

Churchill's Supermarkets, Inc. and United Food & Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626. Cases 8-CA-13944-1, 8-CA-13944-2, and 8-CA-14243-1

February 19, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On July 26, 1990, Administrative Law Judge Robert W. Leiner issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Churchill's Supermarkets, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall pay William Winans the sum set out in the recommended Order.

¹We correct the following inadvertent errors in the judge's decision: (1) Sec. III, par. 4, second sentence should read ". . . commencing with the 2nd quarter of 1986 there is no net backpay due . . ." (2) Sec. III, par. 15, should state that Winans quit Interior Drywall Systems because the work slowed down and there was no more work, and that he subsequently quit Babson-Cook because the work was "dirty and dangerous." (3) Sec. III, par. 12, should state that in August 1980, Winans quit his job as a furniture mover and subsequently went to work at a commercial bindery at the end of August. (4) Sec. III, par. 12 should read "and remained out of work from October 1980 through January 21, 1981." These errors do not affect our decision as they are, in the words of Sir Winston Churchill, merely examples of "terminological inexactitude."

We agree with the judge that the compliance officer properly projected, in the backpay specification, that Winans' annual hourly wage increase would be 18 cents. We find no merit in the Respondent's arguments that the compliance officer's yearly wage projection was too high and that Winans' wage rate should have been capped at \$4.05 an hour, the highest rate paid by the Respondent to any of its bagger employees. In any event, we note that although at the end of the backpay period in 1989 Winans' projected hourly wage rate was \$4.87, the maximum hourly rate actually resulting in net backpay to Winans is \$4.33, because from the second quarter of 1986 to the end of the backpay period, Winans' earnings from interim employment exceeded his projected earnings from the Respondent.

In adopting the judge's findings regarding Winans' projected yearly wage increases, we do not rely on the judge's rationale that Winans' \$4.87 wage rate was comparable to the full package of benefits received by full-time employees (and those working more than 32 hours) covered by collective-bargaining agreements in the area. The judge, at sec. I, par. 9, erroneously compared Winans to full-time employees and those part-time employees working more than 32 hours. Winans, as stipulated by the parties, worked 30.36 hours per week and thus could not be considered a full-time employee. We note, however, that the judge's analogy is not totally without merit as the area collective-bargaining agreements do provide for fringe benefits, such as health and welfare contributions, at a reduced rate, for part-time employees working less than 32 hours per week.

301 NLRB No. 107

Patricia E. Snyder, Esq., for the General Counsel.
Terrance L. Ryan, Esq. (Marshall & Melhorn), of Toledo, Ohio, for the Respondent.
James Carrasquillo, Organizer, of Holand, Ohio, for the Union.

SUPPLEMENTAL DECISION

ROBERT W. LEINER, Administrative Law Judge. On July 31, 1987, the National Labor Relations Board (the Board), issued its Decision and Order (285 NLRB 138 (1987)), directing Churchill's Supermarkets, Inc. (Respondent), its officers, agents, successors, and assigns, to make whole certain employees for loss of wages resulting from Respondent's unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).¹ On September 20, 1988, the United States Court of Appeals for the Sixth Circuit, per curiam, entered its judgment and order enforcing in full the Board's Order (*Churchill's Supermarket, Inc. v. NLRB*, 857 F.2d 1474 (6th Cir. 1988)), and on May 1, 1989, the United States Supreme Court denied Respondent's petition for writ of certiorari, 109 S.Ct. 1953.

On August 30, 1989, the Regional Director for Region 8, issued and served the instant compliance specification and notice of hearing to which Respondent timely filed its answer. Respondent's answer admits various allegations of the specification, denies others, and asserts that the backpay owing to William Winans does not exceed \$1967 exclusive of interest (G.C. Exh. 1(g)).² As an affirmative defense, Respondent asserts that Winans failed to mitigate backpay (1) by failing to seek interim employment, (2) by being discharged from interim employment for cause, or (3) by quitting without just cause (G.C. Exh. 1(g), p. 4).

At the hearing, held November 8, 1989, in Toledo, Ohio, all parties were represented, were given full opportunity to call and examine witnesses, to submit oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs. Thereafter, General Counsel and Respondent submitted timely briefs which have been carefully considered.

At the hearing, the parties stipulated that the backpay period ended on June 20, 1989, rather than as alleged by the General Counsel, on July 17, 1989 (Tr. 13). In addition, Respondent conceded, for purposes of computing gross backpay, that the sole remaining discriminatee, William Winans, would have worked an average of 30.36 straight-time hours per week during the backpay period rather than 7.5 hours, as alleged in Respondent's answer (Tr. 14).

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

Winans was discharged on March 20, 1980. At that time, he was a grocery "bagger," a job which required him to package and deliver to customers various groceries and other

¹Of the three employees named in the compliance specification for whom backpay was allegedly owing, all parties, at the opening of the hearing, entered into settlements resolving backpay of two of the three named discriminatees. This left for resolution only the backpay of discriminatee William Winans.

²In its subsequently filed, posthearing brief, Respondent asserts that Winans' backpay, in total, should not exceed \$204 plus interest (R. Br. p. 10).

items sold in Respondent's supermarket. As above noted, the parties stipulated that the backpay period ended June 20, 1989. In addition, the parties agreed that the amounts of Winans' interim earnings are accurately reflected in General Counsel's backpay specification, appendix B (Tr. 78).

Further, the parties appear to be in agreement that there were two issues to be determined in this proceeding: (1) Whether General Counsel's projected hourly wage rates for Winans, which wage rates form a substantial basis for General Counsel's calculation of gross backpay, should be adopted by the Board; and (2) whether, under Respondent's affirmative defenses, above, Winans failed to lawfully mitigate the backpay Respondent owed to him.

I. THE APPROPRIATE WAGE RATE SUPPORTING CALCULATION OF GROSS BACKPAY

When Respondent unlawfully discharged Winans on March 20, 1980, he was working as a bagger at \$3.15 per hour. Seeking to establish the earnings of a comparable bagger who worked during the backpay period, the Region's compliance officer (Norman L. Richard) discovered that Respondent's record disclosed no other bagger who had worked during the entire 9-year backpay period. There is no dispute that it was therefore necessary for the General Counsel to construct a hypothetical employee who would have worked the entire 39-quarter backpay period (March 20, 1980 to June 20, 1989).

Consistent with this necessity, Respondent supplied to the Regional Office a series of computerized summaries of payroll records in which Respondent developed three hypothetical bagger employees based on a succession of actual employees who had reasonably long tenure. Noting that no bagger actually had remained as such for more than a few years, Respondent created three hypothetical employees: Winnans I, Winnans II, and Winnans III. Respondent nevertheless asserted that these three compilations, creating hypothetical employees, constituted "a fair and average approximation of the hours and rates of pay according to individuals holding Winans' former position" (G.C. Exh. 2). Respondent described the compilation as "the most accurate data readily available and, since it tracks the Board's backpay analysis procedures and practices, should provide a useful means of comparison. (See G.C. Exh. 2, p. 1.) In each of the three hypothetical constructs, the employee initially employed in the first quarter of 1980, had a starting rate of \$3.10 per hour and a finishing rate of \$3.80 per hour.

Confirming from his own examination of Respondent's records that the models supplied by Respondent in fact were representative of baggers during the backpay period, the Regional compliance officer then created a yearly progression of wage per hour for each calendar year based on the wage increases that the actual baggers (whose wages were described in Winans I, II, and III) received during the backpay period. While none of the employees appearing in Respondent's proposed hypotheticals are representative for the purpose of actual reconstruction of what Winnans would have received, the hourly wage rates they received plus the average wage increases Respondent gave them (weighed against long-term employees and in favor of short-term employees, i.e., short-term employees received wage increases at a greater rate than long-term employees, like Winans, in the 10-year backpay period) were projected by the compliance officer on

a yearly basis. This projection created a hypothetical wage rate that Winans would have enjoyed in each of the 10 years of the backpay period. In particular, the compliance officer discovered that, on average, the bagger, in a composite of long-term and short-term employees, received an hourly wage increase, each year, averaging 18 cents per hour. In short, the compliance officer added the amount of all wage increases given to the model baggers supplied by Respondent, totaled the amount, and divided the total by the number of wage increases in the model. I thereby established the average yearly wage increase at 18 cents per hour (Tr. 31).

The backpay specification, therefore, shows Winans' hourly wage rates in the backpay period to be:

3/20/80 to 12/31/80 =	\$3.25
1/1/81 to 12/31/81 =	3.43
1/1/82 to 12/31/82 =	3.61
1/1/83 to 12/31/83 =	3.79
1/1/84 to 12/31/84 =	3.97
1/1/85 to 12/31/85 =	4.15
1/1/86 to 12/31/86 =	4.33
1/1/87 to 12/31/87 =	4.51
1/1/88 to 12/31/88 =	4.69
1/1/89 to 6/20/89 =	4.87 ³

While Respondent admits that the hourly rate for Winans would have increased from time to time (Respondent's answer, G.C. Exh. 1(g), p. 2), and while Respondent admits that Winans' 1980 wage rate was \$3.25, it asserts that the average wage increase per year was 12 cents rather than 18 cents (G.C. Exh. 1(g), p. 2).

Respondent has submitted no documentation to support its assertion that the average yearly wage increase would be merely 12 cents. Nor has it submitted any evidence directly attacking the compliance officer's method by which he reached 8 cents per hour as the average wage increase in the 10-year period; nor has Respondent shown any miscalculation by the compliance officer in arriving at the particular figure. Indeed, the documents submitted by Respondent as a "fair and average approximation of the hours and rates of pay according to individuals holding Winans' former position" (G.C. Exh. 2) disclose numerous examples of hourly wage increases ranging from 15 cents (employee Robert Napierla; Winans I; Kellie Curry, 1983; Winans I; Jeremie Snyder, 20 cents per hour, 1987) to a 35-cent-per-hour wage increase in 1980 (Sheila Boyle, Winans II) and, an apparent 45-cent-per-hour increase in 1985 (Todd Haynes, Winans II). Thus, Respondent's records show wage increases ranging from 10 cents to more than 30 cents per hour for various employees during the backpay period. In view of Respondent's failure to specifically indicate where the compliance officer's sources, methodology or mathematics were incorrect, I find that Respondent has failed in its burden to demonstrate that the yearly increment of 18 cents per hour in Winans' hypothetical pay in each year of the 39-quarter backpay period, was incorrect. I further conclude, on the agreement of the parties, that Winans would have worked 30.36 straight time

³The stipulation that the backpay period ends on June 20, 1989, rather than July 17, 1989, according to the agreement of the parties, does not affect the calculation of gross or net backpay because, since the second quarter of 1986, Winans' interim earnings were higher than the calculated gross backpay owed, resulting in no net backpay calculated. (See G.C. Exh. 3.)

hours per week, and that the General Counsel's calculation of gross backpay, as pleaded in the compliance specification, is correct.

Respondent, however, argues in the alternative that, in any event, no Churchill employee working as a bagger, like Winans, ever earned more than \$4. Where Respondent's records show, as Respondent admits, that one employee received \$4.05, Respondent asserts that that employee "consistently had additional duties beyond those of the ordinary bagger (R. Br., p. 8). While Respondent asserted that it was prepared to offer testimony to support its assertion that employee Todd Haynes had duties other than as bagger in order to qualify him for the \$4.05 rate, it never did so. Respondent counsel's assertions do not constitute affirmative evidence of the fact to be proved in the absence of testimony or stipulation supporting such assertion. In any event, General Counsel did not concede that Winans did not perform additional duties similar to those of Haynes which would have qualified him for a pay rate higher than \$4 per hour. The evidence showed that in addition to his bagging responsibilities, Winans shoveled snow, drove a flower delivery truck on occasion, and delivered banquet party trays in his own vehicle (Tr. 91-93).

Finally, Respondent argues that, in any case, for the period commencing 1986 through the end of the 1989 backpay period, Winans' hourly rate of pay should not be \$4.87 an hour, as General Counsel urges; rather, it should be a maximum of \$4.10 per hour which was the prevailing rate in a 13-county area covered by the Charging Party's union contracts establishing the wage rates for baggers. This is the top rate for baggers at unionized stores (R. Exhs. 1 and 2). The collective-bargaining agreements establish that the highest wage rate would be the bagger's existing wage rate and, effective November 30, 1986, an additional 10-cent-per-hour increase. Thus, as Respondent argues, the maximum would be \$4.10 per hour (or \$4.15 per hour if Winans qualified for the \$4.05-per-hour rate which employee Todd Haynes enjoyed).

The collective-bargaining agreements, however, also contain provisions relating to overtime, Sunday and holiday premium pay; pay for legal holidays; call-in pay; vacation; health and welfare coverage; and a pension plan. Coverage for health and welfare contributions relate to employees, like Winans, who would work 32 hours or more hours per week for 12 consecutive weeks. Contributions for such full-time employees are \$140 per month per eligible full-time employee (R. Exh. 2, p. 26). The Union's pension plan (R. Exh. 2, pp. 28-29) requires an employer contribution of 38 cents per hour (up to 40 hours per week for covered employees).

II. DISCUSSIONS AND CONCLUSIONS

General Counsel's Gross Backpay Computations

As above noted, Respondent produced no particularized evidence to dispute the General Counsel's calculation of projected, estimated yearly wage increases for Winans as a bagger. General Counsel's figures show an 18-cent-per-hour increase per year; Respondent urges a 12- to 13-cent-per-hour increase per year. The regional compliance officer demonstrated his sources, methodology and calculations which showed, he testified, an 18-cent-per-hour average. Respondent failed to adduce evidence to show that either the sources,

methodology, or calculations were incorrect. Furthermore, Respondent itself provided the sources and could not reasonably attack the regional compliance officer's use of the sources or the accuracy of the wage rates, including the 20-cent-per-hour wage increases given to baggers.

There is no question, as Respondent argues, that baggers in the backpay period exceeded \$4 or \$4.05 per hour. They did not. It is further true, as Respondent argues, that the General Counsel's construction of the 39-quarter backpay period, with the hypothetical wage rates Winans would have received during that period, on a yearly basis, is also highly hypothetical. It is further true, as Respondent's records in evidence show, that no bagger worked more than 3 years. It may also be further true that it would be unlikely for Winans to have worked for Respondent as a bagger for the full 39-quarter period in view of the high turnover rate of baggers and in view of Winans' unquestionable ambition and desire to better himself as adequately established on this record. Winans, himself, testified that he left his first interim employment, a roughly comparable job at Kroger's Supermarkets, because there was "not much opportunity at Krogers" (Tr. 102).

On the other hand, as above noted, Respondent, aside from suggesting a somewhat lower annual wage rate during the 10-year backpay period, failed to suggest any hypothetical alternative to the General Counsel's legal position that the backpay period ran for 39 quarters, approximately 10 years. Nor did Respondent show, for instance, that none of its baggers, during the backpay period, progressed to higher paying jobs within its organization.

The General Counsel's obligation is to show that the gross backpay formula was reasonable under the circumstances. *Rikal West, Inc.*, 274 NLRB 1136, 1137 (1985). The General Counsel's gross backpay formula, of course, cannot reach the exact correct figures of backpay during the backpay period since discriminatee Winans did not actually work during the period. The General Counsel's formula must merely be reasonable and have a legal base for computation. *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 891 (1966), as cited in *Rikal West, Inc.*, supra.

In the instant case, the General Counsel's gross backpay formula as based on the records of hypothetical employees created and submitted by Respondent which records Respondent characterized as a "fair and average approximation" of the hours and rates of pay for individuals holding Winans' former position (G.C. Exh. 2). The compliance officer's testimony showed specifically how he reached the 18-cent-per-hour annual wage increase progression. Respondent's suggestion that the wage increase would only be 12 to 13 cents per hour was supported on no particular mathematical basis, and was essentially speculative. It therefore may be disregarded in the face of a reasonable, though hypothetical construct of the General Counsel. *Rikal West, Inc.*, supra at 1138. In the presence of evidence that employees did receive wage increases as high as 20 cents per hour, and in view of agreement that Winans' wage rate started at \$3.25 per hour when he was unlawfully discharged, I conclude that General Counsel's gross backpay formula and the wage increases and levels established during the 10-year backpay period are reasonable, formulated with sufficient particularity and reliability as to come within the "considerable discretion in selecting a methodology which is reasonably designed to approxi-

mate the amount of backpay a wrongfully discharged employee would have received absent the employer's wrongful conduct," *Rikal West, Inc.*, 274 NLRB 1136, 1138. Thus General Counsel's computation of gross backpay, in the absence of preponderant contrary evidence, meets the legal standards of permissible discretion in determining approximate gross backpay. *NLRB v. Carpenters Local 180*, 433 F.2d 934 (9th Cir. 1970); *Iron Workers Local 378 (Judson Steel Corp.)*, 262 NLRB 421 (1982).

Respondent argues that there should be a "cap" on the gross backpay estimation of Winans' hourly wage rate commencing in 1986 since \$4.10 per hour (rather than as much as \$4.87 per hour) was the top pay rate established in the areawide collective-bargaining agreements covering "baggers." Without passing precisely on Respondents' suggestion and argument, if Respondent's argument were accepted, it would be necessary to note that the very collective-bargaining agreements relied on by Respondent to establish the \$4.10 per hour "cap" to Winans' hypothetical wage rate also contain employer monetary contributions which must be accounted for in establishing Winan's statutory "wages." There is no reason to believe that if the union contract pay rate is the model for Winan's hypothetical projected pay, that only his take-home paycheck should be inquired into rather than the total pay "package" established by the collective-bargaining agreements. If the entire collective-bargaining agreements "pay package" is determinative, then it is quite clear, in view of the 38-cent-per-hour pension contribution and the \$140-per-month health and welfare contribution, that General Counsel's projected peak of \$4.87 per hour in the last quarter of the backpay period, would be equaled or exceeded if these additional employer "wage" payments were taken into account. In short, Respondent's assertion that the pay cap described in the collective-bargaining agreements should be used does not avail Respondent of any diminution of the backpay or effect the backpay formula.

Lastly, Respondent argues that the existence of a 39-quarter backpay period is a hypothetical period unsupported by the facts. It asserts that since, as matter of its records, no bagger worked longer than 2 to 3 years for Respondent, there is a statistical conclusion that Winans would not have worked in excess of that period.

While statistics may not be ignored, there is no other proof by Respondent that Winans would not have constituted an exception to the statistics or that, as a bagger, he would not have progressed into a high-paying job. The difficulty in establishing the length of the backpay period, moreover, lies essentially with Respondent's own actions. The date of actual offer of reinstatement must govern over its statistical, necessarily speculative, estimation of the length of Winans' employment. The lengthy backpay period appears to have been the necessary result of Respondent's lawful, but unsuccessful, desire to litigate, inter alia, the matter of Winans' discharge to the United States Supreme Court before it made Winans an offer of reinstatement. Under such circumstances, it should not become the beneficiary of the ambiguity flowing from a statistical estimate in the face of an actual failure to offer reinstatement. This lack of certainty is the product of Respondent's own activities. It may therefore not now complain that the actual backpay period, which it extended by its desire to vindicate through litigation, exceeds its statistical study.

III. WHETHER WINANS ADEQUATELY MITIGATED RESPONDENT'S GROSS BACKPAY OBLIGATION BY SEEKING AND HOLDING INTERIM EMPLOYMENT

Respondent's answer (G.C. Exh. I(g)) asserts that Winans failed to mitigate backpay by failing to see interim employment and by being discharged from interim employment for cause or quitting without just cause, all of which served to reduce Winans' net backpay. In support of these positions, Respondent relied on the examination of Winans himself; Winans having been produced by the General Counsel. Respondent does not dispute the Regional compliance officer's computation of Winans' actual interim earnings in the 10-year backpay period (G.C. Exh. I(c), appendix B). Thus the record shows that in the 39 quarters constituting the approximate 10-year backpay period, there was \$57,785 in gross backpay owing to Winans, but only \$13,152 in net backpay. It is undisputed that in only 14 quarters of the 39 quarters in the backpay period is there any net backpay owing to Winans.

On all issues relating to the diminution of the gross backpay based on interim earnings or a willful failure to see or hold interim employment, the burden of proof rests on Respondent as an affirmative defense. Not only is the burden of proving any mitigation of damages on the Respondent, but any uncertainty is resolved against Respondent whose conduct made certainty impossible, *A & T Mfg. Co.*, 280 NLRB 916, 917 (1986). As noted in *Rikal West, Inc.*, supra at 1138, the deductions for interim earnings are permitted not so much for the minimization of damages as for the policy of promoting production and employment. The burden is on Respondent to demonstrate affirmatively that Winans neglected to make reasonable efforts to find interim work. *Rikal West*, 274 NLRB at 1138.

When an employee secures substantially equivalent employment, if such employment has comparable wages, hours, and working conditions, quitting such interim employment without good cause is a willful loss of earnings warranting a reduction of backpay. *Newport News Shipbuilding Co.*, 278 NLRB 1030, 1033 (1986), and cases cited therein. When, however, the quit of interim employment was from a job that was "unprestigious or annoying, the Board does not expect the discriminatee to retain such otherwise equivalent interim employment." *Shell Oil Co.*, 218 NLRB 87, 89 (1975). Thus where interim employment positions are not substantially equivalent to the position from which the discriminatee was discharged, the discriminatee-claimant may quit the non-equivalent employment without loss of pay or, if he is discharged from such employment, no loss of backpay is thereby incurred, *Newport News Shipbuilding Co.*, supra at 1033. The claimant is under no obligation to prove a systematic method of searching for a job and is under no obligation to retain nonequivalent employment, once secured, regardless of the conditions under which the employee was required to work. *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985), enfg. 267 NLRB 244 (1983).

The backpay period runs from the first quarter of 1980 through the third quarter of 1989, 29 quarters. In the final 14 quarters, commencing with the second quarter of 1987, there is no net backpay due to Winans since his interim earnings, in each quarter, exceeded the gross backpay. Similarly, in the four quarters commencing the second quarter 1981 through the first quarter of 1982, there is no backpay because

Winans' net interim earnings exceeded the total gross backpay. In the seven quarters commencing with the first quarter 1983 through the third quarter of 1984 there is similarly no net backpay because Winans' net interim earnings exceeded the total gross backpay in that period.

As I read Respondent's contentions (R. Br., p. 5 et seq.), its most serious argument concerns Winans employment at Kroger's Supermarket immediately after his unlawful discharge from Respondent.

The record is barren concerning the opportunity for promotion of baggers at Kroger's and at Churchill's. Respondent notes that immediately upon his discharge, Winans was employed as a bagger at Kroger's Supermarket; that he was one of many young persons so employed; that this is not a career opportunity at either store; that the turnover rate at Churchill's Supermarkets was, or exceeded, 100 percent per year; that at Churchill's, most employees worked only a few quarters and certainly no more than 3 years (G.C. Exh. 2, p. 2, Derrek Stockton); and that since Winans would not have remained at Churchill's for more than 2 years,⁴ Winans' employment with Kroger, according to Respondent is the "water shed event" on which the case turns. In short, Respondent argues that Winans found comparable suitable employment on an interim basis with Krogers when he was fired by Churchill; that he worked at Krogers for only 5 weeks, leaving because the position held no promise and that he would have left his job at Churchill's as he left his job at Krogers. Respondent argues that this quit terminates Respondent's backpay obligation because Winans was obliged, under the law, to retain this comparable interim employment. In support of this proposition, Respondent cites *Mastro Plastics Corp.*, 136 NLRB 1342, 1350 (1962): "Only if the evidence supports a finding that the claimant would have left Respondent's plant for the same reason that he left the interim job or in order to obtain this particularly new job is his claim from that time disallowed." Thus, Respondent argues that when Winans quit his job on May 10, 1980, with Kroger's, he forfeited all further backpay from Respondent.⁵

The only evidence regarding the reasons Winans left his interim employment at Kroger's Supermarkets was his own testimony, undisputed on this record (Tr. 135):

Q. Can you be more specific about the reasons you left Kroger's?

A. It was basically the same pay as Churchill's, but a lot more difficult. They wanted you to hustle constantly, run to get cards and [sic], run to check a price which I have no problem with that if there's opportunities, but the store was full of young people and I was at the bottom and it would be a long time before I could ever move up.

It is undisputed that Churchill's, the Respondent here, did not have a labor organization representing any unit employees at the time Winans was unlawfully discharged and that Krogers unit employees were the beneficiaries of collective-

⁴The issue, whether the backpay period should have ended in 1982 as Respondent asserts, based on employment statistics of its employees, was disposed of, above, in the discussion of gross backpay.

⁵Such an argument, however, is contrary to law. An unjustifiable quit from interim employment does not deprive the employee of his entire claim, but only so much of it as he would have earned had he retained the interim job. *Mastro Plastics*, 136 NLRB 1342, 1350 (1962).

bargaining agreement replete with pension plan, and health and welfare plan. The question presented is whether lack of promotion opportunity at Kroger's and a more onerous job constitute a sufficient basis, in law, for Winans to have quit this interim employment without suffering, as a consequence, loss of backpay because of such quit. Application of the *Mastro Plastics* rule requested by Respondent, that the quit from Krogers eliminates backpay because Winans would necessarily have quit the job at Churchill's at the same time, must satisfy the competing rule that a claimant can quit or be discharged from nonequivalent employment without loss of backpay, *Newport News Shipbuilding Co.*, 278 NLRB 1030, 1033 (1986).

In a bagger position where the bagger is represented by a labor organization, it might be expected that employees, without ostensibly better working conditions, have a greater reason to remain in employment. Although Respondent elicited testimony from the compliance officer showing a high turnover rate at Churchills, there was no evidence regarding the equally high turnover rate, if any, at Kroger's, the union-represented store. The record here clearly demonstrates, as Respondent apparently concedes, that Winans was an ambitious young man. Winans quit Kroger's because the future did not look good to him since so many young baggers had seniority over him and he felt his chances for advancement were poor.

Again, the record is barren of evidence of whether, and to what extent, promotion possibilities existed for baggers at Kroger's and at Churchill's. Respondent failed to show that its baggers were not promoted. Promotion prospects at Krogers were poor. If the prospects at Churchill's were better, Winans might well have remained at Churchill's. In addition, Winans found that the job at Kroger's was harder in that the employer was constantly after the employees to hustle in the job in various respects, with the reasonable inference that there was not such great pressure on him at Churchill's, before he was terminated. If employees, under the rule in *Shell Oil Co.*, 218 NLRB 87, 89 (1975), may quit, impunity, from "unprestigious" or "annoying" jobs and are not required to retain such interim employment, *Newport News Shipbuilding Co.*, supra at 1033, then it would appear that an employee may, without prejudice to his continuing backpay rights, quit a job which is more onerous and appears to him, uncontradicted on the record, as offering less opportunity for advancement that may have existed at his prior employment.

In short, I conclude on the basis of Winan's uncontradicted and credited testimony, that the reasons supplied by Winans for his quitting employment at Kroger's (lack of opportunity for advancement and more onerous working conditions) do not make the Kroger's position "substantially equivalent" to Winan's employment with Respondent, *Newport News Shipbuilding Co.*, supra at 1033. But even if the job was substantially equivalent, the unattractive working conditions would privilege Winans to quit without incurring loss of further backpay. Employees quit interim employment because of kinds of physically unattractive conditions, *Westin Hotel Corp.*, 267 NLRB 244, 245 (1983), enf. 758 F.2d 1126 (6th Cir. 1985), and can quit interim employment because of other unattractive conditions including the employer requiring too much hustle and because there is limited opportunity for advancement.

With regard to the claimant's further employment in the backpay period, the job he took after quitting Kroger's was as a laborer in the moving business with trucker Roland Seiper where he worked from May through August 1980 when he quit. He quit the job of furniture mover to work at a commercial bindery commencing in August 1980. In October 1980, he suffered a broken ankle (not connected with his job and remained out of work from August 1980 through January 21, 1981, when he went to work as a counter man for Forrest City Auto parts where he worked until March 1981 when he quit (to escape a scheme of overcharging customers, Tr. 140-141) to move to Florida in order to seek better employment. Within a few weeks, by early April 1981, he found employment with the Ramada Inn in Tampa, Florida. He worked for the Ramada Inn from April 1981 through April 1982 when he quit.⁶ Winans quit the Ramada Inn in April 1982 because of onerous job assignments. He was directed to work an extra 6 hours of work during his shift, more work than he or any other employee had received in an entire year of employment. He quit the job (Tr. 142-143).

After quitting Ramada Inn in April 1982, he pumped gas for 3 weeks in June 1982 when he was terminated because there was "no work" for him (Tr. 112). He suspects that the employer discovered that another employee was embezzling funds (Tr. 112) and the employer solved the problem by getting rid of both Winans and the other employee which constituted the entire shift.

Winans was unemployed from July 1982 through January 1983 when he became a stationary engineer for the Hyatt Regency Hotel until September 1984.⁷ In September 1984, Hyatt Regency fired him because rotating work shifts made it too difficult for him to work. He never became accustomed to his shifting schedule: a shift lasting until 4 p.m. and then another beginning at midnight the same evening. As a result of these shifting schedules, he was fired by the Hyatt Regency for not arriving on time.

About a month later, he became a day laborer for Interior Drywall Systems and quit in a month to work as a construction laborer for Babson-Cook Company. He worked for about a month and again quit. He quit Interior Drywall Systems because he found the work exceptionally dirty and as asked to do dangerous work (Tr. 117). He was out of work for about a month and then was employed by Haymaker Corp. as an electrical apprentice for 2 weeks which job he quit because he knew nothing of electricity and was forced to work with live wires which shocked him on occasion (Tr. 18). He was employed the next day by another electrical contractor (Barraco Electric), worked 1 day and quit (Tr. 118-20). He quit because of the excessive heat (Tr. 120) on the job.

Unemployed from February through August 1985, he returned to his home state and city of Toledo, Ohio, where he became a substitute custodian and fireman in three schools in separate boards of education for the period August 1985 through July 1986 (Sylvania City Schools; Rosford Board of

Education; and Perrysburg Board of Education). He worked those jobs, possessing a boiler license to operate the boilers; each was a part-time job. He took these joint part-time jobs between August 1985 and January 1986, quitting all of them in July 1986 after seeking a full-time job with these employers. When no full-time job as a custodian-fireman appeared by July 1986 Winans quit those jobs and was immediately employed in July 1986, by Gennison-Wright Company. There, he was employed as a full-time boiler operator (Tr. 127) from July 1986 through March 1987 when he quit.⁸

He then was employed in April 1987 as a boiler operator by Morgan Services and worked there until October 1988. He quit in order to pursue a career as a truckdriver to make more money (Tr. 132). He attended truckdriving school (Tr. 132) and was employed as a truckdriver by J. B. Hunt Co. commencing December 1, 1988, where he is currently employed.

IV. RESPONDENT'S ARGUMENTS IN FAVOR OF WILLFUL LOSS

As above noted, Respondent's principal argument is that the backpay should be cut off on Winans' quit of the Kroger job in May 1980. That matter has been disposed of above.

Respondent further argues that Winans, in any event, should not be entitled to backpay because of his repeated quits and terminations, all of which constitute willful loss of employment which tolls backpay (R. Br., p. 7).

In particular, Respondent suggest that Winans had no just cause to quit the Forrest City Auto parts position. The uncontradicted evidence shows that the employer there was consistently overcharging unsuspecting customers for parts. Winans was unwilling to engage in such a practice and quit (Tr. 140-141). Aside from the moral problem on which Winans apparently actually quit (Tr. 141), there is the legal problem of his knowingly participating in a scheme to defraud customers. His quit under such conditions demonstrates good moral and legal sense. I do not find that he would be obliged to continue in such employment on pain of sacrificing future backpay.

Next, Respondent argues that Ramada Inn discharged Winans for insubordination. As Respondent notes, however, Ramada Inn immediately rehired him and he continued to work for Ramada Inn for a period of more than 6 months after the rehiring. I conclude that the discharge for insubordination in refusing to work under dangerous conditions, even if not accompanied by the immediate rehiring, would be condoned by the Board. In any event, the matter of his "insubordination" need not be analyzed or its affect noted because of the immediate rehiring. His subsequent quit of the Ramada Inn job because of onerous working conditions likewise does not toll his backpay or demonstrate willful loss of intermediate employment. Moreover, his quit from Ramada Inn was not a quit from a job which was substantially equivalent to the job he held with Respondent. A quit from such a job, under Board rule, may not cause a loss of backpay, *Newport News Shipbuilding Co.*, 278 NLRB at 1033.

⁶Intermediately, however, while working for Ramada Inn, he was fired by refusing to engage in the dangerous climbing of a marquee, 30 feet in the air, during stormy conditions. Within a week or so, however, Ramada Inn rehired him apparently because it believed that its treatment was unnecessarily harsh (Tr. 109).

⁷On his own time, Winans, in the meantime, had acquired a license as a stationary engineer.

⁸Intermediately, Gennison-Wright fired him in November 1986 but was forced to rehire him on Winans' successful prosecution of a grievance concerning the discharge. On being reinstated, he quit 2 days later in March 1987 because the employer made the job extremely onerous to force him to quit. He did (Tr. 131).

While it is true that his discharge for excessive tardiness from the next position, Hyatt Regency, may not be equated to quit from interim employment where the interim employment is not substantially equivalent, *Newport News Shipbuilding Co.*, 278 NLRB 1030, fn. 1 (1986), it would appear to me that his tardiness at the Hyatt Regency was caused by his inability to adjust to shifting working hours which he would not have experienced had he been employed by Respondent or perhaps at other employment. The continual shifting of work hours caused the tardiness and, it seems to me, Respondent, under such a physically idiosyncratic condition cannot be heard to complain that the discharge for tardiness was based on willfulness on Winans' part.

While Respondent points to the fact that Winans was fired by Gennison-Wright for leaving work without notifying anyone, it fails to note that Winans successfully worked through the grievance system established under a union contract and obliged the employer to reinstate him. The employer, according to the only evidence of record, was subsequently unhappy with an employee who successfully bucked the system and caused his being reinstated after being discharged for alleged cause. The employer then, forced to rehire Winans, made the job unsavory and unacceptable by making the job more onerous. That is the uncontradicted evidence of record. I thus conclude, contrary to Respondent's argument (R. Br. p. 7), that Winans did not quit because he was simply unhappy with the nature of the job. He quit because the job became onerous because of his successful prosecution of his grievance.

Respondent cites no further illustrations of a willful loss of earnings from interim employment and I conclude that the above arguments advanced by Respondent are without merit. I conclude that Respondent has failed to support its burden of proof to show that in the various quits and terminations of Winans, Winans suffered a willful loss of employment under Board rules.

Quite correctly, Respondent fails to urge that the record does not support Winans having engaged in successful efforts at gaining interim employment. In this regard, the record is replete with instances of Winans seeking other employment in order to better himself and increase his earnings according to his clearly demonstrated ambition which characterized the 10-year backpay period.

V. RESPONDENT'S FURTHER ARGUMENTS

(a) Respondent argues that with regard to backpay in the fourth quarter of 1980, the backpay specification shows that Respondent is obligated to pay gross backpay of \$296 and a net backpay of \$202. It is undisputed that Winans was injured in the fourth quarter of 1980; that the injury occurred

on or about October 15, 1980, about 2 weeks into the fourth quarter. Since the agreed-upon calculated backpay for the quarter is \$1283, and since Winans did not work further in the quarter, the backpay for the period should be \$197 rather than the \$296 as alleged in the specification (2/13 ties \$1283). In view of net interim earnings of \$94, the net backpay should be adjusted to reflect a net backpay of \$103 rather than \$202 for the fourth quarter of 1980. This, itself, would result in a diminution of \$99 for that quarter and for the net backpay computation itself.

(b) As Respondent further argues, Winans testified that he was not available for work because of his ankle injury incurred in the fourth quarter of 1980 until January 21, 1981. Respondent argues, therefore, that 3 weeks of the backpay period in the first quarter of 1981 should be eliminated from gross backpay. The gross backpay for the first quarter of 1981 is \$1354. It follows that \$313 should be deducted from the \$1354 of gross backpay (3/13 times \$1354). This leaves gross backpay for the first of 1981 at \$1041. Since the total of interim earnings is \$805, the net backpay should *not* be \$548 as pleaded; rather \$236. Thus, \$312, in addition, should be *deducted* from net backpay as Respondent argues (R. Br. p. 9). I thus agree with Respondent's computation that net backpay for the fourth quarter of 1980 would be \$103 and net backpay for the first quarter of 1981 would be \$237.

Accordingly, I find that the total net backpay owing to William Winans is \$13,152 minus \$410 (\$202 minus \$99 equals \$103; \$548 minus \$313 equals \$237; \$237 plus \$103 equals \$340; \$750 minus \$340 equals \$410; \$13,152 minus \$410 equals \$12,742) is \$12,742 plus interest minus tax withholding deductions required by Federal and state laws.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Churchill's Supermarkets, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

Pay to William Winans, \$12,742 together with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹⁰

⁹If 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.

¹⁰In accordance with our decision in *New Horizons for the Retarded*, 283 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).