

**Tubari, Ltd., Inc. and Fur Workers Union, Local 3,
United Food and Commercial Workers, AFL-
CIO.** Cases 22-CA-13581 and 22-CA-13615

June 26, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On December 19, 1989, Administrative Law Judge Joel P. Biblowitz 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 decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order.

In the underlying unfair labor practice proceeding, as noted at footnote 1 above, the Board found that the discriminatees in this case had been unlawfully discharged on December 3, 1984. They sought reemployment with the Respondent on December 4 but that offer to return was unlawfully rejected by the Respondent. After their offer to return was rejected, the discriminatees picketed the Respondent in protest of its unfair labor practices from 7:30 a.m. to 3:30 p.m. daily. They were paid \$150 a week by the Union for that activity, and that amount was included in the backpay specification as interim earnings, and they were also given \$5 a day as "lunch money." The judge found that the latter amount should also be included as interim earnings and there are no exceptions to that finding. In sum, the judge found that the discriminatees received \$175 a week from the Union for picketing the Respondent. None of the discriminatees searched for interim employment elsewhere. The Respondent argued that because of their failure to engage in such a search the discriminatees

should be denied any backpay. The judge rejected that contention and we affirm that conclusion.

We start from the oft-quoted premise that "[o]nce the General Counsel has established the gross amount of backpay due the discriminatees in question 'the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability' 'The finding of an unfair labor practice is presumptive proof that some backpay is owed.'" *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). Nonetheless, discriminatees have a duty to mitigate damages and the Board has found in particular cases that employees who engage in picketing at the expense of seeking alternative employment incur willful losses and are disqualified from receiving backpay for that period. In those instances, however, there was no indication that the employees received compensation for their picketing duties. See, e.g., *Ozark Hardwood Co.*, 119 NLRB 1130, 1136, 1137 (1957) (employees Homer Currier and Bill Friend), remanded on other grounds, 282 F.2d 1 (8th Cir. 1960); *John Cuneo, Inc.*, 276 NLRB 75 (1985). By contrast, here the discriminatees received significant sums for their picketing. In *Marlene Industries*, 234 NLRB 285 (1978), the Board found that an illegally discharged employee who, during the backpay period, was later hired by and paid by the Union to picket the respondent in its organizational drive at the respondent did not suffer a willful loss of earnings simply by picketing. As in *Marlene Industries*, in the instant case, where the Union's payment to the discriminatees as compensation for their picketing duties constitutes interim earnings which are deductible from gross backpay (see *Superior Warehouse Grocers*, 282 NLRB 802 (1987)), we consider the discriminatees' picketing sufficiently akin to interim employment. In such circumstances, it was incumbent on the Respondent to show that the picketing was not suitable interim employment and the Respondent has failed to show this. The Respondent principally relies on the court's statement in *NLRB v. Madison Courier, Inc.*, supra, that picket line activity does not relieve discriminatees of the obligation of making reasonable efforts to secure work in order to mitigate an employer's backpay liability. We find that this statement, without more, does not compel the conclusion that the discriminatees' paid picketing activity in the instant case does not constitute mitigation.

In finding that the discriminatees did not fail to mitigate their losses, we do not rely on the object of their picketing. They obviously have a statutory right to protest their employer's unfair labor practices through picketing, but this does not automatically translate into a right to have such picketing counted as interim employment that establishes mitigation of loss. In determining adequacy of mitigation, we must consider whether—given the employee's skills and experience, and the rate at which he or she was compensated when

¹We note that in the second paragraph of the judge's decision the first sentence should refer to 1984, not 1985. There were no exceptions filed to the judge's finding regarding the entitlement of certain illegal aliens to backpay.

In adopting the judge's finding that the Respondent is not entitled to a 5-day grace period and that the Respondent's backpay obligation therefore commenced on December 3, 1984, we note that the Board previously found in *Tubari, Ltd.*, 287 NLRB 1273 (1988), that the employees were unlawfully discharged. See 287 NLRB at 1273. Hence no 5-day grace period is applicable to their reinstatement or backpay entitlement. Only as an alternative finding did the Board conclude that, if the employees were not unlawfully discharged, then they were unfair labor practice strikers who had made a request to return, and that request was unlawfully denied. That action constituted a separate violation of the Act. And in circumstances where unfair labor practice strikers' offers to return to work are rejected, the Board has determined that the 5-day grace period is inapplicable. See *Drug Package Co.*, 228 NLRB 108, 114 (1977). Hence the 5-day grace period does not apply here.

employed by the Respondent—acceptance of the picketing job with the Union represents a reasonable effort to obtain sustained income during the backpay period.²

We note that in *Marlene Industries*, supra, on which we are relying to find mitigation here, the judge whose decision was adopted by the Board made an initial finding that discriminatee Brashears' job as a "presser" was not "so highly skilled or highly paid that he would be required to seek only 'presser' work" in order to establish mitigation. Id. at 289. Accord: *Associated Grocers*, 295 NLRB 806 (1989). In our view, if we were dealing with skilled employees who, by virtue of their experience, were not limited to relatively low paid manual laborer work, then work for the Union as a picketer could not excuse failure to seek work in the same trade.³

The 19 discriminatees employed as picketers here, however, had been employed simply as "floorworkers" performing unskilled laborer tasks, and none was shown to have experience in any trade or specialty. Accepting a "bird in the hand" for steady pay that was less than what they had earned in the jobs from which they were unlawfully discharged was not unreasonable.

We also note the Respondent's contention that the judge overstated the extent of the discriminatees' mitigation. The judge stated that the discriminatees "were paid almost seventy five percent of their rate of pay from the first day of the backpay period." While it is true, as the Respondent contends, that once overtime earnings are included in the discriminatees' backpay entitlement, as the judge found they should be, then their earnings from picketing constitute less than 75 percent of their wages, as they also do when the \$.55 per hour wage increase of February 1, 1985, is factored in, we nonetheless find the discriminatees' earnings not so relatively small as to warrant the conclusion that their earnings from their picketing activity do not constitute mitigation. In this regard, we find the facts in the instant case distinguishable from those in *My Store, Inc.*, 181 NLRB 321 (1970). In *My Store*,

²Although acknowledging that employees do not have an automatic right to have unfair labor practice picketing counted as interim employment that establishes mitigation of loss, Member Devaney does note that these employees had been unlawfully discharged; had even sought their former positions from the Respondent; and had been refused these jobs. He finds that paid picketing of the sums involved in this case to pressure the Respondent to take them back did not constitute willful loss of earnings. Cf. *Pilot Freight Carriers*, 238 NLRB 382 (1978).

In addition, Member Devaney, in agreeing with his colleagues that the discriminatees' paid picketing constitutes mitigation, finds it unnecessary to determine whether a contrary result would be warranted if, unlike in the instant case, those engaged in paid picketing were skilled employees who were not limited to relatively low paid manual laborer work. See his colleagues' discussion below in the following two paragraphs.

³Chairman Stephens accepts *Associated Grocers*, supra, in which he dissented in part, as applicable Board precedent on this point. He also notes that employee Mullins, whose backpay he would have cut off for failure to seek employment in the grocery warehouse industry, earned no money from any employment during the period in which he sought work other than warehousing work.

certain discriminatees during a portion of the backpay period were engaged in picketing only and the Board found they were not in the labor market. In addition to the loans they received from the union during the backpay period (which were not counted as interim earnings), they also received small sums from the union as compensation for their extra efforts in guiding the picket line and those were counted as interim earnings. The Board held that these discriminatees incurred willful losses and were barred from receiving backpay during the time that they only picketed. We find the Board's holding in *My Store* not controlling because in *My Store*, unlike in the instant case, the amount the discriminatees were paid by the union in extra compensation was de minimis. Nor do we find the Board's holding in *Ozark Hardwood*, above at 1137-1138, with respect to discriminatee Lum Fisher to be inconsistent with our result in the instant case. Although in *Ozark Hardwood*, the Board disallowed backpay for the period during which Fisher served on the picket line and during which the union paid him \$10 dollars a week, the payment was not clearly shown to be a payment for picketing as in the instant case.⁴

Thus, we find that this was true employment in the sense that the discriminatee/picketers worked regular hours and were paid a specific weekly wage plus lunch expenses. These were not mere strike benefits. Hence, the judge did not err in treating this work as employment that constitutes mitigation and deducting the income as interim earnings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Tubari, Ltd., Inc., Saddlebrook, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

⁴Indeed, it does not appear that the General Counsel had claimed the \$10 weekly payments constituted interim earnings. The judge in *Ozark*, supra (then called the "trial examiner") did not mention any such payments. In finding that Fisher was entitled to backpay for the quarters in which Fisher engaged in picketing, the judge (id. at 1166) relied on the ground that Fisher had satisfied his obligation to mitigate backpay by seeking farmwork, albeit unsuccessfully. In reversing, the Board found no record support for that finding, and it simply noted the \$10 payments without further elaboration.

Marta Figueroa, Esq., for the General Counsel.
Stephen J. Edelstein, Esq. (Schwartz, Pisano, Simon, Elestein & Ben-Asher), for the Respondent.

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge. This supplemental proceeding was initiated by a compliance specification and notice of hearing issued by the Regional Director on June 30, 1989. Respondent filed a timely answer to said specification and the matter was heard by me on October 12, 1989, in Newark, New Jersey.

By its Decision and Order (287 NLRB 1273) dated February 29, 1988, the Board found, inter alia, that Tubari, Ltd., Inc. (Respondent), violated Section 8(a)(1)(2) and (3) of the Act when it discharged 19 employees on December 3, 1985,¹ in an attempt to dissuade its employees from replacing Local 1528, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO with Fur Workers Union, Local 3, United Food and Commercial Workers, AFL-CIO (the Union). The specification alleges that the backpay period for all except Gonzales begins on December 3, 1984, and ends on July 31, 1985. The backpay period for Gonzales begins on January 7, 1985, and ends on July 31, 1985. This much, Respondent admits. The specification next alleges that the appropriate measure of the hours the discriminatees would have worked during the backpay period, absent the discrimination, is the average number of hours, regular and overtime, each worked on a weekly basis during calendar year 1984; this figure multiplied by the discriminatees hourly rate² of pay produces the appropriate weekly wages for each discriminatee. While admitting that the method of computing the hours the discriminatees would have worked is appropriate, denies it is proper in the instant situation because whereas the discriminatees worked a large number of overtime hours in 1984, Respondent moved to a larger facility in later November or early December 1984 in order to eliminate or reduce overtime hours.

In addition to the above defense regarding the elimination of overtime hours, Respondent defends that 10 of the discriminatees are not entitled to any backpay since they are illegal aliens, and that none of the discriminatees are entitled to backpay because of the lack of diligent search for suitable interim employment. Finally, during the backpay period, the Union paid each of the discriminatees \$150 a week, plus \$25 a week "lunch money" to picket the Respondent's facility between 7:30 a.m. and 3:30 p.m. The General Counsel includes the \$150 a week each received from the Union as interim earnings; Respondent alleges that the \$25 a week "lunch money" should have been included as well.

Facts and Analysis

This specification involves discriminatees; pursuant to the Board's Decision and Order, the backpay for all but Felix Gonzales begins on December 3, 1984, the date they were discriminatorily discharged. Gonzales was on disability leave at the time, so his backpay period does not begin until his leave ended on January 7, 1985. The backpay period for all 19 discriminatees ended on July 31, 1985. In determining the backpay due to these discriminatees, the compliance officer figured the hours they would have worked during the backpay period by the average number of hours they worked (regular and overtime) on a weekly basis in 1984; these figures were based on Respondent's payroll records. He then multiplied the regular hours by the hourly wage they were receiving for the period through January 31, 1985, and multiplied the regular hours by the hourly wage which was admittedly increased by 55 cents an hour for the period February 1 through July 31, 1985. Overtime pay was determined in a

¹One of these employees, Felix Gonzales, was on disability leave at the time and did not report back to work until January 7, 1985.

²The specification alleges, and Respondent admits, that on February 1, 1985, each discriminatee would have received a 55-cent hourly wage increase.

similar fashion, but at a time and a half rate. Deducted from the gross backpay rate, as interim earnings, was \$150 a week that each of these employees received from the Union for picketing every day from 7:30 a.m. to 3:30 p.m. Also deducted (but not contested or relevant to any of the issues herein) was money paid to four of the discriminatees as part of a settlement of a prior related manner. Respondent has four affirmative defenses herein:

1. Discriminatees Edgar Aguilar, Veronica Avila, Ismelda Castro, Martha David, Elvia Escobar, Edith Flori, Gladys Luna, Carlos Ochoa, Hugo Patino, and Sara Valiezo are entitled to no backpay since they were illegal aliens during the backpay period.

2. The discriminatees are entitled to no backpay for overtime because beginning at about the commencement of the backpay period, Respondent altered its working conditions which "would have eliminated the need for overtime."

3. The discriminatees should be denied backpay because they did not look for interim employment.

4. The discriminatees should be denied backpay for understating and mistating interim earnings, presumably, by not including the \$5 daily "lunch money."

When loss of employment is caused by a violation of the Act, the finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175-176 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden for the backpay proceeding is "to show the gross backpay due each claimant." *J. H. Rutter-Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973). Once the General Counsel has established gross backpay, the burden is on respondent to establish affirmative defenses that would mitigate its liability. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). Respondent has the burden of establishing such matters as unavailability of jobs, willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812-813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

Respondent first defends that 10 of the discriminatees should receive no backpay because they were illegal aliens during the backpay period. In support of this defense, Michele Glass, Respondent's president, testified that she knew, or believed that she knew, some of the discriminatees by other names and that she "came to believe" that Aguilar, Avila, Castro, David, Escobar, Flori, Luna, Ochoa, Patino, and Valerezo were undocumented aliens. Additionally, she testified that she "received a statement from Social Security about three of the individuals. And a couple of the individuals had to go back to their country for a period of time." The only concrete evidence supplied by Respondent on this defense was a document sent by the Immigration and Naturalization Service of the United States Department of Justice to Ismelda Lucrecia Castro de Hernandez, presumably discriminatee Ismelda Castro. The document is dated October 5, 1988, and the box check on the form states: "In accordance with a decision made in your case, you are required to depart from the United States at your own expense on or before October 54, 1989." No further explanation is provided.

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court modified the Board and the Seventh Circuit's remedial order involving discriminatees who were illegal aliens. In *Felbro, Inc.*, 274 NLRB 1268 at 1269 (1985), the Board modified the administrative law judge's remedy (by issued prior to the Supreme Court's ruling in *Sure-Tan*, stating that *Sure-Tan*

held, inter alia, that while undocumented alien workers are employees entitled to the Act's protection, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefor tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

The court, in *NLRB v. Felbro, Inc.*, 795 F.2d 705 (9th Cir. 1986), disagreed with the Board on the remedy, stating:

in *Sure-Tan*, the Supreme Court did not address the issue whether undocumented workers remaining at work in the United States throughout the backpay period are entitled to backpay awards. *Sure-Tan* barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers.

The court pointed out the obvious difference between *Sure-Tan* and *Felbro* in *Sure-Tan*, all five discriminatees left the United States on the day that they were unlawfully terminated. In *Felbro*, the discriminatees all returned to work for the respondent. In *Felbro, Inc.*, 291 NLRB 373 (1988), the Board accepted the above as the law of the case and modified its remedy accordingly. In *Rios v. Enterprise Assn. of Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988), the Second Circuit agreed: "We conclude, in agreement with the Ninth Circuit, that undocumented workers who have remained in the country are eligible for backpay as of the time of a violation."

On the basis of the above, there is no doubt that Respondent's first affirmative defense is totally lacking in merit. The sole evidence presented by Respondent was that the Immigration and Naturalization Service ordered Castro to leave the country by October 5, 1989. This is more than 4 years after the conclusion of the backpay period. Further, the evidence establishes that, like *Felbro*, supra, and *Rios*, supra, all 19 discriminatees remained in the country and were reinstated, on July 31, 1985. This affirmative defense must therefore fall.

Respondent's next affirmative defense is that the discriminatees are not entitled to backpay for overtime because just prior to the commencement of the backpay period, Respondent moved to a larger, more efficient facility, eliminating the need for overtime. In *Brown & Root*, supra, the court stated that "in many cases, it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee"; however, the Board may use close approximations, and may adopt formulas reasonably designed to produce close approximations, so long as it is not arbitrary or unreasonable. *Mastell Trailer Corp.*, 273 NLRB 1190 (1984). In the instant matter, the compliance officer used the formula of each employee's average number

of hours worked per week in 1984, prior to the backpay period. This is a standard and fair formula to be employed in this matter, and Respondent, apparently agrees, contending only that overtime hours and pay should be excluded from the formula because of the change in its operation and facility in about November and December 1984. The issue, therefore, is whether Respondent has sustained its burden requiring deviation from an otherwise appropriate formula. *DeLorean Cadillac, Inc.*, 231 NLRB 329 (1977). *NLRB v. Dodson's Market*, 553 F.2d 617 (9th Cir. 1977). I find that it has not. Glass testified that in November or December, Respondent moved from its 7500 square foot facility in Ridgefield, New Jersey, to a 22,000 square foot facility in Saddle Brook, New Jersey. She testified that the purpose of the move was to increase the amount of machinery, thereby increasing production, while, at the same time, increasing the number of employees in order to decrease the amount of overtime worked by employees. Respondent received financing from the State of New Jersey in making this move into larger quarters' in consideration of this financing. Respondent committed to employing at least 60 employees at the new facility. It had employed approximately 20 at the Ridgefield facility. At the time of the hearing herein, Respondent employed approximately 65 people. However, Glass did not know how many employees it employed at the new facility between December 1984 and July 31, 1987, nor did she know over what period of time the State of New Jersey, required Respondent to reach the figure of 60 employees. Finally, Respondent could have supported this affirmative defense with its payroll records for the backpay period; its failed to do so. Glass' vague, unsupported testimony is therefore not enough to rebut the General Counsel's appropriate remedy herein. This affirmative defense is therefore dismissed. *East Wind Enterprises*, 268 NLRB 655 (1984).

Respondent's third affirmative defense is that the discriminatees should be denied backpay because of the lack of diligent search for interim employment, and the General Counsel acknowledged that the discriminatees spent from 7:30 a.m. to 3:30 p.m., daily, on the picket line, for which they were paid \$150 a week (which is included in the specification as interim earnings) plus \$5 a day "lunch money,"³ and that none of the discriminatees searched for interim work. The issue is a clear one: can a discriminatee refuse to search for interim employment while picketing his former employer, when he is being paid by the union for doing so and is listing that pay as interim earnings?

Once an employee is discharged unlawfully, triggering the commencement of the backpay period (as occurred with the discriminatees herein on December 3, 1984), he has certain rights and obligations under the Act. He has the right to picket his employer's facility to publicize the wrong perpetrated upon him by his employer. Although one might assume that this right is absolute and would allow the employee to spend *all* his time picketing to protest his employ-

³ Respondent's fourth affirmative defense alleges that the discriminatees should be denied backpay for understatement or misstatement of interim earnings, presumably not including the \$5 a day "lunch money" as interim earnings. Although I disagree that the discriminatees should be denied backpay for this reason, I find that the \$5 a day that the discriminatees received should be included in their interim earnings. In order to receive this additional \$5 a day, the discriminatees had to be present at the facility while the picketing was taking place. I therefore find it undistinguishable (other than in name) from the \$150 a week also paid to the discriminatees.

er's unfair labor practice, this, apparently, is not so. The Act also obliges the employee to mitigate the damages caused by Respondent by looking for interim employment, and this obligation to look for work clearly modifies the discriminatees' right to picket. *Ozark Hardwood Co.*, 119 NLRB 1130 (1957); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1131 (1965); *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 549 (1978). As the court stated in *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1320 (D.C. Cir. 1972): "picket line activity does not relieve the discriminatees of the obligation of making reasonable efforts to obtain appropriate interim employment." See also the Board's Second Supplemental Decision and Order in *Madison Courier, Inc.*, 202 NLRB 808 (1973). The instant situation presents a novel twist to this issue: while admitting that the discriminatees did not search for interim employment while picketing, the specification lists the \$150 a week that the Union paid to the employees for picketing.

I find that the discriminatees are not barred from receiving backpay due to their admitted failure to search for interim employment. The Union paid each of the discriminatees \$175 a week; in return for this the discriminatees were obligated to picket or perform other services for the Union at Respondent's facility. This therefore constitutes employment (of some sort) and mitigates Respondent's damages *Superior Warehouse Grocers*, 282 NLRB 802 (1987). Prior to February 1985, these discriminatees would have been paid \$6.15 an hour by Respondent; the Union was paying them \$4.33 an hour. Although Respondent might argue that this is a ploy designed by the Union to Respondent's detriment, I find, on the contrary that it is a reasonable way to mitigate damages. The discriminatees were paid almost 75 percent of their rate of pay from the first day of the backpay period. Many employers in backpay cases would settle for mitigation to this extent. Finally, I find that the instant case presents a fair compromise between discriminatees' right to picket their unlawful discharges and their obligation to mitigate damages. Effective picketing of this nature requires the discriminatees present at the employer's facility during the entire period that it is open; such picketing leaves little time for an effective search for interim employment. The instant situation allows the discriminatees to effectively picket their unlawful discharge, while, at the same time, mitigating Respondent's damages.

Finally, I must address certain additional defenses raised by Respondent at the hearing and in his brief. Respondent relies on *Southwestern Pipe*, 179 NLRB 364 (1969), for the proposition that the Board requires discharged employees to actively search for interim employment even if he is picketing his employer to protest his discharge. However, *Southwestern Pipe* was not a backpay case and did not involve a striker's failure to search for interim employment. Rather, it involved a striker's refusal to accept an offer of reinstatement because the employer had not made a similar offer to fellow strikers also entitled to immediate reinstatement. Additionally, Respondent relies on *Drug Package Co.*, 288 NLRB 108 (1977), for the proposition that backpay should not begin to run until December 8, 1984, 5 days after the unfair labor practice. This case is inapplicable to the facts herein where the Board found that these employees were unlawfully terminated on December 3, 1984, or, in the alternative, they were engaged in a walkout that constituted protected concerted ac-

tivity under the Act. In this situation, I see no reason to grant Respondent a 5-day grace period. Respondent also alleges that discriminatee Eduardo Martinez should be denied backpay because he was a probationary employee prior to December 3, 1984, who would have been terminated without regard to the events relevant to the underlying Board proceeding. The sole evidence supporting this is Glass' testimony that Martinez had been employed by Respondent for a few weeks prior to December 3, 1984, and was therefore a probationary employee. In answer to the question: "Had the company at that point considered whether Mr. Martinez would have been continued as an employee, but for the events that transpired?", she testified that Respondent had decided to terminate him. This contention is an affirmative defense with the burden on the Respondent to establish that Martinez would not have remained in its employ for non-discriminatory reasons. As the administrative law judge stated in *Midwest Hanger Co.*, 221 NLRB 911, 917 (1975): "Respondent must make the showing and mere conclusions are not sufficient." As the trial examiner stated in *W. C. Nabors Co.*, 134 NLRB 1078, 1088 (1961): "It follows that mere self serving and conclusory statements by Respondent that he would have laid off the 11 claimants here for economic and nondiscriminatory reasons do not suffice to deprive these claimants of their remedial rights." As Respondent's allegations regarding Martinez are solely conclusory, self-serving, and totally unsupported by any other evidence, this defense is therefore denied. *A & T Mfg. Co.*, 280 NLRB 916 (1986).

Finally, counsel for Respondent, in his brief, states that he disagrees with the backpay calculations in the backpay specification for the following discriminatees: Veronica Avila, Ismelda Castro, Edith Flori, Arnulfo Hernandez, Eduardo Martinez, Ramon Molgado, Francisco Molina, Carlos Ochoa, and Juan Perez. The only reference in the brief to mistakes in the backpay specification, apparently, is: "Many of the employees were not on the payroll as of January 1, 1984, so the number of weeks worked by them is less than 49. The number of hours worked includes holiday hours." This is in regard to the computation for average regular hours worked by the discriminatees. In arriving at the average number of regular hours worked by these nine discriminatees during 1984 (as appears in the appendix below), I have included the holiday hours for which they were paid by Respondent in 1984, but I have excluded their final week of employment in 1984 when they were terminated early in the week.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Tubari, Ltd., Inc., Saddlebrook, New Jersey, its officers, agents, successors, and assigns, shall pay, to the individuals named below and listed in the appendix below the amounts set forth beside their names,⁵ plus interest computed in accordance with *Florida Steel Corp.*, 231

⁴If 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.

⁵Discriminatees Eduardo Martinez, Francisco Molina, Juan Moreira, and Carlos Ochoa each received money as part of a settlement of a prior related case. The amounts they received was added to their net interim earnings, to the extent of those earnings, for each quarter until the amount was exhausted.

NLRB 651 (1977), and <i>New Horizons for the Retarded</i> , 283	Arnulfo Hernandez	15,742
NLRB 1173 (1987).	Gladys Luna	5,420
	Eduardo Martinez	712
Edgar Aguilar	Concepcion Molgado	2,791
Veronica Avila	Ramon Molgado	8,662
Ismelda Castro	Francisco Molina	0
Tomas Cruz	Juan Moreira	4,296
Martha David	Carlos Ochoa	6,925
Elvia Escobar	Hugo Patino	7,573
Edith Flori	Juan Perez	4,044
Felix Gonzales	Sara Valerezo	5,541

APPENDIX

<i>Yr./Qtr.</i>	<i>Avg. Weekly Wage</i>	<i>Wks.</i>	<i>Gross Backpay</i>	<i>Net Interim Earning</i>	<i>Net Backpay</i>
Aguilar, Edgar					
84/4	\$445.91	4.2	\$1,873	\$735	\$1,138
85/1	445.91	4.8	2,140	840	1,300
85/1	485.78	8.0	3,886	1,400	2,486
85/2	485.78	13.0	6,315	2,275	4,040
85/3	485.78	4.6	2,235	805	1,430
					\$10,394
Avila, Veronica					
84/4	\$172.45	4.2	\$1,564	\$735	\$829
85/1	372.45	4.8	1,788	840	948
85/1	405.75	8.0	3,246	1,400	1,846
85/2	405.75	13.0	5,275	2,275	3,000
85/3	405.75	4.6	1,866	805	1,614
					\$7,684
Castro, Ismelda					
84/4	\$88.53	4.2	\$1,632	\$735	\$897
85/1	388.53	4.8	1,865	840	1,025
85/1	423.87	8.0	3,386	1,400	1,986
85/2	423.87	13.0	5,503	2,275	3,228
85/3	423.87	4.6	1,947	805	1,142
					\$8,239
Gonzalez, Felix					
85/1	\$395.72	4.0	\$1,583	\$700	\$883
85/1	431.11	8.0	3,449	1,400	2,049
85/2	431.11	13.0	5,604	2,275	3,329
85/3	431.11	4.6	1,983	805	1,178
					\$7,439
Hernandez, Arnulfo					
84/4	\$590.86	4.2	\$2,482	\$735	\$1,747
85/1	590.86	4.8	2,836	840	1,996
85/1	643.71	8.0	5,150	1,400	3,750
85/2	643.71	13.0	8,368	2,275	6,093
85/3	643.71	4.6	2,961	805	2,156
					\$15,835
Luna, Gladys					
84/4	\$311.07	4.2	\$1,306	\$735	\$571
85/1	311.07	4.8	1,493	840	653
85/1	338.89	8.0	2,711	1,400	1,311
85/2	338.89	13.0	4,406	2,275	2,131
85/3	338.89	4.6	1,559	805	754
					\$5,420

APPENDIX—Continued

<i>Yr./Qtr.</i>	<i>Avg. Weekly Wage</i>	<i>Wks.</i>	<i>Gross Backpay</i>	<i>Net Interim Earning</i>	<i>Net Backpay</i>
Martinez, Eduardo					
84/4	\$230.68	4.2	\$969	\$969	\$0
85/1	230.68	4.8	1,107	1,107	0
85/1	262.40	8.0	2,099	2,099	0
85/2	262.40	13.411	3,411	3,101	310
85/3	262.40	4.6	1,207	805	402
					\$1,137
Molgado, Concepcion					
84/4	\$239.79	4.2	\$1,007	\$735	\$272
85/1	239.79	4.8	1,151	840	311
85/1	261.33	8.0	2,090	1,400	690
85/2	261.23	13.0	3,396	2,275	1,121
85/3	261.23	4.6	1,202	805	397
					\$2,791
Molgado, Ramon					
84/4	\$398.95	4.2	\$1,676	\$735	\$941
85/1	398.95	4.8	1,915	840	1,075
85/1	434.63	8.0	3,477	1,400	2,077
85/2	434.63	13.0	5,650	2,275	3,375
85/3	434.63	6.3	1,999	805	1,194
					\$8,662
Molina, Franciso					
84/4	\$76.41	4.2	\$1,161	\$1,161	\$0
85/1	76.41	4.8	1,327	1,327	0
85/1	301.13	8.0	2,409	2,409	0
85/2	301.13	13.0	3,915	3,915	0
85/3	301.13	4.6	1,365	1,385	0
					\$0
Moreira, Juan					
84/4	\$338.25	4.2	\$1,421	\$1,421	\$0
85/1	338.25	4.8	1,624	1,624	0
85/1	368.50	8.0	2,948	2,058	890
85/2	368.50	13.0	4,791	2,275	2,516
85/3	368.50	4.6	1,695	805	890
					\$4,296
Ochoa, Carlos					
84/4	\$487.39	4.2	\$2,047	\$2,047	\$0
85/1	487.39	4.8	2,339	2,339	0
85/1	530.98	8.0	4,248	3,589	659
85/2	530.98	13.0	6,903	2,275	4,628
85/3	530.98	4.6	2,523	805	1,638
					\$6,925
Patino, Hugo					
84/4	\$361.19	4.2	\$1,517	\$735	\$782
85/1	361.19	4.8	1,734	840	894
85/1	405.34	8.0	3,243	1,400	1,843
85/2	405.34	13.0	5,269	2,275	2,994
85/3	405.34	4.6	1,865	805	1,060
					\$7,573

APPENDIX—Continued

<i>Yr./Qtr.</i>	<i>Avg. Weekly Wage</i>	<i>Wks.</i>	<i>Gross Backpay</i>	<i>Net Interim Earning</i>	<i>Net Backpay</i>
Perez, Juan					
84/4	\$73.74	4.2	\$1,150	\$735	\$415
85/1	73.74	4.8	1,314	840	474
85/1	310.81	8.0	2,386	1,400	986
85/2	310.81	13.0	3,877	2,275	1,602
85/3	310.81	4.6	1,372	805	567
					\$4,469
Valerezo, Sara					
84/4	\$314.33	4.2	\$1,320	\$735	\$585
85/1	314.33	4.8	1,509	840	1,401
85/1	342.44	8.0	2,740	1,400	1,340
85/2	342.44	13.0	4,452	2,275	2,177
85/3	342.44	4.6	1,575	805	770
					\$5,541
Cruz, Tomas					
84/4	\$466.82	4.2	\$1,961	\$735	\$1,226
85/1	466.82	4.8	2,241	850	1,407
85/1	508.56	8.0	4,068	1,400	2,668
85/2	508.56	13.0	6,611	2,275	4,336
85/3	508.56	4.6	2,339	805	1,534
					\$11,165
David, Martha					
84/4	\$365.96	4.2	\$1,537	\$735	\$802
85/1	365.96	4.8	1,757	840	917
85/1	398.68	8.0	3,189	1,400	1,789
85/2	398.68	13.0	5,183	2,275	2,908
85/3	398.68	4.6	1,834	805	1,029
					\$7,445
Escobar, Elvia					
85/4	\$349.72	4.2	\$1,469	\$735	\$734
85/1	349.72	4.8	1,679	840	839
85/1	381.00	8.0	3,048	1,400	1,648
85/2	381.00	13.0	4,953	2,275	2,678
85/3	381.00	4.6	1,753	805	948
					\$6,847
Flori, Edith					
84/4	\$283.33	4.2	\$1,190	\$735	\$455
85/1	283.33	4.8	1,360	840	520
85/1	308.67	8.0	2,638	1,400	1,238
85/2	308.67	13.0	4,013	2,275	1,738
85/3	308.67	4.6	1,420	805	615
					\$5,111