

Master Slack and/or Master Trouser Corp. and Hardeman Garment Corp., and Morehouse Garment Corp., and Lauderdale Garment Corp., and Lobelville Garment Corp. and Amalgamated Clothing Workers of America, AFL-CIO. Cases 26-CA-4924, 26-CA-4977, 26-CA-5013, 26-CA-5057, 26-CA-5313, 26-CA-5632, and 26-CA-5953

8 March 1984

SUPPLEMENTAL DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 4 March 1982 Administrative Law Judge Phillip P. McLeod issued the attached Supplemental Decision. Thereafter, the General Counsel and the Respondent, respectively, filed exceptions and supporting briefs. Respondent also filed an answering brief to the General Counsel's exceptions.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified below.

The Respondent has excepted, inter alia, to the judge's finding that the Respondent failed to meet its burden of proof by establishing that Leroy Lake was in high school and not seeking employment during portions of his backpay period. The record shows that before his discharge Lake worked for the Respondent on the night shift while attending school during the day. Lake admitted that he did not seek other night-time employment after being discharged by the Respondent.¹ The judge found that the Respondent offered no evidence that Lake was going to school on a year-round basis, that it was common knowledge that public schools do not operate year-round, and that there was no basis for knowing or assuming the calendar quarters the school year covered absent specific proof from the Respondent. Hence, the judge found that the Respondent failed to meet its burden of proof and he awarded backpay in accordance with the computation of the General Counsel.

The judge's imposition on the Respondent of the burden to establish the calendar quarters that Lake was in school was unwarranted. Lake's status as a student is of no consequence to the determination of reasonable job search for backpay purposes in

¹ In October 1973, the Respondent offered Lake a job on the day shift which Lake declined because he was attending high school.

the circumstances here. The gravamen here is that Lake, who was discharged from a night job, did not seek other night-time employment after his discharge. Indeed, it is clear from Lake's own testimony that he failed to make a reasonable job search during the period from his discharge through the second quarter of 1976 when he graduated from high school.² Accordingly, we will modify the judge's recommended Order by reducing Lake's backpay from \$17,056 to \$9,014 plus interest.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Master Slack and/or Master Trousers Corp., and Hardeman Garment Corp., and Morehouse Garment Corp., and Lauderdale Garment Corp., and Lobelville Garment Corp., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as modified.

Substitute for the list of specific backpay awards in the judge's recommended Order the following.

Grace Beard	\$ 262
Mose Burkley	3,512
Earlie Cheairs	4,455
Ray Davis	3,022
Peggy Peoples Harris	720
Alma Jones	13,557
Freddie Jones	2,455
Mattie Jones	1,263
Earline Lake	14,098
Leo Sain	557
Leroy Lake	9,014
Nathaniel McClellan	37,871
Gladys McGowan	28,404
Annie McKinnie	993
Doris McNeal	14,606
Percy McNeal	28,660
Ronald Moss	23,056
Wiley Murphy	38,561
Vera Norment	2,132
Juanita Phillips	6,871
Lurlene Pirtle	37,055

² The record shows that Lake obtained employment and had certain earnings in the third quarter (July, August, and September) of 1975 and 1976. The record also shows that Lake asked a friend about the possibility of a job without either approaching the employer or submitting an application. The judge found this was not an adequate job search. Otherwise, Lake's testimony reveals no job search during the period in dispute.

³ The General Counsel has excepted to the judge's failure to include in the recommended backpay order an award of \$993, plus interest, for discriminatee Annie McKinnie, as set forth in the backpay specification. The Respondent did not dispute the figure. Accordingly, we will modify the judge's recommended Order to provide backpay for Annie McKinnie.

Allan Lynn Russell	32,492
Johnny Russell	2,941
Willie Spencer	6,909
Ressie Ford Traylor	23,434
Earnest Williams	552
Patricia Williams	7,876
Margie Wilson	29,950

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PHILIP P. McLEOD, Administrative Law Judge. On July 22, 1977, the National Labor Relations Board issued a Decision and Order¹ finding that the Respondent unlawfully discharged 20 employees² in violation of Section 8(a)(3) and 8 other employees³ in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. To remedy the unfair labor practices, the Board, inter alia, directed the Respondent to make whole certain individuals⁴ for any loss of pay or any other benefits they may have suffered by reason of the discrimination against them. With regard to all other individuals, the Board ordered the Respondent to offer them "immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges" as well as to make them whole for any loss of pay or other benefits. The parties being unable to agree on the amount of backpay due under the terms of the Board's Decision and Order, the Regional Director for Region 26 issued a backpay specification dated January 7, 1981, which was amended on May 26, 1981. The Respondent filed an answer, addendum to answer, and amended answer, and, following the Regional Director's amendment to its backpay specification, a second amended answer.

A trial was held before me in Memphis, Tennessee, on June 22 and in Bolivar, Tennessee, on June 23 and 24, 1981. All parties were afforded full opportunity to call, examine, and cross-examine witnesses; to introduce evidence; to argue orally; and to submit post-trial briefs. Briefs filed by counsel for the General Counsel and the Respondent have been received and carefully considered.

On consideration of the entire record herein and on my observation of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. THE FORMER PROCEEDINGS

This case had its beginnings 9 years ago in 1973. On June 20 of that year, Amalgamated Clothing Workers of

America, AFL-CIO, herein called the Union, won an election among the Respondent's production and maintenance employees. The Respondent filed objections to the election, which were found to be without merit, and the Union was certified by the Board on January 4, 1974. Between November 12, 1973, and June 13, 1975, the Union filed numerous unfair labor practice charges alleging that the Respondent violated Section 8(a)(1), (3), and (5) of the Act. Complaints issued in seven consolidated cases, and a trial was held on various dates in February and March 1976 before Administrative Law Judge Thomas A. Ricci. On June 8, 1976, Judge Ricci issued his decision in which he found that the Respondent had engaged in certain violations of Sections 8(a)(1), (3), and (5) of the Act. Ricci found inter alia that on July 17, 1973, 3 days before the scheduled election, the Respondent discontinued the night shift in its pressing department and permanently abolished 20 jobs in violation of Section 8(a)(3) of the Act. During the trial before Judge Ricci, both the Respondent and counsel for the General Counsel introduced substantial evidence of how the Respondent had treated those 20 individuals after July 17 to the time of the trial. As a result, Judge Ricci made specific findings with regard to each of these 20 individuals discriminated against as to when the backpay period began and ended, as well as when it was temporarily suspended for certain periods although not permanently tolled. Judge Ricci also found that the Respondent had not engaged in alleged violations of Section 8(a)(5) of the Act by making unilateral changes in the terms and conditions of employment of its employees without notice to or prior consultation with the Union.

Both the Respondent and counsel for the General Counsel filed exceptions with the Board to Judge Ricci's decision. On July 22, 1977, the Board issued its Decision and Order, which adopted Judge Ricci's decision with certain important modifications. The Board adopted Judge Ricci's decision with regard to the 20 individuals discriminated against by the Respondent discontinuing its night shift in the pressing department. The Board found merit in certain of the exceptions filed by counsel for the General Counsel regarding the alleged unilateral changes. It found that seven changes made by the Respondent unilaterally without notifying the Union or giving it an opportunity to bargain constituted violations of Section 8(a)(1) and (5) of the Act. Because they have a specific and important bearing on the outcome of this stage of the proceedings as is more fully discussed below, I note particularly that the Board found the Respondent had violated Section 8(a)(1) and (5) of the Act on August 20, 1974, by laying off approximately 200 employees; in October 1974 by laying off the remaining production employees and shutting down operations; and in November 1975 by recalling approximately 80 laid-off employees on the basis of seniority and previous efficiency without first negotiating with the Union concerning the method and manner in which such actions would occur. The Board also found that the Respondent had violated Section 8(a)(1) and (5) of the Act by more stringently enforcing tardiness and absenteeism rules which resulted in the discharge of eight individuals. On June

¹ 230 NLRB 1054 (1977).

² Willie Spencer, Earlie Cheairs, Leo Sain, Earnest Williams, Ressie Ford Traylor, Leroy Lake, Peggy Peoples, Mose Burkley, Lurlene Pirtle, Mattie Jones, Doris McNeal, Nathaniel McClellan, Alma Jones, Freddie Jones, William Ray Davis, Vera Norment, Grace Beard, Gladys McGowan, Wiley Murphy, and Annie McKinnie.

³ Donald C. Moss, Patricia Ann Williams, Percy L. McNeal, Margie A. Wilson, Johnny Russell, Allen L. Russell, Earline Lake, and Juanita Phillips.

⁴ Sain, Earnest Williams, Peoples, Burkley, Mattie Jones, Norment, Beard, and McKinnie.

13, 1980, the United States Court of Appeals for the Sixth Circuit ordered that the Board's decision be enforced in full.

A controversy has since arisen over the amount of backpay due under the terms of the Board's Order and that issue is before me for decision.

II. POSITIONS OF THE PARTIES

Following issuance of the backpay specification and notice of hearing on January 7, 1981, the Respondent filed an answer dated January 19, an addendum to answer dated March 10, and an amended answer dated May 18, 1981. On May 26, counsel for the General Counsel issued an amendment to backpay specification, and on June 5 the Respondent filed its second amended answer. Additionally, certain amendments were made at the trial herein.

In its several answers, the Respondent asserted a number of defenses to its backpay liability regarding practically every discriminatee. The Respondent's arguments are often expressed alternatively why backpay should terminate entirely or be tolled during certain periods. Many of these defenses asserted in its answers, however, were not addressed at the trial or in the Respondent's post-trial brief and must fail for lack of evidence. The defenses to backpay liability which the Respondent continues to advance are first that the backpay of various discriminatees should terminate on certain dates when they were reinstated to the Respondent's employ; second, that backpay should terminate for all discriminatees as of August 1974 when Respondent laid off all production employees and completely shut down production because the discriminatees were thereby "restored" to the same position they would have occupied had the Respondent not discriminated against them; third, that 10 discriminatees⁵ should have their backpay completely or partially withheld from them during certain periods because they failed to make a diligent search for interim employment or because they removed themselves from the labor market; fourth, that discriminatee William R. Davis should be partially denied backpay because he failed to produce information bearing on his earnings from self-employment during certain parts of the backpay period; and, fifth, that interest charged on the backpay should remain at 6 percent per annum rather than be raised to an amount called for by *Florida Steel Corp.*, *infra*, as argued by counsel for the General Counsel.

The position advanced by counsel for the General Counsel regarding the backpay claim of certain discriminatees is, at best, confused. Particularly troubling is the position of counsel for the General Counsel regarding backpay due Nathaniel McClellan, Earlie Cheairs, Leroy Lake, William R. Davis, Gladys McGowan, and Wiley Murphy. The backpay specification does not include backpay due, if any, beyond June 23, 1980. The six individuals named above are the subject of a footnote in the backpay specification which reads:

⁵ Willie Spencer, Ressie Ford Traylor, Leroy Lake, Lurlene Pirtle, Nathaniel McClellan, Gladys McGowan, Wiley Murphy, Percy McNeal, Margie Wilson, and Earline Lake.

The date of June 23, 1980 is only for the purpose of this Backpay Specification in that Respondent has not complied with the reinstatement aspects of the Decree to date and backpay is currently accruing since June 23, 1980.

When the subject of these individuals first came up in the hearing, both counsel for the General Counsel and the Board's compliance supervisor who was then on the witness stand informed the court that these individuals were the subject of this footnote because they had not been properly reinstated to their former positions when they were recalled from layoff in November 1975 and were therefore due backpay beyond, i.e., after June 23, 1980. This same position was repeated a short time later. Thereafter, counsel for the General Counsel explained the basis for his position thusly: according to both the employee handbook and Judge Ricci's decision, employees who were in fact recalled in November 1975 had no legitimate claim to seniority; therefore, in recalling employees without first notifying the Union and giving it an opportunity to bargain, and by continuing to recognize the original seniority dates of those individuals whom it did recall, the Respondent has continued its unfair labor practice. Therefore, the argument continues, whenever a discriminatee is adversely affected by the Respondent recognizing those seniority dates, rather than giving the discriminatees preference in job retention, backpay continues to accumulate.

At the same time as he advanced the argument described above, counsel for the General Counsel also argued that discriminatees Earline Lake, Willie Spencer, Doris McNeal, Percy McNeal, and Nathaniel McClellan should have been recalled when the Respondent resumed operations in November 1975 rather than the individuals whom Respondent did recall and therefore are due backpay from that time forward. Further, the argument continues, on various other (later) dates Alma Jones, William Ray Davis, Earlie Cheairs, and Ressie Ford Traylor should have been recalled rather than other individuals. Counsel for the General Counsel argues that a recall right exists for the individuals named above for jobs which became available starting in November 1975 because of the findings by Judge Ricci in June 1976 that they had been discriminated against in July 1973 by the Respondent. According to counsel for the General Counsel's argument, the latter finding of their status as discriminatees thereby cast on them some form of retroactive superseniority. The rationale behind the General Counsel's position was explained a bit more simply by Compliance Supervisor Watson as "solely a matter of convenience."

During the trial, and even more so in his post-trial brief, counsel for the General Counsel confuses and merges the two arguments described above. The General Counsel's post-trial brief states in part:

Here we must note the contention of the General Counsel respecting certain discriminatees, Cheairs being one of them, who were not returned as they should have been returned and therefore a contention of continuing liability. General Counsel's Ex-

hibit 2 is a document giving a breakdown of the discriminatees involved in this proceeding. It does so in the fashion of their relative seniority dates and contrasts them against five employees, who were not discriminatees, who were returned as Respondent resumed operations of its plant in 1975.

As previously noted, the first of the two arguments described below relates to six employees, one of whom is Cheairs, who are the subject of the footnote above. The second argument, however, is the one which is the subject of the General Counsel's Exhibit 2 and is an argument related primarily to employees Earline Lake, Willie Spencer, Doris McNeal, Percy McNeal, and Nathaniel McClellan. The confusion is even more evident from the following statement regarding discriminatees who are the subject of the footnote quoted above:

[I]t is the position of the General Counsel that the argument regarding the incorrect reinstatement relates solely to the manner in which employees should have been recalled when the job opportunities were available upon the opening of the plant in November 1975. *It is not the contention of the General Counsel that after June 23, 1980, backpay continues to accrue*, rather it is the improper method of recall of said employees, that is the issue. The basic premise has been set out already in this memorandum but restated, same is to the effect that discriminatees are entitled to reinstatement requiring, if necessary, displacement of other employees. Here we have a group of employees who were recalled when the plant commenced operations again in 1975, who were not discriminatees. It is the position of the General Counsel that the discriminatees should have been recalled ahead of any other employee. The refusal to consider same in this fashion is tantamount to another violation of Section 8(a)(3) of the Act. [Emphasis added.]

The statement of counsel for the General Counsel in his brief, "it is not the contention of the General Counsel that after June 23, 1980, backpay continues to accrue," is in direct contradiction to the footnote quoted above wherein it states in part "backpay is currently accruing since June 23, 1980. While it is almost impossible from counsel for the General Counsel's muddled treatment to ascertain the real issues, for reasons more fully described below, I have concluded that both of the General Counsel's arguments relate to the availability of work in November 1975 rather than to the reinstatement aspects of the Board Order.

III. GENERAL STATEMENT REGARDING APPLICABLE PRINCIPLES

As was stated long ago by the Supreme Court in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941):

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.

A Board backpay order, the Supreme Court has stated, "should stand unless it can be shown that it is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346, 347 (1953). The Supreme Court has also recognized that "the computation of the amount due may not be a simple matter . . . Congress made the relation of remedy to policy an administrative matter, subject to limited judicial review, and chose the Board as its agent for the purpose." *Nathanson v. NLRB*, 344 U.S. 25, 29-30 (1952). In exercising the broad discretion granted to it, the Board, with Court approval, has consistently applied the principle stated in *New England Tank Industries*, 147 NLRB 598, 601 (1964):

[W]hile the general burden is on the General Counsel to establish for each discriminatee the loss of pay which has resulted from Respondent's established discriminatory conduct, i.e., the gross backpay over the backpay period, the burden of proof is on respondent to show diminution of that amount whether such diminution results from the claimants' willful loss of earnings, or from the unavailability of a job at Respondent's operation for some reason unconnected with the discrimination.⁶

Thus, it is the burden of the General Counsel to establish the reasonableness and accuracy of its calculation of the gross backpay amount. In establishing this burden, it is inherently recognized that a backpay determination is not, and cannot be, an exact science, but rather necessarily requires certain reasonable approximations and judgmental decisions. The burden of proof with respect to its affirmative defenses rests on the Respondent as it was the original wrongdoer.

IV. THE GENERAL COUNSEL'S CASE

In support of the General Counsel's burden of proof, Compliance Supervisor Robert Watson testified and explained the manner in which backpay was calculated consistent with the Board Order. It is apparent from the Respondent's cross-examination of Watson that it has little quarrel with the accuracy and manner in which Watson prepared the backpay specification. Rather, the Respondent attempted primarily to seek agreement from Watson that Judge Ricci's decision, while clear on its face, is internally inconsistent and/or self-contradictory. It is on the basis of that claim, which relates to the Respondent's asserted defenses, that I shall begin to analyze its position. Before doing so, however, I shall first consider the two arguments advanced by counsel for the General Counsel because those arguments affect the gross backpay calculations of several discriminatees. I will not repeat the General Counsel's arguments for they have been described above at length.

Regarding the position of counsel for the General Counsel concerning McClellan, Cheairs, Lake, Davis, McGowan, and Murphy, I note at the outset the appar-

⁶ Citations within quote omitted.

ent inconsistency between the contention in the footnote quoted above that "Respondent had not complied with the reinstatement aspects of the decree to date and backpay is currently accruing since June 23, 1980," and the statement of counsel for the General Counsel in his post-trial brief that "the argument . . . relates solely to the manner in which employees should have been recalled when the job opportunities were available upon the opening of the plant in November 1975. It is not the contention of General Counsel that after June 23, 1980, backpay continues to accrue . . ." If indeed the argument relates solely to the method by which employees were recalled in November 1975, then as it relates to backpay the issue does not involve reinstatement aspects of the Board Order. Rather, insofar as backpay is concerned, the issue simply relates to the availability of work. If work were available, discriminatees are entitled to backpay during that period. Further, the burden is on the Respondent to prove the unavailability of work. *NLRB v. Ellis & Watts Products*, 344 F.2d 67 (6th Cir. 1965); *New England Tank Industries*, supra; *Mastro Plastics Corp.*, 136 NLRB 1342 (1962). The Respondent herein, however, does not even respond to this argument of the General Counsel much less assert an affirmative

⁷ At the commencement of the trial herein, after the formal papers were introduced into evidence, various matters were called to my attention by the parties including the footnote quoted above relating to McClellan, Cheairs, Lake, Davis, McGowan, and Murphy. Based on my reading of that footnote, it was my understanding that counsel for the General Counsel was simply reserving for future proceedings a claim that these discriminatees had not been properly reinstated. It was my understanding that future action was contemplated, probably in the form of a contempt action against the Respondent for failing to comply with the Board Order, to be followed later, if necessary, by a supplemental backpay proceeding. It was also my understanding that both parties agreed with that interpretation. In effect, therefore, this proceeding was to be limited to events predating June 23, 1980. On the basis of that understanding, I sustained several objections by the Respondent to questions asked by counsel for the General Counsel relating to events after that date. It was not my understanding that any party expected me to resolve an issue whether these individuals had been properly reinstated. I did not consider this to be an issue before me for two reasons. First, I was of the opinion that the proper forum for such an issue would be before the circuit court of appeals in a contempt proceeding. Second, if such an issue could be raised before an administrative law judge, I would not have expected it to be raised in the form of a footnote but rather in the form of an affirmative allegation. From my reading of the transcript of the trial herein, however, I have observed a rather clear indication at one point on the part of counsel for the General Counsel that he expected me to determine whether the individuals named above were properly reinstated. I now realize that evidence which I excluded concerning events after June 23, 1980, might be relevant to that issue if it was properly before me.

In preparing this decision, I have discovered authority for the proposition that there are certain circumstances in which it would be appropriate for evidence on the subject of reinstatement to be introduced before an administrative law judge rather than before the circuit court in contempt proceedings. *NLRB v. Bird Machine Co.*, 174 F.2d 404 (1st Cir. 1949), sets forth a still-viable doctrine that provides:

[I]f [the discriminatee's] old position is still in existence, our earlier decree, without the need of supplemental definition, specifically commands that Respondent offer [the discriminatee] reinstatement to that position. If it is the Board's contention that though the old position remains in existence, Respondent has failed to offer [the discriminatee] reinstatement to that position, the issue thus tendered is whether Respondent is in contempt of our decree. Determination of questions of fact on this issue is not a proper administrative function of the Board but becomes the function of this court in contempt proceedings. See *Wallace Corp. v. N.L.R.B.* [159 F.2d 952 (4th Cir. 1947)] at 954.

defense that these discriminatees should not be afforded backpay in November 1975 and thereafter because of an alleged unavailability of work. Therefore, I conclude that backpay has properly been awarded McClellan, Cheairs, Lake, Davis, McGowan, and Murphy for the period including November 1975 and thereafter.⁷

But in the *Wallace* case the court was dealing with a situation where the department in which the discriminatorily discharged employees had previously worked had been abolished. It was therefore proper for the Board to have a further administrative hearing on questions as to whether there were substantially equivalent positions in the Company's service, and as to what action should be taken, in view of changed conditions, to wipe out the effects of the unfair labor practices; such hearing having in contemplation supplemental findings by the Board, appropriate modification of the Board's previous order, and an application to the court for modification of the general terms of its earlier decree so as to give enforcement to the Board's order as modified and made more specific in the light of the supplemental findings.

Substantial confusion has been caused by counsel for the General Counsel through poor articulation of the precise issue relating to McClellan, Cheairs, Lake, Davis, McGowan, and Murphy. At the trial, and in his post-trial brief, he has spoken of an obligation on the Respondent's part to reinstate these employees in November 1975 because of their status as discriminatees. Administrative Law Judge Ricci's decision, however, did not issue until June 8, 1976, and obviously there was no reinstatement order directed against the Respondent until that time. The decision of course also imposed an obligation to make employees whole for employment lost prior to that time, but that is an issue of backpay and not reinstatement. Counsel for the General Counsel cites no case authority whatever in support of his argument framed in the context of Respondent's obligation to reinstate a discriminatee before a judge's decision even issues, and in my view the argument is patently absurd. As will be noted in the portion of counsel for the General Counsel's brief quoted above, he also asserts at one point that the Respondent's failure to reinstate the discriminatees in November 1975 "is tantamount to another violation of Section 8(a)(3) of the Act." This statement is not at all helpful in defining any real issue that may exist with regard to the six discriminatees named above. Suffice it to say that the purpose of a backpay proceeding is not to litigate the merits of any unfair labor practice.

In preparing this decision, I gave considerable thought to reopening the record on my own motion to require further definition of the issue regarding these six discriminatees in order to determine whether that issue is the kind of reinstatement issue which it would be appropriate to litigate before the Board pursuant to *NLRB v. Bird Machine Co.*, supra. I have chosen not to do so, however, for two reasons. First, I note the statement by counsel for the General Counsel in his brief that "it is not the contention of the General Counsel that after June 23, 1980, backpay continues to accrue . . ." If in fact there is no claim for backpay beyond June 23, 1980, in spite of the language in the quoted footnote to the contrary, my resolution of the backpay issue should provide a complete liquidation of the Respondent's backpay liability. Second, although counsel for the General Counsel has never articulated his argument in this way, I have come to the conclusion that if there is in fact any issue regarding reinstatement, rather than one simply involving the availability of work, what he is really arguing is that the Respondent has not complied with the reinstatement aspects of the Board's order because, while the Respondent reinstated these six discriminatees at some point after June 13, 1980, the date of the circuit court's order enforcing the Board's decision, the Respondent should have recognized but has refused to recognize their original date of hire as a seniority date and/or should have recognized but has refused to recognize November 1975 as the seniority date for other employees (nondiscriminatees) reinstated in November 1975. Counsel for the General Counsel would argue that by operation of the Respondent's employee handbook nondiscriminatees lost any earlier seniority date, and by the Respondent recognizing a seniority date earlier than November 1975 for those nondiscriminatees, the Respondent is perpetuating the effects of its conduct which was found to be in violation of Sec. 8(a)(5) in the manner in which it resumed operations. If this is the General Counsel's position, then I view the issue as one which can only be raised in a contempt proceeding rather than as one involving the type of reinstatement matter which might appropriately be litigated before an administrative law judge.

The second argument advanced by counsel for the General Counsel relates to discriminatees Earline Lake, Willie Spencer, Doris McNeal, Percy McNeal, and Nathaniel McClellan, and to a lesser degree to Alma Jones, William Ray Davis, Earlie Cheairs, and Ressie Ford Traylor. Although counsel for the General Counsel also frames this argument in the context of the Respondent having an obligation to reinstate these discriminatees in November 1975 pursuant to Judge Ricci's order of June 1976, I have concluded that this issue also relates simply to the availability of work. Therefore, putting aside the argument that discriminatees had a recall right as discriminatees to jobs which became available in November 1975, I shall simply consider the argument as relating to the availability of work beginning at that time. The Respondent has not expressly asserted any affirmative defense that Lake, Spencer, Doris McNeal, Percy McNeal, McClellan, Jones, Davis, Cheairs, and/or Traylor should not be afforded backpay in November 1975 or thereafter because of an alleged unavailability of work. The Respondent has, however, in conjunction with its argument that backpay should be tolled for all discriminatees when the plant closed in August 1974, which is treated separately below, responded very briefly to the General Counsel's argument regarding these nine discriminatees. Counsel for the Respondent points out that the pre-shutdown complement of employees numbered approximately 400, while the Respondent reopened the facility in November 1975 with only 80 employees. The Respondent argues that it would be punitive rather than remedial to accord the discriminatees the "retroactive superseniority" requested by counsel for the General Counsel because it would "go beyond a restoration of the economic status quo that would have obtained but for the unlawful discrimination" In support of that argument, the Respondent introduced testimony about the manner in which employees were recalled to work in November 1975. From this testimony, it is clear that Respondent argues that work was unavailable for these discriminatees in November 1975 and thereafter. The Respondent introduced testimony from the Respondent's director of manufacturing, Hulon Stringer, that prior to the shutdown there were three job classifications within the pressing department: topper, legger, and combination topper and legger. According to Stringer, when the plant reopened, the Respondent recalled by seniority only those employees who were combination pressers. Stringer testified that Lake, Spencer, both McNeals and Traylor were not combination pressers. Therefore, the argument continues, they would not have been recalled to work in any event. McClellan, Jones, Davis, and Cheairs, who Stringer testified were combination pressers, would not have been recalled until much later dates in 1976, 1977, 1979, and 1980 when jobs became available. The Respondent thus argues that it would be unfair and punitive to award backpay to these nine discriminatees in accordance with the General Counsel's formula. Thus, although the Respondent has not expressly raised an affirmative defense regarding the availability of work in November 1975 and thereafter, evidence bearing directly on that issue has been introduced in response to a position taken by counsel for the General Counsel.

In resolving this issue, I note at the outset that, although the issue was first raised by counsel for the General Counsel, it was not framed in the context of the availability of work, and the burden is on the Respondent to prove the unavailability of work. *NLRB v. Ellis & Watts Products*, supra; *New England Tank Industries*, supra; *Mastro Plastics Corp.*, supra. It is not necessary for the General Counsel to show that on every day, or on any given day, of the backpay period there was work available which a particular discriminatee would have enjoyed but for the discrimination against him. Rather, once an employee is found to have been unlawfully terminated, the employee is entitled to backpay from the date of the unlawful termination until such time as the employee is offered reinstatement. This is true for the entire period of unemployment, and the respondent is relieved of backpay liability only if it affirmatively meets its burden of proof by showing that during some part of the period the discriminatee would not have been employed even if Respondent had not engaged in the discrimination. In the instant case, however, as found by the Board in a decision enforced by the United States Court of Appeals for the Sixth Circuit, the Respondent engaged in unlawful conduct not only by terminating these discriminatees but also by the method in which it recalled people to work following the extended layoff from August 1974 to November 1975. Therefore, if I were to adopt the method which the Respondent used to recall people in order to determine whether work was available for discriminatees in November 1975 I would be utilizing a method which was itself found to be unlawful. I would thereby allow the Respondent to reap a windfall from unlawful conduct by allowing it to establish that pursuant to, and because of, the unlawful method of recall, no work was available for discriminatees. Clearly, the Board in fashioning a remedy should not consciously allow a respondent to reap an affirmative benefit from its own unlawful conduct. As was stated in an analogous case, "when an employer's unlawful discrimination makes it impossible to determine whether the discharged employee would have earned backpay in absence of discrimination, the uncertainty should be resolved against the employer." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966). Since it is impossible to determine whether the discriminatees herein would have been recalled to work in November 1975 if Respondent had not utilized an unlawful method for recalling employees, I conclude that backpay has been awarded properly in accordance with the General Counsel's formula for employees Earline Lake, Willie Spencer, Doris McNeal, Percy McNeal, Nathaniel McClellan, Alma Jones, William Ray Davis, Earlie Cheairs, and Ressie Ford Traylor for the period including November 1975 and thereafter.

V. THE RESPONDENT'S DEFENSES TO BACKPAY

The Respondent's first defense to the payment of backpay is that although Judge Ricci made specific findings of the dates when backpay begins, ends, and is temporarily tolled for each discriminatee, issues regarding individual backpay periods were nevertheless not fully litigated

in the underlying unfair labor practice proceeding. Therefore, the argument runs, the parties to this compliance proceeding are not foreclosed by the doctrine of res judicata from litigating individual backpay periods. The Respondent's second argument is really part and parcel of the first. The Respondent argues that many of the discriminatees received valid offers of reinstatement from the Respondent at various points in time subsequent to the commission of the underlying unfair labor practices, and their backpay periods should terminate at those respective points in time. More specifically, the Respondent argues that such valid offers of reinstatement were made to discriminatees Earlie Cheairs on August 16, 1973; Ressie Ford Traylor on August 28, 1973; Lurlene Pirtle on May 9, 1974; Doris McNeal on February 27, 1974; Nathaniel McClellan on May 9, 1974; Alma Jones on May 9, 1974; and William R. Davis on May 9, 1974. This argument is coextensive with the first argument because the dates when the Respondent argues that these seven discriminatees were made valid offers of reinstatement are matters which were litigated before Judge Ricci. The dates are actually dates when these various discriminatees reentered the Respondent's employ for a period of time before being laid off again. Judge Ricci took into account those events in making his findings of the backpay periods of the individual discriminatees. Judge Ricci nevertheless found the backpay periods to run beyond the dates argued by Respondent. Instead of terminating backpay on those dates, Ricci gave credit for employment of the discriminatees with the Respondent as an offset against (or temporary tolling of) backpay. The Respondent now asks me to find, on the same facts that were before Judge Ricci, that Judge Ricci's findings were incorrect and to make different findings. I am wholly convinced, however, that the doctrine of res judicata was adopted centuries ago to prevent just exactly that.

I find nothing in the Board's Rules and Regulations and no case authority whatever prohibiting an administrative law judge in his decision after the initial trial on the merits of the unfair labor practice from making specific findings with regard to the backpay period of a discriminatee where the judge believes that the evidence required to make those findings has been placed before him by the parties. Even assuming Judge Ricci's findings were wrong, it was incumbent on Respondent—or whoever considered them to be incorrect—to appeal Judge Ricci's decision. The Respondent did appeal Ricci's decision. I note that Respondent even took exception to the remedy ordered by Judge Ricci, but it chose not to appeal that aspect of the remedy which it now attempts to relitigate before me. Not only did the Respondent have the opportunity to appeal the remedial portion of Judge Ricci's decision to the Board, but it also had the opportunity to raise such matters during the enforcement proceedings before the United States Court of Appeals for the Sixth Circuit. The Respondent did not do so. Instead, the Respondent now seeks to relitigate those matters before me. I find that it is precluded from doing so

by the doctrine of res judicata.⁸ Consequently, I hereby reject the affirmative defenses of the Respondent raised in the first "affirmative defense" of its answer dated January 19; paragraph 1 of its amended answer dated May 18; and paragraphs 14-18 of its second amended answer dated June 3, 1981.

As a separate affirmative defense, Respondent argues that the backpay for all discriminatees should terminate as of August 1974 when the Respondent temporarily shut down its entire operation for valid economic reasons. The Respondent argues that as a result of the entire operation shutting down and all employees being laid off/terminated, the discriminatees were thereby "restored" to the same position they would have occupied even if the Respondent had not discriminated against them. This argument is a mere extension of the first and second arguments described above because the events related to it, including a subsequent recall of certain employees when the plant reopened in November 1975, were events litigated before Judge Ricci. Ricci considered this layoff and the subsequent recall in making his findings regarding the backpay periods of the individual discriminatees. With those facts before him, Judge Ricci nevertheless found the backpay periods to run beyond the dates argued by the Respondent. Like the arguments above, I conclude that Respondent's asserted defense is barred by the doctrine of res judicata. Moreover, I note

⁸ At the beginning of the trial herein, counsel for the General Counsel made a motion to strike par. 15 of the Respondent's second amended answer dated June 3 on res judicata grounds. The Respondent opposed that motion and filed a written statement of position which is in evidence. In its post-trial brief, Respondent concedes that the motion should be granted, although not on res judicata grounds. In its brief, the Respondent states in part:

The substance of the paragraph 15 defense is that, inasmuch as the backpay periods for claimants Leo Sain and Earnest Williams terminate on August 20, 1973, the date of a temporary recall of the pressing night shift, backpay periods for various other claimants who were recalled on that date should terminate then as well.

Regarding General Counsel's motion to strike paragraph 15 of Respondent's Second Amended Answer, Respondent concedes that the temporary recall of August 20, 1973 did not constitute a valid offer of reinstatement, but the Respondent does not thereby concede that it is foreclosed by the doctrine of *res judicata* from litigating individual backpay periods.

Respondent does not oppose General Counsel's motion to strike *per se*, since Respondent concedes that the August 20, 1973 recalls did not constitute valid offers of reinstatement for the purpose of terminating backpay liability. By its withdrawal of its opposition to General Counsel's motion, however, the Respondent does not thereby concede that the paragraph 15 defense is barred by the doctrine of *res judicata*.

Elsewhere in its brief, the Respondent argues that even if the motion to strike is granted on res judicata grounds, the doctrine of res judicata should therefore apply only to the one paragraph of that answer since counsel for the General Counsel's motion to dismiss was not directed at other paragraphs of its several answers. Clearly, however, a party does not waive a res judicata argument on the merits by filing a motion to dismiss directed only at limited matters. I find no substantive difference between granting counsel for the General Counsel's motion to dismiss par. 15 of the second amended answer on res judicata grounds and dismissing the other paragraphs on the merits on the same grounds. Therefore, rather than grant counsel for the General Counsel's motion to dismiss, I shall simply reject on the merits all of the Respondent's defenses asserted in the paragraphs enumerated above on res judicata grounds.

the Respondent's argument overlooks the fact that the Board, with circuit court agreement, found the method in which the Respondent effected both the layoff and recall to be unlawful in violation of Section 8(a)(5) of the Act. In order to find merit to this asserted defense of the Respondent, one would have to invoke a presumption that if the Respondent had acted lawfully and fulfilled its obligation to bargain with the Union in good faith, the exact same result would have occurred as did occur. Since it is impossible to determine what would have occurred if Respondent had fulfilled its lawful obligation to bargain with the Union, Respondent's unlawful conduct could not serve to terminate backpay. Therefore, I reject the affirmative defenses of the Respondent raised in paragraphs 7-14 of its amended answer dated May 18 and paragraph 19 of its second amended answer dated June 3, 1981.

The Respondent argues that discriminatees Willie Spencer, Ressie Ford Traylor, Leroy Lake, Lurlene Pirtle, Nathaniel McClellan, Gladys McGowan, Wiley Murphy, Percy McNeal, Margie Wilson, and Earline Lake should have their backpay completely or partially withheld from them during certain periods because they failed to make a diligent search for interim employment or because they removed themselves from the labor market.

A. Willie Spencer

The Respondent argues that Spencer failed to make a diligent search for employment throughout his entire backpay period and that his claim for backpay should therefore be denied in full.

Spencer worked for the Respondent in a night-shift position. At the same time Spencer worked for the Respondent, he also worked for another employer on a day-shift job. Spencer admitted that after his termination by Respondent he never made any attempt to secure nighttime employment elsewhere. It is on this basis that the Respondent argues Spencer should be denied backpay in full.

Following Spencer's termination by the Respondent, however, he was laid off at a later date by the other employer. Thereafter, Spencer sought employment through the Tennessee state-operated employment service. He was able to secure employment with CETA; the city of Bolivar, Tennessee; and an employer referred to in the record as ECS in Whiteville, Tennessee.

In his post-trial brief, counsel for the General Counsel concedes that backpay should be withheld from Spencer until the time when he was laid off by the other employer. Counsel for the General Counsel is therefore willing to reduce the Respondent's net backpay figure of \$11,047 by \$4,138 in order to arrive at a new net backpay figure of \$6,909, exclusive of interest. Counsel for the General Counsel gives no reason why Spencer's backpay should not be withheld in its entirety since Spencer admits that he never looked for supplemental income. I shall nevertheless award Spencer the amount of backpay recommended by counsel for the General Counsel. The fact is that Spencer held two jobs. While Spencer did not begin to look for work until he also lost the job with the other employer, it is just as possible and reasonable that he

would not have looked for work then had he still been employed by the Respondent. It is impossible to say that the search for work which began after he lost the job with the other employer was directed at replacing only that other job. The fact is that beginning in approximately August 1974 and continuing thereafter, Spencer did seek work and obtained it where he could. Consequently, beginning at that time, but not earlier, Spencer is entitled to backpay. Accordingly, I find that the Respondent owes Spencer backpay in the amount of \$6,909, plus interest.

B. Leroy Lake

The Respondent argues that Lake should be denied backpay from the time of his discriminatory termination through the second quarter of 1976 when Lake graduated from high school.

Lake worked for the Respondent on the night shift at the time he was going to high school during the day. Lake admits that, after being discharged by the Respondent, he did not seek other nighttime employment. Lake testified that he did ask a friend who worked for another employer about the possibility of Lake obtaining nighttime work, but was told no jobs were available. Lake admits he never submitted an application with that employer. Consequently, the Respondent argues Lake should be denied backpay. Counsel for the General Counsel argues that because Bolivar, Tennessee is a very small community of 7500 people, nighttime work was not available and Lake's search was adequate. I find that merely asking a friend about the possibility of a job, without at least approaching the employer itself and/or submitting an application is not an adequate search for work. I also find, however, that the Respondent has failed to meet its burden of proving that in each of the calendar quarters for which backpay is claimed Lake was in school and therefore not conducting an adequate search for work. The Respondent offered no evidence to show that Lake was going to school on a year-round basis and it is common knowledge that public schools do not operate on that basis. I note from the backpay specification computation for Lake that he earned \$638.40 during the third calendar quarter (i.e. July, August, September) 1975 and again obtained employment beginning in the third calendar quarter 1976, the period when public schools normally do not operate. Failing specific proof from the Respondent of the calendar quarters when Lake was in school, I have no basis for knowing or assuming what calendar quarters the school year covered. Consequently, I am constrained to conclude that the Respondent has failed to meet its burden of proof on the issue, and I shall award backpay in accordance with the computation of counsel for the General Counsel. Accordingly, I find that Leroy Lake is due backpay in the amount of \$17,056, plus interest.

C. Ressie Ford Traylor, Lurlene Pirtle, Nathaniel McClellan, Gladys McGowan, Wiley Murphy, Percy McNeal, and Margie Wilson

The Respondent contends that Traylor, Pirtle, McClellan, McGowan, Murphy, McNeal, and Wilson should be

denied backpay during portions of the backpay period because their search for work was inadequate.

Regarding Traylor, the Respondent argues that she should be denied backpay for the fourth quarter 1975 through the fourth quarter 1976. The Respondent submits that it owes Traylor only \$14,036 rather than \$23,434 claimed by counsel for the General Counsel. The Respondent argues that, during the period from mid-1975 until she began work at the Townhouse Restaurant in early 1977, Traylor applied for work at only two places, Harman International and Armour Leather.⁹ Traylor testified that she telephoned Harman International once a week for approximately a month and that she tried for 3 or 4 weeks consecutively to obtain employment at Armour Leather.

Regarding Pirtle, the Respondent argues that she should be denied backpay for third and fourth quarters 1973, the first and second quarters 1974, the years 1976, 1977, 1978, and the first and second quarters 1979. The Respondent admits that it owes Pirtle only \$3,847 rather than \$37,055 claimed by counsel for the General Counsel. During the period from her termination through the third quarter 1975, Pirtle could recall applying for work at only four places: Harman International, Kilgore Corporation, Western State Hospital, and Brown Shoe Corporation where she was hired in mid-1975. After being laid off from her job at Brown Shoe Corporation in October 1975, Pirtle remained unemployed until mid-1979. During that time, she was registered with the Tennessee state employment service and individually applied for positions at a local hospital, at Care Inn, and at the Sumnerville Board of Education.

Regarding McClellan, the Respondent argues that he should be denied backpay during the second, third, and fourth quarters 1976, all of 1977, the first and fourth quarters 1978, the first and second quarters 1979, and the first and second quarters 1980. Respondent submits that it owes McClellan only \$10,912 rather than the \$37,871 claimed by counsel for the General Counsel. During the backpay period from July 1973 to June 1980, McClellan worked for Bolivar Motor Company; Bryan Foods in West Point, Mississippi; the city of Bolivar; Care Inn; and T. J. & L. Construction Company in Henderson, Tennessee. McClellan could not recall whether he submitted any job applications between the time he was laid off by the City of Bolivar in February 1976 and the time he went to work for Care Inn in March 1978. He voluntarily quit the job at Care Inn, and shortly thereafter went to work for T. J. & L. Construction Company. After working there only 3 days, however, McClellan was terminated because he did not possess necessary qualifications for the position. From then until August 1979, when he returned to work for the Respondent, he was able to remember submitting applications at Western State Hospital and at Kilgore Corporation.

Regarding McGowan, the Respondent argues that she should be denied backpay for the fourth quarter 1975, the entire year 1976, the first and second quarters 1977,

the fourth quarter 1978, and the entire year 1979. The Respondent submits that it owes McGowan only \$4,221 rather than \$28,404 claimed by counsel for the General Counsel. Following her unlawful termination by the Respondent, McGowan sought and obtained employment at Kilgore Corporation. She remained employed there continuously for approximately a year and a half from August 1973 to March 1975. She did not obtain work again until some time in the third quarter of 1977 when she was able to secure a job with Winter Garden Freezer Company. McGowan was not able to recall whether she submitted any employment applications during the interim period. It is not clear whether she quit or lost her position with Winter Garden, but it is clear that from September 1977 to September 1978, McGowan attended school. No backpay is claimed by counsel for the General Counsel during that entire year. Upon graduation, McGowan, reentered the labor market. McGowan was able to recall that after her graduation she submitted applications at Western State Hospital, Care Inn, an HIS plant, and the Townhouse Restaurant. In early 1980, McGowan was offered and accepted a job at the Townhouse Restaurant where she remained employed through the end of her backpay period.

Regarding Murphy, the Respondent argues that he should be denied backpay for the years 1974, 1975, 1976, 1977, and first and second quarters 1978. The Respondent submits it owes Murphy only \$13,941 rather than the \$38,561 claimed by counsel for the General Counsel. The Respondent argues that Murphy should be denied backpay because he submitted a miniscule number of employment applications over a 5-year period and failed to secure anything other than low-paying seasonal employment during that time. Murphy's testimony was typical of that by the backpay claimants generally. Overall, the testimony was vague and indefinite. Initially, he could not recall having worked at all during the 6-year period from 1973 to 1979. Only through prompting was he eventually able to recall seasonal employment with Maro Farms and Laro Angus Ranch. Murphy testified he never worked for Chickasaw Area Development Commission which is listed as one of his employers in the backpay specification. Murphy was only able to recall applying at Dover Elevator and at Brown Shoe between 1976 and 1978.

Regarding Percy McNeal, the Respondent argues that he should be denied backpay for the third and fourth quarters 1973; the first, second, and third quarters 1974; the fourth quarter 1975; the first, second, and third quarters 1976; the fourth quarter 1978; and the first and second quarters 1979. The Respondent submits it owes McNeal only \$12,522 rather than \$28,660 claimed by counsel for the General Counsel. McNeal was able to recall that during the backpay period he applied for work at Harman International and Brown Shoe Corporation; that he sought and eventually obtained farm work with Maro Farms; that he applied for work and took a test at a plant referred to as E.S.C.; and that he applied for work at Jervis Company. McNeal also testified that he twice went to St. Louis, Missouri, to look for work. His first trip was unsuccessful, and he returned home.

⁹ Needless to say, Traylor also began to seek work at some point in time at the Townhouse Restaurant where she eventually obtained employment in early 1977.

Thereafter, he was only able to secure intermittent farm work, and he therefore went back to St. Louis. In St. Louis, McNeal obtained work at French Cleaners. After being laid off from that position, McNeal remained in St. Louis and secured a job at Crown Foods. After being laid off from Crown Foods in October 1978, McNeal utilized the St. Louis employment job referral service. Unable to find employment in St. Louis, McNeal thereafter returned to Bolivar, Tennessee. In the fall of 1979, McNeal was able to secure a job with Bolivar Wood Products, where he remained employed until being reinstated by the Respondent.

Regarding Wilson, the Respondent argues that, while she has made attempts to secure employment during the 8-year backpay period, they have been half-hearted attempts. According to the Respondent, an inference should be drawn from the fact Wilson's interim jobs frequently lasted no longer than a month that Wilson gradually made herself more and more unemployable. The Respondent argues that it should not be called on to bear the burden of Wilson's inability to find or hold a job over an 8-year period of time. Therefore, the Respondent would deny Wilson all backpay after the third quarter 1974. The Respondent submits it owes Wilson only \$2,854 rather than the \$29,950 claimed by counsel for the General Counsel. After the Respondent unlawfully terminated Wilson, she sought work through the Tennessee state unemployment office. She submitted applications at Kilgore Corporation and at Armour Leather Company, but she was not hired. In addition, she applied for work at Sommerville Manufacturing Company where she was hired in August 1974. After working there 2 days, she failed to report to work thereafter. In the evening after the second day of work, Wilson received a beating which caused her to go to the hospital. Wilson was treated and released without spending the night. The Respondent does not argue that Wilson's termination on this occasion should result in Wilson forfeiting backpay. Approximately 1 month later, in September 1974, Wilson obtained employment at Kilgore Corporation. After working at Kilgore for about a month, Wilson's child became ill and Wilson was forced to quit. How long Wilson remained out of the labor market in order to care for her sick child is not reflected in the record. No backpay is claimed by counsel for the General Counsel from October 1974 to October 1975 because the Respondent's plant was shut down and no work was available. In August 1975, Wilson obtained work at Brown Shoe Company. She quit after 1 week because the individual with whom she rode to work quit; the job then did not pay enough in view of babysitting expenses and increased transportation costs resulting from having to commute alone.

Wilson, like many other discriminatees, was vague and indefinite in her testimony about her search for interim employment. There is no reason whatever to believe, however, that this resulted from any design on her part. Rather, it was clear from the demeanor of Wilson and every other witness that they were trying their best to recall events which, as a practical matter, had been completely forgotten about because of the passage of time. For example, Wilson testified that she worked at the

Pizza Hut Restaurant in Bolivar for about a 3-week period but was not able to recall when it was or even whether it was in 1976 or 1977. Wilson quit that job after 3 weeks because it was only a part-time job working 3 or 4 hours a day at \$1.65 per hour. Wilson estimated that during the 3-week period she earned approximately \$26 plus one 25-cent tip. Wilson quit because she simply was not making enough money to cover the added cost of babysitting and transportation expenses. Throughout 1976 to her offer of reinstatement by Respondent in June 1980, Wilson continued her search for employment through the state-operated unemployment office. In addition, she applied for positions with the Respondent, Jervis, The Tannery, Tipco, and UGGS. Wilson was offered and accepted a job at Tipco. At the end of the first day, Wilson was told they had run out of work for her to do, but that they would call her back when work picked up. At the UGGS factory, Wilson was told they were only hiring men.¹⁰

As previously indicated, the Respondent argues that Wilson's attempts to secure work have been "half-hearted." It asks that an inference be drawn that Wilson has made herself more and more unemployable by her repeated failure to stay on a job. In substance, the Respondent's argument is identical to one rejected by the United States Court of Appeals for the Sixth Circuit in *NLRB v. Miami Coca-Cola Bottling Company*, supra, at 575, wherein the Respondent argued that because interim earnings were "incredibly low," this fact makes a prima facie case of willfully incurring losses during the backpay period. The court stated:

Respondent invites our adoption of a rule that the employer's proof of "incredibly low" earnings shifts to the General Counsel the burden of going forward with evidence that the discriminatees used reasonable efforts to find interim work. We decline the invitation.

Similarly in this case, the fact that Wilson's periods of interim employment have been abbreviated does not lead to an inference that Wilson willfully incurred losses during the backpay period. Neither does the burden shift to the General Counsel to go forward with evidence that Wilson used reasonable efforts to find interim work. Rather, the burden remains with the Respondent to prove that Wilson failed to conduct an adequate search for interim employment or voluntarily removed herself from the labor market.

I have grouped Traylor, Pirtle, McClellan, McGowan, Murphy, McNeal, and Wilson for consideration because there is a common thread which runs through their testimony and which carries significant weight in my analysis of that testimony. While it is undoubtedly gross oversimplification, it must be observed that the discriminatees

¹⁰ I reject the Respondent's argument that Wilson should be discredited in this regard based on the improbability of an employer violating Title VII of the Civil Rights Act of 1964 and/or the improbability of an employer revealing such an unlawful intent to an applicant. In this proceeding, Wilson's testimony is uncontroverted and I find no basis in her demeanor for discrediting Wilson. Rather, I conclude that the incident occurred as described by Wilson.

herein are rural and uneducated. This factor is only partly revealed by a reading of the literal transcript of the trial herein and is necessarily dependent in part on my observation of the witnesses' conduct and demeanor in testifying. The transcript cannot show the full extent to which they mispronounced, misused, and misunderstood words. As the record does reveal, the testimony of the backpay claimants about their search for interim jobs was vague and indefinite. Some witnesses could not remember names of some of the plants where they applied for work. At least one denied, on examination by counsel for the Respondent, working at a place that was listed as their employer in the backpay specification. Based on my observation of each witness, however, I am thoroughly convinced that they were testifying truthfully to the best of their ability at the time about their search for interim employment. Their testimony was frequently vague and indefinite not because of an intention or attempt to deceive but rather because of poor memories, the fact that the period of time about which they were being questioned spanned eight calendar years, the failure to keep records, and a lack of understanding as to the information they were expected to furnish. The Respondent has not shown that these discriminatees did not search for work, but only that they could not recall searching for work during certain periods. All of the discriminatees did find interim jobs, some for substantial periods, and there is no evidence that any of them rejected offers of jobs. No backpay is sought for periods when they were not seeking work for various reasons, such as when McGowan attended school from September 1977 to September 1978.

As was stated in *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977):

It is established policy under the Act that a backpay claimant is required to make a reasonable search for interim employment¹¹ in order to mitigate loss of income and the amount of backpay. The Board and the Courts hold, however, that, in seeking to mitigate loss of income, a backpay claimant is "held . . . only to reasonable exertions in this regard, not the highest standard of diligence The principle of mitigation of damages does not require success; it only requires an honest good faith effort"¹² The Board and the Courts also hold that the burden of proof is on the employer to show that the employee failed to make a reasonable search,¹³ or that he willfully incurred losses of income or otherwise was not available for work during periods when backpay is claimed¹⁴ and any "doubts should

be resolved in favor of the backpay claimant rather than the respondent wrongdoer who is responsible for any uncertainty which may exist" and against whom any uncertainty must be resolved.¹⁵

It is particularly important in a case such as this where the backpay period spans eight calendar years and the backpay claimants simply are not able to recall much of what occurred during that period to keep in mind the fact that at this stage in the proceedings the backpay claimants do not enter the courtroom with a burden of establishing that throughout the backpay period they have engaged in an uninterrupted search for work. Rather, they enter as employees who have been unlawfully discriminated against by the Respondent, who, as the wrongdoer, is responsible for any uncertainty which may exist. While there may be some surface appeal to the Respondent's argument that it "should not be called upon to bear the burden of [employees'] inability to find or hold a job over an eight-year period of time," that argument must fail because it is directly contrary to all precedent and sound public policy. The burden is and remains on the Respondent as the original wrongdoer to show that the employee failed to make a reasonable search for work, if that is the Respondent's claim. Based on my observation of the witnesses and a careful analysis of the record as a whole, I find that the Respondent has not shown that the backpay claimants did not search for work, only that during various periods they could not recall whether and where they searched. In conclusion, I find that all of these backpay claimants made a sincere and reasonable effort, in their circumstances, to find interim employment to mitigate loss of income resulting from their discriminatory discharges and because they needed to work to earn their livelihood. The Respondent has failed to sustain its burden of proving lack of diligence in seeking interim employment or willful loss of earnings on the part of any of these backpay claimants during the period when backpay is claimed. Accordingly, I find that backpay is due these individuals in the amounts claimed by counsel for the General Counsel.¹⁶

D. William Ray Davis

The Respondent argues that William Ray Davis has made ascertainment of his interim earnings impossible by failing to produce subpoenaed information bearing on his earnings from self-employment throughout his backpay period. Thus, the Respondent argues, Davis should be denied backpay in full from the time he became self-employed through the remainder of his backpay period. The Respondent submits that it owes Davis only \$2,710. In the backpay specification, counsel for the General Counsel claimed \$10,159 on Davis' behalf, but, accepting

¹¹ *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir. 1977).

¹² *NLRB v. Madison Courier*, 472 F.2d 1307 (D.C. Cir. 1972); *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420, 423 (1st Cir. 1968); *NLRB v. NHE/Freeway*, 545 F.2d 592, 594 (7th Cir. 1976); *McCann Steel Co.*, 224 NLRB 607 (1976).

¹³ *NLRB v. Midwest Hanger Co.*, supra.

¹⁴ *NLRB v. Pugh and Barr, Inc.*, 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966); *Guardian Industries*, 227 NLRB 1140 (1977).

¹⁵ *United Aircraft Corp.*, 204 NLRB 1068 (1973).

¹⁶ Earline Lake, another individual whom the Respondent argues failed to make an adequate search for work and should have her backpay reduced, removed herself from the labor market between May 1975 and December 1976 in order to care for her sick husband. Counsel for the General Counsel and counsel for the Respondent agree that Lake's backpay should be reduced accordingly, and both agree to the sum of \$14,098, plus appropriate interest. Their agreement is well supported by the record herein, and I find that to be the amount owed to Lake.

only the least sum which Davis testified he might have earned through self-employment, has agreed in his post-trial brief to reduce that amount to \$5,968.17.

In the backpay specification, no interim earnings are attributed to Davis for having operated any individual business. When examined by counsel for the Respondent, however, Davis freely admitted operating Ray's Wharf and Hideout. The Respondent argues that it should be inferred Davis purposely neglected to inform counsel for the General Counsel about the establishment and any revenue it brought him. The Respondent also submits it is probable Davis would have never acknowledged its existence had the Respondent not questioned him about it while on the stand. I see no basis for drawing any inference against Davis or speculating about probabilities suggested by Respondent. During his examination, Davis made no attempt to conceal his earnings from that source and cannot be said to have been evasive.

Davis admitted that he obtained a beer license in approximately October 1974 at which time he opened Ray's Wharf and Hideout. Davis operated the establishment as a sole proprietorship for approximately 3 or 4 years, i.e., at least through 1977. Davis now rents out the facility. During examination by counsel for the Respondent, Davis admitted several times that when he operated the business himself prior to renting it out he made approximately \$7,000 or \$8,000 per year from the business. Under cross-examination by the General Counsel, Davis asserted he made only \$150 or \$200 per month. It is on the basis of the testimony on cross-examination that counsel for the General Counsel has agreed to reduce the claim for backpay for Davis from \$10,159 to \$5,968.17. I am not satisfied with the General Counsel's position. Davis claimed that he filed annual income tax returns derived from the operation of Ray's Wharf and Hideout. The Respondent subpoenaed Davis to bring those records to the trial, and in his testimony Davis acknowledged receipt of the subpoena. Although Davis admitted having copies of those records, Davis failed to comply with the subpoena. While Davis was not evasive in his testimony and I will not draw an inference that he concealed interim earnings from counsel for the General Counsel, I shall draw an adverse inference against Davis for having failed to comply with the subpoena requiring him to produce income tax records which he admits are in his possession and/or control. I shall infer that if produced, those records would not support the assertion on cross-examination that he earned only \$150 or \$200 a month from the operation of this business but rather would reflect that he earned at least \$7,000 or \$8,000 per year from it as he admitted to counsel for the Respondent on direct examination. Further, in view of Davis having willfully failed to comply with the subpoena, I shall adopt the approximation of \$8,000 annually (\$2,000 quarterly) for determining whether Davis is entitled to any backpay after October 1974 when he commenced business. A review of the backpay specification reflects that the second calendar quarter of 1976 is the only quar-

ter in which an amount greater than \$2,000 is claimed. Accordingly, I find that after October 1974 Davis is entitled only to \$312 of \$2,312 claimed on his behalf for the second quarter 1976. Adding that to the amounts claimed on his behalf for the fourth quarter 1973 and the first and second quarters 1974, the net backpay due Davis is \$3,022 plus appropriate interest.

ORDER

Upon the entire record, and in accordance with the foregoing findings, I conclude that the Respondent, Master Slack and/or Master Trouser Corp., Hardeman Garment Corp., Morehouse Garment Corp., Lauderdale Garment Corp., Lobelville Garment Corp., its officers, agents, successors, and assigns, shall satisfy its obligation to make whole the backpay claimants here involved by payment of the amounts of net backpay set forth opposite their names. Each of the amounts listed below shall be paid plus interest thereon accrued to the date of payment at the rate of 6-percent interest per annum, computed in the manner specified in *Isis Plumbing Co.*, 138 NLRB 716 (1962), minus any tax withholdings required by Federal and state laws.¹⁷

Grace Beard	\$ 262
Mose Burkley	3,512
Earlie Cheairs	4,455
Ray Davis	3,022
Peggy Peoples Harris	720
Alma Jones	13,557
Freddie Jones	2,455
Mattie Jones	1,263
Earline Lake	14,098
Leroy Lake	17,056
Nathaniel McClellan	37,871
Gladys McGowan	28,404
Doris McNeal	14,606
Percy McNeal	28,660
Ronald Moss	23,056
Wiley Murphy	38,561
Vera Norment	2,132
Juanita Phillips	6,871
Lurlene Pirtle	37,055
Allan Lynn Russell	32,492
Johnny Russell	2,941
Leo Sain	557
Willie Spencer	6,909
Ressie Ford Traylor	23,434
Earnest Williams	552
Patricia Williams	7,876
Margie Wilson	29,950

¹⁷ Counsel for the General Counsel argues that interest should be computed on the basis of the Board's decision in *Florida Steel Corp.*, 231 NLRB 651 (1977). Counsel for the Respondent objects, citing clear authority contrary to the General Counsel's position. *Vanguard Oil & Service*, 246 NLRB 130 (1979); *Otis Hospital*, 240 NLRB 173 (1979); *Pierre Pellaton Enterprises*, 239 NLRB 1211 (1979). Accordingly, interest shall be computed at the rate of 6 percent per annum.