

Houston Building Services, Inc. and Industrial, Technical & Professional Employees, a division of District 1, Marine Engineers Beneficial Association/National Maritime Union of America, AFL-CIO. Case 23-CA-10872

May 1, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On September 29, 1989, the National Labor Relations Board issued a Decision and Order in this proceeding in which it ordered the Respondent to make whole 11 employees it had unlawfully discharged and to make whole 30 employees for wages lost as a result of an unlawful 3-hour reduction in their working hours on December 9, 1987, plus interest on sums due. It further ordered the Respondent to make whole the employees by remitting to the Union's health, pension, and annual benefit funds contributions the Respondent failed to make.

The United States Court of Appeals for the Fifth Circuit enforced the Board's Decision and Order,¹ and the United States Supreme Court denied the Respondent's petition for a writ of certiorari.²

A controversy having arisen over the liability for and amount of payments due under the Board's Decision and Order, the Regional Director for Region 23 issued a compliance specification and notice of hearing on September 30, 1993, alleging the amounts of backpay due the 11 employees discharged on December 11, 1987, and backpay due the 30 employees who lost wages as a result of a 3-hour reduction in working hours on December 9, 1987. The Regional Director issued an amended specification on April 1, 1994, setting forth the amounts allegedly due to the funds. Pursuant to notice, a hearing was held before Administrative Law Judge George Christensen on June 21 and 22, 1994.

On April 21, 1995, the administrative law judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed limited cross-exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has de-

ecided to affirm the judge's rulings, findings,³ and conclusions, and his recommended Order as modified.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Houston Building Services, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholding required by Federal and state law. The Respondent shall also remit to the Union's health, pension, and annual benefit funds the contributions which the Respondent failed to make, plus additional amounts, if any, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).⁵ We further order that the Respondent make whole discriminatees Maria Menchaca, Benny Pamplin, and Francis Cortez Ramirez for interest accumulated on any amount deducted from their backpay as a result of amounts received by them in exchange for "releases" they signed

³In its limited cross-exceptions, the Charging Party contends that the judge erred in not ordering the Respondent to pay interest on any amounts deducted from the gross backpay due discriminatees Maria Menchaca, Benny Pamplin, and Francis Cortez Ramirez by reason of their receipt of funds in exchange for "releases" signed by them at the Respondent's behest. As interest accrued on those amounts between the date the discriminatees began to incur losses as a result of the Respondent unfair labor practices and the date those amounts were received in exchange for the "releases," we find merit in this exception. We also find merit in the Charging Party's cross-exception that the judge miscalculated the amounts of net backpay due discriminatees Jessie Meyer and Pamplin. Thus, we shall modify the Order accordingly.

Member Cohen notes that, pursuant to the releases, certain monetary amounts were paid to employees as severance pay. Inasmuch as severance pay is to be deducted from gross backpay, *Sheller-Globe Corp.*, 296 NLRB 116, 117 (1989), these "release" payments were deducted by the judge from gross backpay. In addition, Member Cohen notes that other employees continue to pursue claims with the Department of Labor (DOL). If DOL orders the payment of severance pay (or its functional equivalent), Member Cohen would be amenable to a motion seeking a concomitant deduction from gross backpay.

⁴We deny the Respondent's request for oral argument as the record, exceptions, and briefs adequately present the issues and the positions of the parties. The Charging Party also excepts to the judge's failure to grant the General Counsel and the Union their legal fees and costs in moving to strike the Respondent's posthearing effort to alter a witness' testimony and requests that the Board award legal fees and costs incurred by it and the General Counsel in opposing the Respondent's exceptions. We also deny this request. The Board provides for litigation expenses only in extraordinary cases as a means of discouraging frivolous litigation. See *Heck's Inc.*, 215 NLRB 765, 767-768 (1974).

⁵To the extent that an employee has made personal contributions to funds that are accepted by the funds in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee for amounts paid, with interest, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the funds. See *Donovan & Associates*, 316 NLRB 169, 170 (1995).

¹ 936 F.2d 178 (1991).

² 112 S.Ct. 1159 (1992).

at the behest of the Respondent up to the date they received those amounts, as computed in *New Horizons for the Retarded*, supra.

	Net Backpay
Joyce M. Altum	\$12,486.69
	22.65
Clifton Bailey	9,433.15
	22.65
Emestia Cadena	22.65
Rita Cedillo Morales	4,671.77
	22.65
Tommy L. Clark	22.65
Francis Cortez Ramirez	649.42
	22.65
Clemente Cortiz	22.65
Charles A. Deshay	22.65
Kim Du Triem	7,731.60
	22.65
Louis Figueroa	22.65
Howard L. Franklin	22.65
Larry L. Galloway	22.65
Cardenas Giollerma Jr.	22.65
Milton L. Henderson	22.65
Grady Kennie	18,203.13
	22.65
Candelario S. Martinez	22.65
Maria Menchaca	12,160.24
	22.65
Jessie I. Meyer	8,971.49
	22.65
Ophelia R. Milicia	22.65
Helen L. North	22.65
Benny H. Pamplin	5,704.22
	22.65
Mary A. Pesina	22.65
Willie B. Piper	10,747.95
	22.65
Eugene Porter	22.65
Anthony Rodriguez	22.65
Gloria Rodriguez	22.65
Lonnie D. Walker	22.65
Onnie L. Walker	10,289.70
	22.65
Booker T. Washington	22.65
John L. Washington	22.65
TOTAL BACKPAY	\$101,728.86
	Contributions Owed
ITPE-NMU Health & Welfare Fund	\$29,257.20
ITPE-NMU Pension Fund	22,755.60
ITPE-NMU Annual Benefit Fund	79,319.52

TOTAL CONTRIBUTIONS	\$131,332.32
TOTAL AMOUNTS DUE:	\$233,061.18

Edward B. Valverde, Esq., for the General Counsel.¹
Paul McCulloch, Thomas W. Moore, and Veda Moore (Moore, Moore & McCulloch), of Sugar Land, Texas, for Houston Building Services, Inc.
Sidney H. Kalban, of Jersey City, New Jersey, for District 1.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On September 29, 1989, the National Labor Relations Board (the Board) issued a Decision and Order² holding Houston Building Services, Inc. (HBS) on December 1, 1987, succeeded Housekeepers Maintenance Service & Supply, Inc. (HMSS) in providing custodial services at the Austin, Texas Federal buildings; Industrial, Technical & Professional Employees, a division of District 1, Marine Engineers Beneficial Association/National Maritime Union of America, AFL-CIO (the Union) was the exclusive collective-bargaining representative of HMSS' custodial service employees employed at the Austin Federal buildings at the time of the succession; those employees at that time were covered by a collective-bargaining agreement between HMSS and the Union for a term extending from August 1, 1986, through October 31, 1989, wherein HMSS recognized the Union as the exclusive collective-bargaining representative of those employees and specified their wages, hours, and working conditions; HBS offered and HMSS' employees accepted employment by HBS at the wages, hours, and conditions of employment they were receiving at the time of the succession; after the succession, however, while HBS paid the employees the basic hourly rate of pay they received while HMSS employees, HBS refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees; discontinued payments to the health, pension, and annual benefit funds providing the employees health, pension, and annual benefits (paid vacations, paid holidays, paid sick leave, etc.); on December 9, 1987, reduced the employees' hours of work by 3 hours; on December 11, 1987, discharged 11 unit employees; took those actions without prior notice to or bargaining with the Union; thereby violated the National Labor Relations Act (the Act); and to remedy those violations, inter alia, ordered HBS:

1. To make whole 11 discharged HBS employees—Joyce Altum, Clifton Bailey, Grady Kennie, Kim Du Triem, Maria Menchaca, Jessie Meyer, Rita Cedillo Morales, Benny Pamplin, Willie Piper, Frances Cortez Ramirez, and Onnie Walker—for the wages they lost as a result of their December 11, 1987 unlawful discharges and losses of the type described in *Kraft Plumbing*, 252 NLRB 891 fn. 2 (1980) (medical and dental expenses incurred due to their loss of coverage by the health and welfare fund), plus interest on the sums due.

¹ Hereafter called the General Counsel.

² Reported at 296 NLRB 808.

2. To make whole 30 HBS employees for the wages they lost as a result of the 3-hour reduction in their working hours on December 9, 1987, plus interest on the sums due.

3. To make whole the health, pension, and annual benefit funds for the contributions they lost as a result of HBS' failure to make those contributions, plus losses of the type described in *Merryweather Optical Co.*, 240 NLRB 1219 (1979)—such as penalties levied for delinquent payment of requisite contributions, fund losses resulting from failures to tender timely contributions.

The United States Court of Appeals for the Fifth Circuit upheld the Board's Decision and Order in 1991³ and, in 1992, the United States Supreme Court denied HBS' petition for a writ of certiorari.⁴ A controversy having arisen over the liability for and amount of payments due under the Board's Order and Decision, Region 16 in 1993 issued an initial backpay specification and notice of hearing alleging the amount of backpay due the 11 employees discharged on December 11, 1987, and due the 30 employees who lost 3 hours of pay on December 9, 1987. In 1994, the Region issued an amended specification adding the amounts allegedly due to the funds. Both the initial and the amended specification notified HBS it must file a timely answer complying with the Board's Rules and Regulations. HBS filed timely answers to the initial and amended specifications, after requesting and securing continuances to enable HBS to complete its answers. In June 1994, I conducted a hearing on the issues raised by the amended specification and HBS' answer thereto.

HBS asserts: (1) payment of backpay to 9 of the 11 discharges (Bailey, Kennie, Menchaca, Meyer, Cedillo Morales, Pamplin, Piper, Cortez Ramirez, and Walker) is not warranted on the ground those employees will be made whole for their wage losses by their receipt of severance pay from HBS through a proceeding brought against HBS on behalf of the 9 by the United States Department of Labor (DOL), in view of the fact the United States General Accounting Office (GAO) is withholding \$33,627.32 from the amounts due to HBS under HBS' contract with the General Services Administration (GSA) to perform custodial services at the Austin Federal buildings, to satisfy HBS' potential severance pay liability under that contract; (2) payment of backpay to 3 of the 11 (Menchaca, Pamplin, and Cortez Ramirez) is not warranted on the ground HBS paid certain moneys to the 3 and, in consideration of those payments, the 3 released their backpay claims against HBS or, at least, the sums paid by HBS to the 3 should be deducted from any backpay due to the 3 under the terms of the Board's Order as "interim earnings"; (3) HBS should not be ordered to make payments to the health, pension, and annual benefit funds because: (a) HBS neither assumed HMSS' agreement with the Union nor entered into any other agreement with the Union mandating those payments, thus HBS was never party to any agreement requiring such payments throughout the backpay period; (b) the Employee Retirement Income Security Act requires such recoveries be accomplished exclusively through that Act, preempting the Board from seeking such recovery, and (c) since HBS paid amounts it should have paid to the funds to the employees, requiring HBS to reim-

burse the funds would constitute a double payment and exceed the Board's remedial powers under the Act.

Section 3 of the amended specification alleges the gross backpay and interest due each of the 11 discharges during the backpay period⁵ is properly calculated by adding to the basic wage rate each of the 11 was paid at the time of the discharge (\$5.43 per hour); 10 cents per hour for uniform laundering and maintenance; 45 cents per hour in lieu of a 45-cent-per-hour contribution to the health fund; 35 cents per hour in lieu of a 35-cent-per-hour contribution to the pension fund; and \$1.22 per hour in lieu of a \$1.22 contribution to the annual benefit fund (a fund established to maintain the normal pay of the employees during their absences from work on authorized vacations, holidays, and sick leave), for a total of \$7.55 per hour and multiplying that figure by the average number of hours the 11 were working per week prior to their discharges.

HBS disputes the accuracy of the average hours calculation.

HBS did not dispute the propriety of adding to the basic wage rate and paying to the 11 discharges the 10-cent-per-hour payment the 11 employees would have received during the backpay period for uniform maintenance but for their unlawful discharges and the 35-cent-per-hour payment which HBS should have paid to the pension fund on behalf of the 11 for each hour the 11 would have worked during the backpay period but for their unlawful discharges, but contends the 11 should not be compensated for the 45 cents per hour HBS should have paid to the health fund for each hour they would have worked during the backpay period but for their unlawful discharges and the \$1.22 per hour HBS should have paid to the annual benefit fund for each hour the 11 would have worked during the backpay period but for their unlawful discharges, on the ground the payments which should have been paid to the health fund and the annual benefit fund are not "wages."

The amended specification details interim earnings deductions from the gross backpay calculation of the wage losses of the 11 discharges during the backpay period, based on information supplied by the 11 to the Region and other records it was able to secure.

HBS contends additional deductions from the gross backpay due to some of the 11 should be made on the ground during the backpay period: some of the 11 failed to make reasonable efforts to secure interim employment; some of the 11 were unavailable for work; and some of the 11 voluntarily removed themselves from the work force. HBS in its answer, however, did not identify the employees who allegedly failed to make such efforts, were unavailable or voluntarily removed themselves from the work force; HBS did not state the duration of the alleged failures or unavailability; and HBS did not state the amounts which allegedly should be deducted. Nor did HBS set forth in its answer any support for those contentions.

HBS also contends deductions from the gross backpay due to the 11 should be made on the ground the Region failed to make a timely and full investigation of the interim earn-

³ Reported at 936 F.2d 178.

⁴ Reported at 112 S.Ct 1159.

⁵ It is undisputed the back period extends from December 11, 1987, through May 31, 1990, when HBS lost its GSA contract and ceased operations at the Austin Federal buildings.

ings of the 11 during the backpay period and failed to provide HBS full information thereon prior to the hearing.

In the course of the hearing, I granted the General Counsel's motion to consider the premises and figures set out in sections 4, 6, and 7 of the amended specification as true inasmuch as HBS, in its answer to those sections, generally denied the correctness and accuracy of the premises and figures stated but failed to set forth premises, figures, and support for a challenge thereto, as required by Section 102.56 (b) of the Board's Rules and Regulations. I thus rejected HBS' attempt during the hearing to introduce evidence supporting a challenge to the premises and figures of sections 4, 6, and 7 of the amended specification.

Subsequent to the close of the hearing, the parties filed briefs.

HBS attached evidentiary material to its brief allegedly supporting a challenge to the premises and figures of specifications 6 and 7.

The General Counsel filed a motion to strike that material.

Subsequent to the close of the hearing, HBS filed a motion for leave to reopen the hearing to permit HBS to introduce evidence allegedly supporting a challenge to the premises and figures of sections 6 and 7 of the amended specification and amend its answer to those sections accordingly. Alternatively, HBS moved to strike sections 6 and 7. The motion did not request leave to reopen the hearing to introduce evidence allegedly supporting a challenge to the premises and figures of section 4 and amend its answer to that section.

The General Counsel and the Union opposed HBS' motion on the ground my prior rulings were correct as a matter of law.

I granted the parties leave to file replies to their opposing contentions.

HBS again attached evidentiary material to one of its replies (HBS filed separate replies to the opposition to its motion and to the General Counsel's motion to strike the evidentiary material attached to HBS' posthearing brief) purporting to support its challenge to the premises and figures of sections 6 and 7. The General Counsel moved to strike that material.

The issues created by the foregoing shall be resolved below.

I. THE POSTHEARING MOTIONS

In essence, HBS' posthearing motion seeks a reversal of my ruling its general denial of sections 6 and 7 (as well as sec. 4) of the amended specification acted as an admission and precluded HBS from introducing evidence at the hearing allegedly supporting a challenge to the premises and figures contained in sections 6 and 7. My ruling was based on Section 102.56 of the Board's Rules and Regulations, which states allegations contained in a backpay specification shall be deemed admitted as true and admitted when a respondent, in its answer thereto, generally denies such allegations but fails to "*specifically state the basis for disagreement with the specification, setting forth in detail the Respondent's position as to the applicable premises and furnishing the appropriate supporting figures.*"⁶

⁶For authority supporting my rulings, see *Coronet Foods*, 316 NLRB 700 (1995); *Carlows, Ltd.*, 315 NLRB 27 (1994), and *Hahn Motors*, 314 NLRB 511 (1994).

The record established the Region addressed repeated requests to HBS prior to the hearing for access to HBS records enabling the Region to determine the average number of employees within the unit and the average number of hours those employees worked during the backpay period and that HBS failed and refused to supply the requested records, despite its possession of and/or access thereto.

This limited the Region to reliance on secondary evidence (the HMSS-Union agreement; the GSA-HBS contract, information furnished by HBS to DOL with respect to the severance pay claim before that agency, information furnished by the employees and the Union, etc.) to establish the number of employees on the job at the time of the succession (30), the number of hours the discharges would have worked but for their discharges, and the wages the discharges would have received but for their discharges.

The amended specification notified HBS that "pursuant to Section 102.56 of the Board's Rules and Regulations the Respondent (HBS) shall . . . file . . . an answer . . . (and) **to the extent that such answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations, and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.**"

HBS demonstrated its awareness of the requirements of Section 102.56 by filing a detailed answer to section 3 of the amended specification.

Despite that awareness and HBS' acceptance of the finality of my ruling with respect to its answer to section 4, HBS at this late date contends it should be permitted to reopen the record, introduce evidence allegedly supporting a challenge to the premises and figures of sections 6 and 7, and amend its answer thereto or those specifications should be stricken.

HBS alleges as grounds therefor the General Counsel failed to comply with the requirements of Section 10624.2 of the Board's Casehandling Manual. HBS contends that section requires the General Counsel to give HBS an opportunity to amend its answers to sections 6 and 7 with a statement of premises, figures, and support therefor challenging the premises and figures of the specifications *prior to* moving for a ruling those specifications be deemed true and admitted due to HBS' general denial.

The General Counsel was *not* required to afford HBS that opportunity prior to filing his motion.⁷ There might be some basis for affording HBS that opportunity had the General Counsel filed a *pretrial* motion to either strike HBS' answer to sections 6 and 7 or to enter summary judgment the allegations there be considered as true and admitted and the General Counsel was informed by HBS prior to the hearing HBS had support for and wished to mount a challenge to the allegations of sections 6 and 7. In this case, however, that opportunity was sought by HBS **after** HBS' receipt of the original and amended specifications, **after** HBS sought and secured extensions of time for filing its answers thereto, and where there is no evidence the General Counsel was aware at any time prior to the hearing HBS wished to, or had any basis for, challenging the premises and figures contained in sections 6 and 7 (as well as sec. 4). In fact, prior to the hear-

⁷*Aquatech, Inc.*, 306 NLRB 975 fn. 6 (1991).

ing, HBS' counsel conveyed the impression to Regional personnel HBS did not have access to or available records relating to the premises and figures set out in sections 6 and 7 and not until HBS during the hearing attempted to challenge those premises and figures did it appear HBS had, or had access to, records relating to the allegations of sections 6 and 7 during the time it was preparing its answers to the specifications.

The original and the amended specification put HBS on notice it was required **in its answers** to state the premises and figures it believed should be substituted for those in the specification and that a **general** denial would not suffice. HBS' receipt of that notice and awareness of the requirements of Section 102.56 of the Board's Rules in filing its answers was evidenced by HBS' detailed challenge to the premises and figures of amended specification 3, including the citation of specific supporting data and figures.

It was reasonable for the Region to conclude HBS did not have information, grounds for, or intention to challenge the premises and figures set out in sections 4, 6, and 7 of the specifications prior to the hearing.

HBS' reliance on the provision of the Casehandling Manual cited above is misplaced; the provisions of the Casehandling Manual are guides, they are **not** mandates.⁸

HBS' attempt at and subsequent to the hearing to introduce evidence allegedly supporting a challenge to the premises and figures of sections 6 and 7, amend its answers thereto, or secure the dismissal of those sections, thus appears to be a disingenuous attempt to avoid the consequences of its failure to cooperate with the Region in a timely submission of pertinent data either in its possession or available prior to the hearing and to excuse its failure to comply with Section 102.56 of the Board's Rules and Regulations at the time it filed its answers thereto (perhaps to place the General Counsel and the Union at a disadvantage in cross-examining HBS' witness(es) and questioning supporting data those witnesses attempted to sponsor, as well as their securing and introducing rebuttal thereto).

On the basis of the foregoing, I deny HBS' motion to reopen the record to receive evidence allegedly supporting a challenge to the premises and figures of sections 6 and 7 of the amended specification, amend its answers thereto, or strike those sections of the amended specification.

The General Counsel and the Union moved to strike evidentiary material attached to HBS' posthearing brief and to HBS' reply to their opposition to HBS' motion. That material purports to support an HBS challenge to the premises and figures contained in sections 4, 6, and 7 of the amended specification and is within the scope of my ruling barring the introduction of such evidence.

On the basis of the foregoing, I grant the General Counsel's and the Union's motions to strike the evidentiary material attached to HBS' posthearing filings.

FINDINGS AND CONCLUSIONS

II. DO THE PENDING CLAIMS OF 9 OF THE 11 DISCHARGED EMPLOYEES FOR SEVERANCE PAY PRESENTLY PENDING BEFORE DOL BAR THEIR RECEIPT OF BACKPAY PURSUANT TO THE BOARD'S ORDER

The Board does not seek severance pay payments as part of the remedy for HBS' unlawful conduct.

Nine of the eleven employees unlawfully discharged on December 11, 1987, filed claims for severance pay with DOL. HBS denied liability for payment of those claims and DOL has not issued a final decision on the claims.

HBS contends the nine should be denied backpay in this proceeding, noting GAO is withholding moneys due to HBS under HBS' contract with GSA for the performance of custodial services at the Austin Federal buildings by HBS' employees and contending the receipt by the nine of severance pay pursuant to a DOL order will make the nine whole for their loss of earnings due to their unlawful discharges.

While the Board treats severance pay as interim earnings deductible from gross backpay due to a discriminatorily discharged employee,⁹ there is no assurance the nine employees will prevail before DOL (or after subsequent appeals), no determination which employees (if any) are entitled to receive severance pay, and no determination of how much (if anything) any employee may receive.

Under these circumstances, this contention is rejected.

III. DO RELEASES SIGNED BY THREE OF THE DISCHARGED EMPLOYEES BAR THEIR RECEIPT OF BACKPAY PURSUANT TO THE BOARD'S ORDER

In 1994 discharged employees Cortez Ramirez, Menchaca, and Pamplin signed documents containing statements they understood DOL had filed claims on their behalf in case 91 SCA 30 against HBS for severance pay, they were accepting payments from HBS of \$1,360.54, \$715.35, and \$910.07, respectively, and they "authorize(d) and instruct(ed) the Department of Labor to dismiss the claim(s) . . . asserted in (their) behalf against Houston Building Services, Inc."

The documents also contained statements that the three signatories accepted the sums set out above:

To extinguish all claims I have arising out of my employment with Houston Building Services, Inc., including but not limited to the termination of my employment.

and that, in consideration of the sums paid to them, they:

Released, acquitted and forever discharged Houston Building Services, Inc. . . . from any claims, demands and causes of action of whatever nature, including but not limited to the claims asserted in the above-described case.

An HBS representative solicited and secured the signatures of the three to the documents without the knowledge of or

⁸ *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 655 fn. 41 (1985).

⁹ *Sheller-Globe Corp.*, 296 NLRB 116, 117 (1989).

participation by a representative of the Board or the Union (or private counsel).

There is no evidence at the time the three signed the documents they knew the amount of severance pay DOL was seeking on their behalf¹⁰ nor that they knew the amount of backpay the Board seeks on their behalf.

The Board has stated:

Reinstatement and backpay are remedies which the Board provides in the public interest to enforce a public right. No private right to such relief attaches to a discriminatee which he can bargain away or compromise . . . if a settlement of charges was desired by the Respondents, negotiations for that purpose should have been with the Regional Director, in accordance with well-established procedures We shall order full backpay for any loss of pay he may have suffered less the amount the Respondents already paid.¹¹

and has ruled a document signed by a discriminatee in consideration of payment to him of moneys satisfying his claim to pay for a 2-day discriminatory layoff, without the knowledge or participation of any representative of the Board or the union representing him, does not waive his public right as a discriminatorily discharged employee under the Act to the Board's grant to him of the traditional remedies of backpay and reinstatement.¹²

The Board has also ruled the payment of severance pay to an unlawfully discharged employee is *not* a remedy for his unlawful termination and does not waive his right under the Act to traditional remedies, i.e., reinstatement and backpay.¹³

Since the documents signed by the three refer solely to their pending claims for severance pay before the Department of Labor and make no reference to their pending claims for backpay before the Board; HBS offered and paid the exact sum counsel for HBS claimed as the correct amount of severance pay due two of the three; HBS' original offer to the third was the exact sum counsel for HBS claimed as the correct amount of severance pay due the third until changed for unexplained reasons; the three unsophisticated discriminatees were not represented or advised by any Board or Union or private counsel in the negotiation of the sums paid nor what they covered; the three discriminatees neither were aware of nor notified of the value of their claims before either the Department of Labor or the Board prior to signing the docu-

¹⁰An attachment to HBS' answer to the amended compliance specification (attachment A, G.C. Exh. 1 (ee)) states DOL is seeking severance pay of \$2416 on behalf of Cortez Ramirez, \$453 on behalf of Menchaca, and \$1208 on behalf of Pamplin as opposed to HBS' contention only \$1,360.54 may be due to Cortez Ramirez, \$215.35 to Menchaca, and \$910.07 to Pamplin. It is notable the amounts received by Cortez Ramirez and Pamplin in return for their signatures to the documents described above are identical to the amounts HBS contended may be due in severance pay to those employees rather than the amounts sought by DOL. There was no explanation why the \$225.35 figure, the amount HBS contended was due to Menchaca in severance pay, was scratched out and a higher figure written in on that document.

¹¹*Ideal Donut Shop*, 148 NLRB 236, 237-238 (1964), enf. 347 F.2d 498 (7th Cir. 1965). Also see *Michael M. Schaefer*, 261 NLRB 272 (1982).

¹²*Jones Plumbing Co.*, 277 NLRB 437, 444 (1985).

¹³*Federal Screw Works*, 310 NLRB 1131 (1993).

ments; I find and conclude by signing the documents the three discriminatees did not waive their right to a full remedy in this case, i.e., backpay for the wage losses they suffered by virtue of HBS' unlawful discrimination against them.

Whether the amounts received by the three should be deducted from any gross backpay due to them pursuant to the Board Order as interim earnings shall be resolved below.

IV. DOES ERISA BAR THE BOARD FROM ORDERING PAYMENTS TO THE FUNDS

HBS contends the Board is barred from seeking and securing payments to the funds of contributions HBS should have made to the funds to finance its employees' health, pension, and annual benefits (paid vacations, paid holidays, paid sick leave, etc.) during the backpay period, on the ground the Employee Retirement Income Security Act (ERISA) has exclusive jurisdiction over claims against employers for such payments.

The contention has no merit.

The Board seeks the recoveries to remedy HBS' violation of Section 8(a)(5) of the Act, i.e., because of HBS' failure to notify and bargain with the Union either to agreement or impasse prior to implementing changes in their health, pension, and annual benefits, i.e., prior to discontinuing contributions to the funds providing those benefits.

The Board is *not* enforcing a contractual obligation within the purview of Section 502(g) and 515 of ERISA; it is remedying HBS' violation of Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act, a matter within *the Board's* exclusive jurisdiction.¹⁴

Thus a Board Order directing reimbursement to the funds of the contributions HBS unlawfully withheld is an exercise of the Board's traditional and normal remedial powers.

This contention is therefore rejected.

V. DOES THE ABSENCE OF ANY SIGNED COLLECTIVE-BARGAINING AGREEMENT BETWEEN HBS AND THE UNION REQUIRING HBS TO MAKE PAYMENTS TO THE FUNDS BAR THE BOARD FROM ORDERING PAYMENTS TO THE FUNDS OR HBS EMPLOYEES

As noted above, the Board enforces rights and obligations **created by public law**. Ordering a successor employer to continue to tender fund contributions established by a predecessor employer until and unless the successor employer has recognized the union representing the predecessor's employees it has hired with their understanding those contributions will continue and bargained with that union either to impasse or agreement is enforcement of a right and obligation created **by the Act**.

A Board Order directing payment to employees who were discriminated against by an employer is also enforcement of such a right and obligation. While the right or obligation may be based on terms of the predecessor's (the HMSS-Union) agreement, it is nevertheless enforceable on the basis of the principles set out above.¹⁵

¹⁴*Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 484 U.S. 539 (1988).

¹⁵*L.A. Beeffland*, 232 NLRB 1189 (1977), and *Spruce Up Corp.*, 209 NLRB 194 (1974), based on *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

It is further apparent the GSA-HBS contract contemplated a carryover of the provisions of the WMSS-Union agreement governing the rates of pay, wages, hours, and working conditions of HBS' employees following the succession. HBS, however, in clear violation of its obligations under the Act, unilaterally elected to make selective changes there, including withholding continued contributions to the funds and a reduced workshift on December 9, 1987.

On the basis of the foregoing, I find and conclude the absence of a collective-bargaining agreement between HBS and the Union does not bar the Board from exercising its powers under the Act to remedy HBS' unfair labor practices by ordering fund reimbursement and employee payments to compensate the funds and the employees for their losses occasioned by HBS' discrimination against them.

VI. DOES THE BOARD'S ORDER DIRECTING PAYMENTS TO THE FUNDS EXCEED ITS REMEDIAL POWERS

It is undisputed the month prior to the succession (November 1987) HMSS paid its employees \$5.43 for each hour they worked that month plus 10 cents for uniform cleaning and that HMSS contributed to the ITPE-NMU Health & Welfare Fund 45 cents for each hour those employees worked that month, 35 cents to the ITPE-NMU Pension Fund for each hour, and \$1.22 to the ITPE-NMU Annual Benefit Fund for each hour.

It is also undisputed on and after December 1, 1987, the GSA-HBS contract required HBS to pay its employees \$5.43 for each hour worked plus 10 cents per hour as a uniform cleaning allowance, 45 cents per hour for "Health & Welfare," \$1.22 per hour "for the purpose of providing vacations, holidays and sick leave" (the annual benefits), and 35 cents per hour for the "Pension Fund."

It is further undisputed HBS elected to comply with the GSA-HBS contract by continuing to pay to the 30 HMSS employees it hired on December 1, 1987, the \$5.43 per hour wage rate and 10 cents uniform allowance per hour they had been receiving, but **paid to the employees rather than to the funds** additional payments with their wages as a substitute payment for their health and annual benefits.

HBS argues since it paid its employees directly moneys it should have contributed to the funds, ordering HBS to now reimburse the funds as well constitutes a double payment and exceeds the Board's remedial powers.

The Board and reviewing courts have rejected that argument. As the Ninth Circuit in a similar situation stated in 1983:

The diversion of contributions for the union funds undercut the ability of those funds to provide for future needs.¹⁶

On the basis of the foregoing, I reject this contention.

VII. ARE HEALTH AND WELFARE AND ANNUAL BENEFITS "WAGES"

HBS in its answer admitted the addition of 10 cents per hour for uniform maintenance and 35 cents per hour for pensions set forth in the GSA-HBS contract and paid per hour

¹⁶ *Stone Boatyard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983); cert. denied 446 U.S. 937 (1984). Also see *NLRB v. Transport Service Co.*, 970 F.2d 562 (5th Cir. 1992).

worked by HBS to its custodial employees were reasonable and appropriate additions to the basic wage rate utilized by the Board for computing lost wages, but contended the 45-cent-per-hour health and welfare benefit amount and the \$1.22-per-hour annual benefit amount (for sick leave, vacations, and holidays) were improper additions, alleging those benefits are not wage components.

This contention is patently frivolous; those benefits were listed as wage components in the GSA-HBS contract and HBS recognized them as wage components by paying amounts directly to the employees in lieu of contributions to the funds.

The contention is rejected.

VIII. THE FORMULAE FOR COMPUTATION OF THE 11 DISCHARGEES' GROSS BACKPAY

Section 3 of the amended specification alleges and HBS' answer thereto denies the quarterly gross backpay due each of the 11 dischargees under the terms of the Board's Order is correctly calculated by multiplying the average number of hours each would have worked during the backpay period but for their discharges by the hourly wages they would have earned during the backpay period. The specification alleged the wages each would have received during the backpay period was \$7.55 per hour and that each would have worked the following number of hours per week:

Joyce Altum	17.00
Clifton Bailey	17.26
Grady Kennie	18.69
Kim Du Triem	17.00
Maria Menchaca	13.22
Jesse Meyer	17.30
Rita Cedillo Morales	17.27
Benny Pamplin	16.76
Willie Piper	18.38
Francis Cortez Ramirez	15.66
Onnie Walker	16.46

The \$7.55 per hour is a total figure derived by adding the wage components in effect at the time of the succession to the basic wage rate paid pursuant to the GSA-HBS contract.

In its Exhibit A and its attachments B(4), (5), (7), (8), (10), and (11) attached to its answer to section 3 of the amended specification, HBS set forth the *same* hours-per-week figure specified above for Bailey, Du Triem, Menchaca, Meyer, Cedillo Morales, Pamplin, Piper, Cortez Ramirez, and Walker; a *higher* figure (17.26) for Altum and *lower* figures for Kennie (17.08) and Meyer (13.22).

Thus while in its answer HBS *generally* denied the accuracy of the hours-per-week figures of Bailey, Triem, Menchaca, Meyer, Cedillo Morales, Pamplin, Piper, and Cortez Ramirez, HBS in another portion of its answer *citing specifics*, HBS *admitted* those figures were accurate!

With respect to Altum, Kennie, and Meyer, while HBS submitted specific figures challenging the hours-per-week figures set out in the specification for those employees, HBS failed to cite any support therefor or produce evidence supporting the figures it cited.

On the basis of the foregoing, I find the quarterly gross backpay due the 11 dischargees was correctly calculated by multiplying the average weekly hour figures cited in section 3 by an hourly rate of \$7.55 over the backpay period.

IX. SHOULD ADDITIONAL DEDUCTIONS BE MADE FROM THE GROSS BACKPAY DUE TO THE 11 DISCHARGEES FOR ALLEGED DEFICIENCIES IN THE REGION'S INVESTIGATION OF THEIR BACKPAY ENTITLEMENTS

The Region's compliance officer acknowledged in 1993 he began his investigation to determine what deductions, if any, should be made from the gross backpay due to the 11 dischargees under the Board's Order, following the United States Supreme Court's denial of HBS' final appeal of the underlying Order.

Citing Section 10540.2 of the Board's Compliance Manual,¹⁷ HBS contends as a result of the Region's lack of compliance with that section, the Board failed to supply HBS with a full and accurate record of the discriminatees' efforts to secure other employment during the backpay period, the times they were unavailable for work, and the amounts they earned and that failure excuses HBS from the burden of proving as an affirmative defense additional deductions should be made from the gross backpay due to the 11 dischargees pursuant to the Board's Order.

The contention has no merit.

It is established law the wrongdoer, in this case HBS, has the duty of proving, as an affirmative defense, alleged discriminatees were unavailable for work during the backpay period, failed to seek and secure alternate employment, and the amounts they earned in alternate employment during the backpay period.¹⁸

The Region furnished HBS with all the information gathered by the compliance officer in his investigation prior to the hearing, issued subpoenas at HBS' request addressed to the 11 dischargees requesting they bring to the hearing all records in their possession concerning their efforts to secure employment and their earnings during the backpay period, and summoned all 11 dischargees to appear at the hearing prepared to answer any questions addressed to them by HBS and provide HBS any information HBS desired in these matters.¹⁹

HBS knew the identity of the 11 unlawfully discharged employees in 1987; HBS had 7 years within which to investigate whether the 11 sought to mitigate their pay losses following their discharges; and HBS experienced no difficulty in contacting the 11, as evidenced by the contacts HBS' representative had with the dischargees in seeking their signatures to releases in 1994. The Region is not obligated to investigate those matters;²⁰ and penalizing the employees to

¹⁷That section advises regional personnel to make contact with alleged discriminatees as soon as possible after the Region has determined a violation has occurred and to maintain contact with those discriminatees thereafter, to advise the discriminatees of their obligation to mitigate their damages by seeking and securing, if possible, other employment, and to collect data concerning their earnings and availability during the period any backpay may be ordered on their behalf.

¹⁸*NLRB v. Brown & Root*, 311 F.2d 447 (8th Cir. 1963); *Southern Household Products*, 203 NLRB 881 fn. 2 (1973); *Heinrich Motors*, 166 NLRB 783 (1967).

¹⁹All 11 appeared at the hearing. HBS interrogated all but Menchaca. HBS was offered and declined the opportunity to decline Menchaca.

²⁰As noted heretofore, the Compliance Manual only provides **guidance** to regional personnel. Mandatory compliance with its provisions are not required.

benefit the wrongdoer, in this case HBS, for alleged shortcomings in the regional investigation, is unwarranted.

As the Supreme Court stated in *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969):

The Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.²¹

On the basis of the foregoing, this contention is rejected.

X. APPROPRIATE DEDUCTIONS FROM THE GROSS BACKPAY DUE THE 11 DISCHARGEES AND THE RESULTING NET BACKPAY DUE

A. *Joyce Altum*

The amended specification lists the gross backpay Altum would have earned during the backpay period but for her unlawful discharge at \$17,010.55; earnings at work comparable to her work for HBS for each of the four quarters of 1989 of \$311.78; and earnings for each of the first two quarters of 1990 of \$1,668.50, totaling \$4,584.12 in interim earnings and \$12,486.43 in net pay due Altum to compensate her for her unlawful discharge. The specification does not show any interim earnings by Altum between the date she was discharged (December 11, 1987) and December 31, 1988.

I credit Altum's testimony she sought but was unable to find employment comparable to her employment by HMSS and HBS²² from the time HBS discharged her through the end of the second quarter of 1989, not just through 1988, and that she secured comparable employment beginning in the third quarter of 1989 and was so employed through the balance of the backpay period.

Her earnings during the second and third quarters of 1989 were \$623.56 for each quarter rather than \$311.78 and her earnings during the second quarter of 1990 should reflect \$1,155.15 rather than the \$1,668.55 listed in the specification.

HBS failed to produce any evidence establishing during those portions of the backpay period that Altum was unable to secure work comparable to her work for HBS, Altum was unavailable for work at work comparable to the work she performed for HBS prior to her discharge, failed to seek such work, or voluntarily removed herself from the work force.

On the basis of the foregoing, I find and conclude the gross backpay Altum would have earned during the backpay period but for her unlawful discharge totaled \$16,557.15, her interim earnings during the period were \$4,070.77, and the net backpay due to her pursuant to the Board's Order is \$12,486.38, plus interest calculated at the rate and in the manner set out in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).

B. *Clifton Bailey*

The amended specification lists the gross earnings Bailey would have received from HBS but for his unlawful discharge at \$17,331.64; no earnings in work comparable to his HBS employment between December 11, 1987, and the end

²¹Also see *Consolidated Freightways v. NLRB*, 892 F.2d 1052 (D.C. Cir. 1989), and *Mid-State Ready Mix*, 316 NLRB 500 (1995).

²²Altum, as other HMSS/HBS employees, had full-time employment during daytime hours with other employers and worked part time for HMSS and HBS during evening and night hours.

of the last quarter of 1987; earnings of \$407.65 for each quarter of 1988; earnings of \$729.90 for each quarter of 1989; and earnings of \$1,654.02 for each of the first two quarters of 1990.

Bailey testified the record reflecting he earned \$407.65 during each quarter of 1988 was erroneous, since he sought but was unable to find employment comparable to his employment at HBS until the second quarter of 1988, and thus had no earnings during the first quarter of 1988. His interim earnings figures for 1988 should rather show earnings of \$543.60 for each quarter of 1988 but the first quarter and no earnings for the first quarter.

The gross earnings figure for the second quarter of 1990 was erroneously stated as \$1,694.07; the correct figure is \$1,172.82.

HBS failed to produce any evidence Bailey failed to seek or was unavailable for work comparable to his work at HBS or voluntarily removed himself from the work force during any portion of the backpay period.

I therefore find and conclude the gross backpay Bailey would have earned and received from HBS during the backpay period but for his unlawful discharge was \$16,810.39, his interim earnings during that period were \$7,377.24, and the net backpay due Bailey pursuant to the Board's Order is \$9,433.15, plus interest calculated at the rate and in the manner set out in section X,A, above.

C. Grady Kennie

The backpay specification lists \$18,767.53 in gross earnings Kennie would have earned during the backpay period but for his unlawful discharge, no earnings at employment comparable to his HBS employment by Kennie during the entire backpay period, and net backpay due to Kennie to remedy HBS' unlawful discharge of Kennie of \$18,767.53.

I credit Kennie's testimony that he sought employment during the entire period by contacting employers of night cleaning personnel and by asking employees of such employers about available employment, but was only able to secure employment, as he put it, for a few months by K & B Contract Maintenance and another few months by St. David Hospital.

HBS failed to develop any evidence, however, during what quarters Kennie worked for the two employers, how many hours he worked, and what he was paid.

It was incumbent on HBS to develop such evidence. In the absence of such proof, no interim earnings deductions vis-a-vis Kennie shall be deducted from the backpay due to him.

HBS also failed to establish during any part of the backpay period Kennie was unavailable for work, not seeking employment comparable to his employment by HBS or removed himself from the work force.

The specification erroneously listed Kennie's earnings during the second quarter of 1990 at \$1,834.42; the correct figure is \$1,269.99.

On the basis of the foregoing, I find and conclude but for his unlawful discharge, Kennie would have earned gross backpay of \$18,203.13. I therefore find and conclude the net backpay due to Kennie to make him whole for his unlawful discharge is payment by HBS to Kennie of that sum, plus interest thereon at the rate of interest and in the manner set out in section X,A, above.

D. Kim Du Triem

The amended specification lists the gross backpay Du Triem would have earned but for her unlawful discharge at \$17,070.55; the period between the date Du Triem was discharged (December 11, 1987) and December 30, 1987, as the only period she was unable to secure employment comparable to her employment at HBS; and interim earnings which equaled her earnings at HBS at comparable work for the balance of the backpay period.

Du Triem testified prior to her December 11, 1987 discharge by HBS, she worked 8 hours each Saturday and Sunday for the Hyatt Regency Hotel, a total of 16 hours per week, in addition to the 17 hours per week she worked for HBS. She further testified immediately following her discharge by HBS, she secured full-time employment at the hotel, working 8 hours per day, 5 to 6 days per week, or 40 to 48 hours per week; continued to so work until June 1989, when she secured a higher-paying full-time janitorial job at Advanced Micro Devices working 5 days per week, 8 hours per day, or 40 hours per week, and continued in that employment for the balance of the backpay period.

Du Triem testified she was paid the minimum hourly rate while working at the hotel and a higher wage rate (but less than \$7.55 per hour) at Advanced Micro. While she testified she was covered by a health plan and a pension plan in both of those employments, HBS failed to establish the monetary value of those fringe benefits.

Du Triem's hourly earnings in those two employments for hours equivalent to the hours she worked each week for HBS during the backpay period were \$142.80 between December 11 and 31, 1987; \$618.80 during each quarter of 1988; \$618.80 during the first quarter of 1989; \$1,100.75 during the second quarter of 1989; \$1,215.50 during the third and fourth quarter of 1989; and \$1,215.50 during the first quarter of 1990, for total interim earnings during the backpay period of \$8,825.55.

The gross pay she would have earned for the second quarter of 1990, but for her unlawful discharge, was \$1,155.15, not \$1,668.55.

On the basis of the foregoing, I find and conclude but for her unlawful discharge, during the backpay period Du Triem would have earned gross pay of \$16,557.15, that she had interim earnings during the period of \$8,825.55, and that the payment by HBS to Du Triem of \$7,731.60, the net earnings she would have earned but for her unlawful discharge, plus interest thereon calculated at the rate and in the manner set out in section X,A, above, will make Du Triem whole for the wage losses she suffered due to HBS' unlawful discrimination against her.

E. Maria Menchaca

The amended backpay specification lists \$13,274.83 in gross backpay due Menchaca for her earning losses during the backpay period and no interim earnings during the entire period.

HBS failed and refused to avail itself of the opportunity to interrogate Menchaca at the hearing when she was made available by the General Counsel.

HBS produced no evidence Menchaca was unavailable for work or failed to seek work or voluntarily removed herself from the work force during the backpay period.

Menchaca received \$715.35 from HBS on May 19, 1994, in return for her signature to a release described earlier and the amended specification erroneously listed Menchaca's wage loss for the second quarter at \$1,297.54 rather than the correct figure of \$898.30.

In his posthearing brief, the General Counsel requested the amount received by Menchaca in return for signing the release described heretofore be offset from the gross backpay due to Menchaca and the amount listed as Menchaca's pay loss in the second quarter be corrected to the figure just cited.

In view of the foregoing, I find and conclude the payment by HBS to Menchaca of \$12,160.24 in net backpay, plus interest calculated at the rate and in the manner set out in section X,A, above, will make Menchaca whole for the discrimination practices by HBS against her.

F. *Jessie Meyer*

The amended specification lists total gross backpay due to Meyer to make her whole for her unlawful discharge at \$17,371.85, no interim earnings between December 11 and 30, 1987, the first, third, and fourth quarters of 1988, and interim earnings in the second quarter of 1988 and each quarter between January 1, 1989, and May 31, 1990, of \$8009.

Meyer testified she made no effort to seek employment comparable to her HBS employment between December 11 and 30, 1987, but sought employment at comparable jobs after the 1987 Christmas holidays and at all times thereafter, including the first, third, and fourth quarters of 1988.

On the basis of the foregoing, I find and conclude Meyer voluntarily removed herself from the work force between December 11 and 30, 1987, but was available and sought employment unsuccessfully during the first, third, and fourth quarters of 1988 and both sought and secured employment during the balance of the backpay period.

The gross backpay figure for the second quarter of 1990 was erroneously calculated at \$1698; the correct figure is \$1,175.54. Correspondingly, the interim earnings figure for that quarter should also be reduced from \$1698 to \$1,175.54.

Thus the gross backpay due Meyer to compensate her for her loss in earnings due to her unlawful discharge during the backpay period is \$16,457.49, less interim earnings of \$7486, for net backpay due to Meyer of \$8,579.64, plus interest on that amount calculated at the rate and in the manner set forth in section X,A, above.

G. *Rita Cedillo Morales*

The amended specification lists \$17,341.67 as the gross backpay Cedillo Morales would have earned but for her unlawful discharge, and \$12,669.90 as the amount she earned in comparable work to that she performed for HBS while working for other employers during the backpay period, for net backpay of \$4,671.77 due Cedillo Morales to make her whole for the wage losses resulting from her unlawful discharge.

Only in the period between December 11 and 30, 1987, are no interim earnings shown for Cedillo Morales.

I credit her testimony at all times during the backpay period she did not have employment comparable to her employment at HBS, she was available and sought such work.

HBS failed to develop any evidence to the contrary.

I thus find and conclude Cedillo Morales will be made whole for the wage loss she suffered as a result of her unlawful discharge by HBS' payment to Cedillo Morales of \$4,671.77 plus interest calculated at the rate and in the manner set out in section X,A, above.

H. *Benny Pamplin*

The amended specification lists the gross backpay due Pamplin to make him whole the wage losses he suffered during the backpay period due to his unlawful discharge at \$16,829.51 and the net backpay due him at the same amount, with no interim earnings.

Pamplin testified he sought and secured employment comparable to his employment by HBS immediately after his December 11, 1987 discharge and remained continuously in that employment through February 17, 1990, after which he secured sporadic employment on a casual basis through the first quarter of 1990 but was unable to secure compensable employment during the second quarter of 1990.

It was established Pamplin earned \$83.80 in employment comparable to his HBS employment between December 11–30, 1987; \$1,097.78 during the first quarter of 1988; \$1,198.34 during each of the second, third, and fourth quarters of 1988; the same amount in each quarter of 1989; and \$645.26 in the first quarter of 1990, for total interim earnings during the backpay period of \$10,215.22. As noted earlier, Pamplin also received \$910.07 in return for his signature to a release, as discussed earlier. That amount shall be deducted from his gross backpay figure.

On the basis of the foregoing, I find and conclude HBS' payment to Pamplin of \$5,098.07, the net earnings he would have earned in HBS employment but for his unlawful discharge, plus interest calculated at the rate and in the manner set out in section X,A, above, will make Pamplin whole for the discrimination practiced against him.

I. *Willie Piper*

The amended specification lists the gross backpay Piper would have earned during the backpay period but for her unlawful discharge as \$18,456.31 Piper's interim earnings during the period at \$5,119.36, for a net backpay figure of \$13,336.95 due Piper.

The amended specification lists the period of December 11 through 30, 1987, and the first and second quarters of 1990 as the only periods Piper had no interim earnings.

I credit Piper's testimony she actively sought work at employment comparable to her employment by HBS at all times during the backpay period she was not actively employed during evening hours and find HBS failed to establish Piper was not available and pursuing work equivalent to her employment by HBS during the entire backpay period.

It was also established at the hearing Piper secured comparable employment during the first and second quarters of 1990, earning \$1,201.86 in the first quarter and \$832.06 in the second quarter. The figure for her gross pay loss for the second quarter of 1990 was also incorrectly calculated at \$1804; the correct figure is \$1,248.92.

On the basis of the foregoing, I find and conclude the gross pay Piper lost during the backpay period due to her unlawful discharge was \$17,901.23; her interim earnings during the period was \$7,153.28, and HBS' payment to her of \$10,747.95, her net pay loss resulting from her discharge,

plus interest calculated at the rate and in the manner set out in section X,A, above, will make her whole for HBS' unlawful discrimination against her.

J. Francis Cortez Ramirez

The amended specification lists \$12,650.94 as the gross pay Cortez Ramirez would have earned in HBS' employment during the backpay period but for her unlawful discharge, no interim earnings during the period, for a net backpay due Ramirez as a remedy for her unlawful discharge of \$12,650.94.

I credit Cortez Ramirez' testimony she actively sought employment comparable to her HBS employment immediately following her discharge, she met with no success, and ceased looking for such employment 5 months following her discharge due to a heart condition and has been unable to work since that time.

On the basis of that testimony, I find and conclude to remedy its discrimination against Cortez Ramirez, HBS pay to her the wages she would have earned during the 5 months following her discharge, i.e., \$2,955.83, less \$1,360.54, the amount she received from HBS in 1994 in return for signing the release earlier described, for a net payment of \$649.42, plus interest calculated at the rate and in the manner set out in section X,A, above.

K. Onni Walker

The amended specification lists \$16,528.32 as the amount of pay Walker would have earned in HBS' employ during the backpay period but for his unlawful discharge, \$6,238.62 as his interim earnings during the backpay period, for net backpay due to Walker to remedy the discrimination against him of \$10,289.70.

The specification alleges Walker was employed in employment comparable to his HBS employment in all but the first, second, and third quarters of 1988 and between December 11 and 30, 1987.

I credit Walker's testimony she was available for and sought work comparable to her work at HBS during the periods she did not have any interim earnings and HBS produced no evidence to the contrary.

The amended specification erroneously listed \$1,615.55 as a setoff against the gross backpay Piper would have earned but for her discharge during the second quarter of 1990. The correct figure is \$1,118.46, for total offsetting interim earnings of \$5,741.53.

Based on the foregoing, I find and conclude HBS' discrimination against Walker will be remedied by HBS' payment to her of the net income she lost by virtue of her unlawful discharge, i.e., \$10,289.70, plus interest calculated at the rate and in the manner set out in section X,A, above.

XI. THE PAYMENTS DUE 30 EMPLOYEES FOR THEIR
DECEMBER 9, 1987 LOSS

Section 4 of the amended specification calculates the 3-hour pay loss of the 30 workers employed by HBS on December 9, 1987, due to the unilateral reduction in their workshifts that day by multiplying their wage rate of \$7.55 by three, for a total of \$22.65.

At the hearing I granted the General Counsel's motion to consider HBS' general denial of that section as an admission

rather than a denial, in view of HBS' failure to cite in its answer differing premises and figures, with support therefor.

HBS did not seek any reconsideration or reopening of the hearing with respect to that ruling.

On the basis of the foregoing, I find HBS' payment to each of the 30 employees named below of \$22.65 plus interest calculated at the rate and in the manner set out in section X,A, above, will remedy HBS' unlawful discrimination against these 30 employees:

Joyce Altum	Jessie Meyer
Clifton Bailey	Ophelia Milicia
Ernestia Cadena	Rita Morales
Tommy Clark	Helen North
Clemente Cortiz	Benny Pamplin
Charles Deshay	Mary Pesina
Kim Du Triem	Willie Piper
Louis Figueroa	Eugene Porter
Howard Franklin	Francis Ramirez
Larry Galloway	Anthony Rodriguez
Cardenas Giollermo Jr.	Gloria Rodriguez
Milton N. Henderson	Lonnie Walker
Grady Kennie	Omni Walker
Candelario Martinez	Booker Washington
Maria Menchaca	John Washington

XII. CONTRIBUTIONS DUE TO THE FUNDS

Section 6 of the amended specification calculated HBS' work force averaged 30 employees during the backpay period, the 30 worked an average of 16.8 hours per week during the period, the contribution due to the pension fund for each hour worked during the period was 35 cents for each hour, the contribution due to the health and welfare fund for each hour worked during the period was 45 cents for each hour and the contribution due to the annual benefit fund for each hour worked during the period was \$1.22 per hour; there were 129 weeks during the period; and the total number of employee hours worked during the period was 65,016.

Multiplying 65,016 times 35 cents, a figure of \$22,755.60 was calculated as the total contribution due to the ITPE-NMU Pension Fund; multiplying 65,016 times 45 cents, a figure of \$29,257.20 was calculated as the total contribution due to the ITPE-NMU Health & Welfare Fund; and multiplying 65,016 times \$1.22, a figure of \$79,319.52 was calculated as the total contribution due to the ITPE-NMU Annual Benefit Fund.

Section 7 of the amended specification thus calculated the payment by HBS of the sums set out above as the total contributions necessary to make the funds whole for the discrimination practiced against them, plus interest.

The Board's Order also directed the employees be made whole for any losses they suffered as the result of HBS' failure to make the requisite contributions, such as medical bills, etc. The specification, however, does not set forth any such losses.

In view of the foregoing, I find and conclude the payment of the amounts specified above to the three funds will satisfy HBS' obligations for withholding the contributions it should have made to the funds during the backpay period.

[Recommended Order omitted from publication.]