

Sav-On Drugs, Inc.; Jewel Companies, Inc.; American Stores Company; Osco Drug, Inc. and Howard A. Lipton. Case 31-CA-9143

October 31, 1990

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
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On May 24, 1989, Administrative Law Judge Richard D. Taplitz issued the attached supplemental decision. The Charging Party filed 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 the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

In the underlying case,¹ the Board found that Respondent Sav-On Drugs, Inc., violated the Act by discharging employee pharmacists, including Charging Party Howard Lipton, and ordered that those employees be made whole. After enforcement of the Board's Order, Sav-On entered into a settlement agreement, pursuant to which four checks totaling \$48,326.79 were sent by letter dated January 15, 1986, to Lipton's attorney. This amount included \$241.39 as a stock option payment. Lipton, however, never agreed to the settlement and has consistently asserted that he is due more than the \$241.39 for the stock option payment. The checks were never cashed by Lipton nor returned to the Respondent.

Following the Board's denial of Lipton's motion for clarification on July 21, 1986, he filed a petition for review with the Ninth Circuit Court of Appeals. On October 15, 1987, the court remanded the proceeding for an evidentiary hearing on the Charging Party's contentions. By unpublished order of April 20, 1988, the Board accepted the Ninth Circuit's decision as the law of the case and remanded the case to the Regional Director for the purpose of arranging a hearing.

At the hearing the parties stipulated as to certain amounts owed to Lipton (\$2114 more than offered by settlement in January 1986). They left open issues concerning additional backpay from the stock option plan and Lipton's entitlement to additional interest since 1985.²

Lipton contended that he should have received more backpay from the stock option plan than provided for

in the backpay specification.³ He claimed that he would have purchased the maximum number of shares in the years 1982, 1983, and 1984, and that, rather than cash them in when they were called in November 1984, he would have converted them to American Stores common and preferred stocks. At the time of the hearing, he contends, he was entitled to more than \$46,000 plus dividends from the stock option plans.

The judge found that Lipton introduced evidence clearly supporting his assertion that he was in a financial position to participate in the Jewel stock option plan to the maximum extent. The judge also found that Lipton had worked for employers who had stock option plans twice before and that he had participated in both of those plans. The first employer was Sav-On, which offered a stock option plan in 1968. The second employer was Lucky Stores, which offered plans in 1983, 1984, and 1985; Lipton had participated as a manager in those plans.

Despite these findings, the judge was "unable to determine whether Lipton would have purchased Jewel stock under the stock option plan if he had an opportunity to do so, or what amount he would have purchased if he had participated." The judge then concluded that the formula used for computing the backpay owed Lipton was reasonable. He awarded Lipton the stipulated amount of \$50,442 in net backpay, plus interest on only \$2114, the difference between the amount awarded and the amount tendered Lipton in mid-January 1986, rather than on the entire amount of backpay owed.

Lipton excepts to the judge's findings on two matters—the formula for determining the backpay component attributable to the stock option plan and the finding that interest should be awarded only on the difference between what Lipton was originally offered in

³ Regarding the stock option plan, par. 18(a) of the amended backpay specification states:

[I]n a unit of 425 eligible pharmacists during 1982, with a possible total stock purchase power of 106,250 shares, only twenty-six (26) pharmacists availed themselves of the plan for a total stock purchase of 2,043 shares. The formula applied to reasonably determine the number of shares each discriminatee, including Lipton, would have purchased, divided the actual stock purchased (2043 shares) into the total stock available (106,250) to arrive at a percentage figure which represents the percentage of available stock purchased by the unit employees. This percentage is 1.92 percent. The percentage figure of 1.92 percent was then multiplied by the number of maximum shares available to each person (250) to arrive at a stock purchase amount for each person available to purchase stock in the unit, or 4.80 shares per person, rounded off to 5 shares. Each discriminatee, including Lipton, was then given credit for having purchased that number of shares during 1982 at \$30.88 per share x 5 shares = \$154.40, and selling all 5 shares at \$75.00 per share, or \$375.00, on November 16, 1984 when Respondent Jewel was acquired by Respondent American and all shares were called. Therefore, Lipton's shares were worth \$220.60, the difference between \$375.00, the sell price, and \$154.40, the purchase price, plus \$20.79 in returns and stock purchase discounts, for a total of \$241.39.

Par. 18(b) of the specification alleges that, in 1983, one employee purchased 250 shares, and in 1984, two employees purchased a total of 200 shares. It further states that because this amounted to "de minimis" participation, "no shares were credited for those years."

¹ *Sav-On Drugs*, 253 NLRB 816 (1980), enf'd. 728 F.2d 1254 (9th Cir. 1984).

² A further issue concerning successor American Stores Company's liability was also open. The judge found it liable and there are no exceptions to the finding.

settlement and what the Board determines he is owed. We find merit in both exceptions.

1. As the judge found, evidence submitted by Lipton clearly supported his assertion that he had the cash reserves necessary to purchase the stock offered by Jewel during the 1982–1984 period in question, and he had a history as a substantial investor in stocks. Further, the evidence showed that he bought stock under a stock option plan offered by Sav-On in 1968, which he retained for 3 years before selling it. Similarly, while working as a manager for Lucky Stores, he purchased stock under its stock purchase plan in 1983, 1984, and 1985, and kept it until it was recalled and he was required to sell it.

We agree with the judge that this evidence does not require a finding that Lipton would have, as he testified, participated in the plan to the maximum extent possible and would have converted the Sav-On shares to American Stores stock in 1984. Nonetheless, because Lipton has a demonstrated record as a stock investor, it is unreasonable to determine the extent of his likely investment on the basis of an average that includes employees who chose not to participate in the plan at all. It is, however, reasonable to infer that he would have participated in the stock option plan for the 3 years at the same rate as the average employee in the subgroup of those who chose to participate in the plan. We therefore find that the amount due him with respect to the plan should be determined by calculating the average amount of stock purchased by those who purchased stock in the plan during 1982, 1983, and 1984, and that it should be assumed that he would have sold that amount of stock at \$75 a share on November 16, 1984, when the shares were called in by American.⁴

2. In excepting to the judge's determination of interest due on backpay, Lipton argues that the judge erred in awarding interest only on the *difference* between the amount tendered by the Respondents pursuant to the settlement agreement and the larger amount found by the Board to be due him. He contends that he should receive interest on the entire amount due him.

In finding merit to this exception, we note at the outset that, although the checks sent to Lipton's attorney were not returned to the Respondents, they were never cashed by Lipton, because he contended that they were for an amount less than he was owed. The Respondents were on notice at all times that Lipton was contesting the amount, and they knew that he had not cashed the checks soon after receiving them. At no time did they demand that the checks be returned. Because we have now found that Lipton is correct in contending that he was entitled to a significant additional amount from the stock option plan, Lipton was under

no obligation to accept the lesser amount tendered by the Respondents. As a result of Lipton's refusal to accept what he alleged was an inadequate tender, the Respondents could have demanded return of the checks and have had the use of that money. Therefore, we do not find it inequitable now to require the Respondents, as the wrongdoers, to pay interest on the entire amount of backpay owed Lipton.

We will leave the determination of the amount of backpay owed Lipton pursuant to our findings here to further compliance proceedings.

ORDER

The Respondents, Sav-On Drugs, Inc.; Jewel Companies, Inc.; American Stores Company; Osco Drugs, Inc., Los Angeles, California, their officers, agents, successors, and assigns, shall satisfy their obligation to make Howard A. Lipton whole by payment to him of net backpay in an amount to be determined in further compliance proceedings pursuant to this supplemental decision.

Mori Pam Rubin, Esq., for the General Counsel.

Timothy F. Ryan, Esq. (McLaughlin and Irvin), of Los Angeles, California, for the Respondents.

Dennis F. Moss, Esq., of Sherman Oaks, California, for the Charging Party.

SUPPLEMENTAL DECISION

RICHARD D. TAPLITZ, Administrative Law Judge. This supplemental proceeding to determine the "backpay due" Howard A. Lipton was heard in Los Angeles, California, on January 19, 1989. Briefs, which have been carefully considered, were filed by the Charging Party and the Respondents.

A. *Statement of the Case and Background*

In the underlying case, *Sav-On Drugs*, 253 NLRB 816 (1980), enfg. 728 F.2d 1254 (9th Cir. 1984), the Board found that Sav-On Drugs, Inc. (Sav-On) violated the Act by discharging two pharmacy managers (who were held to be employees rather than supervisors) and by thereafter firing 59 pharmacists (including Howard A. Lipton, the Charging Party) when they struck to protest the discharge of the pharmacy managers. The Board ordered Sav-On, its officers, agents, successors, and assigns to make those employees whole for any loss of earnings which they may have suffered by virtue of the discrimination against them by paying them an amount equal to what they would have earned from the date of discharge to the date they were offered reinstatement together with interest calculated in accordance with the policy of the Board, as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition the Board held that other pharmacists whose names were then unknown but who were allegedly discharged because they engaged in the strike could have their rights litigated in a backpay proceeding.

While the matter was pending before the Ninth Circuit, Sav-On entered into a settlement agreement which resolved the litigation with regard to 61 out of a total of 67

⁴Lipton did not except to the judge's finding that Lipton was not entitled to increases in the stocks value due to the takeover by American Stores.

discriminatees.¹ After enforcement of the Board Order, Sav-On entered into a settlement² that on its face resolved the litigation with regard to all remaining six discriminatees including Lipton. Pursuant to that settlement agreement, Sav-On forwarded checks dated January 13, 1986, to the compliance officer of Region 31 for distribution to the discriminatees. By letter dated January 15, 1986, the compliance officer sent four checks to Lipton's attorney. They were \$14,647.56 for interest; \$7,053.63 for profit-sharing payment; \$614.76 for medical expense payment; and \$17,934.26 which was calculated by adding \$25,769.45 for wages to \$241.39 for stock option payment (total of \$26,010.84), and subtracting \$8,076.58 for normal tax withholding. In sum, Lipton's share of the settlement was \$48,326.79 from which normal withholding taxes were deducted. However, Lipton never agreed to the settlement. He consistently claimed that he was due substantially more money. He neither cashed the checks nor returned them to Sav-On. As of the date of the trial, he (either directly or through his attorney) still had possession of the checks. The checks stated that they were for full and complete payment.

On June 25, 1986, Lipton served a motion for clarification on the Board and on Sav-On. On July 21, 1986, the Board denied the motion.

On September 11, 1986, Lipton filed a petition for review with the Ninth Circuit Court of Appeals seeking review of the General Counsel's decision to approve the settlement. In an order filed on October 15, 1987, in *Howard Lipton, Petitioner v. NLRB*, Respondent, Case 86-7573, the court remanded the case to the Board for the purpose of arranging a hearing, holding:

This case presents a single issue: to what extent does the Board have the power to approve settlements of unfair labor practice claims without the charging party's consent and without providing the charging party an evidentiary hearing to consider the charging party's version of the facts? We hold that when a charging party raises a material issue of disputed fact regarding an unfair labor practice, the Board cannot approve a settlement over the charging party's objections without first granting an evidentiary hearing.

The decision as a whole dealt with the right of a charging party to an evidentiary hearing and there is nothing in the decision to indicate whether Lipton's claim that he was entitled to more than was provided for in the settlement agreement was or was not a valid one. In accordance with the court's decision, the Board on April 20, 1988 remanded the case to the Regional Director for Region 31 for the purpose of arranging a hearing before an administrative law judge on Lipton's objections which raised material issues of disputed fact. That hearing was held before me on January 19, 1989.

¹ Apparently six formerly unknown names were added to the original 61 pursuant to the procedure set forth in the Board Order.

² The settlements were entered into between another charging party, the Guild for Professional Pharmacists, and Sav-On. They were approved by the Regional Director. The 61 discriminatees received a total of \$3,987,849 and later 5 other discriminatees received a total of \$581,098.

B. Agreed-Upon Matters and the Remaining Issues

At the outset of the hearing the parties were able to narrow the issues. They entered into the following stipulation:

The Administrative Law Judge may issue an order finding that Respondents' obligation for gross backpay, all interest through July 12, 1985, profit-sharing and medical benefits will be discharged by payment to Lipton of the following gross sums, \$14,600 as interest, \$7,000 as profit-sharing, \$27,500 as backpay and \$1,100 as medical benefits.

The parties further stipulated that that sum was greater than the amount previously offered to Lipton.

All parties agreed that there were only three issues remaining to be resolved. They were: (1) whether American Stores Company is jointly and severally liable for backpay with the other companies named in the caption; (2) whether Lipton is entitled to additional backpay because of the provisions of a stock purchase plan; and (3) whether Lipton is entitled to interest from July 12, 1985, until payment is made.

C. American's Liability

The amended backpay specification alleges, the amended answer to that specification admits, and I find that on or about November 6, 1980, Jewel Companies, Inc. (Jewel) purchased Sav-On; that on or about November 16, 1984, Jewel was purchased by American Stores Company (American); that on or about February 2, 1986, American caused Sav-On to merge with Osco Drug, Inc. (Osco) and that Jewel, American, and Osco are successors of Sav-On for the purposes of remedying the reinstatement and make-whole provisions of the Board's Order and judgment.

While admitting that American is a successor to Jewel and Sav-On for the purposes of remedying the reinstatement and make whole provisions, the answer denies that American purchased Jewel with full knowledge of the pending unfair labor practice litigation in this matter. However, the parties entered into a stipulation as follows:

Respondents Sav-On Drugs, Inc.; Jewel Companies Inc.; American Stores Company; and Osco Drugs, Inc., Charging Party Howard A. Lipton and the General Counsel for the National Labor Relations Board hereby stipulate the following.

The supervisors, managers and agents of Sav-On Drugs, Inc., who participated in the decision in or about January/February 1979 to terminate the pharmacists (including Howard A. Lipton) who were the subject of the National Labor Relations Board matter of *Sav-On Drugs, Inc. and Guild for Professional Pharmacists and Howard A. Lipton* Cases No. 31-CA-8641 *et al*, and the supervisors, managers, and agents of Sav-On Drugs, Inc. who implemented or had knowledge of said decision were substantially the same supervisors, managers and agents who continued to work for Jewel Companies, Inc. and also for American Stores Company when it purchased Jewel Companies, Inc. (in November 1984).

In the light of that stipulation, an inference is warranted that American did have knowledge of the unfair labor practice

litigation. The answer admitted such knowledge with regard to Jewel and Osco and also admitted the legal conclusion that Jewel, American, and Osco were successors for the purpose of remedying the unfair labor practices. Sav-On, Jewel, American, and Osco (jointly referred to as the Respondents) offered no evidence with regard to the issue of joint and several liability and I find that they are so liable. *Croley Coal Corp.*, 280 NLRB 899 fn. 3 (1986); *Cumberland Nursing Center*, 263 NLRB 428, 434 (1982).

D. The Stock Purchase Plan

Beginning in March 1982, Jewel made available to its employees and those of its affiliated companies a stock purchase plan which allowed employees to purchase up to 250 shares of Jewel stock per year per employee. If Lipton had not been unlawfully discharged, he would have been eligible to participate in that stock option plan. Under that plan, Lipton, if he had been an employee of Sav-On, would have had the option of buying up to 250 shares a year during 1982, 1983, and 1984. The shares were available on the open market to anyone who cared to purchase them but through the plan, the employee could obtain a discount of \$2 a share or 5 percent, whichever was less. In addition the employee was given up to 100 weeks to pay for the stock. However if an employee who purchased stock in one year wanted to purchase stock in the following year, he had to complete payment on the first purchase before making the second purchase. Once full payment was made, dividends were paid from the date of original purchase. No brokerage commission was charged.

The General Counsel in the amended backpay specification asserts that Lipton would be made whole with regard to the stock purchase plan by the payment of \$241.39. In substance the General Counsel took the position that there was no way of ascertaining what Lipton would have purchased or how long he would have held whatever he did purchase and that it was reasonable to take an average of the stock purchase participation of all similarly situated employees and use that as a basis for approximating the amount that Lipton should receive. The calculation is set out in paragraph 18 and appendix D of the amended backpay specification.

Paragraph 18 of the amended backpay specification states:

18 (a) Beginning in March 1982, Respondent Jewel made available to its employees a stock option plan which allowed employees to purchase company stock, up to 250 shares per year, per employee. Appendix D," attached hereto and made a part hereof, shows that in a unit of 425 eligible pharmacists during 1982, with a possible total stock purchase power of 106,250 shares, only twenty-six (26) pharmacists availed themselves of the plan, for a total stock purchase of 2043 shares. The formula applied to reasonably determine the number of shares each discriminatee, including Lipton, would have purchased, divided the actual stock purchased (2043) shares into the total stock available (106,250) to arrive at a percentage figure which represents the percentage of available stock purchased by the unit employees. This percentage is 1.92 percent. The percentage figure of 1.92 percent was then multiplied by the number of maximum shares available to each person (250) to arrive at a stock purchase amount for each person available to purchase stock in the unit, or 4.80 shares per

person, rounded off to 5 shares. Each discriminatee, including Lipton, was then given credit for having purchased that number of shares during 1982 at \$30.88 per share X 5 shares = \$154.40, and selling all 5 shares at \$75.00 per share, or \$375.00, on November 16, 1984 when Respondent Jewel was acquired by Respondent American and all shares were called. Therefore, Lipton's shares were worth \$220.60, the difference between \$375.00, the sell price, and \$154.40, the purchase price, plus \$20.79 in returns and stock purchase discounts, for a total of \$241.39.

(b) For the calendar year 1983, only one (1) unit employee purchased stock, for a total purchase of 250 shares for 1983, and in 1984, only two (2) unit employees purchased stock, for a total purchase of 200 shares for 1984. As participation for those years was de minimus, no shares were credited for those years.

Lipton vigorously opposes the General Counsel's position. He asserts that he was in a financial position to exercise the stock option to its maximum extent; that he would have purchased all the stock under the plan that he could have; and that he would have held on to the stock and converted it to the stock of a successor company when the original stock was called in. He testified that he would have bought 250 shares a year in 1982, 1983, and 1984. His computations were as follows: The average of the highest and lowest prices for the stock for the first quarter of 1982, 1983, and 1984 were respectively \$31.37, \$44.75, and \$46.13; the cost of the 250 shares in each year's first quarter would be \$250 times the average cost in each of the first quarters, which came to \$7,842.50 for 1982, \$11,187.50 for 1983, and \$11,531.25 for 1984; the discount from those prices would be 5 percent or \$2 a share, whichever was less (which would have amounted to discounts of \$392 in 1982, \$500 in 1983, and \$500 in 1984) so that he would have paid a total of \$30,561 minus \$1392 or \$29,169 for the stock; he would have had to pay \$30,561 plus brokerage commission if he had bought the same stock on the open market; he would have kept the stock until November 16, 1984, when American purchased Jewel and gave all stockholders the option of either receiving \$75 per share or converting their stock to American stock; at that time he would have converted his 750 shares of Jewel stock to 324 shares of American Stores common, 673 shares of American Stores preferred A, and 195 shares of American Stores preferred B; on August 15, 1988, American bought back the preferred B stock of which he would have had 195 shares at \$55.60 a share for a total of \$10,842; he would have kept the remaining stock consisting of 324 shares of American Stores common which as of the date of the trial was worth \$59.75 a share or \$19,359; and his remaining stock consisting of 673 shares of American preferred A was at the time of the trial worth \$67.50 or \$45,427.50. Adding up the figures given by Lipton, it appears that he is contending that the total value of the stock and the money he received from stock sales would have amounted to \$75,628.50. In addition he contends that he should be paid an amount equal to the dividends distributed from all the stocks that he would have held. Though Lipton has not added up the figures in his brief, it appears that because of the stock purchase plan he is seeking the difference between the purchase price of \$29,169 and the value at the

time of the trial of \$75,628.50 for a total of \$46,459.50 plus dividends.

Respondents contend that any additional award to Lipton on the stock purchase plan would be based on pure speculation because there is no reliable evidence that he would have participated in the plan at all. Respondents also argue in substance that the General Counsel's formula was reasonable and that in any event even if Lipton is entitled to money under the plan, mitigating factors have to be addressed.

Pursuant to the direction of the Ninth Circuit and the Board, Lipton was permitted to develop evidence on the record with regard to what he as an individual would have done if he had been permitted to participate in the stock purchase plan.

He testified that he was in a financial position to participate in the plan to the maximum extent. He introduced evidence of other stock market transactions and his income tax returns that clearly supported that assertion. He was a substantial investor in the stock market and had reserves that could easily have met the cash needs for purchasing some \$30,000 worth of Jewel stock under the plan from 1982 through 1984.

The remainder of the evidence in this regard consisted of Lipton's testimony that he would have purchased the 250 shares per year of Jewel stock in 1982, 1983, and 1984; that he would have held on to all of that stock until it was called in by American; and that he would have converted the called-in stock for American stock. The testimony with regard to his intentions was supported by evidence concerning his conduct with prior employers where he had taken full advantage of stock option plans offered by those employers. With regard to each of his claims, there is some grounds for skepticism.

Lipton worked for employers who had stock option plans twice before the incidents in this case took place. The first time was for Sav-On which offered a stock option plan in 1968. Lipton testified that he participated to the maximum extent possible in that plan. There is very little evidence in the record to indicate the details of the plan or to establish whether Lipton bought the stock because of the company plan or simply because it was one of many trades that he thought was worthwhile and that he would have purchased on the open market with or without the plan. The stock purchase order does indicate that he bought 50 shares of Sav-On stock on October 16, 1968, at \$22 a share for a total purchase price of \$1100 with no deduction for commission, so apparently there was at least a commission-free aspect to the plan. However the record also shows that Lipton sold those 50 shares on October 28, 1971, for a net amount of \$1,252.53 after paying \$19.81 commission. That sale undermines to some extent Lipton's contention that he would have held on to the Jewel stock if he had purchased it in 1982, 1983, and 1984. The evidence supplied by Lipton establishes that Lipton bought and sold when he thought market conditions warranted action. Even if he bought stock as part of a stock purchase plan, there was no incentive in such a plan to keep the stock after it had been purchased. At that point ordinary business considerations were controlling. In any event the fact that he thought it good business to purchase \$1100 worth of Sav-On stock in 1968 does not give much weight to Lipton's argument that he would have purchased almost \$30,000 worth of stock in Sav-On's successor com-

pany from 1982 through 1984. In 1971 Lipton demonstrated a lack of confidence in Sav-On by selling its stock. Moreover, even though Lipton made substantial trades on the market, he was still a person to whom there was a very sizeable difference between an \$1100 purchase and a \$30,000 one. He might have bought no stock, \$1100 worth of stock, or \$30,000 worth of stock in 1982-1984 but it is not possible from his prior conduct to tell just what action he would have taken.

The second company that Lipton worked for that had a stock purchase plan was Lucky Stores. While he was employed there as a manager in 1983, 1984, and 1985, he purchased 25 shares each year at \$337.50 per year for a total of \$1,012.50. He kept that stock until it was recalled and he was required to sell it. The record is not clear as to whether there was a successor company to Lucky with stock that could have been purchased on the open market. If there was then the situation would be similar to that which would have taken place when American succeeded Jewel. Lipton testified that he would not have taken the money for the Jewel stock but would have reinvested it in the American stock. With the Lucky stock he apparently took the money and there is no indication he reinvested it in any successor stock. Here again, however, the purchase of the Lucky stock is simply not comparable to the situation in the instant case. The total purchase at Lucky was \$1,012.50 and the purchase involved in the instant case was almost \$30,000. Lipton's past practices do not indicate what he would have done in the instant case.³

The only other evidence indicating what Lipton would have done with regard to the Jewel purchase option plan was the testimony of Lipton himself. He is a stock market investor who was testifying with all the advantages of hindsight as to what trades he would have made years ago. It is very difficult to be objective in such circumstances. Stocks can go up as well as down. Respondents are required to put Lipton in the position he would have been in if he had not been unlawfully discharged. If Lipton had bought \$30,000 worth of Jewel stock under the plan from 1982 through 1984 and the stock had gone down, a serious argument could have been made that the amount of the loss could have been deducted from Lipton's backpay and he would still have been made whole. In such circumstances it is difficult to picture Lipton testifying during this trial that he would have made those purchases. It is equally difficult to give full weight to his testimony at the trial, at a time when he knew that the value of the stock had exploded in an upward direction, that he would have purchased the maximum amount under the plan. The fact is that Lipton could have bought all the stock on the open market in 1982 through 1984 for only slightly more than it would have cost him through the plan. The amount involved in the \$2 per share or 5-percent discount could have been made up or lost in a few days trading. It was a marginal amount rather than one which would have made a \$30,000 stock purchase a good or a bad investment. Even if we assume that such a minimal incentive would have induced Lipton to purchase the \$30,000 worth of stock at a time when he did not consider it a good enough investment to buy on the open market, the incentive would have dropped

³In addition the plans were not comparable in that the Lucky plan provided for a substantially greater discount on the purchase of shares than did the Jewel plan.

out at the point that the Jewel stock was called in when American purchased Jewel. At that point Lipton was no different than any other stockholder who had purchased shares on the open market. Lipton did not purchase American shares on the open market and his contention that he would have used the \$75 per share he was offered for the Jewel stock to reinvest in American stock (at a time when there was no stock purchase plan incentive to do so) is highly suspect. Even if I were to find that Lipton would have purchased the maximum amount of Jewel stock under the plan, I would still find that that stock would have been valued at \$75 per share, which was its value when it was called in on November 16, 1984, and that Lipton was not entitled to any increase in the value of American stock.

Lipton testified that his investment strategy in 1982, 1983, and 1984 was to look for sound investments with high yields which would diversify his holdings. He also averred that he considered the tax consequences of investments.⁴ He testified that he would have made the purchases under the Jewel stock purchase plan because the store was growing and adding new stores and the profits and sales were going up. However, those considerations were not sufficient to prompt Lipton to buy the stock on the open market where he could have done so without substantially greater cost. Indeed, in 1982, 1983, and 1984 he could have hedged on the relatively small additional cost of the stock by purchasing the stock on the open market and then claiming in the unfair labor practice proceedings that he was entitled to the discount and the broker's fee. He did not do so.

There is also reason to question whether the purchase of \$30,000 worth of Jewel stock would have fit into Lipton's overall investment strategy. He was extremely concerned with the tax consequences of his investments as indicated by the tax returns for 1982, 1983, and 1984 that he introduced into evidence. Lipton's Federal return for 1982 showed wages of \$43,614, interest income of \$6357 and dividend income of \$2265. That return showed an investment loss on schedule E of \$15,101. The return for 1983 showed an even more substantial loss. Wages were \$46,460, interest \$2536 and dividends \$3941 with the schedule E loss of \$23,500. For tax purposes, 1984 was a banner year. The return showed wages of \$50,221, interest of \$1571, and dividends of \$5148 with the schedule E loss of \$51,407. If Lipton had purchased \$30,000 worth of Jewel stock during that 1982 through 1984 period, any profits he made on the sale would have been exposed to full capital gains tax and he would not have been able to shelter his regular income with that investment.

After fully considering the testimony of Lipton and the other evidence in the record, I am unable to determine whether Lipton would have purchased Jewel stock under the stock option plan if he had an opportunity to do so, what amount he would have purchased if he had participated, or whether he would have held on to the stock for any length of time if he had purchased it.⁵ Under such circumstances

⁴At another point in his testimony he averred that he purchased stock at companies with which he worked because he wanted to be part of those companies. I am unable to give that assertion much weight. His testimony as a whole indicates that he is a very astute stock market investor who puts his money to work for him on the basis of business judgment rather than emotional ties to an employer.

⁵As indicated above, I believe the evidence warrants the conclusion that even if Lipton had participated in the stock option plan, he would have sold

the General Counsel is put in an extremely difficult position when he has to set forth a rational formula in a backpay specification. As a general principle, doubts should be resolved in favor of a wronged party rather than a wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068, 1069 (1978). However, the backpay specification must be based on something more than sheer speculation. As the court held in *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1177 fn. 28 (5th Cir. 1969), where the backpay liability basis cannot be established precisely, the Board is only required to employ a formula reasonably designed to produce approximate awards due. The General Counsel has met that requirement in the backpay specification. For the reasons set forth above, the evidence does not establish that Lipton would have acted differently than other employees with regard to the stock purchase plan. It was therefore reasonable for the General Counsel to assign to Lipton the same benefits that the other employees, on average, obtained from the stock purchase plan. The General Counsel's computation is set forth in detail in section D above where it is concluded that Lipton was entitled to \$241.39 in order to be made whole with regard to the stock purchase plan. I find that that was all Lipton was entitled to with regard to that plan. That was also the amount that was tendered to Lipton when he was given the checks dated January 13, 1986, as part of the \$48,326.79 which was Lipton's share in the settlement agreement.

It is noted that even if Lipton's contentions were fully accepted, there would be great difficulty in determining the amount due on the stock purchase plan. Where an unlawfully discharged employee spends his time earning money at another job, that money constitutes interim earnings that must be deducted from the backpay. An analogy can be drawn to money earning money. Lipton had \$30,000 worth of money working for him that he would not have had available if he had spent it on the Jewel stock. It is not possible on the present record to determine what investments Lipton would have had to forgo in order to use the \$30,000 for the Jewel stock. That \$30,000 might have given him an even better return on the investments he made with it than if he had used it for the Jewel stock. On the other hand, he might have lost money on those investments. It is quite possible that "interim earnings" in terms of profits from the \$30,000 investment would have to be set off against the amount due. It is apparent that there are many too many "ifs" in this case, which gives added impetus to the conclusion that the General Counsel's "averaging" formula is a reasonable one. Where reasonable, the General Counsel's formula for backpay should be entitled to great weight. The General Counsel is enforcing public rather than private rights. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-308 (1959).

E. *The Interest Due*

As is set forth above, the parties are in agreement that I may issue an order finding that Respondents' obligation for gross backpay, all interest through July 12, 1985, profit-sharing and medical benefits will be discharged by payment to Lipton of the following gross sums, \$14,600 as interest, \$7000 as profit-sharing, \$27,500 as backpay and \$1100 as medical benefits. That amounts to a total of \$50,200. In addi-

his shares at \$75 a share on November 16, 1984, when they were called in by American.

tion I have found that Lipton is entitled to \$241.39 to make him whole with regard to the stock purchase plan. That brings the total to \$50,441.39. He is entitled to that amount from which normal withholding taxes must be deducted. The only remaining question relates to the amount of interest that Lipton is entitled to from July 12, 1985, until payment is made.

The checks dated January 13, 1986, which Lipton still holds, are for \$48,326.79 minus normal withholding taxes. The difference between the amount due (not including possible interest after July 12, 1985) of \$50,441 and the amount tendered to Lipton in mid-January 1986 of \$48,326.79 (from which normal withholding taxes were deducted) was \$2,114.21. The years of litigation after Lipton rejected the settlement has resulted in an increase due to Lipton of \$2,114.21, which is about 4.4 percent more than the \$48,326.79 he would have received if he had accepted the settlement and cashed the checks. Lipton has not prevailed in his contention that he was entitled to a very substantial sum because of the stock option plan. The \$241.39 that he is entitled to was tendered to him as part of the settlement in mid-January 1986. Yet he seeks interest not only on the \$2114 increase the litigation brought him but on the entire \$50,200. Whether or not Lipton had an obligation to return the checks that he retained in his possession, I believe it would be inequitable to require Respondents to pay interest on the entire amount. The Board encourages settlements rather than litigation. Here the settlement offer covered 95.6 percent of the amount that was eventually held to be due. The settlement was satisfactory to the General Counsel and the Board. As the United States Supreme Court held in *NLRB v. Fant Milling Co.*, supra, "The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce."

As held by the Ninth Circuit, the charging party was entitled to an evidentiary hearing. That hearing has been held and the charging party has not prevailed in establishing that the settlement agreement was substantially inadequate. I shall therefore award interest only on the \$2114, which is the

amount by which the money due exceeds the settlement offer.

F. Conclusionary Findings

In sum, I find that Respondents' obligation to Lipton will be discharged by the payment to him of \$14,600 as interest through July 12, 1985, \$7000 as profit sharing, \$27,500 as backpay, and \$1100 as medical benefits. In addition, Respondents are to be ordered to pay Lipton \$242 in order to make him whole with regard to the stock purchase plan and to pay interest on \$2114 to accrue commencing July 13, 1985, and continuing until the date this decision is complied with, in the manner prescribed in *New Horizons for the Retarded*.⁶

On the basis of these findings and conclusions and on the entire record of this proceeding, I issue the following recommended⁷

ORDER

The Respondents, Sav-On Drugs, Inc.; Jewel Companies, Inc.; American Stores Company; and Osco Drugs, Inc., Los Angeles, California, their officers, agents, successors, and assigns, shall satisfy their obligation to make Howard A. Lipton whole by payment to him of net backpay in the amount of \$50,442, plus interest on \$2114, in the manner set forth in the section of this decision entitled "Conclusionary Findings," minus any tax withholding required by Federal and state laws.

⁶283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.