

Pepsi-Cola Bottling Company of Fayetteville, Inc. and United Food and Commercial Workers Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 11-CA-14889, 11-CA-15034, 11-CA-15181, 11-CA-15281, 11-CA-15383, and 11-CA-15556

March 24, 2000

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 9, 1998, Administrative Law Judge Robert C. Batson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and an answering brief.

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

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

We adopt the judge's backpay calculations in this compliance proceeding for employees Roger Deskin, Christopher Hyatt,¹ and John Faass. We reverse, however, the judge's backpay calculations for employee Robert Munn, for the reasons discussed below.

1. Robert Munn was employed as a mechanic by the Respondent from September 2 to November 22, 1991, when he was unlawfully discharged. During that time, he was paid \$7.50 an hour. Munn testified that when he was hired, his supervisor told him that at the end of his 120-day probationary period, he would receive a raise of \$1.25 an hour.² The Respondent disputed Munn's assertion that he would have received a raise of \$1.25 an hour, contending, *inter alia*, that there was no set practice for increases to probationary employees. The Respondent further argued that an increase of \$1.25 an hour would have constituted an increase of 16.7 percent, which would have been more than any other probationary employee had received, and would have given Munn a higher salary than his supervisor and fellow employees,

¹ The Respondent's general manager, Randall Kennedy, offered an alternative backpay calculation for computing the backpay of employee Christopher Hyatt. Based on Kennedy's testimony at the hearing, we find that the Respondent's alternative calculations were hypothetical and somewhat speculative. Thus, we agree with the judge that the General Counsel's backpay calculations for Hyatt as set forth in the amended compliance specification are the more accurate and reasonable of the two. *Woodline Motor Freight*, 305 NLRB 6 fn. 4 (1991).

Contrary to our dissenting colleague, and for the reasons set forth at sec. 2 of this decision, we also agree with the judge that the Respondent's backpay liability for Hyatt should be offset only for 2 weeks in November 1995.

² Munn was unlawfully discharged before the end of his probationary period.

who had been employed by the Respondent for a longer period of time than Munn.

The judge credited the Respondent's testimony that Munn would not have received a raise of \$1.25 an hour, noting that an increase of 16.7 percent did seem excessive and would have given him a higher salary than his supervisor and his fellow employees. The judge found that instead, because Munn had been employed by the Respondent for a short time, a 3-percent yearly increase during the backpay period was a reasonable figure. He stated that a 3-percent yearly increase was a more likely and reasonable amount than the amount alleged in the General Counsel's amended compliance specification, which he noted was based on a sampling of similar employees and on Munn's alleged salary of \$8.75 an hour (his starting salary plus his alleged \$1.25 raise). Accordingly, the judge recalculated the gross backpay owed to Munn from that alleged in the amended compliance specification.

The General Counsel excepts to the judge's rejection of the gross backpay formula used for Munn in the amended compliance specification. The General Counsel contends that the judge erred when he concluded that the compliance specification was "based [*inter alia*] upon [Munn's] alleged salary of \$8.75 an hour." Rather, the General Counsel explains that the compliance specification used a representative employee formula, and thus was based on the wage rates of the other mechanics employed throughout the backpay period, not on an alleged salary of \$8.75 an hour.³ The General Counsel also contends that the judge's assignment of a 3-percent yearly increase to Munn was arbitrary and unsupported by record evidence.

We find merit in the General Counsel's exceptions. An examination of the record reveals that the amended compliance specification with regard to Munn was not based on Munn's alleged salary of \$8.75 an hour, but rather was based on a representative employee formula, a method which has long been used by the Board. *Midwest Hanger Co.*, 221 NLRB 911, 915 (1975), *enfd.* in relevant part 550 F.2d 1101 (8th Cir. 1977). Therefore, the judge's assignment of a set wage increase for Munn was neither justified nor necessary. Thus, contrary to the judge, we adopt the backpay amounts for Munn as set out in the General Counsel's amended compliance specification, and we shall modify the judge's recommended Order accordingly.

2. The General Counsel does not except to the judge's finding that the Respondent's liability for backpay owed to Christopher Hyatt should be offset by the amount he would have earned from one of his interim employers, Coca-Cola, for the approximately 2-week period follow-

³ The General Counsel notes that the record evidence concerning the wage rates of the other mechanics shows that these rates were well under \$8.75 an hour.

ing the cessation of his employment with Coca-Cola after failing a drug test, and before he obtained interim employment with another employer (at lower wages than what he had been earning from Coca-Cola). Our dissenting colleague, however, would find that the Respondent's backpay liability should be offset by the amount Hyatt would have earned from Coca-Cola if he had remained employed there for the *entire* remainder of his backpay period.

Hyatt was unlawfully discharged by the Respondent on December 30, 1992, and was reinstated to his prior position with the Respondent on May 12, 1997. He obtained substantial interim employment during 1993, 1994, 1995, and 1996. There was a dispute as to his interim earnings for a period in November 1995, when Hyatt left his interim employment with Coca-Cola after he failed a drug test. There was some uncertainty about the circumstances of his leaving Coca-Cola. The Region's compliance officer testified that Hyatt resigned after being given the option of resigning or being fired. Hyatt was asked by the Respondent's counsel at the hearing why he was fired by Coca-Cola, and he replied, "I failed a drug test." Hyatt was unemployed for about 2 weeks thereafter prior to obtaining another job, which paid less than the Coca-Cola job. The General Counsel determined that by resigning his employment, Hyatt failed to mitigate damages for that 2-week period of unemployment, and thus the General Counsel extended his interim earnings at Coca-Cola for that 2-week period.

As the judge correctly stated, it is the Respondent's burden to establish any failure by Hyatt to mitigate his backpay damages. The applicable principles are well established, and are summarized in *Ryder System*, 302 NLRB 608, 610 (1991), *enfd.* 983 F.2d 705 (6th Cir. 1993). As applied here, these principles require the Respondent to establish that Hyatt incurred a willful loss of interim earnings. More specifically, the Respondent must establish either that Hyatt unjustifiably or unreasonably resigned from Coca-Cola of his own volition, or, if instead he was discharged, that it was for deliberate or gross misconduct. We agree with the judge that the Respondent has failed to establish either of the above.

First, the record establishes that, after failing a drug test, Hyatt was given an ultimatum to resign or be fired. His subsequent resignation, therefore, was clearly not voluntary, but was instead compelled; he had no meaningful choice. Thus, we find that Hyatt was effectively discharged from his interim job with Coca-Cola because he failed a drug test and that he did not voluntarily quit, as asserted by our dissenting colleague. Further, as discussed below, we find, in agreement with the judge and contrary to our dissenting colleague, that the Respondent has not established that Hyatt's discharge was based on deliberate or gross misconduct.

The discharge of an employee for cause by an interim employer does not constitute a willful loss of earnings by

the discriminatee in the absence of proof that the discriminatee has committed an offense involving moral turpitude. *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981), *enfd.* mem. 718 F.2d 1104 (7th Cir. 1983), *cert. denied* 469 U.S. 982 (1984). In *Mid-America Machinery*, the employer attempted to establish that the discriminatee had incurred a willful loss of earnings by introducing a termination report which stated that he was discharged for "absenteeism, poor quality of work and bad attitude," and added in a handwritten notation, "drunk and disorderly." In the absence of evidence as to the precise circumstances surrounding the reference to "drunk and disorderly," however, the Board found that the employer had not established that the discriminatee had engaged in gross misconduct. *Id.* at 319. Similarly, in this case, the only evidence introduced by the Respondent is an acknowledgment by Hyatt that he failed a drug test. There is no evidence at all about the circumstances that led to the administering of the drug test, the nature of the test, or the results of the test. The mere fact that Hyatt failed an unspecified drug test under unspecified circumstances does not establish conduct on his part constituting gross misconduct.

Finally, contrary to our dissenting colleague, we find that the Respondent's establishing simply that Hyatt failed a drug test does not shift the burden to the General Counsel to show mitigating circumstances surrounding the drug test. We find the cases relied upon by our colleague in this regard to be inapposite, applicable only to circumstances in which an employee has voluntarily quit his interim employment—a circumstance that we have found is clearly not present here. Thus, in *Big Three Industrial Gas*,⁴ the discriminatee in question unreasonably quit his interim job, and thus incurred a willful loss of interim earnings, solely because, in his own words, "I didn't get along with the supervisor out there." 263 NLRB at 1198–1199. In *Minette Mills*,⁵ the discriminatee in question, "fearing for her health," reasonably quit her interim job because of the stress created by the nature of the job and her supervisor's unprofessional method of supervision. 316 NLRB at 1016–1018 (sec. II,E,6(b), Debra Wright).

Accordingly, we find that the Respondent's liability for backpay owed to Christopher Hyatt should be offset by the amount he would have earned from Coca-Cola only through the approximately 2-week period after the cessation of his employment with Coca-Cola and before he obtained new interim employment with another employer at lower wages than what he had been earning from Coca-Cola.

⁴ 263 NLRB 1189, 1199 (1982), overruled on other grounds *American Navigation Co.*, 268 NLRB 426, 427 (1983).

⁵ 316 NLRB 1009, 1010 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

Substitute the following for the amount of backpay due to employee Robert Munn:

“Robert Munn \$18,444.67”

MEMBER BRAME, dissenting in part.

I agree with my colleagues in all respects except that for employee Christopher Hyatt, I would mitigate the Respondent’s backpay liability starting with the date Hyatt left his employment at interim employer Coca-Cola and continuing for the remainder of his backpay period, by offsetting the amount Hyatt would have earned at Coca-Cola had he stayed there. This is in contrast to my colleagues, who have affirmed the administrative law judge’s mitigating the Respondent’s backpay liability for Hyatt by offsetting the earnings he would have earned at Coca-Cola only for a 2-week period in which Hyatt was unemployed after leaving Coca-Cola.

Hyatt was unlawfully discharged by the Respondent on December 30, 1992, and was reinstated to his prior position with the Respondent on May 12, 1997. In November 1995, Hyatt left his interim employment with Coca-Cola after failing a drug test. The Region’s compliance officer testified that Hyatt resigned after being given the option of resigning or being fired. Hyatt was asked by the Respondent’s counsel at the hearing why he was fired by Coca-Cola, and he replied, “I failed a drug test.” Hyatt was unemployed for about 2 weeks thereafter prior to obtaining another job, which paid less than the Coca-Cola job. The judge adopted the General Counsel’s determination that Hyatt failed to mitigate the damages for that 2-week period of unemployment, and thus extended his interim earnings at Coca-Cola for that 2-week period. My colleagues have adopted this conclusion.

Contrary to my colleagues, I find that the Respondent has met its burden of establishing that Hyatt failed to mitigate his backpay damages, regardless of whether he voluntarily left Coca-Cola or was fired, by extracting the testimony that Hyatt was fired by (or voluntarily left) Coca-Cola because he “failed a drug test.” The General Counsel has failed to present any evidence to indicate that the drug test was unfairly or unlawfully applied, or to explain the circumstances of Hyatt’s taking the test. For example, any possible mitigating factors surrounding Hyatt’s testing positive, such as that he had ingested another, legal substance that was producing a positive result, were within the peculiar knowledge of Hyatt, and

thus it would be unreasonable to require the Respondent to prove the absence of such factors.¹

In a similar case, *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982) (overruled on other grounds in *American Navigation Co.*, 268 NLRB 426, 427 (1983)), the Board found that the respondent met its burden of establishing that an employee had failed to mitigate backpay damages by “unreasonably” quitting his interim employment, by extracting the employee’s testimony that he quit because he “didn’t get along with the supervisor.” The Board also noted that the surrounding circumstances of the quit were within the peculiar knowledge of the backpay claimant, and thus it would be unreasonable to require the respondent to prove the absence of the various circumstances that conceivably could make the decision to quit a “reasonable” one. The Board found that “once [r]espondent showed that [the employee] had quit the equivalent [interim job], it fell to the General Counsel to demonstrate that the decision to quit was, in the circumstances, ‘reasonable.’” Absent such a showing by the General Counsel, the Board concluded that the quitting amounted to a willful forfeiture of equivalent interim earnings. *Id.* at 1199.

Thus, given that here the Respondent established that Hyatt either quit or was fired for failing a drug test—which I assert establishes either that Hyatt did not leave his employment with Coca-Cola for a “justifiable” reason,² or that Hyatt was discharged for “gross misconduct”³—the burden then shifted to the General Counsel to demonstrate that the drug test was unfairly or unlawfully applied or that the surrounding circumstances would excuse the positive test. See *Big Three Industrial Gas*, supra; *Minette Mills*, 316 NLRB 1009, 1010 (1995). Absent such a showing by the General Counsel, I conclude that Hyatt’s leaving the Coca-Cola job amounted to a willful forfeiture of interim earnings. Accordingly, I would offset Hyatt’s backpay for the remainder of his backpay period by the amount he would have earned had he remained in the employ of Coca-Cola.

¹ My colleagues cite *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981), enfd. mem. 718 F.2d 1104 (7th Cir. 1983), cert. denied 469 U.S. 982 (1984), in which the Board found that the employer had failed to establish that a discriminatee had engaged in gross misconduct involving being drunk and disorderly while at work, which, if shown, would have constituted a willful loss of employment. *Mid-America Machinery* is distinguishable from the instant case, however, because there the discriminatee denied that he had been drinking that day, and the Board found that the Respondent did not show otherwise. Here, in contrast, Hyatt admitted to failing the drug test, and did not deny having taken drugs.

² *NLRB v. Ryder System*, 983 F.2d 705, 714 (6th Cir. 1993).

³ *Ryder System*, 302 NLRB 608, 610 (1991).

Jane North, Esq., for the General Counsel.
Joel I. Keiler, Esq., for the Respondent.

SUPPLEMENTAL DECISION

ROBERT C. BATSON, Administrative Law Judge. This case was tried before me on September 2–4 and October 16, 1997, in Fayetteville, North Carolina.¹ On December 16, 1994, the Board issued a Decision and Order directing Pepsi-Cola Bottling Company of Fayetteville, Inc. (the Respondent), to take certain affirmative action, including reinstating John Faass Jr., Christopher Hyatt, and Robert Munn, and making them whole for the losses that they suffered as a result of the unfair labor practices of the Respondent, found to have violated Section 8(a)(1), and (3) of the Act. On December 30, 1996, the United States Court of Appeals for the Fourth Circuit entered a judgment enforcing, in relevant part, the Board's Order. The amended compliance specification herein issued on September 2, 1997, alleging the backpay due to Faass, Hyatt, and Munn. This specification was further amended at the hearing to allege that Roger Deskin is owed \$377.60 due to an unlawful 5-day suspension.

I. GENERAL PRINCIPALS

It is the General Counsel's burden to prove the gross amount of backpay due to the discriminatees. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). The burden then shifts to the employer who committed the unfair labor practices to establish facts that would reduce the gross amount of backpay owed. *Chem Fab Corp.*, 275 NLRB 21 (1985); *Florida Tile Co.*, 310 NLRB 609 (1993). In *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 891 (D.C. Cir. 1996), the court referred to the difficulty of devising a formula to determine the discriminatee's backpay:

This formula may not reach the exactly correct figure, but there is no suggestion of a formula that could, since the discriminatees did not actually work during the period... The approximation thus reached is permissible in view of the impossibility of exactitude.

In *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), the Board, citing well-established cases on the subject, stated:

Any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. The formula should be representative of the discriminatee's employment history and take into account intermittency of employment. Where awards may be only close approximations, the Board may adopt formulas reasonably designed to produce such approximations. Another well established principle is that "the backpay claimant should receive the benefit of the doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." [Citations omitted.]

The judge should accept the General Counsel's formula if it is reasonable and fair. *Mid-State Ready Mix*, 316 NLRB 500 (1995). However, where the respondent offers an alternative formula, the Judge must determine the "most accurate" method

¹ Counsel for the Respondent's unopposed motion to correct transcript, attached to his brief, have been granted.

of determining backpay amounts. *Woodline Motor Freight*, 305 NLRB 6 (1991).

Respondents often litigate the interim earnings and interim employment (or the lack thereof) of the discriminatees in order to reduce the net backpay due to the discriminatees. In this regard, the respondent has the burden of establishing such matters as unavailability of jobs, willful loss of earnings, and interim earnings to be deducted from backpay. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Although a discriminatee must attempt to mitigate the loss of income due to the discrimination, he/she is held only to a reasonable assertion and not to the highest standard of diligence. *Arlington Hotel Co.*, 287 NLRB 851 (1987). The burden the discriminatee bears is not onerous and does not require that he/she be successful. In *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985), the court stated: "basic principals of equity and fairness mandate that the burden of proof must remain on the employer because the employer's illegal discharge of the employee precipitated the search for another job."

II. THE INDIVIDUAL DISCRIMINATEES

A. Roger Deskin

The Board found, and the court agreed that the 5-day suspension to Deskin between June 29 and July 3, 1992, violated the Act. Counsel for the General Counsel computed his backpay as \$377.62 (at his hourly wage rate of \$7.95 an hour), plus interest of \$160 through August 31, 1997. The Region's compliance officer testified that Deskin had no interim employment, because he was scheduled to take his vacation at that time and "he just looked upon this as being a continuation of his vacation and there was no indication that he took that opportunity to work elsewhere." Deskin was present at the hearing on, at least, one day and was not called by either the General Counsel or the Respondent. I therefore find that Deskin is owed \$377.62, plus interest from July 3, 1992.

B. Christopher Hyatt

Hyatt had been employed by the Respondent as a bulk route salesman for, at least, 3 years and was paid on a commission basis. His job consisted of covering a chain of about five grocery stores, ordering the products and keeping the stores' shelves fully stocked, neat, and clean. He was terminated on December 30, 1992. Hyatt received an offer of reinstatement from the Respondent in December 1996 and returned to work on January 27, 1997. At that time, Respondent assigned him to a position of swingman, relief person. He was relief for three different routes and was paid a third of each of those routes. He was paid "on the clock" at first, and then went on commission. On about May 12, 1997, he was assigned to a permanent bulk route and was paid on commission. Because his pre-May 12 employment was not the equivalent of his prior employment, and because his pay was less than he would have received if he had been immediately reinstated to his prior job, Counsel for the General Counsel contends, and I agree, that because he was not reinstated to a substantially equivalent position of employment until May 12, 1997, the backpay period continues to that date.

Jack Bradshaw, supervisory compliance officer for Region 11, testified that in determining Hyatt's gross backpay, he be-

gan with Hyatt's word that at the time of his discharge by Respondent, he was earning between \$30,000 and \$32,000 a year. He then used W-2 forms that he received from the Respondent for its bulk route salesmen and used all the employees in that classification whose pay fell within that range. For the year 1993, he used as representative employees seven employees whose yearly pay ranged from \$26,924 to \$37,760. For 1993 and the other years involved herein, he did not use the yearly salaries of four employees who earned between \$3298 and \$19,075 because he determined that they had not been employed sufficiently during that year to warrant their inclusion. The average of these yearly wages in 1993 was \$31,783, and from that he computed a quarterly figure, \$7946 and a weekly figure, \$611. His used a similar method for determining the gross backpay for 1994 by using the same employees as he had used in 1993, with the exception of one, Gary Jones, who, apparently, was no longer employed by the Respondent or was no longer employed as a bulk route salesman, and James Britt, whose yearly earnings of \$5565 were clearly not representative of this group's yearly earnings. The five remaining bulk route salesmen earned between \$28,045 and \$33,646 in 1994, for an average of \$31,309, which is \$7827 quarterly, and \$602 weekly. In 1995, four of those bulk route employees remained, with earnings ranging from \$31,161 to \$40,105, for an average of \$34,372, \$8,593 quarterly and \$661 weekly. In 1996, only two of the seven original group was still employed by the Respondent in this job category, and they earned \$38,297 and \$42,086, for an average of \$40,192, \$10,048 quarterly, and \$773 weekly. As these employees' 1997 earnings were not available to the Board's Regional Office when it prepared the compliance specification, the above figures from 1996 were utilized for 1997. Bradshaw testified that he utilized the same bulk route salesmen from 1993 through 1996, or those that were still employed, to maintain consistency in his determinations.

Randall Kennedy, Respondent's general manager, testified that he did some calculations to determine the gross backpay due to Hyatt:

I went back and constructed his route as if he'd stayed there, re-did his route; put the accounts in that would have been on that route; pulled the computed volume and plugged them in on a yearly basis in 1993, because our computer drops after two years. I do not have accurate volume for the—each individual account. So what I did for '93 was said that 1994's volume was actually a 10% increase over what he would have done in 1993, and that's how I got the '93 number. From '94 on are actual—is actual volume by store for the route that he would have had during that time period, each year.

He testified that these calculations were based upon two computer report forms, SA-140 and SA-790, neither of which he brought to the hearing.²

In determining Hyatt's gross backpay, the Region used W-2 forms that it received from the Respondent. It is difficult to determine the basis of Kennedy's calculations because he did

² Kennedy's calculations for Hyatt are apparently contained in R. Exh. 21, 1 of 22 exhibits of Respondent that were received into evidence. The court reporter's notes in the binder that would normally contain the Respondent's exhibits, states that counsel for the Respondent withdrew the exhibits in order to make duplicates. It appears that counsel for the Respondent has failed to proffer these exhibits since the close of the hearing, and I will therefor take no notice of them.

not produce the forms upon which they were allegedly based and the documents containing his calculations was withdrawn by counsel for the Respondent and never returned. The General Counsel's calculations are certainly reasonable, and are the most accurate of the two. I therefore find that the gross backpay for Hyatt is as set forth in appendix F of the amended compliance specification.

Hyatt obtained substantial interim employment during 1993, 1994, 1995, and 1996. I have previously stated that I agree with the General Counsel's contention that because he was not reinstated to a substantially equivalent position when he returned to work on January 27, 1997, he is entitled to reimbursement for this period, as well, and find no reason to dispute the Region's determination that his net backpay for the first quarter of 1997 is \$5240, plus interest, and \$1278 for the second quarter of 1997. There is a dispute as to interim earnings for a period in about November 1995 when Hyatt left his interim employment with Coca-Cola after he failed a drug test, and there is some uncertainty of the circumstances of his leaving this employment. Bradshaw testified that Hyatt resigned after being given the option of resigning or being fired. Hyatt was asked by counsel for the Respondent why he was fired by Coca-Cola; he testified: "I failed a drug test." He was unemployed for about 2 weeks prior to obtaining another job, a lower paying job. The Region determined that by resigning his employment, he failed to mitigate the damages for that 2-week period and extended his interim earnings at Coca-Cola for that 2-week period. Respondent's position is that his backpay should end on the day he resigned from Coca-Cola.

As stated above, it is the Respondent's burden to establish that the discriminatee failed to mitigate backpay damages. The longstanding Board law is that if a discriminatee "reasonably" quits interim employment, or leaves it for a "justifiable" reason, he does not forfeit his right to additional backpay. *NLRB v. Ryder System, Inc.*, 983 F.2d 705 (6th Cir. 1993). In *Mastro Plastics Corp.*, 136 NLRB 1342 (1962), the Board stated:

In addition, a claimant who obtains a job but then leaves it for a justifiable reason is not deprived of all further claim; the assumption is that the reason for his quitting the job would not have been present at Respondent's plant and therefore the job is not substantially equivalent.

If, in fact, Hyatt was fired by Coca-Cola, the standard is different. In that situation: "A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment." *Ryder System*, 302 NLRB 608, 610 (1991). In *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, at 512-513 (7th Cir. 1991), the employer defended that the discriminatee's discharge from Aurora constituted a willful loss of earnings that would mitigate its backpay liability. The court stated: "This argument, in turn, hinges upon the factual determination of whether Clement's discharge from Aurora constituted a discharge for gross misconduct . . . Clement admitted that he had been discharged by Aurora, but a discharge from employment, without more, does not reduce a backpay award." The issue is therefor whether the Respondent has satisfied its burden that Hyatt was not justified in quitting his job at Coca-Cola after failing a drug test there, if he quit his employment at Coca-Cola or, if he was fired, it was due to deliberate or gross misconduct. I find that the Respondent has not satisfied either burden. The sole evidence of his leaving Coca-Cola's employment is his testimony: "I failed a drug

test.” Respondent, who shoulders the burden herein, did not produce evidence to establish that the drug test was lawfully, or fairly applied, or the circumstances of Hyatt taking the drug test. I therefor find that the Region’s calculations were correct in continuing his pay at Coca-Cola for his 2 weeks of unemployment, and find that the net interim earnings as amended and set forth in the amended compliance specification are correct. The net backpay due Hyatt is \$60,905, plus interest.

C. Robert Munn

Munn was employed as a mechanic by the Respondent from September 2, to November 22, 1991. From that time until the time of his discharge, he was paid \$7.50 an hour. He testified that at the time of his hire, Bob Talkin,³ his supervisor, told him that he would start at \$7.50 an hour and at the conclusion of his 120-day probationary period he would receive a raise of \$1.25 an hour. Respondent disputes this. Kennedy testified that he does not know what Talkin told Munn when he was first hired, but there is no set practice for increases to probationary employees, some get increases, others don’t. If Munn had received a \$1.25-an-hour increase as he testified, that would be an increase of 16.7 percent, more than any other probationary employee has received, and would have given him a higher salary than his supervisor and his fellow employees, who had been working there for a longer period. He testified further that Munn would not have received a raise when he completed his probationary period. I would credit Kennedy that Munn would not have received a \$1.25 hourly increase, as an increase of 16.7 percent does seem excessive, especially as it would give him a higher salary than his supervisor and fellow employees. Rather, because Munn had been employed by the Respondent for a short time, I find that a 3-percent yearly increase during the backpay period is a reasonable figure for the Respondent’s operation, and is a more likely and reasonable amount than the amount alleged in the amended compliance specification, which is a sampling of similar employees, and was based upon his alleged salary of \$8.75 an hour.

The Region originally alleged that the backpay period for Munn began on November 22, 1991, and ended on April 10, 1997, when he was effectively offered reinstatement. On the final day of hearing, the Regional Office amended the compliance specification for Munn to end on November 28, 1996, and amended the specification appropriately. I agree with counsel for the General Counsel that the cutoff date for Munn should be November 28, 1996, but because of my discrediting Munn’s testimony about the alleged \$1.25-pay increase, my findings of gross backpay due to Munn differs from the General Counsel’s figures.

Munn had substantial interim earnings during the backpay period and, in fact, during all but two of these quarters, his interim earnings exceeded his gross backpay, thereby absolving Respondent of any backpay liability for these periods. As stated above, it is the Respondent’s burden to establish the willful loss of earnings or unavailability for jobs of the discriminatee. Respondent has introduced absolutely no evidence in that regard for Munn and, as stated above, the evidence establishes the opposite, that he was diligent and successful in obtaining interim employment. I therefore find that the interim earnings

figures for Munn, as contained on exhibit D of the amended compliance specification, are correct.

As stated above, in determining the gross backpay for Munn, I have concluded that he would have received a 3 percent yearly increase and that he could have, and would have worked 45 hours a week or the Respondent, as he testified. I therefore find the following, with interest through August 31, 1997:

Year	Quarter	Gross Backpay	Net Interim Earning	Total	Total For Quarter
1991	4	\$1687.50	\$1220	\$467.50	\$467.50
1992	1	4522.05	5028	0	
1992	2	4522.05	5183	0	
1992	3	4522.05	5026	0	
1992	4	4522.05	4743	0	
1993	1	4656.60	3834	822.00	822.00
1993	2	4656.60	5573	0	
1993	3	4656.60	5070	0	
1993	4	4656.60	5070	0	
1994	1	4797.00	4829	0	
1994	2	4797.00	4988	0	
1994	3	4797.00	5878	0	
1994	4	4797.00	4998	0	
1995	1	4943.25	5115	0	
1995	2	4943.25	5115	0	
1995	3	4943.25	5115	0	
1995	4	4943.25	5115	0	
1996	1	5089.50	6012	0	
1996	2	5089.50	6012	0	
1996	3	5089.50	6012	0	
1996	4	3390.00	4008	0	

The backpay due to Robert Munn is therefore \$1,289.50 plus interest.

D. John Faass

The backpay period for Faass begins on May 27, 1993, when he was unlawfully discharged and ends on November 29, 1996, when he was offered reinstatement. He was employed by Respondent as a route salesman and was paid on an hourly rate plus commission. By letter dated March 14, 1997, Bradshaw wrote to counsel for the Respondent requesting, *inter alia*, all the forms it utilized in making quarterly Federal tax payments to the U.S. Treasury for route salesmen from 1993 to 1996. Respondent transmitted to the Region W-2 forms for the requested job classifications, without any further explanation. The Region used these forms in order to determine Faass’ gross backpay even though, as they learned at the hearing, these W-2 forms included salesmen who were paid straight commission, as compared to Faass, who was paid an hourly rate plus commission. Counsel for the Respondent understandably objects to these calculations as based upon an incorrect grouping. Counsel for the General Counsel, while agreeing in her brief that it was incorrectly based on employees who were paid solely on commission basis, defends that this was the fault of the Respondent and counsel for the Respondent. They transmitted the forms to the compliance officer without explanation, and refused to explain the job classifications and the classification numbers, and they therefore are barred from now objecting to these figures. I agree with counsel for the General Counsel. Respondent knew

³ Kennedy testified that Talkin is on permanent disability from the Respondent suffering from Parkinson’s disease.

very well what records the Region wanted, not only from the Board and the court's decisions, but from subsequent correspondence. For example, on December 3, 1996, Bradshaw wrote to counsel for the Respondent, *inter alia*:

With respect to the records we seek in order to determine the gross backpay for the three discriminatees in this matter, initially we would seek to review the backpay and time and attendance records of those individuals who occupied the positions that these discriminatees held at the time of their separations throughout the backpay liability period for each discriminatee. We are amenable to any assistance which you can provide that would indicate that another method of arriving at the gross backpay for these discriminatees is more appropriate.

By letter dated December 12, 1996, to counsel for the Respondent, Bradshaw repeated his availability to inspect and review records relevant to the discriminatees' backpay. Ten days later, Bradshaw wrote again to counsel for the Respondent stating: "Please advise me as soon as possible of the earliest date that you or a company representative would be able to meet with a Board agent to commence the computations of the backwages due." By letter dated January 21, 1997, Bradshaw wrote to counsel for the Respondent: "Earlier this month you indicated that the records necessary for the region to compute the gross backpay in this matter would be available by the middle of the month. Therefore, I would appreciate hearing from you or your client as soon as possible so that we can arrange to meet and review these records." By letter dated March 28, 1997, counsel for the Respondent wrote to Bradshaw: "[M]y client is sending you all of the W-2 forms for all of the employees in all of the categories and for the dates you have deemed appropriate."

The above evidence establishes that Respondent substantially delayed transmitting to the Region the requested information and, when it did transmit the information it failed to offer any explanation or assistance to the Board in properly computing the backpay. Bradshaw had requested that they meet with him to compute the backpay due to the discriminatees. By failing to meet with Regional representatives, and by failing to explain the W-2 forms that it transmitted to the Region, the Respondent is now estopped from objecting to the means of calculating Faass' backpay. I therefore agree with the General Counsel's computation of gross backpay for Faass for the period from the second quarter of 1993 through the fourth quarter of 1996, as contained in appendix E on the amended compliance specification, as the most reasonable computation with the records in its possession.

Faass had substantial interim earnings through the backpay period and, in one quarter, his interim earnings exceeded his gross backpay. He began working for FD Services, Inc. on June 16, 1993, and remained there until it was taken over by Day & Zimmerman Services on February 5, 1994. He remained with Day & Zimmerman until October 1995 when he left its employ and immediately began working for Nicholson Electric, where he remained throughout the balance of the backpay period. Respondent produced no evidence to challenge these backpay figures or Faass' attempts to find interim employment, and they probably could not do so as Faass' interim earnings establish a good-faith attempt to mitigate damages. I therefore find that the interim earnings computed by the Region as contained in appendix E of the amended complaint are correct. The net backpay is therefore \$34,707, plus interest.

E. Profit Sharing

The amended compliance specification alleges that Hyatt, Munn, and Faass are entitled to receive all credits, contributions and other benefits provided by the Respondent's retirement plans from their date of hire throughout the backpay period, as if they had never left Respondent's employ. At the hearing herein, this benefit was referred to as Respondent's profit-sharing plan. The Respondent maintains a profit-sharing plan and a 401(k) plan for its covered employees. Employees are eligible for the plan after being employed for 1000 hours in a year, and the plan vests after 5 years of employment. A handout given to employees states that the amount that the Respondent contributes to the plan is determined on a yearly basis by the board of directors and depends upon the financial performance of the Respondent. Counsel for the General Counsel subpoenaed Respondent's records that would have enabled it to determine the amount of profit sharing due to the discriminatees, but the Respondent refused to produce these documents. Kennedy testified that there is a formula for determining the amount of profit sharing, but he does not know what the formula is. Counsel for the General Counsel moved that I keep this record open while the Region proceed with subpoena enforcement for these profit-sharing records, but I denied that request.

Hyatt, Munn, and Faass were employed in job classifications that were covered by the Respondent's profit-sharing plan. Had they not been discriminatorily discharged, they would have been able to share in the benefits of this plan. The Board is entitled to know the formula employed by the Respondent in determining how much was contributed to the plan. However, rather than delaying this proceeding any further, I shall recommend that the Respondent be ordered to pay the appropriate amounts of profit-sharing contributions to Hyatt, Munn, and Faass as if they had continuous service with the Respondent and, if there is disagreement on the amount of these contributions, that there be a subsequent compliance proceeding to resolve this issue.

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

ORDER

The Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall

1. Pay to Roger Deskin, Christopher Hyatt, Robert Munn, and John Faass Jr. the backpay set forth opposite his name, with interest thereon to be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). There shall be deducted from the amounts due any tax withholding required by law.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that there be a further compliance proceeding to determine the amount of profit-sharing and/or retirement benefits due to Hyatt, Munn, and Faass.

Christopher Hyatt \$60,905.00

Robert Munn	1,289.50
John Faass	34,747.00
Roger Deskin	377.62