \$7,129.50.¹⁹ Neither the General Counsel nor the Respondents addressed this specific in their briefs, although at the hearing the Respondents objected at numerous points, and the General Counsel took the position that the burden establishing any different figures falls on the Respondents and Westmoreland.

The only evidence supporting Westmoreland is his own testimony concerning part of the affected period plus a copy of his Federal tax return for 1980 (C.P.W. Exh. 4) and a schedule E computation of Social Security Self-Employment Tax, from his 1981 Federal tax return (C.P.W. Exh. 1). Interpreting his tax return, Westmoreland testified that he earned \$33 from his self-employment in the last two quarters of 1980, or \$16.50 a quarter, and schedule SE (C.P.W. Exh. 2) so reflects. For some reason that \$33 is not carried forward to page one of form 1040, for only his wife's self-employment income of \$3,624 is there shown.

Westmoreland further testified that his net earnings in 1981 from self-employment were \$475, or \$118.75 per quarter, and that is the sum put forward in Westmoreland's brief. In fact, however, the tax form schedule SE for 1981 (C.P.W. Exh. 1) shows a \$475 loss, not a gain. The complete 1981 tax return is not in evidence.

The 1982 figure of \$99 is based on the representation of Westmoreland's counsel as he sought to describe how Compliance Officer Gibson had explained to him the method of converting an annual sum into a quarterly figure. As I pointed out at the hearing, that representation is not evidence.

In view of the rather confusing and incomplete evidence on this point, I reject Westmoreland's contention requesting that I find that his interim earnings should be different from those shown in the backpay specification. Westmoreland contends that his backpay period should not terminate on March 15, 1982, because he has received no offer of reinstatement at any time since that date. I also reject that contention.

¹⁹ At the hearing I denied Westmoreland's motion to amend the backpay specification itself in this regard on the basis that only the General Counsel can amend the backpay specification, but I ruled that a charging party could offer different figures under the formula alleged in the backpay specification. The figure of \$7,129.50 apparently is based on calculations incorrectly incorporating Westmoreland's earnings of \$880 at Wagner Body & Repair in the third quarter of 1980. The correct total would be \$6,857.50.

Accordingly, I shall recommend that Westmoreland be paid the amount set forth in the backpay specification, as shown in my Order below.

4. Tom Mitchell

a. *The gross backpay formula*

Tom Mitchell's backpay period began January 13, 1977, and ends March 15, 1982. It is alleged in paragraph 11,B of the backpay specification, and denied by the Respondents, that Mitchell "specialized as a 'powderman, blaster or shooter' and was employed in that specialty 90% of the time." The backpay specification further alleges that such specialty received a premium pay.

As previously noted, the backpay specification computes Mitchell's quarterly average of hours by combining the 5-year period of 1971 through 1975. The quarterly average, after applying the multiplier factor, equals 530.53 adjusted hours.

The Respondents' first objection to the backpay formula is that there is no adequate explanation as to why several years should be averaged and, secondly, no reason is shown why 1976 was not utilized, "except perhaps as a way of coming up with a greater number of hours than Mr. Mitchell is truly entitled to." (R. br. 3) Had 1976 alone been utilized, and disregarding the multiplier factor, the calendar year hours of 766 would equate to 191.5 hours per quarter, substantially less than that shown in the backpay specification.

Compliance Officer Gibson testified that the reason he used a 5-year average for Mitchell arose from the fact that the Respondents had raised a question concerning whether Mitchell had sustained a leg injury around the beginning of the backpay period. On checking with Mitchell, Gibson ascertained that the injury had been sustained years earlier. Gibson further testified:

He—based on Mr. Mitchell's statement to me that he had had the injury for a substantial period of time, I determined that in his particular instance it would be more appropriate rather than using one year to use a longer period of time as a base; therefore, had he missed work as a result of that injury, it would show up in the averages for the backpay calculations; if he had not missed work during that period of time when the average would be equitable—as an equitable average.

And again:

That basically is the backpay formula that I developed. That is the backpay formula that I have used, and these are the rationales for the use of that backpay formula. I of course felt that it was an equitable formula, that it was fair to the discriminatees, to the union and to the public, because I do in fact represent all those as opposed to just one particular group.

Gibson was not asked why he did not include 1976 in the average. However, when the Respondents asked him if he agreed that the discrimination occurred in 1977,

Gibson replied, "We have agreed that the backpay commences in 1977."

I interpret Gibson's response as implying that he skipped 1976 for the same reason that he did in Westmoreland's case—that fact that 1976 was *tainted* with threats of discrimination and violence, outright violence, and the illegal refusal to refer Charging Party Stewart on and after November 30, 1976, by Acting Business Manager David Solly.

Mitchell, it is seen on reading the underlying decision, was prominent in opposition to Solly during 1976. In October 1976, outside the 10(b) period, Solly was overheard stating that he could send Mitchell "on small jobs" where he "could not make expenses" so as to induce him to drop out of Local 38. 247 NLRB at 1258, 1259. A month earlier Mitchell was in the group at the motel when Solly, after attempting to throw Stewart over a railing, point blank told Mitchell, "I'll kill you all three." 247 NLRB at 1258.

That no 1976 acts regarding Mitchell were alleged or found to be unlawful (because the 10(b) cutoff date was November 23, 1976) does not mean that Compliance Officer Gibson's refusal to include 1976 in a 5- or 6-year average vitiates the backpay specification formula as to Mitchell. Gibson has shown a rational basis for selecting the particular 5-year span. It is immaterial that he possibly could have included 1976. And Gibson's deletion of 1976 from the representative group appears to have been more rational than including it. In any event, the General Counsel may choose one formula from several equally available methods of computations. *Highview, Inc.*, 250 NLRB 549, 550 (1980). I therefore reject the Respondents' objections to the General Counsel's gross backpay formula for Mitchell.

b. *The Respondents' defenses*

1. Introduction

The Respondents' defenses regarding Mitchell generally are: (1) his physical condition restricted his availability to very few types of jobs and most of those were not within 200 miles of Mitchell's Midland, Texas, home where Mitchell said he needed to be; (2) he quit certain jobs; and (3) he declined certain jobs.

2. Mitchell's background and physical condition

Age 66 when he appeared before me, Mitchell had been a pipeliner for 36 years. Mitchell explained that as a result of an industrial accident in 1952²⁰ he sustained a severe injury to his left leg, left knee, and particularly to his left ankle. Surgery was performed and pins were inserted. The doctor told him that if he ever broke the ankle again the joint would be left stiff.²¹ As a result of the precarious condition of his ankle, Mitchell avoided jobs which would require him to climb in and around

²⁰ For which he received a 40-percent permanent disability rating on his left ankle in a workers' compensation proceeding.

²¹ In 1973 the same leg, but apparently not the ankle, was reinjured when he was hit by a vehicle while he was walking a picket line (247 NLRB at 1260).

deep ditches or to walk through mud,²² and sought jobs on relatively level ground, without the heavy brush or timber which is found in east Texas.

On November 13, 1961, Mitchell sustained head injuries when the panel truck transporting him and 14 other employees of McVean and Barlow was involved in an accident. Mitchell's injuries included damage to his sinus cavities. He still takes medicine for the sinus problems he has experienced since 1961. As a result of the sinus problems, Mitchell has found it necessary to avoid any territory with a humid climate. As long as he remains in a area with low humidity, such as west Texas and New Mexico, he experiences no difficulty. It will be recalled that the territorial jurisdiction of Local 38 is the entire State of Texas plus the southern half of New Mexico.

Mitchell testified that by 1970 his trade was that of a shooter. As he testified:

Q. You didn't want to do the other work. You wanted to be a shooter.

A. Because that was my trade, just like you are a lawyer, Mr. Menaker. When you started out maybe downhill on the bottom as a municipal lawyer, you worked your way up. I started out pipelining as a laborer, and I had worked my way up to a shooter, and that is what I wanted to do.

To be more precise, Mitchell actually is a powderman. A powderman possesses a greater skill than that of a shooter. Mitchell explained, however, that Local 38 makes no distinction between the two. He testified that a powderman has the skill to analyze a job and determine how much dynamite will be required to shoot a ditch out of rock. A shooter ordinarily only installs certain "delays," applies to the blasting cap, and ignites the blast. A powderman can do both jobs, but a shooter does not necessarily have the skill and experience to perform the work of a powderman. Only one or the other, not both, will be on a job at any one time, however.

Mitchell credibly testified that he explained all this background to the officials of Local 38 and the International in Dallas, Texas, in July 1970 before he joined Local 38 the following month. Local 38 was delighted to receive Mitchell and his skills in membership because the Laborers had just obtained shooter work formerly under the jurisdiction of the Operating Engineers, and they needed experienced shooters. On that basis Mitchell joined Local 38.

From the time he joined through 1975, every one of the jobs Mitchell worked was as a shooter; every one of the jobs was in west Texas or New Mexico; all of the approximately 22 jobs, except 2 short ones, were on referrals from Local 38; and he averaged working about 50 percent of the time. Mitchell explained that the work of a powderman or a shooter portion of a job averages about a month. As the record reflects, some shooters may elect to remain on a job and work as a laborer on the different crews.

²² He would be unable to ascertain what ground condition might be under the mud. He credibly testified that even when it rains there is very little mud in west Texas.

Although Mitchell agreed that most of the jobs in west Texas are nonunion, Judge Ladwig wrote in the underlying case that (247 NLRB at 1260):

Mitchell had been a member since 1970 and was an asset to the local because of his skill in doing the dangerous work of driller, loader, and shooter (using dynamite). He was also one of the few skilled M-scope operators in the local, and he lived in West Texas where the local was attempting to obtain more of the pipeline work. [Emphasis added.]

Although Business Manager Solly testified that there supposedly were only 7 to 10 or so shooter jobs Local 38 was able to make referrals to in the period 1977 to 1980 in west Texas, I do not credit him. Solly's demeanor was such that I do not believe him. I therefore find that the existence of shooter jobs prevailed in at least the same average quantity in west Texas and New Mexico as existed during the 1971-1975 period when Mitchell, as shown in paragraph 4 of the backpay specification, worked 8,183 hours before adjustment for the overtime factor.²³ The Respondents presented no evidence showing why the number of such jobs did not increase since, as Judge Ladwig found, the Respondents were seeking to capture more of the pipeline work in the west Texas and New Mexico area.

The Respondents gave no explanation of why the time frame ends with 1980. I note from the General Counsel's offer of proof that a new referral procedure assertedly was adopted in 1980 by Local 38 in which employees are referred from categories A, B, or C. Category A must be exhausted before anyone in category B is called. Those in category A must have worked (on referral?) at least 1500 hours the previous calendar year. That condition precedent would have eliminated Mitchell, although his annual average for 1971-1975 was 1636.60 hours.

The Respondents seek to make much of the fact that in 1979 Mitchell developed phlebitis in his left leg, and that the situation became worse in October 1979 when his right leg also developed the condition.²⁴ Mitchell therefore wrote a letter (R. Exh. 17), dated December 30, 1980,²⁵ to Local 38 reading as follows (minor spelling errors corrected):

Enclosed is a check (#6400) for \$42.00, for dues, January 19, 1981, through June 1981.

Please place my name on the out of work list as a Shooter, Driller and Loader.

²³ The 8183 hours, the backpay specification reflects, were taken from actual payroll check stubs rather than from the pension fund report as in the case of the other discriminatees. Mitchell even brought the stubs to the hearing, but Respondents did not examine him concerning the stubs.

²⁴ Mitchell testified that the condition developed after he had to do a lot of walking while serving as an M-scope operator working for Great Plains Construction Company in 1978. Solly explained that an M-scope is a device used to detect underground pipes. As we shall see, Mitchell worked as the M-scope operator because Local 38 refused to refer him for the shooter's job.

²⁵ At one point Mitchell testified that he wrote the letter in late 1979. However, he identified the letter and confirmed that he forwarded his dues for 1981 with the message. Yet the stamped date receipt which shows "RECEIVED JAN 6, 1980" is consistent with a composition of December 30, 1979.

Do not call me for a job that is much over two (2) hundred miles from my home, as I have severe phlebitis problems in both of my legs, and have to be reasonably close to home if I have a recurrence of this problem, to where I have to stay in bed with my legs elevated.

Nevertheless, while Mitchell could perform the same work as before, he confirmed at the hearing that he did, by his letter of December 30, 1980, place a distance restriction on jobs he would take. This was so he could return home to elevate his legs if the phlebitis problem flared up. The record does not show to what extent, if any, this 200-mile limitation restricted his employment opportunities. The Respondents offered no evidence that Mitchell turned down any shooter jobs in the west Texas-New Mexico area during 1981 to March 15, 1982.

On the other hand Mitchell concedes that he quit a shooter's job with Majestic Wiley in March 1981 after working about 5 days. It is the only job he ever quit. And he did so because it involved doing work that ordinarily was not shooter's work which caused one of his legs to swell, apparently because of the phlebitis. Richard Hartness, Majestic Wiley's field superintendent for that Seminole to San Saba, Texas project (in west Texas), confirmed that Mitchell left because of the phlebitis problem. The shooting work, Hartness testified, lasted about 30 more days. He further testified, under cross-examination by counsel for the General Counsel, that to his knowledge Mitchell did no manual labor on the job.²⁶ Further reference to this Seminole, Texas project of Majestic Wiley is made below in the section discussing the defense that Mitchell quit jobs.

Insofar as this particular defense is concerned, I find that the Respondents have not shown that Mitchell's physical condition, including the phlebitis, caused him to decline any work of the type he performed during the 1971-1975 representative period.

3. The defense that Mitchell quit certain jobs

The Respondents contend that Mitchell voluntarily quit a shooter job for McVean and Barlow in February 1977, and one for Charles Wright Co. in August 1977, and a shooter position with Majestic Wiley Contractors in March 1981. As Mitchell credibly explained, he was laid off the McVean and Barlow job when the blasting work was completed. He obtained the position with the Charles Wright Company on a prearranged understanding that the job for Mitchell was only temporary until the firm's regular shooter returned to work. Thus, the Respondents' allegations regarding these two jobs are baseless.

Mitchell admits that he quit the Majestic Wiley job, the only job he ever quit. But he quit because he was given work to do which would not ordinarily have been the work of a shooter. This caused one of his legs to swell from the phlebitis, which in turn forced him to quit. The Respondents did not elicit a description of the

²⁶ Mitchell was not asked to explain his earlier testimony that the swelling resulted from work other than normal shooter's. There is no evidence in the record otherwise describing such other work.

specific work Mitchell made reference to. Richard Hartness, the field superintendent for Majestic Wiley, testified on cross-examination by counsel for the General Counsel that to his knowledge Mitchell did not perform any manual labor or any work other than that of a shooter on that job. However, Hartness did not testify that he observed all the work Mitchell did, and Mitchell credibly testified that he did perform some work outside the normal work of a shooter. Of course, any doubt on ambiguous matters is resolved against the Respondents as the wrongdoers. In light of the foregoing, I find that the Respondents failed to show that Mitchell willfully failed in his duty to mitigate his losses regarding the Majestic Wiley job. I further find that this entire ground of defense is without any merit. *United Aircraft Corp.*, 204 NLRB 1068, 1078 (1973).

4. The defense that Mitchell declined jobs

The Respondents' evidence on this subject concerns potential job referrals by the Respondents during 1977, a tainted year,²⁷ for I have determined that the Board's decision in the underlying case is *res judicata* on this subject. Thus, it already has been established that the Respondents sought to discriminate against Mitchell during the backpay period.²⁸ In light of that established fact, the Respondents are precluded from seeking to show that they attempted during such period to make good-faith job referrals. The matter has been litigated and decided.

Although the Board did observe, at footnote 6 of its decision, that whether Mitchell mitigated his loss of pay and to what extent he was available for work are matters to be determined at the compliance stage, I interpret that to refer to Mitchell's efforts and availability in relation to the labor market other than his relationship with the Respondents. That is, the Respondents were free to show that Mitchell did not on his own seek work from employers, that he turned down jobs offered directly to him by employers, or that he was unavailable to work because, for example, he was physically incapacitated during all or part of the backpay period.

Other than Mitchell's physical condition, including his phlebitis problems, all of which has been discussed earli-

²⁷ Indeed, most of the examples were testified to in the underlying case, and the Respondents, over the General Counsel's persistent objections, went through the procedure in the instant hearing of making reference to the specific pages of the earlier transcript. Although that procedure was physically appropriate, the effort is unavailing because the Respondents are precluded from relitigating those matters here.

²⁸ For example, in the instant proceeding the Respondents asked Mitchell about his turning down a referral to a job in Quitman, Texas, in 1977. Yet Judge Ladwig discussed this referral (to a short job some 600 miles from Mitchell's home in Midland, Texas). 247 NLRB at 1260. It is clear that the Quitman job referral was an example of what the Board referred to in its language, 247 NLRB at 1250:

In addition, on a number of occasions Solly threatened to manipulate the Local's hiring hall and out-of-work list in order to retaliate against his political opponents, and on a number of occasions Solly in fact engaged in such manipulations to retaliate against his political opponents and to force them out of the Local. Thus, at various times during Solly's tenures as acting business manager and as business manager he discriminatorily referred to undesirable jobs employees that he perceived to be his political opponents in the Local, and on other occasions he discriminatorily refused to refer such employees to any jobs.

er, the Respondents failed to adduce any evidence that Mitchell failed to look for work or that he declined job offers from employers for shooter (or any other) jobs. Accordingly, I find this defense of Respondent's to have no merit.

Before passing to another subject, it should be noted that the Respondents make two contentions regarding two jobs, Natco and Cap-Con, discussed in the underlying case. The Board adopted Judge Ladwig's findings on the matter, and found that in 1977 the Respondents failed to refer Mitchell to jobs for Natco, Inc., and Cap-Con International, Inc. in east Texas. 247 NLRB at 1259-61, 1263. The Respondents argue here that they should be relieved of any backpay liability for these jobs because Mitchell has shown that he would not have worked in east Texas in any event. The Respondents overlook the fact that their liability for those two jobs has been judicially determined against them, and the subject is not open for redetermination here.

Finally, the Respondents contend that the hours shown in the backpay specification for the Natco and Cap-Con jobs are excessive. The Respondents offered evidence, based on lists showing the hours worked by each laborer on the job, as reported to the pension fund (R. Exhs. 22, 23). The problem with the lists is that they include a significant number of laborers who worked only a few hours on the jobs. While there is no guarantee that Mitchell would have worked the entire time specified in the backpay specification, there is no evidence that he would not have done so, and any doubt in the matter is resolved against the Respondents—the wrongdoers whose discrimination is responsible for the situation. I therefore reject the Respondents' final contention as to Mitchell.

IV. DIVISION OF LIABILITY

Under the Board's order in the underlying case, the only financial liability of the International is its joint and several liability with Local 38 as to Louis Alvin Stewart and Tom Mitchell, and then only to May 1, 1977, when the International's trusteeship of Local 38 ended.²⁹ Aside from its joint liability with the International, Local 38 is separately liable to all four discriminatees for all backpay found to be due.

Under these special circumstances, and in view of the fact that the Local is liable for the full amount in any

²⁹ The trusteeship was imposed in October 1976. Stewart's backpay period begins November 30, 1976, and ends March 15, 1982. Mitchell's begins January 13, 1977, and ends March 15, 1982.

As the backpay specification fails to show a breakout of the limited amount of backpay owed by the International, I directed the General Counsel, at the close of the hearing, to include that information in his brief. Such brief did not contain that information. By letter dated May 3, 1983, with copies to all counsel, I requested the General Counsel to forward these separate figures. His response is dated May 26, 1983. Because the amounts set forth in the backpay specification are shown by quarters and not by months, it is not possible on this record to ascertain the International's liability for the month of April 1977, which falls in the second quarter of the year. The General Counsel suggests that the calculations be deferred to the conclusion of the compliance stage following this decision, and its adoption, when the compliance officer of Region 16 will compute the interest due. Although interest can be computed later, the litigated nature of this proceeding seems to call for a specific order if at all possible.

event, and as the month of April 1977 involves relatively minor amounts of backpay and benefit payments for Mitchell and Stewart, I shall recommend to the Board that the International's liability be computed as ending with the close of the first quarter of 1977 in order that the Order here may contain specific figures.

In light of the foregoing, I compute the International's backpay liability for Stewart to be \$1,853.80 (\$1,951.37 less \$97.57 for the 5-percent steward factor), plus interest. In addition, the International must pay the contractually established benefit funds the following amounts, plus interest: welfare, \$228.07; pension, \$165.87.

I compute the International's liability for Mitchell to be as follows, plus interest: backpay, \$2,626.86; medical expense, \$496.20; welfare, \$132; and pension, \$96.

Local 38 shall be ordered to pay each discriminatee, and the benefit funds, the amounts set forth in the backpay specification, as amended, plus interest. However, application of the 10-percent steward factor to the backpay of M. Dale Cook, and a 5-percent steward factor to the backpay of Stewart, reduces their backpay by \$7,603.80 for Cook and \$3,721.03 for Stewart. Thus, the final backpay figure owed by Local 38 is \$68,434.16 for Cook and \$33,489.25 for Stewart.

On the basis of the foregoing and the entire record in this proceeding, I issue the following recommended

ORDER³⁰

The Respondents, Laborers' International Union of North America, AFL-CIO; and Pipeline Local Union

³⁰ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³¹ The figures shown for Mitchell and Stewart include the amounts shown above under the liability of Respondent International. Mitchell and Stewart, of course, are not entitled to a double payment, and the

No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO, their officers, agents, and representatives, shall make whole the employees and benefit funds set forth by payment to each, as shown below, plus interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws.

Respondent International:

| | <i>Backpay</i> | <i>Medical Expense</i> | <i>Welfare</i> | <i>Pension</i> |
|-----------------|----------------|------------------------|----------------|----------------|
| L. Alvin | | | | |
| Stewart | \$1,853.80 | -0- | \$228.07 | \$167.87 |
| Tom Mitchell... | 2,626.86 | \$496.20 | 132.00 | 96.00 |

Respondent Local 38:³¹

| | <i>Backpay</i> | <i>Medical Expense</i> | <i>Welfare</i> | <i>Pension</i> |
|-----------------|----------------|------------------------|----------------|----------------|
| M. Dale Cook .. | \$68,434.16 | \$1,996.58 | \$2,790.46 | \$2,817.98 |
| Tom Mitchell... | 81,637.37 | 1,440.60 | 2,851.37 | 2,679.98 |
| L. Alvin | | | | |
| Stewart | 33,489.25 | -0- | 3,794.21 | 3,596.24 |
| Mac | | | | |
| Westmore- | | | | |
| land | 34,936.43 | 3,602.30 | 2,466.84 | 2,367.86 |

actual collection procedure is a matter to be handled by the compliance officer of the General Counsel.