

Ryder System, Inc., Ryder Distribution Systems, Inc., DPD, Inc., and Ryder Distribution Resources, Inc. and Local Motor Freight Employees No. 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 26-CA-10714 and 26-CA-10872

April 19, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On June 27, 1990, Administrative Law Judge Walter H. Maloney issued the attached supplemental decision. The Respondents filed exceptions and a supporting brief and the General Counsel filed exceptions. Discriminatee Larry Elmore filed an exception adopting and incorporating by reference the exceptions filed by the General Counsel.

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 brief and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to issue the Order as set forth below.

1. The judge found that the formula used to calculate gross backpay appropriately included a meal and travel allowance, which was paid to the Respondents' employees while on over-the-road assignments. He concluded that these items were properly includable as a standard part of the Respondents' pay package, and thus represented amounts that the discriminatees would have earned had they not been unlawfully denied employment. Accordingly, all "travel/meal" figures supplied by the Respondents went into the judge's calculation of the discriminatees' gross backpay.

The Respondents assert that the "travel/meal" figures should not have been included in the calculations, because they were not emoluments of employment or fringe benefits that are customarily included as part of gross backpay. They contend that such amounts were only paid when drivers performed over-the-road runs and were not paid for city or local travel. The Respondents argue that the meal/travel allowance was more in the nature of reimbursement for expenses actually incurred.¹

We agree with the judge, but not for the same reasons. We recognize that a meal allowance and a travel

¹The Respondents also appear to argue that the discriminatees had to have incurred meal and travel expenses in their interim employment in order to be entitled to the Respondents' travel/meal allowance. We disagree. The Board looks to what discriminatees would have had an opportunity to earn had they not been unlawfully discriminated against, and treats interim earnings only as an offset to that amount.

allowance were customarily paid by the Respondents under somewhat different circumstances, i.e., the former was paid automatically at a flat rate for every 12 hours on the road, while the latter was paid only for expenses incurred and verified. It is clear, however, that to the extent *any* allowance was given automatically, it should figure into the gross backpay calculation as a regular part of the pay package.² It follows, therefore, that the meal allowance was properly treated as an item of gross backpay and we so find. The travel allowance, on the other hand, was only given as a reimbursement for an expense actually incurred and thus would not ordinarily be factored into a gross backpay calculation. The Respondents, however, who have the burden to establish with specificity any amounts they claim would mitigate their backpay liability, failed to distinguish between meal and travel expenses in the amounts they set forth under the heading of "travel/meal money" which they supplied to the compliance officer for his use in calculating backpay.³ As a result, the compliance officer was unable to segregate meal from travel allowances in those amounts and exclude the latter in calculating gross backpay for the discriminatees. Indeed, we are faced with the same quandary that confronted the compliance officer, because the Respondents have not at any time material subsequent to the issuance of the backpay specification presented figures that separate the two allowances in question. Because any ambiguity concerning the computation of backpay will be resolved against a respondent,⁴ we find that the Respondents have failed to meet their burden of proof with respect to the travel allowance and must bear the consequences of that failure. Accordingly, we find that inclusion of travel expenses as part of gross backpay in this case is warranted.

2. The Respondents excepted to the judge's finding that their discharge, in 1987, of discriminatee Larry Elmore from a position as a casual driver did not toll backpay accruing under the Board Order in the underlying unfair labor practice case. The judge found that (1) the Respondents had never made Elmore a proper reinstatement offer under that earlier Order, and (2) Elmore's conduct prompting the 1987 discharge was

²Because the objective in calculating backpay is to approximate what discriminatees would have earned had they not been discriminated against, fringe benefits and other automatically paid emoluments of employment are properly deemed to be part of gross backpay.

³The Respondents provided pay figures for their current employees which were broken down into columns labeled "gross pay," "travel/meal money," and "net pay." The compliance officer testified that in attempting to exclude from gross backpay amounts which represented expenses for travel (because travel reimbursements were not considered part of gross backpay), he requested from the Respondents a breakdown of what amounts constituted meal money and what constituted travel money. The Respondents failed to provide any breakdown. Accordingly, the compliance officer included the entire "travel/meal money" figures in his calculation of the discriminatees' backpay, except where the amount appeared considerably higher than normal. In such a case, the compliance officer reduced the amount as he saw fit.

⁴*Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enf'd. 683 F.2d 1296 (9th Cir. 1982).

not so egregious as to forfeit Elmore's entitlement to reinstatement to a position substantially equivalent to the one from which he had originally been unlawfully discharged. For the following reasons, we deny the exceptions and affirm the judge.

Under the underlying Order, the Respondents were required to offer Elmore reinstatement to his former driver position or, if that position did not exist, to "a substantially equivalent position without prejudice to his seniority or other rights and privileges." 280 NLRB 1024, 1054 (1986). Elmore had originally been ranked second in seniority among drivers in the division in question; thus, when the Respondents rehired him in October 1985 as a casual driver without seniority ranking, the Respondents did not thereby offer the reinstatement to which Elmore was entitled under the Order. The Respondents' obligation to make a proper offer continued unless they could show that the conduct for which Elmore was discharged in 1987 was so egregious as to require forfeiture of right to reinstatement and further backpay. *Deauville Hotel*, 256 NLRB 561 (1981), enf. denied on other grounds 751 F.2d 1562 (11th Cir. 1985). See also *David R. Webb Co.*, 291 NLRB 236, 237 fn. 3 (1988), enf. 888 F.2d 501 (7th Cir. 1989), cert. denied 110 S.Ct. 2560 (1990) (discharge of economic strikers from jobs that were not substantially equivalent to their prestrike employment did not defeat their right to reinstatement to substantially equivalent positions that became available after their discharges); *Kansas Refined Helium*, supra at 1162, and cases there cited (a discriminatee's discharge for cause by an interim employer other than the respondent does not necessarily toll backpay and bar reinstatement).

The Respondents showed that the 1987 discharge, which an administrative law judge in another Board proceeding found to be lawful,⁵ did not relate to Elmore's earlier unlawful discharge. The conduct for which the Respondents lawfully discharged Elmore cannot, for example, be treated as having been provoked either by the Respondents' earlier unlawful treatment of him or its failure to make a proper reinstatement offer. Thus, we do not rely on *John Kinkel & Son*, 157 NLRB 744 (1966), cited by the judge. The Respondents failed to show, however, that Elmore had engaged in such gross misconduct as to require him to forfeit his rights under the 1985 Order, with which the Respondents had never fully complied.

The incident leading to the 1987 discharge began when the Respondents' operations manager, L. Anthony Chrestman, requested that Elmore appear in his office to discuss Elmore's having volunteered for DOT truck inspections instead of only permitting such inspections when he was stopped on the road by DOT

inspectors. When Elmore arrived, he requested that another driver, Baker, be present as well. Chrestman denied the request and ordered Baker out of the room. Baker refused to leave without Elmore's approval, so Chrestman ordered Elmore to tell Baker to leave. When Elmore refused, Chrestman discharged him for insubordination. Although this assertion by Elmore of a purported *Weingarten*⁶ right might have been erroneous, and even provided the basis for a lawful discharge, we find that it did not meet the misconduct standard referred to above, any more than it would have had Elmore been hired by a different interim employer and discharged for the same reasons relied on by the Respondents here. *Kansas Refined Helium Co.*, supra at 1162, and cases there cited. Similarly, nothing in the incident for which Elmore was discharged demonstrated that he was clearly unfit for the job to which he had never been properly reinstated. Compare *NLRB v. Holiday Inn of California*, 512 F.2d 1171 (9th Cir. 1975). Accordingly, we adopt the judge's finding that the Respondents' liability for backpay has continued to run after March 18, 1987, until the Respondents tender a proper offer of reinstatement.

3. The Respondents argue with regard to both Larry Elmore and Carl Briscoe that the fact that those claimants quit interim employment to go to other jobs, which turned out to be lower paying, should serve to toll backpay. We disagree. In Elmore's case, he testified without contradiction that at the time he took the new job, he thought it would be a better-paying position. That it may not have resulted in higher wages will not serve to toll backpay. The Board requires that claimants do not willfully incur losses, but make reasonable efforts to find substantially equivalent employment. There is no requirement, however, that their efforts meet with success. *Mastro Plastics Corp.*, 136 NLRB 1342, 1349 (1962), enf. in pertinent part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

As to Briscoe, the job he left was not found by the judge to be employment comparable to that from which he had been laid off, and accordingly, he was not obligated to continue with it. A claimant is not required to continue employment which is not suitable or not substantially equivalent to the position from which he was discriminatorily discharged. *Alamo Express*, 217 NLRB 402 fn. 17 (1975). See also *Mastro Plastics Corp.*, supra.

4. The Respondents also contend that the judge erred in finding that Elmore's termination from interim employer Associated Transportation Services (ATS) did not constitute a willful loss of earnings sufficient to toll backpay. The judge found that Elmore was discharged after he failed to call the dispatcher and ran several hours late for two deliveries he had been

⁵ *Ryder System, Inc.*, JD-(Atl)-26-88, adopted by the Board by unpublished order dated November 10, 1988, because no exceptions were filed.

⁶ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

scheduled to make for one of ATS' customers. He concluded that Elmore was not out of work because of his choice but because of the choice of that employer, and that this did not constitute a willful loss of earnings.

The Respondents attempt to liken Larry Elmore's leaving ATS to situations in which employees left interim employment voluntarily for various reasons, thus tolling their backpay, citing *Sorensen Lighted Controls*, 297 NLRB 282 (1989) (discriminatee left an interim job because she no longer wanted to impose on her brother-in-law for a ride),⁷ and *Associated Grocers*, 295 NLRB 806 (1989) (employee quit interim employment to pursue other endeavors). In Elmore's case, however, his departure from ATS was not volitional. The relevant inquiry is whether the Respondents have shown that there was a willful loss of earnings on his part, and we conclude they have not.

The Board has consistently held that discharge from interim employment, without more, is not enough to constitute willful loss of employment. *P*I*E Nationwide*, 297 NLRB 454 (1989), enfd. in pertinent part 923 F.2d 506 (7th Cir. 1991), and cases cited therein. A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. Here we find that the Respondents failed to show that Larry Elmore's conduct fell within that standard. Elmore may have missed several scheduled deliveries, but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge.⁸ Without such proof, Elmore's discharge from ATS will not serve as a basis for tolling his backpay.⁹

5. Discriminatee Bobby Goza went into business for himself as a truckdriver after being laid off, and remained self-employed for a significant portion of the backpay period. The judge, citing *Rice Lake Creamery Co.*, 151 NLRB 1113 (1965), noted that it is well settled that a discriminatee may go into business for himself during the backpay period, and that the net earnings from that business constitute interim earnings to be offset against gross backpay. He awarded backpay to Goza based on the figures supplied by the compli-

ance officer, which figures included, inter alia, amounts representing depreciation on Goza's truck.

The Respondents except to the judge's findings and conclusions with regard to Goza, contending that his self-employment in this situation was not comparable employment. They assert that they are being forced to bear the burden of Goza's inability to succeed in his business, by subsidizing him during his self-employment, a period during which he had little or no interim income. In addition, the Respondents contend that it was error for the judge to have allowed amounts representing depreciation on Goza's truck to offset his interim earnings, to have looked only at Goza's "salary" and not at the actual net earnings of his business, and to have ruled that any recaptured assets would be offset by the amount of the initial investment that Goza did not offset against interim earnings.

Although we agree with the judge's legal conclusions with regard to treating Goza's self-employment as comparable interim employment for the purposes of calculating backpay, we find that the Respondents' exceptions raise troubling questions concerning the actual calculation of that backpay. Because we are unable to determine from the figures supplied in the backpay specification how Goza's self-employment income and expenditures were calculated, we will remand this issue to the judge for further appropriate action, including, if necessary, further hearing on the computation of Goza's backpay. Some points which should be addressed are as follows.

First, it is unclear to what extent (if at all) the expense of Goza's truck(s) was entered into the calculations.¹⁰ Such a capital expense is not normally made a part of backpay calculations where the item has a resale value and the use of the item potentially extends beyond the backpay period.¹¹

Second, the judge apparently allowed amounts claimed by Goza on his corporate tax returns as depreciation on the truck to be used as an offset against interim earnings. Although we agree that as a general rule depreciation is an allowable deduction,¹² it is unclear where the depreciation here was actually entered into the backpay specification.

Finally, the judge concluded in footnote 15, rather speculatively, that the first truck purchased by Goza was traded in as a down payment on the second truck.¹³ We require a showing of the extent to which this transaction had an impact on the backpay calcula-

⁷Member Cracraft dissented on this issue and would have found that discriminatee Bermudez' decision to quit her job was not a willful loss of earnings. 297 NLRB at 284.

⁸See *Lundy Packing Co.*, 286 NLRB 141, 146 (1987), enfd. 856 F.2d 627 (4th Cir. 1988), and *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981). The same reasoning applies with regard to David Elmore's discharge from Music City.

⁹We find no merit in the General Counsel's contention that we should order the Respondents to comply with our earlier Order regarding reinstatement and backpay for Larry Elmore, when that Order was upheld on appeal to the Sixth Circuit and is fully enforceable by that court. We conclude that such an Order would be redundant. As the judge noted, "[s]ince the Board's enforced order requires such [a reinstatement] offer and since it has never been tendered, there can be little dispute that the Respondent has never complied with its basic remedial obligation."

¹⁰The judge notes that two figures, \$9932 and \$2901, were included in the specification as expenses incurred in the first two quarters of 1984 as start-up costs for Goza's business. The judge seems to conclude that at least some part of this money was used as a down payment on a truck; however the specification provides no breakdown of what portion it might have been.

¹¹*C. R. Adams Trucking*, 272 NLRB 1271, 1277 (par. 2) (1984), enfd. per curiam 767 F.2d 1276 (8th Cir. 1985).

¹²*C. R. Adams Trucking*, supra at 1277.

¹³The price of the first truck was \$20,392.15, and the price of the second was \$23,194.38.

tions, if at all. As to the Respondents' argument that any recapture of Goza's initial investment in the truck should offset the initial capitalization of the truck which the Respondents are being charged for, we doubt—for the reasons explained above—that the Respondents can properly be held liable for any amounts which represent principal on the truck.¹⁴

Accordingly, we remand the question of Bobby Goza's backpay to the judge for further appropriate action in accordance with the terms of this remand.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Ryder System, Inc., Ryder Distribution Systems, Inc., DPD, Inc., and Ryder Distribution Resources, Inc., Memphis, Tennessee, their officers, agents, successors, and assigns, shall take the action set forth in the Order, except that payment of backpay to Bobby Goza shall await further findings of fact, conclusions of law, and any recalculations by the administrative law judge.

IT IS FURTHER ORDERED that this proceeding is remanded to the administrative law judge for the purpose of taking such further appropriate action as is necessary, including the holding of further hearing if warranted.

¹⁴Although the judge concluded that the Respondents' argument that its backpay liability should be reduced by the amount recaptured by Goza from the sale of the truck had merit, we do not rely on this conclusion. We believe that the truck, as capital equipment, should not have been included in the backpay specification as an item of reimbursable expense in the first place. See *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644, 650 (1976).

We also do not rely on the judge's calculations included in fn. 14 of the judge's opinion.

SUPPLEMENTAL DECISION

WALTER H. MALONEY, Administrative Law Judge. On August 30, 1985, Administrative Law Judge Howard I. Grossman issued a decision in which he found Ryder System, Inc., Ryder Distribution Systems, Inc., DPD, Inc., and Ryder Distribution Resources, Inc.,¹ the Respondents, guilty of violating Section 8(a)(1), (2), (3), and (5) of the Act. His decision detailed how the Diesel Recon Company, a company engaged at Memphis, Tennessee, in the manufacture and reconditioning of diesel engines and components, decided to discontinue the transportation of its products (and presumably the pickup of motors to be reconditioned) by its own drivers and to contract this work to the Respondents. For a number of years Diesel Recon had performed this activity with the use of trucks rented from the Respondents and with drivers it employed pursuant to the terms and conditions of a series of contracts with the Charging Party. On December 3, 1983, when the last of these contracts expired, Diesel Recon laid off its 32 drivers and looked to the Respondents

¹The name of Ryder Distribution Resources, Inc., does not appear in the original caption to this case but was added by motion of the General Counsel, which was unopposed.

thereafter to perform the work these drivers had previously been doing. Thereafter, Ryder rented not only trucks but drivers as well.

In order to fulfill its obligation to Diesel Recon, the Respondents hired about 10 of Diesel Recon's former employees, transferred to this division (referred to in the record as an account) a number of its own employees who had been servicing another of the Respondents' customers (the Sunbeam account), and recruited additional drivers in various cities throughout Pennsylvania, Ohio, and Kentucky. Thereafter, Respondents recognized District 2-A, Transportation, Technical, Warehouse, Industrial and Services Employees Union, affiliated with District 2, MEBA-AMO, AFL-CIO, and concluded a contract with that labor organization. In so doing, it refused to recognize the Charging Party and declined to hire more than 20 of the employees whom Diesel Recon had laid off. Those who were hired were not accorded the seniority they had enjoyed as Diesel Recon employees.

Judge Grossman found that the Respondents were a successor to Diesel Recon and were obligated to recognize and bargain with the Charging Party. He further found that the refusal of the Respondents to hire 32 former Diesel Recon employees named in his decision was prompted by discriminatory motives. He issued a recommended Order, providing, *inter alia*, that the Respondent be required to offer to these individuals full and immediate reinstatement, including a recognition of their former seniority, dismissing if necessary others who had been hired in their places, and to make them whole for any loss of pay that they might have suffered by reason of the discriminations. This recommended Order was adopted by the Board on June 24, 1986 (280 NLRB 1024), and was enforced by the United States Court of Appeals for the Sixth Circuit in an unpublished *per curiam* decision, dated March 17, 1988.

Following that decision, the Regional Director issued a backpay specification, later amended, in which he sought various amounts of backpay for 31 of the 32 discriminatees² and requested that backpay liability continue in the case of Larry Elmore because of the asserted refusal of the Respondents to offer him full reinstatement. In the interim, one of the discriminatees named in the specification settled his case with the Respondents and, after the opening of the supplemental hearing in this case in February 1990, an additional 23 discriminatees named in the specification settled their respective cases with the Respondents.³ Accordingly, the Board must now proceed to determine the backpay liability of the Respondents to seven discriminatees, whose individual cases will be hereafter discussed.

1. The appropriate formula to be used in determining gross backpay

In order to compute the gross backpay due and owing by the Respondents to the discriminatees, Compliance Officer Robert H. Watson, a public official with some 17 years of

²The Regional Director determined that one of the discriminatees, Frank Varble, was not entitled to any backpay.

³While the Regional Director refused to join in the backpay settlements which were concluded after the hearing in this case opened, he stated on the record that he would not appeal any of my decisions approving those settlements. I approved the 23 settlements in question, notwithstanding the declination of the General Counsel to join in them, and the time for taking an appeal in those cases has now expired.

experience in making backpay determinations in Board proceedings, selected what he called a representative employee formula. Employing this formula, he ranked Respondents' replacement employees in the order of seniority given to them by the Respondents when it took over the Diesel Recon account, computed the actual earnings of each of those employees on a quarterly basis to comply with the requirements of the *Woolworth* decision,⁴ and measured against those quarterly earnings the names of each of the discriminatees in the order of seniority that they enjoyed as Diesel Recon employees.⁵ For example, the earnings of the fifth man on the Respondents' seniority list were used to determine the gross backpay due and owing to the fifth man on the Diesel Recon list.

One problem faced by the compliance officer in making these determinations was that the Respondents experienced considerable turnover among their replacement drivers. It frequently occurred that a driver selected as a representative employee because of his seniority might have worked only a few weeks in one or more calendar quarters before he quit or was discharged, so a mechanical application of this process could have resulted in an abnormally low and unrepresentative basic determination. In order to avoid this error, it was necessary for the compliance officer to use 51, not 32, payroll records because he omitted from his list of representative employees anyone whose earnings in any quarter showed less than 10 weeks of employment. Figures derived by this process were obtained for each calendar quarter from December 3, 1983, the date of the Diesel Recon layoff, until May 19, 1988, by which time unconditional offers of employment had been tendered to all former Diesel Recon employees with the exception of Harold C. Baker and the arguable exception of Larry G. Elmore.⁶

Watson testified credibly and without contradiction that seniority played a great role in the amounts earned by drivers under both the former and present regimes. Most drivers had over-the-road assignments, which took them from Memphis to either coast. Only one or two were utilized on dispatches limited to the Memphis metropolitan area. All were paid on a mileage basis and selected their runs from a listing or driver board in the order of their seniority. Accordingly, drivers with higher rankings selected the most lucrative routes while others were consigned to the less rewarding ones. The result was a considerable disparity in earnings arising out of placement on the seniority or bidding list. Watson pointed out that this disparity was modified under the Respondents' practice since many of its assignments were two-driver jobs. Under this arrangement, a senior driver could pick not only a more lucrative assignment but could also pick his driving partner, who might rank far below him on the seniority list. Both would receive the same earnings on the same run because both were credited with driving the same number of miles.

Watson rejected any modification of this formula based on the team driving concept because he felt that any such modi-

fications would be too speculative to fashion into a statistical result, inasmuch as all runs were re-bid every 6 months.

The formula for gross backpay also included meals and lodgings allowance. Under the Diesel Recon contract, drivers were given an extra amount equal to 5 percent of their mileage earnings for meals and lodgings, whether or not they actually spent this money on the road. It was a standard part of their earnings. If a driver incurred additional company related expenses, such as for tolls, new tires, or truck repairs, these amounts could also be claimed if verified by a receipt. The Respondents also provide over-the-road drivers money for meals and lodgings as a standard part of their pay plan but not in the manner outlined in the Diesel Recon contract. Meals and lodgings are paid by the Respondents at a flat rate—formerly \$7 and now \$7.50—for every 12 hours that a driver is on the road. A driver must be on the road at least 12 hours to receive any travel money; city drivers receive none. The sum is paid automatically; no meal receipts are required. Respondents regularly pay motel expenses on an every-other-night basis if those expenses are verified by receipt. Respondents also reimburse drivers for expenses related to truck maintenance that are incurred while out of town. However, the data it provided to the compliance officer in this regard did not break out these expenses from payments for meals and lodgings so it was impossible to treat them separately in preparing the specification. These sums were all integrated into the gross backpay formula which was used in the specification.

In its verified answer the Respondents asserted that the proper method to arrive at the gross backpay that would have been paid to discriminatees had they been hired at the outset of its Diesel Recon contract is to aggregate the annual earnings of the top 31 drivers on its seniority roster each year (leaving out anything for Varble, who, under the specification, was found to have nothing owed), divide the total of all those earnings by 31 to determine an overall average per employee, and then divide that figure by four to arrive at quarterly earnings. According to this formula, the average earnings, both yearly and quarterly, for each discriminatee would be the same, irrespective of seniority. Respondent also objected to the inclusion of vacation or meal money in any gross backpay formula, arguing that such money was in the nature of a bonus or gratuity and did not reflect earnings.

The compliance officer testified that this formula was defective in several respects. Respondents' alternative formula and computations provided no figures for the end of 1983 or the first months of 1988, all of which were part of the backpay period. The formula made no allowance for any variation of earnings in each calendar quarter, as required by *Woolworth*, supra, and made no allowance for any variation in earnings between employees based on seniority. The Respondents placed no evidence in the record to support its formula and basic method of computation and did not present any argument in its brief in support of the income averaging approach, limiting its argument to an objection to the inclusion of meal and travel money.

The Supreme Court said at the outset of the enforcement of the Act that awarding of backpay authorized by Section 10(c) was part of the Board's "power to undo the effects of discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941). The Court went on to say that:

⁴ *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

⁵ The figures used were obtained from the Respondents' payroll records except for 1984 and 1985. The Respondents failed to produce such records for those years and provided only Internal Revenue W-2 forms showing annual earnings. Accordingly, the compliance officer was unable to make separate and accurate *Woolworth* quarterly earnings determinations for those years and simply divided the figures found on the W-2 forms by four to arrive at the quarterly figure for each discriminatee.

⁶ Backpay liability for some discriminatees ended before that date.

[I]n the nature of things, Congress could not catalogue all the devices and stratagems for circumventing the [policies] of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. [Id. at 194.]

The purpose of backpay was to "make whole everything but what employees failed without excuse to earn." Id. at 198-199.

Kansas Refined Helium Co., 252 NLRB 1156 (1980), was cited on both sides in support of various propositions relating to the determination of backpay liability. Several well-established general rules of law are set forth in that case and will only be summarized here:

1. The sole burden of proof on the General Counsel in a backpay case is to show the gross amounts of backpay due. This means that he must establish the propriety of the formula to be employed and must adduce evidence establishing the gross amounts of liability under that formula. Every backpay respondent is under both a general legal obligation and a specific Board order directing it to make its payroll records available for this purpose.

2. The burden of proof is upon a respondent to establish any mitigating factors, such as interim earnings, failure of a claimant to make a diligent search for work, the discharge of the claimant from interim employment under circumstances serious enough to warrant the tolling of liability, illness, or injury that incapacitated a claimant for work.⁷

3. Any doubt or ambiguity will be resolved against a respondent and in favor of the backpay claimant.

4. Any backpay formula that approximates what discriminatees would have earned had they not been unlawfully discharged (or refused hire) is acceptable if it is not unreasonable or arbitrary. Exactness is not required. The Board has wide discretion in the selection of a formula to be employed in determining gross backpay.

The use of representative employees in determining a gross backpay formula is both a permissible and a commonplace practice. *Midwest Hanger Co.* 221 NLRB 911 (1975). In selecting representative employees, it is permissible to exclude

from that category any employees who have worked only sporadically during the backpay period or for periods of time that were markedly less than the hours worked by most employees in the unit. *I-O Services, Inc.*, 225 NLRB 1251 (1976). Where seniority makes a difference in the relative earnings of employees, as in this case, a gross backpay formula should take seniority into account. *Controlled Alloy, Inc.*, 208 NLRB 882 (1974). In the present case, the Board order, enforced by the Court of Appeals, directed the Respondents to reinstate each named employee "without prejudice to his seniority or other rights and privileges." The remedy required the Respondents here to pay to each discriminatee "a sum of money equal to the amount he would have earned from the date of Respondents' unlawful refusal to hire him to a date of an offer of employment as described above." Accordingly, the law of this case requires the Board to incorporate considerations of seniority into any gross backpay formula, regardless of what the Board might do in some other situation. The General Counsel's formula makes provision for seniority in determining the backpay due and owing to each discriminatee and, insofar as possible, complies with the quarterly earnings determinations required by *Woolworth*. The Respondents' proposed formula fails in both respects. Accordingly, the General Counsel's formula should be adopted and the Respondents' formula should be rejected.

The backpay formula should also include money regularly paid to the Respondents' employees for meals, lodgings, and related travel expenses, as well as vacation pay. These moneys are not bonuses but emoluments of employment that the discriminatees would normally have received had they been employed. Like various fringe benefits, they are a regular part of the Respondents' pay package and are not the equivalent of gasoline allowances and similar items, which are only paid when and if expenses are actually incurred. It is no defense to assert that these expenses should not be a part of gross backpay because the discriminatees did not in fact perform services that generated these payments nor incur the expenses associated with them so they should not be credited with such payments when they were paid to others. The key consideration is that the discriminatees would have received these moneys had they been employed by the Respondents as they should have been during the backpay period. *NLRB v. Laborers Local 38*, 748 F.2d 1001 (5th Cir. 1984). To the overall figures to which claimants are entitled and from which offsets may be deducted, money spent during the backpay period to assist claimants in their search for work and premiums paid for medical insurance by claimants during the backpay period must be offset against interim earnings. *Continental Insurance Co.*, 289 NLRB 579 (1988); *Colorado Forge Co.*, 285 NLRB 530 (1987).

2. Larry G. Elmore

Larry G. Elmore was employed by Diesel Recon on June 6, 1975, and was number two on its seniority list at the time he and the other discriminatees were laid off on December 3, 1983. After working for several interim employers, he was offered a job with the Respondents as a casual driver, meaning that he had no seniority ranking. He accepted this position on October 13, 1985. After a probation period of 90 days, he was offered and accepted a regular position at the bottom of the Respondents' seniority list and continued to be

⁷Here, as in all backpay litigation, the compliance officer made an effort to discover interim earnings by claimants as well as other offsets which would reduce the Respondents' backpay liability. However, this was only an administrative courtesy. The Respondents still shouldered the burden of establishing these offsets. In certain instances, the Respondents brought to light certain matters which further reduced the liability set forth in the specification. When this occurred, as in the case of Harold Baker, the General Counsel amended the specification to reflect these matters. In another instance, evidence adduced at the hearing prompted the General Counsel to amend the specification to increase the amount of a requested award.

employed as a driver in this seniority ranking until March 18, 1987, when he was discharged. In the amended specification, the General Counsel alleged a backpay liability, as of March 18, 1987, due and owing to Elmore of \$26,024.83, plus interest. In his opinion, this amount reflects only an interim amount that is due and owing.

The facts and circumstances surrounding Elmore's 1987 discharge were litigated in another unfair labor practice proceeding—*Ryder System, Inc.*, JD(ATL)-26-88, dated September 30, 1988. In that case, General Counsel alleged that the Respondent was discharged for attempting to assert his *Weingarten*⁸ right—the right to have a fellow employee present during a disciplinary interview—during an interview conducted by Respondents' operations manager, L. Anthony Chrestman. Respondents defended on the basis that Elmore was discharged for insubordination. The facts of that case were summarized by Administrative Law Judge Robert A. Gritta in his decision, *supra*. Without delving at length into Judge Gritta's findings, it is sufficient to recite here that Elmore was suspicious that he was being set up by someone who was planting drugs and a bypass device (designed to prevent the odometer from recording mileage) on a truck he was assigned to drive. He sought legal advice and was advised by his attorney to volunteer for a DOT examination on every truck in which he was dispatched. When Chrestman learned of this advice, he instructed Elmore not to volunteer for DOT truck inspections but to permit such inspections should he be stopped on the road by DOT inspectors.

This controversy led to a request by Chrestman for a discussion with Elmore. When Elmore appeared in Chrestman's office for the discussion, he requested the presence of fellow driver Harold C. Baker, who is also a discriminatee in this proceeding. There is a suggestion in Judge Gritta's decision that Baker, a Teamsters adherent, had little use for the collective-bargaining agent who had been installed at the Respondents' facility and wanted the assistance of a Teamsters supporter whom he trusted. In any event, when Baker appeared, Chrestman ordered him out of the room but Baker refused to leave unless Elmore approved. Elmore insisted that Baker remain. Chrestman instructed Elmore to tell Baker to leave. Elmore refused, so Chrestman discharged Elmore for insubordination.

Judge Gritta concluded that the General Counsel had failed to establish all the elements of a *Weingarten* violation and that the Respondent was within its right to discharge Elmore. Later, Baker was discharged by the Respondents under circumstances found by Judge Gritta to be discriminatory. He dismissed the consolidated complaint regarding Elmore and ordered Baker reinstated with backpay. None of the parties excepted to this decision so it became the final disposition of both cases.

The General Counsel contends in this proceeding that Elmore is still entitled to an offer of full reinstatement, including the seniority he would have enjoyed had he received such an offer, and that the Respondents' backpay liability continues to run until such an offer is tendered. In effect, he is treating the Respondents as an interim employer. Since the Board's enforced order requires such an offer and since it has never been tendered, there can be little dispute that the Respondent has never complied with its basic remedial obli-

gation. It would serve no purpose in this proceeding to recommend a second reinstatement offer because the original order, now incorporated into a court decree, is still outstanding and the Sixth Circuit is quite capable of enforcing its own decrees.

Respondents argue that Elmore forfeited any reinstatement right he might otherwise be entitled to by virtue of the conduct which led up to his discharge in 1987. They contend that the Board should now defer to the decision and order that refused Elmore any relief when his case was litigated before Judge Gritta. The test of whether a discriminatee should be denied reinstatement, with the consequent tolling of backpay liability, is set forth in *Deauville Hotel*, 256 NLRB 561 (1981), where the Board held that the discharge of a rehired but unreinstated employee, even if lawful, does not absolve a respondent from making full reinstatement due and owing as the result of a previous unlawful discharge, unless the second discharge is for conduct which is so egregious that an employee's right to reinstatement has been forfeited. Under Board law, an employer may discharge an employee for good reason, bad reason, or no reason at all so long as it is not for union or concerted protected activities. In the case before him, Judge Gritta decided that Elmore was not asserting his *Weingarten* right during the interview at which he was discharged so the Respondents were free to do what they did when they fired him. Judge Gritta did not decide—because the issue was not before him for decision—whether Elmore's misconceived assertion of a *Weingarten* right was such egregious and outrageous conduct that it should bring about the forfeiture of a reinstatement right which had never been fully vindicated. Plainly it was not, so the Respondents are still obligated to make such an offer. *John Kinkel & Son*, 157 NLRB 744 (1966).

Relying on an EEOC case decided by the Supreme Court in 1982, the Respondents further argue that Elmore's acceptance of a job without any seniority standing somehow constitutes a waiver of that seniority. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). Leaving aside the fact that the *Ford Motor Co.* case was litigated under the terms of another statute having a somewhat different remedial scheme, the facts of that case posed a far different question of mitigation of damages. In *Ford Motor Co.* the Court held that backpay liability of two discriminatees was tolled when they refused Ford's offers of employment because they had not done all they reasonably could to mitigate damages arising out of Ford's initial discriminatory refusal to hire them. They had been working for another employer and refused to accept an offer of employment by Ford which did not include full seniority. In the present case, Elmore, by accepting an inadequate offer of reinstatement, did all that he could to mitigate his damages and should not be penalized because the Respondents failed to comply with the clear language of the Board order.

It so happened that when Elmore went to work for the Respondents he drove as part of a team with a senior driver who selected him as a driving partner. As a result, Elmore had earnings derived from his partner's seniority that were higher than they might have been had he been placed in a position of personally selecting runs while at the bottom of the seniority roster. To determine gross backpay liability, Elmore's earnings during the backpay period were compared with those of representative employee Lavelle Cross, who

⁸ *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

was number two on the Respondents' seniority roster, the same ranking Elmore enjoyed on the Diesel Recon list. The resulting comparisons show no backpay liability for the period between Elmore's date of hire by the Respondents and his date of discharge. However, this happenstance does not absolve the Respondent from its ongoing obligation of placing Elmore in a position vis-a-vis other employees where he can obtain appropriate earnings based on his own seniority standing rather than the generosity of a ranking fellow employee who might select him to be on the same driving team. To the extent that earnings derived from this set of circumstances made Elmore whole financially, appropriate offset credit was given to the Respondents in the backpay specification. These backpay credits do not satisfy the Respondents' underlying reinstatement obligation.

Respondents further assert that the gross backpay of Elmore should be reduced because he willfully removed himself from the labor market by quitting an interim job at Ozark Motor Lines to take another job at Jones Trucking Company, a job from which he was ultimately laid off. Respondents also claim willful loss on the part of Elmore by virtue of his discharge on August 21, 1985, from Associated Transportation Services, Inc. (ATS), another interim employer.

Between the date of his layoff by Diesel Recon and his date of hire by the Respondents, Elmore worked for four different trucking companies. In the first two quarters of 1984, he worked for Ozark Motor Lines from its Memphis terminal as an over-the-road driver. In part of the second and third quarters of the same year, he worked on the dock as a warehouseman at Jones Truck Lines, Inc., in Memphis. In the last quarter of 1984 and the first quarter of 1985, he worked for Southeast Carriers, Inc., out of its Memphis terminal, and finally, in the second and third quarters of 1985, he worked for Associated Transportation Services, Inc., of Memphis. In the fall of 1985, Elmore was rehired by the Respondents and continued to drive from its Memphis terminal till his discharge, discussed above, which occurred in 1987.⁹

Elmore's first job was with Ozark Motor Lines, for whom he worked as an over-the-road driver. He was compensated on a mileage basis. He started with Ozark on March 13, 1984, and left voluntarily on June 22, 1984, to go to work for Jones Truck Lines. At Jones he was a casual dock employee but was paid on an hourly basis under a union contract. Elmore learned of the Jones job from friends and from Teamsters Agent Duria Jones.¹⁰ He testified credibly that he quit Ozark to go to work for Jones because the latter offered a better paying job, even though it was casual employment. His hourly rate was \$13.23, whereas he was receiving about 17 cents a mile at Ozark. Two months later he was laid off by Jones because of lack of work, along with several other employees, and did not obtain employment with his third interim employer, Southeast Carriers, Inc., until October 23 of the same year. This 2-month interim is regarded by the Respondents as a period of willful loss. According to the Re-

spondents, Elmore should have stayed with Ozark, a more stable employer, and, had he done so, he would not have been out of work between August 25 and October 23.

Here, as with every other offset against gross backpay, it must be remembered that Elmore would not have been placed in the situation in which he found himself on August 25, 1984, except for the wrongdoing of the Respondents, so it is their burden to establish the the layoff he experienced at Jones was the result of Elmore's *willful* wrongdoing. A backpay claimant is certainly entitled to quit a lower paying job to take a better paying job without placing his claim in jeopardy. *Laborers Local 1440 (Delbert A. Schultz)*, 243 NLRB 1169 (1979).¹¹ If such an opportunity presented itself and a claimant refused to improve his lot, an erring employer would certainly seize upon it and urge that it be considered an element of willful loss. The fact that the Jones job was casual employment does not mean that it was temporary employment. In the trucking industry, new hires are frequently put in casual status during their probationary period and then given a full-time position after they have demonstrated their ability. Indeed, this is what the Respondents did when it hired Elmore. There is no reason to believe that Elmore or anyone else knew, or had reason to suspect, when he took the warehouse job at Jones that he would be the victim of a business downturn 2 months later. Elmore's joblessness after August 25 was the result of a situation over which he had no control and should in no way detract from the amount of money which is due and owing to him as a discriminatee.

I credit the testimony of Edwyna Woody, the former district manager of ATS, that Elmore was discharged from its employment on August 21, 1985, because, without excuse or explanation, he failed to call the dispatcher and ran several hours late for two scheduled deliveries. Elmore had been hired by ATS on April 1, 1985, and was farmed out to one of its customers, MCT, Incorporated. ATS supplied this customer with its drivers and MCT supplied the trucks. In driving for this and other customers, Elmore normally acted under instructions from the customer for whom he was hauling items and making deliveries.

During the course of his employment with ATS, which lasted just less than 5 months, Elmore had a minor dispute over whether he was being paid the accurate mileage for one of his deliveries. ATS thought that the dispute had been resolved but apparently it had not been resolved to Elmore's satisfaction. According to credited testimony, ATS President Charles Hankins and Mrs. Woody learned from the ATS dispatcher, JoAnn Tucker, that Elmore had failed to call in, as instructed, and had arrived several hours late for two deliveries he was scheduled to make for MCT. They summoned him to the company office and asked him for an explanation. Elmore had none. Instead, he brought up again his earlier complaint about being shortchanged on mileage for a previous delivery. Apparently the dispute became heated. In any event, he was discharged for insubordination and was out of work for the next 2 months until he was hired by the Respondents on October 13, 1985. Respondents argue that backpay should be tolled during this period of time because of Elmore's willful loss.

⁹The record contains evidence of Elmore's search for work during the backpay period. He registered with the Tennessee Department of Employment Services, regularly followed up newspaper want ads and tips from friends concerning job openings, and made actual applications during this period of time to 25 different companies engaged in the trucking business in and about Memphis, Tennessee, including the Respondents.

¹⁰He is no kin to the owners of the truck line.

¹¹A claimant is even entitled to quit interim employment to make a bona fide search for a more rewarding or less onerous job. *Chef Nathan Sez Eat Here*, 201 NLRB 343 (1973).

As in the case of the layoff from Jones, Elmore was not out of work because of his choice but because of the choice of his employer. If Elmore had his way, he would have continued to work for ATS during this period of time. The Board has held that various acts on the part of a discriminatee which bring about his discharge by an interim employer, such as going to jail, refusing to work on Sunday, unsatisfactory job performance, or arguing with a supervisor about working conditions, do not give rise to a tolling of backpay. See *Kansas Refined Helium Co.*, supra, and cases cited therein at 252 NLRB 1162. Accordingly, it should not be tolled in this instance.

The Respondent has not shouldered its burden of proof in establishing any offsets to be charged against the backpay of Larry G. Elmore, as set forth in the amended specification. Therefore, Elmore is entitled to an interim net award of \$26,024.83, plus interest. The assessment of any backpay due and owing subsequent to the date of his discharge must await the issuance of another specification.

3. W. David Elmore

W. David Elmore was hired by Diesel Recon on March 15, 1976, as an over-the-road driver. At the time he was laid off on December 3, 1983, he ranked third on the Diesel Recon seniority list. The General Counsel seeks a net backpay award for him of \$22,593.50, plus interest, in his second amended specification introduced at the hearing.

Immediately following layoff, Elmore had a tonsillectomy and, as pointed out in the first decision in this case, was unavailable for work for this reason until March 18, 1984. 280 NLRB at 1036. The computation of his earnings for backpay purposes began on that date. On March 19, 1984, he filed an application with the Respondents for employment but was not hired until October 1985. In the interim he worked for six different employers in the Memphis area. When he was hired by the Respondents, he started as a casual employee and thereafter was given a regular position at the bottom of the Respondents' seniority list.

To apply the gross backpay formula to Elmore's case, the compliance officer used as representative employees Lavelle Cross and Marvin Mays, who were numbers two and three, respectively, on the Respondents' seniority list. Because of the disparity in seniority between these individuals and Elmore, the latter suffered a disparity in pay because of his lower bidding rights between what he should have been earning and what he was in fact earning as an employee of the Respondents. As a result, backpay liability continued to accrue after Elmore was placed on the Respondents' payroll until he was tendered an offer of reinstatement which comported with his seniority. Sometime following the end of the backpay period, Elmore was discharged under circumstances which are not relevant to this case.

Elmore's first job after re-entering the job market in March 1984 was for Slaughter Brothers, Inc. He drove a flat-bed truck for Slaughter Brothers hauling lumber in and about Memphis and was paid \$5.50 an hour. He worked at this job for about 6 months and quit to go to work for Music City, a sightseeing company which transported visitors to Memphis to local sights of interest, such as Graceland, the home of the late Elvis Presley. Elmore drove a sightseeing bus. He would pick up customers at their motels, drive them to the company office, and then take these and other sightseers who

had been assembled at this collection point to one or more scheduled stops on the tour. For this work he was paid \$5.50 an hour, the same rate he received at Slaughter Brothers, and enjoyed no fringe benefits. This job did not require his overnight absence from Memphis, except on rare occasions when tours to other localities were assigned. Respondents' claim that, by accepting such interim employment, Elmore left the relevant job market for an over-the-road driver job and thus was guilty of willful loss requiring the tolling of backpay. The contention borders on the frivolous.

Like most of the claimants in this case, Elmore registered for unemployment compensation with the Tennessee Department of Employment Services. The record contains a list of thirteen employers in the Memphis area to whom Elmore made job applications during the backpay period. This fact alone would normally protect Elmore from any contention that he was responsible for willful loss. *Laredo Packing Co.*, 271 NLRB 553 (1984). It is certainly not willful loss if a backpay claimant takes only intermittent, low paying jobs during the backpay period. *Scott Management Co.*, 273 NLRB 1216 (1984). Accordingly, backpay liability will not be tolled for any period of time for which Elmore worked for Slaughter Brothers or for Music City.

Respondents also contend that Elmore was guilty of willful loss during the month that elapsed between his discharge by Music City and his employment by Sunbelt Transportation Services began. As set forth above, Elmore was discharged following a heated argument concerning smoking a cigarette in a parking lot while giving directions to a tourist. While Elmore was unhappy about the criticism he was receiving for an act which he did not regard as a violation of company rules, the fact that he was separated from the Music City payroll was due to a decision taken by his employer, not a decision which he made. In light of the cases cited, supra, he was not guilty of willful loss of being discharged under those circumstances, so backpay liability will not be tolled.

The fact that Elmore did not receive fringe benefits, such as health insurance, meal, and travel money, from some of his interim employers has no bearing on the propriety of the formula used to determine gross backpay. Gross backpay is the amount a claimant would have earned as an employee of the Respondents had he not been wrongfully treated by the Respondents. What the claimant actually earned during the backpay period may be relevant as an offset to gross backpay, but it has no bearing on the initial figure from which the offset is to be deducted. In light of these considerations, I have determined that W. David Elmore is entitled to a net backpay award of \$22,593.50, plus interest.

4. Harold C. Baker

Harold C. Baker was hired by Diesel Recon as an over-the-road driver on March 14, 1977, and stood number six on its seniority roster when he was laid off on December 3, 1983. He immediately applied for work with the Respondents and was told that he could drive for its Sunbeam account but that no positions were available at its Diesel Recon account. Baker went to work for the Respondents driving for Sunbeam.¹² When jobs opened up at the Diesel Recon account

¹²The original backpay specification contained no interim earnings for Baker during the last calendar quarter of 1983 because the Respondents failed

in March 1984, Baker was transferred to this account, first as a casual and then as a full-time employee at the bottom of the seniority roster. To determine his gross backpay, the Compliance Officer selected as representative employees Respondents' employees Sturdivant, Murphy, and Telford, who were listed 5, 6, and 8 on its roster. Until Baker's discharge by the Respondents in May 1987, he accrued no backpay. The bulk of his claim relates to a period of time following his discharge by the Respondents. The General Counsel seeks an amended net backpay award for Baker in the amount of \$35,511.85, plus interest.

The facts and circumstances surrounding Baker's discharge are set forth by Judge Gritta in the same 1988 decision that resolved Larry Elmore's discharge. In summary, Baker was involved in an accident which occurred on May 8, 1987, on I-65 near Louisville, Kentucky, while he was driving a company vehicle. He was suspended on May 13 pending an investigation of the accident. Baker took advantage of this suspension to serve 2 weeks' duty with the National Guard. When he returned from Guard duty, he phoned the Company to ask about the outcome of the accident investigation and was informed that he had been discharged.

Judge Gritta concluded that the discharge was discriminatory and that the excuse proffered by the Respondents for its action was pretextual. Relying on the fact that Baker was a Teamsters shop steward while Diesel Recon was operating the delivery aspect of its business, the fact that Baker had several safe driving awards and a record of driving for 16 years without an accident, and the fact that other drivers had not been discharged in similar circumstances, Judge Gritta found the Respondents guilty of a violation of Section 8(a)(1) and (3) of the Act. In a decision, dated September 30, 1988, he directed the Respondents to offer Baker reinstatement and to make him whole for any financial losses experienced as a result of the discrimination. As noted above, no exceptions were taken to this decision and it became the final disposition of the Baker case as well as the Larry G. Elmore case. Baker was offered reinstatement and accepted. He is now a city driver for the Respondents and has resumed his position as Teamsters shop steward.

During the nearly 19 months that Baker was absent from the Respondents' payroll by reason of the second discrimination practiced against him, he worked for two trucking companies, Motor Convoy, Inc. and Signal Delivery Service. Motor Convoy is a carrier which specializes in car hauling. While their pay is good (62 cents a mile), their work is very demanding and, in Baker's opinion, nerve wracking. Baker had driven trucks for many years but had never previously operated a car hauler, which has two tiers and is loaded with 9 or 10 new vehicles to be delivered to dealerships located in various cities. He was required not only to drive but to load the hauler and to adjust the racks on the hauler so the top rack would be no more than an inch above the new cars loaded on the bottom rack. This tolerance was required because the hauler had to be adjusted to come within over-the-road height limitations placed on such vehicles. Baker testified that this effort, plus the strain of driving such valuable

cargo over the road, made the job too difficult to perform, so he quit on December 8, 1987.

By following up on newspaper want ads and seeking the assistance of the Union, he found a job with Signal Delivery Service and started to work on March 7, 1988. He testified that his search for work with other trucking companies was made more difficult by the fact that the Respondents had stated that he had been discharged as the result of an accident. For that reason, he was often considered a bad risk by prospective employers in the trucking field.

The Respondents argue that their backpay liability should be tolled from December 8, 1987, until March 7, 1988, because, by quitting his job with Motor Convoy, Baker was guilty of willful loss. The authenticity of Baker's reason for leaving Motor Convoy was unchallenged. It was manifestly an act of prudence for an individual, with no experience in car hauling, to leave a job for which he felt unqualified and in which he could have done enormous damage, in order to seek employment doing the type of driving to which he was accustomed. Backpay will not be tolled for this reason. *Aircraft & Helicopter Leasing & Sales* (Fournier), 227 NLRB 644 (1976).

At the hearing, it was learned that, during the final months of Baker's employment with Service Delivery, he suffered a knee injury and was off work for about 5 weeks. When these facts were brought to light by the Respondents, the General Counsel amended the specification to deduct from gross backpay the amount of money Baker would have earned from the Respondents during this period when he was unavailable for work. In light of these considerations, I have concluded that Harold C. Baker is entitled to an award of net backpay in the amount of \$35,511.85, plus interest.

5. Bobby L. Goza

Bobby L. Goza was hired by Diesel Recon as an over-the-road driver on December 27, 1979, and was 25th on its seniority roster when he was laid off on December 3, 1983. To obtain a gross backpay figure for Goza, the compliance officer utilized the earnings of nine different replacement employees having equivalent seniority who worked a sufficient number of hours during each calendar quarter of the backpay period.

Goza immediately went into business for himself after being laid off. In order to do so, he activated a corporate charter for Goza Trucking Company, Inc., a Tennessee corporation which he had formed in 1978 but which had been dormant since that time. Goza lent the corporation about \$12,000 in cash from his savings for start-up costs, bought a truck, and operated the business until January 1986, when he discontinued the enterprise and went to work for Helena Truck Lines, Inc. Goza was offered reinstatement by the Respondents on May 19, 1988, and accepted it. The General Counsel seeks a net backpay award for Goza in the amount of \$54,984.67, plus interest.

It is well settled that a discriminatee may, during the backpay period, go into business for himself. The net earnings from his business constitute interim earnings to be offset against gross backpay. *Rice Lake Creamery*, 151 NLRB 1113 (1965). A vexing question which sometimes arises in cases involving offsets derived from business enterprises operated by backpay claimants is just what constitutes net earnings. Wherever possible, all income and expenses must be deter-

to furnish the Regional Office with any payroll records for this period of time. When such earnings were determined from Baker, the specification was amended to deduct, among other things, the \$1349 originally assessed against the Respondent.

mined in accordance with the *Woolworth* formula, just as in the case of wages derived from an interim employer.

In this case, Goza Trucking Company, Inc., which is wholly owned by the claimant, paid the claimant a salary during 1985 and 1986. This salary was offset in the specification from gross backpay on a quarterly basis in the same manner that interim earnings from any other employer might be offset. The specification also included as interim expenses two amounts, \$9932 and \$2901, incurred in the first two quarters of 1984, respectively. These were amounts which Goza lent to the corporation from his savings to cover start-up costs or were corporate expenses Goza incurred personally. The money was used by the corporation as a down payment on a truck and other related matters. Start-up costs are a legitimate expense of a business and normally may be included as an expense which reduces interim corporate earnings. One cannot go into the trucking business without a truck, so these items were properly includable by the compliance officer in the expense column.

The effect of placing these two expense items in the interim expense column for the first two quarters of 1984 is that they more than offset Goza's interim earnings in those quarters by several thousand dollars. They diminished interim earnings to zero during those quarters but Goza was deprived of the opportunity to utilize the amounts over and above those two offsets to reduce interim earnings in other quarters.¹³ Goza's attorney argues that the amounts Goza contributed to the corporation for start-up costs should be divided by nine, reflecting the fact that the backpay period during which Goza was self-employed embraced nine calendar quarters, and that start-up costs should be apportioned equally as interim expenses throughout those nine quarters. In this way, Goza would not "waste" surplus offsetting expenses in two calendar quarters and have them available in other quarters when the unused portion of these offsets would actually count against interim earnings, thereby increasing net backpay liability. Unlike the Internal Revenue Code, Board law does not permit losses to be carried back or carried forward into other accounting periods. In some instances the *Woolworth* doctrine aids a claimant by enlarging his claim and, in other instances, such as the present, it serves to diminish the ultimate award. Whether it helps or hurts, it must be followed, so the specification in this respect will not be disturbed.

The result of following *Woolworth* regarding these start-up expenses is that Goza in fact had \$12,833 in start-up costs (including some out-of-pocket expenses for the corporation which he personally paid) during these two quarters, but only \$7787 of this amount actually reduced the Respondents' net backpay liability. Goza testified credibly that, when he wound up the business in 1986, he recaptured no cash from his initial investment. As a result, absent certain considerations which will be discussed below, he suffered a total overall loss of \$5046 for which he will receive no recompense under the specification.¹⁴

¹³ Interim expenses can only offset interim earnings. They cannot serve to increase gross backpay liability.

¹⁴ Goza's backpay specification for the first two quarters of 1984 stated the following:

1984	Goza's gross backpay	Interim earnings	Interim expenses	Unused or unapplied interim expenses from capitalization and other personal expenditures
1st Qtr.	\$6,713	\$3,154	\$9,932	\$6,798
2d Qtr.	6,763	1,192	2,901	989
		Total	\$12,833	\$7,787

The Respondents also challenge the allowance of a portion of this money as start-up cost. They also challenge the action of the compliance officer in allowing, as expense items in arriving at net interim earnings, two depreciation costs found in the corporation's 1984 and 1985 tax returns. In computing net interim earnings from Goza Trucking Company, Inc., during the period that Goza was in business for himself, the compliance officer gave the corporation credit for depreciation on the trucks it owned.¹⁵ The depreciation allowed to produce these interim earning figures is \$5098.13 in calendar year 1984 and \$3476.17 in calendar year 1985. Despite the fact that depreciation on the assets of a claimant is normally allowable in determining net income from a business, the Respondents object to permitting these allowances for Goza Trucking Company, Inc., to offset Goza's interim earnings (and thereby increase his backpay claim) because Respondents assert that the Board does not allow depreciation on assets which do not lose value merely because it is claimed and allowed on the claimant's income tax return. The depreciation allowed here is for a truck (or trucks) which Goza drove extensively over a period of 2 years in the course of his business. It is pointless to contend that these vehicles did not suffer substantial reductions in their value because of wear and tear from constant use over a 2-year period of time. A schedule appended to the Goza Trucking Company corporate tax return for 1986 shows that a 1979 tractor which it purchased in February 1985, for \$23,194.38 was sold a year later for \$14,888.60. These figures more than bear out both the fact of depreciation and the reasonableness of the amounts claimed for that purpose.

Respondents' final objection to the Goza specification is essentially that they are being charged twice for their wrongdoing in failing to reinstate Goza in a timely fashion. The compliance officer gave Goza credit for substantial start-up expenses, although, as noted above, not all of those expenses served to augment the Respondents' liability because they could not be offset against interim earnings. When Goza turned the truck into the finance company in January 1986, because he could no longer afford the monthly payments, he was still able to use a portion of its value as a trade-in on a vehicle which he purchased for his personal use. According to the Respondents, Goza recaptured a portion of his initial investment in the form of a downpayment on a new truck. Because the Respondents are being charged for the capitalization of the corporation in their backpay liability, that li-

¹⁵ The corporate tax returns in evidence in this case show the acquisition of an asset, presumably a truck, in 1984, at a cost of \$20,392.15. Other returns indicate that Goza acquired on February 8, 1985, a 1979 Ford tractor for \$23,194.38. Presumably the first truck was traded in as a downpayment on the second one. The second truck was sold by the corporation January 31, 1986, for \$14,888.60.

ability should be reduced by the amount attributable to the downpayment on Goza's personal vehicle since Goza allegedly recaptured a part of the capital. The argument has merit. Unfortunately, the Respondents, who bear the burden of proof in such matters, failed to establish the amount of the downpayment they wish to assert as an offset to their liability to Goza.¹⁶ Accordingly, I conclude that Bobby Goza is entitled to an award of net backpay in the amount of \$54,984.67, plus interest.

6. Joe Gross

Joe Gross was hired by Diesel Recon on December 2, 1978, as an over-the-road driver. He was 16th on its seniority list when he was laid off on December 3, 1983. Thereafter, he worked for Leaseway Personnel Corporation, Sunbelt Transportation Service, Inc., and Associated Transportation Services, Inc. To determine his gross backpay, the compliance officer selected four different employees of the Respondents, in the order of their seniority on the Respondents' seniority list, who had worked a sufficient number of hours in each calendar quarter to serve as representative employees. Gross was offered reinstatement on May 19, 1988, and accepted it. The General Counsel seeks a net backpay award on his behalf in the amount of \$12,800.85, plus interest. In their brief, the Respondents offered no reasons why the award requested in the specification should not be paid in full. Accordingly, I have determined that Joe Gross is entitled to a net backpay award of \$12,800.85, plus interest.

7. Carl Briscoe

Carl Briscoe was hired by Diesel Recon on March 27, 1979, as an over-the-road driver, and was number nineteen on its seniority list when he was laid off on December 3, 1983. As recited in the previous decision in this case, Briscoe, as well as other Diesel Recon drivers, applied in writing for jobs with the Respondents before the actual date of the layoff but they were not hired. To determine Briscoe's gross backpay, the compliance officer used the earnings of five different drivers on the Respondents' payroll who had comparable seniority and who worked a sufficient number of hours in each quarter to provide representative earnings figures. In a second amended specification pertaining only to Briscoe (G.C. Exh. 33), the General Counsel is seeking a net backpay award for him in the amount of \$79,267.98, plus interest. No backpay is requested for Briscoe for the period of time immediately following the Diesel Recon layoff, apparently because the Respondents did not have 19 drivers on their payroll at that time and there was no work for a driver holding the 19th rank on its seniority list.

Record evidence indicates that, in addition to applying to work with the Respondents, Briscoe registered for unemployment compensation with the Tennessee Department of Employment Security and made personal applications over a period of time to 16 different employers in the Memphis area, seven of whom actually employed him for short periods of time. During 1984 and 1985, Briscoe worked as a ware-

houseman for one of these companies and drove a truck for the others. During the backpay period he filed a second written application for employment with the Respondents. For a brief period of time he worked for his brother-in-law, who operated a Chevron gas station, and then he went to work for A. P. Briscoe Repairs doing roofing and painting. A. P. Briscoe is the claimant's father; Briscoe worked with him under what was essentially a partnership arrangement. On May 19, 1988, the Respondents offered Briscoe reinstatement and he accepted.

The Respondents object to certain items in the backpay specification, claiming Briscoe was guilty of willful loss by leaving a driver's job to accept a freight handlers job and by leaving the trucking industry entirely to work as a painter and roofer with his father. Respondents also claim that backpay should be tolled between the time Briscoe quit Southeast Carriers, an interim employer, until he found other employment with Dixie Auto Transport, another interim employer. Respondents also assert that Briscoe's gross backpay formula should not include meal and travel money because Briscoe did not receive meal and travel money from any of his interim employers.

At the risk of repetition certain basic propositions of backpay law which control the disposition of Briscoe's claim should be recited. "The principle of mitigation of damages does not require success, only an honest, good-faith effort." *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). A discriminatee who accepts a job at a lower rate of pay than the job from which he was illegally discharged is under no duty to continue to search for work. *Champa Linen Service Co.*, 222 NLRB 940 (1976). A claimant who leaves a job for a justifiable reason does not forfeit his right to additional backpay. *Mastro Plastics Corp.*, 136 NLRB 1342 (1962). A claimant may leave one interim job to obtain another one in order to improve his earnings, especially where, as here, he has been holding jobs which are less remunerative than the job to which he is entitled with the respondent. *Alamo Express, Inc.*, 217 NLRB 402 (1975). A claimant is not required to accept or continue employment in a job which is not suitable or substantially equivalent to the position from which he was discharged. *Oman Construction Co.*, 137 NLRB 111 (1962), enf. 316 F.2d 230 (6th Cir. 1963). A backpay claimant is under no duty to remain in the industry in which he was working at the time unlawful discrimination was practiced against him. Some examples of this rule are a limousine driver who obtained work as a security guard, *Fugazy Continental Corp.*, 276 NLRB 1334 (1985), a pipefitter who took a job as a store clerk, *Big Three Industrial Gas & Equipment Co.* (Lee J. Judd), 263 NLRB 1189, 1206 (1982), and an electrician's helper who went into business repairing radios and television sets, *Big Three* (Kenneth Gatlin), supra at 1207.

It should be remembered at the outset that Briscoe applied for work to the Respondents not once but twice. In and of itself, this effort shows a diligent search for work. The fact that he applied to the state unemployment agency and a total of 15 employers, most of whom were in the trucking industry, is further evidence of an effort to mitigate damages. Respondents complain Briscoe should be penalized because he quit working as a driver for Ozark Truck Lines to go to work for Jones Trucking Company as a freight handler. The job at Ozark Truck Lines was in no way comparable to the one

¹⁶Even if the Respondents had established the value of the downpayment attributable to recapturing a part of Goza's initial investment, this sum would have to be further offset against \$7787, the amount of the initial investment which Goza did not recapture and which was never passed on to the Respondents in the form of backpay liability.

from which he was laid off at Diesel Recon. Not only did Ozark fail to pay meal and travel allowance to its drivers but, to use Briscoe's expression, they "ran you around the clock." Unlike the Respondents' operation or most unionized trucking companies, Briscoe not only drove a truck but he had to unload it at its destination because there were no warehousemen employed by Ozark or anyone else for this purpose. His mileage rate for Ozark covered not only driving but "lumping," a task he had to perform gratis. This was not equivalent employment to the work from which he was laid off, and he was fully justified in leaving it without forfeiting backpay. As noted in the Larry G. Elmore case, the fact that a driver decides to work as a warehouseman on a dock, as Briscoe did when he took a job with Jones Truck Lines, has no bearing on his eligibility to collect backpay. He did not leave the relevant labor market by so doing and he may well have improved his earnings. As in the Elmore case, the fact that Briscoe was eventually laid off by Jones for lack of work was simply a circumstance over which he had no control and in no way indicated willful loss.

Briscoe quit driving for Southeast Carriers because he did not want to become involved or implicated in an ongoing practice of pilferage which was taking place at Southeast Carriers. This quit was also justifiable and should not result in a tolling of backpay simply because it took Briscoe a month to find another job. His decision to leave the trucking industry for two years to become a painter and roofer was legitimate, especially in light of the fact that, as revealed by the specification, he was earning as much or more doing painting and roofing as he had earned from driving trucks for a series of trucking companies who paid marginal wages and few if any benefits.¹⁷ In light of these considerations, I conclude that the amended specification should not be disturbed and that Carl Briscoe is entitled to a net backpay award of \$79,267.98, plus interest.

8. Tommy Bracken

Tommy Bracken was hired by Diesel Recon on May 2, 1981, and was 30th on its seniority list when he was laid off on December 3, 1983. To obtain a gross backpay figure for Bracken, the compliance officer utilized the pay experience of 12 different representative employees, inasmuch as there was considerable turnover among the Respondents' drivers who were so low on its seniority list and many did not consistently work a full quarter. No backpay was claimed for the last quarter of 1983 because here, as in the case of Briscoe, the Respondents did not employ 30 drivers during the start-up period of their Diesel Recon account. The General Counsel seeks a net backpay award for Bracken, contained in his second amended specification (G.C. Exh. 49), of \$51,356.72.

Like several other drivers, Bracken applied for a job with the Respondents before he was actually laid off from Diesel Recon. He registered with the Tennessee Department of Employment Security and, during the backpay period, submitted job applications to 16 different employers, 5 of whom employed him at various times. Before coming to work for Die-

sel Recon in 1981, Bracken was an employee of Roadway Express, Inc. However, he was so low on its seniority list that he had been laid off. He worked for Diesel Recon without ever having been recalled by Roadway but he still maintained his seniority with that company. In March 1984, Bracken was recalled briefly by Roadway and was then laid off a second time. Two of his interim employers, Labicon, Inc., and Mid-South Laboratory Supply, Inc., were companies which installed fixtures and equipment in laboratories. Bracken did not drive a truck for these companies. Instead, he worked as an installer of cabinets and other equipment. The Respondents argue that backpay should be tolled for the period of time that Bracken was working for these employers outside the trucking industry because he had willfully removed himself from the work force. It should be noted that, in one of these jobs, Bracken was working between 50 and 70 hours a week and making about \$650 a week. In light of precedents cited above, this argument is wholly without merit and backpay will not be tolled.

The original specification called for a deduction for interim earnings of \$650 in the first quarter of 1988 for the period of time in January 1988, that Bracken worked for Mid-South Laboratories. Bracken presented his IRS W-2 form at the hearing showing that he had worked 2 weeks, not 1 week, in January 1988, for Mid-South and that his earnings were \$1300 rather than \$650. Upon discovery of this discrepancy, the General Counsel moved to amend the specification to reflect the correct amount. The Respondents argue that backpay for the entire quarter should be tolled and that Bracken's award be reduced by \$6138 because he willfully concealed his earnings. Respondents never explained the source of the "\$6,138" figure in their request.

In fact, the correction to the specification was made because Bracken himself brought to light the total amount of the earnings reflected on his W-2 form, a form he did not receive until the end of the calendar year and long after he had supplied to the Regional Office the information normally provided to the compliance officer by a backpay claimant through the filing of NLRB quarterly employment and expense data sheets. Respondents' contention is not only Draconian but absurd. A backpay case is an adversary proceeding in which, as noted above, a respondent shoulders the burden of proving any interim earnings which would reduce the amount from gross backpay ascertained from the earnings of representative employees. To the extent that a compliance officer or a claimant voluntarily provides a respondent in advance of the hearing with information which eases its burden, they are acting gratuitously. The whole purpose of a hearing on a backpay specification is to permit a respondent to establish interim earnings and any other mitigating matters it may wish to assert. If information to support a respondent's case is made available at the hearing by a claimant, this is time enough to fulfill any legal duty imposed on him. The error at issue here was an obvious inadvertence of a trivial character which was easily and readily corrected. Since any correction attributable to this error has already been made, the amended specification will not be further disturbed on that account.

Lastly, Respondents argue that backpay should be tolled following Bracken's actions in quitting his employment at Allen Iron Works and at Mid-South until he obtained other employment because, by quitting these jobs, he willfully re-

¹⁷ Respondents also argue that Briscoe's gross backpay should not include any recognition of travel and meal money since he did not receive these benefits from interim employers. As discussed, supra, in the case of W. David Elmore, whether an interim employer does or does not offer fringe benefits has no bearing on whether these items should be a part of the Respondents' gross liability.

moved himself from the work force and should bear the consequences of his actions. Bracken worked as an over-the-road driver for Allen Iron Works. He quit his job because he was forced to "run hot." This means that Bracken was being directed by his employer to operate his vehicle on a public highway in excess of ten hours a day, the legal maximum that an over-the-road driver may drive in any 24-hour period under regulations promulgated by the United States Department of Transportation. The obvious purpose of this important regulation is to promote highway safety by reducing the number of vehicle accidents attributable to driver fatigue. Quitting one's employment to avoid being charged with a Federal safety violation and quite possibly to avoid an accident due to fatigue is a legitimate reason, so backpay will not be tolled.¹⁸

Respondents also argue that backpay liability should be tolled during the period following Bracken's departure from Mid-South Laboratories because, by quitting his job with this employer, Bracken was willfully leaving the labor force and thus not entitled to backpay. Bracken was paid a salary by Mid-South and was being required to work between 50 and 70 hours a week. These conditions and earnings were in no way comparable to what he would have experienced as an employee of the Respondents. Bracken was discharged by Mid-South because he told his employer that he would no longer work a 70-hour week. This was a legitimate complaint, so backpay will not be tolled. In light of these consid-

¹⁸ Respondents filed with their brief two posttrial affidavits of a management employee of Allen Iron Works in an effort to impeach Bracken's testimony concerning the reason why he left its employment. The matters recited in the affidavit are quite consistent with Bracken's testimony and in no way serve to impeach him. The affidavit will not be admitted into evidence.

erations, I conclude that Tommy Bracken is entitled to an award of net backpay in the amount of \$51,356.72, plus interest.

On the basis of the foregoing findings of fact and conclusions of law, and on the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended¹⁹

ORDER

Respondents Ryder System, Inc., Ryder Distribution Systems, Inc., DPD, Inc., and Ryder Distribution Resources, Inc., Memphis, Tennessee, their officers, agents, successors, and assigns, shall pay to the employees named below the amounts of net backpay set forth after their names, with interest thereon computed at the short-term Federal rate used to compute interest on underpayments and overpayments of Federal income taxes under the Tax Reform Act of 1986, *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less withholdings for Federal and state income taxes and social security:

Larry G. Elmore—\$26,024.83 (interim)
 W. David Elmore—\$22,593.50
 Harold C. Baker—\$35,511.85
 Bobby L. Goza—\$54,984.67
 Joe Gross—\$12,800.85
 Carl Briscoe—\$79,267.98
 Tommy Bracken—\$51,356.72

¹⁹ If 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.