

**Laborers Local No. 135 (Bechtel Power Corporation and General Building Contractors Association) and Andrew Huggins and Judith B. Chomsky.** Cases 4-CB-4204 and 4-CB-4256

May 28, 1993

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On July 31, 1984, the National Labor Relations Board issued a Decision and Order in this case, adopting with modifications the administrative law judge's findings, inter alia, that the Respondent, Laborers Local No. 135, had violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer from its hiring hall eight named individuals because of their internal union political activities,<sup>1</sup> and ordering the Respondent to make the discriminatees whole. On January 24, 1986, the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board's Order.<sup>2</sup>

In the original compliance proceeding (*Bechtel II*), the administrative law judge awarded the amounts of backpay claimed by the General Counsel. Exceptions were filed, and on February 28, 1991, the Board issued a Supplemental Decision and Order.<sup>3</sup> In that decision, the Board found merit to certain of the Respondent's exceptions regarding the dates on which each discriminatee's backpay period should commence and the proper formula to be used in computing gross backpay. Except as specifically noted, however, the Board adopted the judge's findings and conclusions.<sup>4</sup> The Board remanded the case to the Regional Director to recompute the amounts of backpay for seven of the eight discriminatees and to prepare an amended backpay specification.<sup>5</sup>

On December 3, 1991, the Regional Director issued his second amended compliance specification, which was further amended on September 30, 1992. The Respondent filed answers to both the specification and the amendments.

On November 3, 1992, the General Counsel filed a Motion for Summary Judgment and to transfer the proceeding to the Board, with exhibits attached. In support of the motion, the General Counsel argues that the specification was prepared according to the Board's instructions in *Bechtel II*, and that the Respondent in its answer is simply attempting to relitigate issues that the

Board has already decided. The General Counsel also contends that numerous assertions in the Respondent's answer are unsupported in fact or law. The General Counsel requests, in the alternative, that the Board strike all parts of the Respondent's answer that attempt to relitigate matters that are beyond the scope of the remand and the law of the case, are res judicata, are unresponsive to the pleadings, or are immaterial to the issues remaining in this proceeding.

On November 6, 1992, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent submitted a response to the Notice to Show Cause, but failed to do so in a timely fashion, and the response was rejected. The allegations contained in the General Counsel's motion, therefore, are un rebutted.

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

On the entire record in this case, the Board makes the following

Ruling on Motion for Summary Judgment

We agree with the General Counsel that, for the most part, the Respondent is attempting to challenge the terms of the Board's remand Order in *Bechtel II*, to relitigate matters that were disposed of in the earlier proceedings, and to raise issues that the Respondent failed to argue to the Board in exceptions. Thus, the Board in *Bechtel II* rejected the Respondent's contentions regarding the proper lengths of the backpay periods of five of the discriminatees<sup>6</sup> and concerning the effect of Fred Gray's temporary disability in 1982 and his ineligibility to work at Bechtel on his backpay claim.<sup>7</sup> As for the Respondent's allegation that backpay should not be awarded to Roy Poorman for the early part of 1981, that matter was decided adversely to the Respondent in *Bechtel I*.<sup>8</sup> The Respondent's arguments concerning the legitimacy of the General Counsel's claims for vacation pay, pension credits, and (for George Scott) medical benefits,<sup>9</sup> and concerning the effect of the deaths of Wilson Bradley and Poorman on their backpay claims, could have been made in exceptions in *Bechtel II* but were not.<sup>10</sup> The

<sup>6</sup>Id. at 1070, 1071 fn. 37.

<sup>7</sup>Id. at 1074 fn. 54.

<sup>8</sup>271 NLRB at 782.

<sup>9</sup>The Respondent does not contest the computations of any of the claims for fringe benefits. It merely argues, for a variety of reasons, that no such payments are due.

<sup>10</sup>Indeed, the judge found that "[t]he Union does not challenge the accuracy or legitimacy of the sums appearing in the backpay specification as interim earnings, vacation hours, pension hours and amounts due for vacation, pension contributions, or a medical expense claim of Scott in fourth quarter, 1983." 301 NLRB at 1086. The Respondent did not except to that finding.

<sup>1</sup>271 NLRB 777 (*Bechtel I*).

<sup>2</sup>782 F.2d 1030 (mem.).

<sup>3</sup>301 NLRB 1066.

<sup>4</sup>Id. at 1074.

<sup>5</sup>No recomputation was ordered concerning the claim for Rita McMillan. Her claim is not before us in this proceeding.

*Continued*

Respondent is precluded from raising any of those arguments in this proceeding.<sup>11</sup>

The Respondent also asserts generally that the amounts of interim earnings claimed in the specification are understated. As the General Counsel observes, a general denial regarding amounts of interim earnings usually is sufficient to warrant a hearing, because a respondent normally will not have information about interim earnings.<sup>12</sup> Here, however, as the General Counsel also points out, the judge in *Bechtel II* made specific findings concerning the amounts of interim earnings for each discriminatee. The Respondent did not contest those findings in exceptions, and the Board affirmed. As with pension credits, vacation pay, and Scott's medical claim, we shall not inquire into the accuracy of the interim earnings claimed in the specification where those figures are identical to those contained in the judge's Order, as adopted by the Board, in *Bechtel II*.

As we have said, the Board in *Bechtel II* remanded the case to the Regional Director with instructions to recompute the claimants' (gross) backpay using a more appropriate formula than the one the General Counsel had used. In this regard, we note that there are a few periods for which the new specification claims net backpay even though no net backpay was claimed or awarded by the judge in *Bechtel II*.<sup>13</sup> Thus, backpay is now claimed for Harold Coates for the third quarter of 1982; for Gray for the fourth quarter of 1986; for Andrew Huggins for the second quarter of 1981 and the fourth quarter of 1982; for Poorman for the third quarter of 1981; and for Scott for the first quarter of 1986.<sup>14</sup> Because the General Counsel did not claim backpay for those discriminatees for those periods, and because the judge awarded none, the issue of the actual amounts of interim earnings for those men for

The Respondent knew of Bradley's death before the hearing in *Bechtel II*. Poorman apparently died after the hearing; however, the Respondent referred to his death in its exceptions. The Respondent did not argue to the Board that either man's backpay claim should be affected by his death. (Each man's backpay period ended well before his death.)

The Respondent's contention regarding Gray's inability to work in 1982 is irrelevant in any event. According to the un rebutted allegation of the General Counsel's Motion for Summary Judgment, no backpay is claimed for Gray for the period of his disability.

<sup>11</sup> Sec. 102.46(g) of the Board's Rules and Regulations provides that "[n]o matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding."

<sup>12</sup> *Dews Construction Corp.*, 246 NLRB 945, 946-947 (1979).

<sup>13</sup> The General Counsel has not stated whether these new claims result from the application of the revised formula. However, the Respondent has not challenged the new claims on this basis.

<sup>14</sup> The claim for Scott is puzzling, because at one time during the proceedings in *Bechtel II*, the General Counsel admitted interim earnings of \$2400 for Scott for the first quarter of 1986; see App. K attached to the Motion for Summary Judgment. The second amended backpay specification, however, lists no interim earnings for Scott for that quarter.

those quarters was not decided in *Bechtel II*.<sup>15</sup> The Respondent accordingly is not precluded from raising that issue now. We shall remand the case to the Regional Director to arrange for a hearing on this issue.

The Respondent also opposes the backpay specification, even though it was prepared according to the Board's instructions in *Bechtel II*, because it asserts that several of the Board's crucial findings in *Bechtel II* were flawed. Specifically, the Respondent claims that, if it were afforded the opportunity, it would show that the out-of-order referrals found by the Board in part II,A, of *Bechtel II*<sup>16</sup> were not unlawful, and that the reference period 1976-1977 selected by the Board for comparing the hours worked by the discriminatees with the average hours worked by a sample of other laborers<sup>17</sup> was remote, unrepresentative, and inappropriate. The Respondent also argues that the Board improperly excluded certain individuals and failed to exclude others from the comparison sample.<sup>18</sup> The Respondent contends that because the Board made those findings sua sponte, it has been denied due process because it never had the opportunity to litigate those issues. We find no merit in the Respondent's arguments.

First, the findings of which the Respondent complains were plainly set forth in *Bechtel II*, yet the Respondent did not make its concerns known at that time by filing a motion for reconsideration, rehearing, or reopening the record, as provided for in Section 102.48(d) of the Board's Rules and Regulations. Had it done so (and had it persuaded the Board of the validity of its concerns), the Board might have modified its instructions to the Regional Director concerning the proper method for preparing the new backpay specification. Instead, the Respondent waited until after the Regional Director had prepared the specification to challenge the findings on which the specification was based. Such tactics, if tolerated, obviously would lead to a waste of administrative resources, and would further postpone the end of these proceedings (which are already more than 12 years old). We reject the approach suggested by the Respondent, and we also reject its contention that it was denied due process. In these circumstances, the Respondent has no one to blame but itself for its failure to file a timely motion for reconsideration.

The Respondent's challenge to the Board's findings in *Bechtel II* is unavailing for other reasons as well. The Respondent asserts, for example, that all the referrals the Board found unlawful in part II,A of *Bechtel II* were valid because they were either referrals of

<sup>15</sup> To be sure, it is unlikely that the Respondent would have made the attempt in any event, given that it failed to call a single discriminatee to testify and made no attempt to rebut any of the General Counsel's other claims regarding interim earnings.

<sup>16</sup> 301 NLRB at 1069-1070.

<sup>17</sup> Id. at 1073.

<sup>18</sup> Ibid.

union stewards, referrals made pursuant to contractors' requests for particular individuals, or for persons who possessed skills lacked by the discriminatees, recalls, or instances in which laborers obtained jobs without benefit of referral. Many of those referrals, however, had been specifically alleged to be unlawful by the General Counsel in *Bechtel I*, yet in its brief to the Board in that proceeding, the Respondent did not attempt to justify any of the allegedly unlawful referrals on the grounds now urged in its answer. The Respondent's due process argument with respect to those referrals thus is doubly flawed; the Respondent failed in *Bechtel I* and again after *Bechtel II* to demonstrate their validity.

With regard to its assertion that the 1976–1977 period is an inappropriate baseline period for comparing the hours worked by the discriminatees and the laborers in the sample, the Respondent argues only that the period is remote in time and that it yields a higher backpay award for Randy Huggins than the Respondent's preferred method. Neither argument has merit. The Board was aware of the relative remoteness of the 1976–1977 period when it decided *Bechtel II* but, as it explained, the use of any more recent period would be improper because it would include a time when the Respondent had begun to demonstrate animus against the discriminatees.<sup>19</sup> The Respondent's citation of Randy Huggins' declining hours worked after 1977, far from impeaching the Board's choice of a comparison period, if anything illustrates the desirability of choosing a period free of animus against the discriminatees. Finally, the Respondent offers no alternative method for estimating the number of hours the discriminatees would have worked in the absence of discrimination, during the backpay period, other than using the periods the Board explicitly rejected in *Bechtel II*.<sup>20</sup> This failure to offer a cognizable alternative formula contravenes Section 102.56 of the Board's Rules and Regulations, which provides:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial

shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*— . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The Respondent's answer having failed to comport with the requirements of the Board's Rules, we find that the allegations of the specification concerning the use of the 1976–1977 reference period have been admitted to be, and are, true.

The Respondent also disputes the accuracy of the Board's mathematical calculations in *Bechtel II* and of the specification's computation of the average hours worked by employees in the sample during the backpay period. Again, however, the Respondent's answer contains no alternative formula or calculations. Its failure to do so is inexplicable. The Board's calculations were based on record evidence—indeed, on exhibits submitted by the Respondent—and, thus, were subject to rebuttal by the Respondent had it taken the trouble to perform the calculations.<sup>21</sup> Similarly, according to the General Counsel, the average hours for the laborers in the sample were computed from data that were supplied to the Respondent in *Bechtel II*, and, thus, were subject to verification by the Respondent. And although the specification's computation of average hours is based on health and welfare fund records, rather than on the pension fund data submitted by the Respondent and used by the Board in *Bechtel II*, the Respondent could have estimated the sample employees' average hours using its own exhibits, if it had wanted to show that the General Counsel's method resulted in “gross distortions.”<sup>22</sup> Because the Respond-

<sup>21</sup> This is another issue that could and should have been addressed in a motion for reconsideration.

<sup>22</sup> The Respondent's pension fund exhibits contain the individuals' hours worked on an annual basis, rather than on a quarterly basis like the General Counsel's health and welfare fund records. Still, the Respondent could have compared its pension fund data with the av-

<sup>19</sup> Id. at 1073.

<sup>20</sup> Ibid.

ent's answer fails in this respect to comply with the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations, we find that the Respondent has admitted the accuracy of the calculations in question.

The Respondent contends that it owes no backpay to Coates, Gray, Andrew Huggins, Poorman, or Scott for the period after April 1, 1984, because they failed to register for referral and to appear in the hiring hall as the Respondent's hiring hall rules required on and after that date.<sup>23</sup> That assertion is contrary to the record evidence. According to the un rebutted allegations of the General Counsel's Motion for Summary Judgment, all five discriminatees for whom backpay is claimed for the period after April 1, 1984, signed the referral register during that period, some more than once.<sup>24</sup> Thus, the discriminatees obviously appeared at the hiring hall at least on the days they signed, and the record does not establish that those were the only occasions on which they appeared for referrals.<sup>25</sup> The Respondent's allegations that the discriminatees were not available for referrals are contrary to established fact and do not warrant a hearing.<sup>26</sup>

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erage annual hours contained in the specification, if it were concerned that the General Counsel's method yielded biased results.

<sup>23</sup>No backpay is claimed for Bradley or R. Huggins for the period after 1981.

<sup>24</sup>Our review of the Respondent's hiring hall records reveals that the General Counsel's assertion is correct. Thus, Coates, A. Huggins, Poorman, and Scott signed at least three times, and Gray signed at least twice.

<sup>25</sup>John Weaver, who was the Respondent's secretary-treasurer, testified that Coates, A. Huggins, Poorman, and Scott did not appear "day to day" for referrals during this period, not that the discriminatees appeared for referrals only on the days they signed the register. Indeed, Weaver admitted that Poorman and Scott reported to the hiring hall in late 1985 and received referrals.

Weaver did testify that the discriminatees did not appear at the hiring hall in late 1984 and early 1985, and the record indicates that they did not sign the daily "sign-in sheets" that were used during those months. The only discriminatee who was called for referral during that period, however, was A. Huggins, who was marked absent on January 3, 1985, and stricken from the register. We note, in this regard, that Huggins had already been unlawfully bypassed in October 1984; thus, even if he had been present and referred on January 3, 1985, we would not have found that to be a proper referral ending his backpay period. See 301 NLRB at 1070.

<sup>26</sup>The Respondent claims that Scott has admitted that he never appeared at the hiring hall or signed the referral book after April 1, 1984. The Respondent failed to make this argument to the Board in *Bechtel II*, and does not identify the portion of the record on which it is based. (Scott testified at the hearing, but was not questioned about this alleged admission.) Board Agent Robert Curley, who prepared the backpay specification in *Bechtel II*, testified that Scott had given him an affidavit on October 7, 1985, stating that he had gotten a job on April 19, 1985, and had stopped reporting to the hiring hall thereafter. Before he got the job, according to the affidavit, Scott went to the hiring hall every week. If this is the "admission" that the Respondent refers to, it does not warrant holding a hearing. Indeed, Scott's assertion that he went to the hall on a weekly basis before April 19 flatly contradicts the Respondent's claim that he never appeared for referrals after April 1, 1984. Because the affidavit evidently was given in October 1985, it obviously does not establish

The Respondent urges that it owes no backpay to Gray, Andrew Huggins, Poorman, or Scott because the Board allegedly made no findings that those claimants were unlawfully bypassed for referrals during the backpay period. That argument is without merit. The Board did, in fact, find that Huggins, Poorman, and Scott were bypassed unlawfully on more than one occasion.<sup>27</sup> The Respondent correctly observes that the Board found no specific unlawful bypasses of Gray between March 1982 and February 1984. The reason for that is that the Respondent's hiring hall records for that period are entirely inadequate in most cases to show when, or even if, referrals were made. The judge, however, found that in numerous instances the records of the health and welfare fund showed contributions by contractors on behalf of other individuals who either had not registered for referral or had registered after the discriminatees. The judge found that each of those individuals apparently had been referred out of order in preference to the discriminatees. The Board adopted the judge's findings (with modifications), but only with respect to referrals to Bechtel. Because Bechtel and the Respondent have an exclusive hiring hall relationship, the Board inferred that anyone who went to work at Bechtel did so pursuant to a referral, and thus, that the "apparent" bypasses found by the judge were actual bypasses. However, because the record did not establish that any other contractor had an exclusive hiring hall arrangement with the Union, and because individuals could and did obtain work with signatory contractors on their own, the Board could not infer that individuals for whom health and welfare contributions were made by contractors *other than* Bechtel necessarily obtained their jobs through referrals from the hiring hall. Gray was ineligible to work at Bechtel; hence, no one who received out-of-order referrals to Bechtel bypassed him unlawfully. And because the Board could not infer that all individuals who went to work for employers other than Bechtel did so pursuant to referrals, the Board did not identify any instances in which Gray was unlawfully bypassed during the period in question. That fact does not aid the Respondent, however, because, as we have noted, the uncertainty regarding actual referral activity during the backpay period is the direct and proximate result of the Respondent's failure to keep adequate hiring hall records. That uncertainty, as we made clear in *Bechtel II*, is a burden that the Respondent, as the wrongdoer, must

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either Scott's presence at the hiring hall or his absence from it at any time thereafter. (See also Weaver's admission that Scott and Poorman appeared at the hall in late 1985; fn. 25, *supra*.) Finally, even if Scott did not go to the hiring hall for the 6 months between April and October 1985, there is no contention that he was called for referral during that period and marked absent; thus, for the purposes of this proceeding, it is irrelevant whether Scott appeared at the hiring hall during that period.

<sup>27</sup>301 NLRB at 1070-1071, 1079-1080.

bear.<sup>28</sup> As we also made clear in *Bechtel II*, the Respondent has failed to carry that burden. Accordingly, we find that the absence of any specific finding of an unlawful bypass of Gray between March 1982 and February 1984 does not raise any issue warranting a hearing.

Finally, the Respondent asserts that the specification fails to deduct amounts received by the discriminatees for workers compensation, disability benefits, welfare payments, food stamps, “under the table earnings,” life insurance proceeds, and other earnings. The Respondent demands that the discriminatees produce Federal, state, and county tax returns, including W-2 forms, for all periods for which backpay is claimed. We find that none of these contentions requires a hearing. In the first place, as we have said, we shall not permit the Respondent to attempt to relitigate any matters relating to deductions from gross backpay that it could have raised in exceptions in *Bechtel II*. Therefore, except for the few individuals and quarters enumerated above, for which we have found that the Respondent may inquire into the issue of interim earnings (including “under the table earnings”), none of the Respondent’s contentions concerning offsets to backpay has been timely raised.<sup>29</sup> Even for those few individuals and quarters, however, the Respondent’s arguments lack merit. According to the un rebutted allegations of the Motion for Summary Judgment, the General Counsel has not claimed backpay for periods in which the discriminatees were unable to work because of disabling injuries.<sup>30</sup> Accordingly, even if any of the claimants had received workers’ compensation or disability benefits during those periods when they were disabled, there are no gross backpay claims against which those payments could be offset.<sup>31</sup> There is, therefore, no reason to hold a hearing on those matters. We agree with the General Counsel that welfare payments and food stamps are collateral benefits that are not offset against backpay.<sup>32</sup> As for the Respondent’s

<sup>28</sup> 301 NLRB at 1071.

<sup>29</sup> Including, of course, the Respondent’s contention that life insurance proceeds should be deducted from Bradley’s and Poorman’s backpay awards.

<sup>30</sup> The General Counsel alleges that backpay is not claimed for Gray, A. Huggins, and Scott for various periods of disability. The backpay claims for each of those men for each of the periods of disability were litigated in *Bechtel II*, and will not be re-litigated now.

<sup>31</sup> In any event, workers’ compensation benefits may offset gross backpay only to the extent that they constitute payments for lost wages. *American Mfg. Co. of Texas*, 167 NLRB 520, 523 (1967).

<sup>32</sup> See, e.g., *Mooney Aircraft*, 164 NLRB 1102, 1106 (1967) (payments from union welfare fund not earnings, hence not set off against gross backpay); *Gullett Gin Co. v. NLRB*, 340 U.S. 361 (1951) (unemployment compensation payments not deducted from

demand for the production of tax records, the General Counsel’s allegation that all such records were given to the Respondent in *Bechtel II* stands un rebutted.

In summary, we find that, with respect to the individuals and quarters enumerated above, the Respondent has raised an issue that warrants a hearing on the issue of those individuals’ interim earnings. With regard to all other matters, we agree with the General Counsel that the Respondent is attempting to raise issues that either were decided previously or should have been raised in earlier stages of these proceedings, and that its answer makes allegations that are unsupported in fact or law, and in certain respects, fails to comport with the Board’s Rules. A hearing is not warranted with respect to those issues.<sup>33</sup> We therefore find that, except for the amounts of interim earnings alluded to above, the allegations of the second amended backpay specification have been admitted to be true, and we find that they are correct. We therefore grant the General Counsel’s Motion for Summary Judgment in all other respects.

#### ORDER

It is ordered that the General Counsel’s Motion for Summary Judgment is granted in its entirety with respect to the backpay claims on behalf of Wilson Bradley and Randy Huggins.

IT IS FURTHER ORDERED that the General Counsel’s Motion for Summary Judgment is granted with respect to the backpay claims of Harold Coates, Fred Gray, Andrew Huggins, Roy Poorman, and George Scott on all issues except interim earnings for the following individuals and time periods: Coates, third quarter of 1982; Gray, fourth quarter of 1986; A. Huggins, second quarter of 1981 and fourth quarter of 1982; Poorman, third quarter of 1981; and Scott, first quarter of 1986.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 4 for the purpose of arranging a hearing before an administrative law judge, limiting such proceeding to a determination of the proper amount of interim earnings for each of the individuals and time periods set forth in the previous paragraph, and to the final computation of make-whole relief for each of the seven discriminatees.

backpay); *F & W Oldsmobile*, 272 NLRB 1150, 1152 (1984) (social security benefits, same); *Vegetable Oil Products Co.*, 5 NLRB 52, 53 (1938) (“home relief” benefits, same).

<sup>33</sup> We find it unnecessary, however, to strike the portions of the Respondent’s answer concerning those matters. See *Edward Cooper Painting*, 297 NLRB 627, 628 (1990).

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

IT IS FURTHER ORDERED that the General Counsel's request to strike portions of the Respondent's answer is denied, but that the Respondent is precluded from

introducing evidence bearing on any matter other than the amounts of interim earnings for the individuals and time periods enumerated above.

MEMBER DEVANEY, dissenting.

For the reasons set forth in my dissent in *Bechtel II*, I would not grant the General Counsel's Motion for Summary Judgment. I would, instead, grant backpay according to the formula approved by the administrative law judge in *Bechtel II*.