

**Cobb Mechanical Contractors, Inc. and United Association of Plumbers and Pipefitters, Local Union No. 196, AFL-CIO.** Case 16-CA-16483

April 30, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN AND WALSH

On May 13, 1998, Administrative Law Judge Keltner W. Locke issued the attached supplemental decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Charging Party filed cross-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 decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

The judge found that a premise implicit in the backpay formula the General Counsel used is that the Respondent would have hired the discriminatees who applied as journeyman plumbers to fill plumber's helper positions. The Respondent has excepted to this finding. We find no merit to the exception.

In compliance proceedings, the Board attempts to reconstruct, "as nearly as possible," the economic life of each claimant and place him in the same financial position he would have enjoyed "but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Determining what would have happened absent

a respondent's unfair labor practices, however, is often problematic and inexact. Consequently, a backpay award "is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

The Board's well-settled policy is that "[a backpay] 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." *La Favorita, Inc.*, 313 NLRB 902 (1994). Further, it is also well-settled that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. See *Ryder/P\*I\*E\* Nationwide*, 297 NLRB 454, 457 (1989), enfd. in relevant part 923 F.2d 506 (7th Cir. 1991).

The compliance officer testified that the discriminatees informed her they would have accepted jobs as plumber's helpers, if they had been offered those positions. Based on this testimony, which the judge credited, it is clear that the backpay formula is not unreasonable or arbitrary. Rather, it is a reasonable attempt to approximate what the discriminatees would have earned absent any discrimination. To the extent that there is a lack of certainty on this point, such uncertainty should be resolved in favor of the wronged party rather than the wrongdoer.

Further, at the heart of the Respondent's exceptions is the argument that, with minor exceptions, the discriminatees are entitled to no backpay. It is axiomatic, however, that the finding of an unfair labor practice is presumptive proof that some backpay is owed. See *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Accordingly, we find, in agreement with the judge, that the backpay formula is acceptable and that it approximates what the discriminatees would have earned had there been no discrimination.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Cobb Mechanical Contractors, Inc., Amarillo, Texas, its officers, agents, successors, and assigns, shall make whole the individuals 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 withholdings required by Federal and State laws:

Raymond Rex Bohannon	\$97,186
Viviano Coronado	18,002
Billy Culwell	-0-

<sup>1</sup> The Respondent implicitly has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In agreeing with the judge's finding that discriminatee Don Green did not make reasonable efforts to mitigate damages, we observe that the judge's decision is consistent with *Ferguson Electric Co.*, 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001), which issued after the judge's decision.

<sup>3</sup> In his decision, the judge made three inadvertent typographical and computation errors to which the General Counsel filed cross-exceptions. Accordingly, in sec. III,B, par. 1, L. 1, of the judge's decision, the number "486,753" should be "\$86,753." In addition, in computing James Christopher Monroe's backpay in sec. III,K, par. 10, col. 4, of the judge's decision, the number "3411" should be "3141" and the total net backpay in sec. III,K, par. 10 should be \$26,303 rather than \$23,162. Lastly, in sec. III,M, par. 9 of the judge's decision, Keith Monroe's total net backpay should be \$37,823, as calculated by the General Counsel, rather than \$34,263.

Larry Gallop	7,163
Donald Green	-0-
James Kerek	68,260
Kris Kienast	-0-
Mike Lea	22,034
John Lester	3,092
Todd Lindsey	14,000
James Chris Monroe	26,303
James Monroe	24,525
Keith Monroe	37,823
Kelton Naylor	69,111
Randy Noland	33,994
Donald Peyton	16,842
Donnie Sarrett	344
Joe Simms	41,316
William Garland Stevens	58,646
Eddie Dwayne Terry	46,864
Mike Thompson	29,961
William White	<u>57,424</u>
<b>TOTAL</b>	<b>\$672,890</b>

IT IS FURTHER ORDERED that the Respondent shall take the action set forth in paragraphs 1 and 2 of the judge's recommended Order.

*Elizabeth Kilpatrick, Esq.*, for the General Counsel.  
*W. V. Siebert, Esq. (Sherman & Howard, L.L.C.)*, for the Respondent.  
*Benjamin N. Davis, Esq. and Brian A. Powers, Esq. (O'Donoghue & O'Donoghue)*, for the Charging Party.

SUPPLEMENTAL DECISION  
STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. This is a proceeding to determine backpay at the compliance stage. On April 26, 1995, the Honorable Frederick C. Herzog, Administrative Law Judge, issued a decision in this matter. Judge Herzog found that Cobb Mechanical Contractors, Inc. (the Respondent or the Employer) had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing and refusing to consider certain individuals,<sup>1</sup> named in the decision, "as plumbers, plumber helpers and pipefitters at jobsites in Amarillo and Dalhart, Texas where it was performing work in connection with the construction of Federal prisons at the respective sites, because the individuals were members of the Union." *Cobb Mechanical Contractors, Inc.*, JD(SF)-45-95, slip op. at 21. (GC Exh. 1(a).)

<sup>1</sup> The decision identified these persons as Don Green, Donnie Sarritt, James Kerek, Raymond Bohanon, James Monroe, Kelton Naylor, Chris Monroe, Kelton Naylor, Keith Monroe, William (Bill) White, Joe Simms, Garland Stevens, Mike Thompson, Viviano Coronado, Eddie Terry, Randy Noland, Billy Culwell, Kerwin Todd Lindsey, Don Peyton, Mike Lea, John Lester, Larry Gallop, and Kris Kienast.

On June 23, 1995, the National Labor Relations Board (the Board) entered an order which adopted Judge Herzog's decision and ordered the Respondent to take the action set forth in it. (GC Exh. 1(b).) On June 6, 1996, the United States Court of Appeals for the Fifth Circuit entered a judgment enforcing the Board's Order. (GC Exh. 1(d).)

The General Counsel and Respondent were not able to agree on the amount of backpay which Respondent must pay to the discriminatees to comply with the Board's Order. On June 20, 1997, the Regional Director for Region 16 of the Board issued a compliance specification (the specification) and notice of hearing, alleging the amounts of backpay which Respondent must pay to the named discriminatees to comply with the Board's Order.

I heard this case in Amarillo, Texas, on September 2-4, 1997. After the hearing, the parties filed briefs, which I have considered.

I. THE ISSUES

The Respondent must comply with Judge Herzog's Order, which was adopted by the Board without modification and enforced by the court of appeals.<sup>2</sup> The issues before me concern the amount of backpay which the Respondent must pay to comply with that order.

In its second amended answer to compliance specification and notice of hearing (the answer), the Respondent raises a number of defenses. Its "Tenth Separate Defense" states as follows:

There is no evidence that any discriminatee is equal to, or better qualified than any plumber hired by Respondent. There is no evidence that such discriminatee met the necessary licensing requirements for employment as of the relevant time period.

(GC Exh. 1(m).)

The General Counsel asserts that the Respondent may not raise this issue. The General Counsel's brief states, in part:

Respondent claims that in order for the discriminatees to be owed any compensation, it must be shown that the discriminatees were more qualified than the employees utilized by Respondent. Respondent's argument appears to be that it would not have hired the discriminatees regardless of their to relitigate its violation of Section 8(a)(3) of the Act.

<sup>2</sup> in its posthearing brief, Respondent asserts that "there exists no valid Order of the NLRB on which the General Counsel can lawfully claim backpay from the Respondent." (R. Br. at p. 7.) If Respondent intends these words to be understood by their plain meaning, then this argument must be rejected as frivolous. Judge Herzog's decision concluded with an order that Respondent offer employment to the 22 discriminatees and "make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them." (GC Exh. 1(a) at p. 21.) The Board adopted Judge Herzog's decision and ordered that Respondent "shall take the action" set forth in it. (GC Exh. 1(b).) The United States Court of Appeals for the Fifth Circuit enforced the Board's Order. (GC Exh. 1(c).)

Moreover, Sec. 10(c) of the Act specifically authorizes the Board to enter an order requiring backpay. 29 U.S.C. § 160(c). In these circumstances, there can be no reasonable doubt regarding the validity of the Board's Order in this case.

(GC Br. at 5.)

It is axiomatic that a respondent may not relitigate at the compliance stage an issue already decided during the underlying unfair labor practice proceeding. The Board's Rules and Regulations provide separate hearings for such issues in much the same way that issues of liability and damages, or guilt and sentence, may be heard separately in "bifurcated" civil and criminal trial proceedings. In other words, if an issue has been decided by Judge Herzog, it is not before me to decide again.

However, the Respondent asserts that Judge Herzog did not decide whether it would have hired any of the discriminatees, but only decided that Respondent did not consider them for hire. The Respondent's Brief states that Judge Herzog and the Board at best "deferred the issues of failure to hire, the offering of employment and backpay to the compliance proceeding." (R. Br. at p. 6.)

Certain statements in Judge Herzog's decision would appear to support the Respondent's position. However, that decision must be examined in its entirety to determine whether he found only that Respondent had refused to consider the alleged discriminatees, or, on the other hand, found that Respondent unlawfully had refused to hire them.

The Order issued by Judge Herzog and adopted by the Board directed the Respondent to cease "[r]efusing to consider for employment and/or refusing to employ" the 22 persons it identified by name. The phrase "and/or" suggests that Judge Herzog did not decide the question of whether the Respondent refused to consider a particular discriminatee or refused to hire him, but only decided that, in each instance, the Respondent did one or the other, or both.

In the "Findings and Conclusions" portion of that decision, Judge Herzog includes a subheading entitled "Unlawful Refusal to Hire Allegations." This section concludes with the finding "that Respondent has violated Section 8(a)(3) and (1) of the Act by failing to consider the applications for employment of 22 individuals because of their union activities or affiliation." (GC Exh. 1(a) at p. 17.)

This conclusion does not mention a refusal to hire, only a refusal to consider. It would be consistent, in considering this language together with the "and/or" language of the Order, to infer that Judge Herzog did not resolve the issue of whether any particular discriminatee had been denied employment or only had been denied consideration for employment.

However, other portions of Judge Herzog's decision indicate that he did reach and decide such issues. Thus, the decision specifically found "that the Respondent's refusal to hire was motivated by union animus." (GC Exh. 1(a), p. 27, L. 35, emphasis added.) Moreover, the portion of Judge Herzog's Order requiring the Respondent to take affirmative action specifically directed the Respondent to offer all 22 named discriminatees "employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them, as set forth in the Remedy section of this decision." (GC Exh. 1(a) at p. 21.)

This language is dispositive. My job is not to modify Judge Herzog's Order in any way, but to determine exactly what actions will constitute compliance with it. Since Judge Herzog, in a decision adopted by the Board and enforced by the court of appeals, specifically ordered that the Respondent offer employment to the 22 discriminatees, there is no issue before me concerning whether or not the Respondent would have hired any of them but for its unlawful motivation. It has already been decided that Respondent would have, and should have.<sup>3</sup>

However, Judge Herzog did leave open an issue related to how long each discriminatee would have remained employed by the Respondent after hire. Specifically, his decision did not resolve how the completion of the Respondent's projects at Amarillo and Dalhart, Texas, would have affected the employment of the discriminatees. The remedy section of Judge Herzog's decision concludes with the following language:

This Order is subject to resolution at the compliance proceedings of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987). Consistent with that decision *the Respondent will have the opportunity in compliance to show that, under its customary procedure, an employee in the applicants' position would not have been transferred to another project after the one for which he was hired was completed, and that thus no backpay and reinstatement obligation exists beyond the time when the project as to which the discrimination occurred was completed.*

(GC Exh. 1(a) at p. 21, emphasis added.)

In sum, Respondent may litigate in this proceeding the issue of whether or not it would have transferred any of the discriminatees to other work after the completion of its Amarillo and Dalhart projects. However, Respondent may not litigate, or more precisely, relitigate, whether or not it would have employed any of the 22 discriminatees. Judge Herzog's Order that Respondent offer all of them employment was adopted by the Board in a decision enforced by the court of appeals, and is beyond question now.

<sup>3</sup> Respondent argues in its brief that "the ALJ failed to identify any specific discriminatee who was unlawfully refused employment by Respondent." (R. Br. at p. 8.) That statement is incorrect. Judge Herzog ordered Respondent to offer employment to 22 persons identified by name. Clearly, this Order embodies a finding that the Respondent unlawfully refused to hire each of the persons identified because, if Judge Herzog had found only a refusal to consider for hire, he would have ordered a different remedy.

Respondent had the opportunity to file timely exceptions to this Order, but did not do so, although it did try to file exceptions after the deadline had passed. The Court of Appeals for the Fifth Circuit specifically held that the Board did not abuse its discretion by rejecting the Respondent's untimely exceptions. (GC Exh. 1(c).) Because it did not file timely exceptions to Judge Herzog's Order that it offer employment to the 22 named individuals, the Respondent waived its right to contest that Order. See the Board's Rules and Regulations, Sec. 102.46(g) ("No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding."). Respondent may not avoid the effect of such a waiver now by claiming, incorrectly, that Judge Herzog's decision failed to identify the persons whom it unlawfully refused employment.

## II. THE BACKPAY FORMULA

The Respondent has contested the appropriateness and accuracy of the formula, described in the compliance specification, used to calculate the amount of backpay owed to the discriminatees. These issues will be discussed individually.

### A. Starting Dates

The compliance specification alleges that the backpay period for each discriminatee began “on the date the Respondent employed or transferred an employee to the Amarillo and Dalhart Texas, jobsites instead of employing the discriminatee.” (GC Exh. 1(e) at par. 8.) Respondent’s answer denies this allegation. It states, in pertinent part, as follows:

Respondent denies the allegations contained in paragraph 8 of the compliance specification and denies that any discriminatee is entitled to any backpay. Respondent denies that there has been any finding or proof that any discriminatee is equal to, or better qualified than any employee employed by Respondent at its Amarillo and Dalhart, Texas jobsites. Respondent further denies that employees transferred by Respondent to its Amarillo and Dalhart, Texas jobsites are properly comparable, even assuming the validity of the Board’s remedial theory. In the alternative, Respondent states that the backpay period for each discriminatee would commence on the date Respondent employed a newly hired plumber, not a transfer or rehire, for its Amarillo and Dalhart, Texas jobs.

(GC Exh. 1(m) at par. 8.)

With respect to the first sentence, which denies that any discriminatee is entitled to any backpay, this argument ignores the principle that where there is a wrong under the Act, there is a remedy; the Board’s finding that Respondent unlawfully refused to hire the discriminatees creates a presumption that backpay is appropriate.<sup>4</sup> Respondent has not presented any evidence to overcome this presumption.

With respect to the second sentence, it is irrelevant whether or not “there has been any finding or proof that any discriminatee is equal to, or better qualified than any employee employed by Respondent at its Amarillo and Dalhart, Texas jobsites.” Respondent had the opportunity to make this argument during the proceeding before Judge Herzog, when its reasons for hiring or not hiring a particular person were in issue. However, such issues have already been decided and are not before me now.

With respect to the third and fourth sentences quoted above, Respondent’s answer offers no explanation why the Board should not assume that work performed by an employee transferred from elsewhere to the Amarillo or Dalhart jobsite is not equivalent to work performed by an employee hired at the jobsite. No reason appears obvious.

It appears that Respondent does not base this argument on any difference in the work performed by transferees and the work done by those hired locally. Instead, Respondent draws such a distinction based on its hiring policies. Thus, Respondent’s Br. states, in part, as follows:

Respondent had valid policies of granting a hiring preference to currently employed and previously employed journeyman plumbers, pipefitters and helpers/laborers/apprentices.

(R. Br. at p. 6.)

However, Respondent raised its employment policies as a defense in the proceeding before Judge Herzog, who considered them and found them wanting.<sup>5</sup> Respondent has had its “day in court” regarding its employment policies and may not relitigate the issue now.<sup>6</sup>

Because Respondent disputed the starting dates alleged in the compliance specification, it had a duty to “specifically state the basis for such disagreement, setting forth in detail the respondent’s position as to the applicable premises and furnishing the appropriate supporting figures.” See Section 102.56(b) of the Board’s Rules and Regulations.

Respondent’s answer did propose alternative starting dates for some, but not all, of the discriminatees. (GC Exh. 1(m), Exh. 4.) However, the method of computing these starting dates relied, in part, on assumptions contrary to the facts already resolved in the underlying unfair labor practice proceeding.<sup>7</sup> In other words, accepting those assumptions would amount to a relitigation of issues previously decided and not before me.

I reject the Respondent’s arguments and find, in accordance with paragraph 8 of the specification, that backpay for each discriminatee commenced on the date the Respondent employed or transferred an employee to the Amarillo and Dalhart, Texas jobsites instead of employing the discriminatee. Additionally, based on the record, and noting the absence of evidence which would refute the backpay starting dates alleged in appendix 2 of the compliance specification, I find that the backpay period for each discriminatee began on the date indicated in that appendix.

### B. Starting Dates—Pipefitters

Certain of Respondent’s arguments, regarding the employment of discriminatees classified as pipefitters and plumber’s helpers, can be characterized as disputes about the starting dates of such discriminatees. Therefore, the discussion above, pertaining to starting dates, applies to these arguments as well. However, for clarity, this section of the decision will address the issues regarding pipefitters and plumber’s helpers separately.

Respondent disputes that it would have used discriminatees classified as “pipefitters” to fill plumbers’ jobs. I will not consider this argument to the extent it claims that certain discrimi-

<sup>5</sup> See GC Exh. 1(a), p. 17, LL. 6–8 (“[T]he preponderance of evidence supports a finding that Respondent’s hiring practices served to systematically exclude Union members from consideration for employment).

<sup>6</sup> See *WestPac Electric*, 321 NLRB 1322 (1996). (“[W]e will not allow the Respondent to show in compliance that it would have rejected any of the discriminatees for lawful reasons even if it had considered hiring these job applicants.”)

<sup>7</sup> For example, Respondent assumes that “the backpay period for each discriminatee would commence on the date Respondent employed a newly hired plumber, not a transfer or rehire, for its Amarillo and Dalhart, Texas jobs.” (GC Exh. 1(m) at par. 8.)

<sup>4</sup> See, e.g., *La Favorita, Inc.*, 313 NLRB 902 (1994) (“finding of an unfair labor practice is presumptive proof that some backpay is owed”).

natees would not have been offered employment. Clearly, Judge Herzog ordered the Respondent to offer all discriminatees employment, and the reasons justifying this Order may not be relitigated now.

On the other hand, Judge Herzog did not decide when the Respondent would have hired a particular discriminatee in the absence of unlawful motivation. If Respondent wishes to argue that it would have hired persons classified as pipefitters on different dates than it hired plumbers, that argument is entitled to consideration.

With respect to two of the four discriminatees classified as pipefitters, Culwell and Peyton, Respondent has not raised any contention that these discriminatees would have been hired on different dates or otherwise would be entitled to a different amount of backpay because of their classification as pipefitters. Rather, it simply has contended that they would not have been hired at all.

Specifically, Respondent's answer to the compliance specification included, as exhibit 1, a statement entitled "Excluded Discriminatees." It asserted that two discriminatees, Billy Culwell and Donald Peyton, "are not eligible for receipt of backpay according to General Counsel's Exhibit 6, such individuals *only* applied for pipefitter positions and Respondent employed only two (2) pipefitters on its Amarillo/Dalhart jobsites for a brief period of time." (GC Exh. 1(m), Exh. 1, emphasis in original, footnote omitted.)

Clearly, Respondent cannot force the relitigation of issues already decided by labeling certain discriminatees "Excluded." Because an argument which raises only impermissible issues may not be heard, and because Respondent did not advance any other argument about the employment of Culwell and Peyton which could be heard, the result is silence.

To dispute allegations in a compliance specification, a Respondent must comply with the pleading requirements in Section 102.56 of the Board's Rules and Regulations. That provision states, in part, as follows:

(b) . . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

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

With respect to Culwell and Peyton, Respondent has not raised any argument which may be heard. The resulting silence

constitutes a failure to deny the allegations in the manner required by Section 102.56(b). Therefore, I deem to be admitted to be true the allegations that the backpay starting date for Billy Culwell is January 9, 1994, and the backpay starting date for Donald Peyton is January 10, 1994. (GC Exh. 1(e), par. 10 and app. 2.)

With respect to the other two discriminatees classified as pipefitters, Kerek and Bohanon, the Respondent's answer does provide dates, later than those alleged in the backpay specification, when Respondent would have hired them but for its unlawful discrimination. Specifically, Respondent's answer gives a "hire date" of June 6, 1994, for Kerek and of August 31, 1994, for Bohanon. (GC Exh. 1(m), Exh. 4.)<sup>8</sup>

However, Respondent's answer still fails to satisfy the requirements of Section 102.56 that Respondent set forth in detail its position as to the applicable premises, and furnish the appropriate supporting figures. The answer simply does not provide any explanation for the assertion that, but for the unlawful discrimination, the Respondent would have hired Kerek on June 6 and Bohannon on August 31, 1994. Therefore, pursuant to Section 102.56(c), I deem that Respondent has admitted to be true the compliance specification allegations that the backpay starting date for James Kerek is November 19, 1993, and the backpay starting date for Raymond Bohanon is November 29, 1993.

Additionally, I note that Respondent did not become more specific at the hearing or in its posthearing brief, which contends that "because the job positions [of plumber and pipefitter] are clearly distinct, those discriminatees who applied for only pipefitter positions . . . should be consider only for the position for which they applied—pipefitter." (R. Br. at 22.) Respondent has the burden of showing that it treated the positions of plumber and pipefitter as distinct, separate, and noninterchangeable, and it also bears the burden of proving when it filled such positions. Respondent has not carried either of these burdens.

In its brief, Respondent cites Board precedent, and the *Dictionary of Occupational Titles* published by the United States Department of Labor, to support its argument that plumbers and pipefitters are in two separate occupations. However, the issue to be decided does not concern whether or not the occupations of plumber and pipefitter are distinct. Rather, it involves what sorts of work the Respondent hired pipefitters to do.

Respondent does not meet its burden of proving that it employed pipefitters only for certain limited tasks by showing that the occupations of plumber and pipefitter differ in certain respects. To carry its burden, Respondent must adduce evidence about how it, as an employer, has made work assignments. However, the record does not establish that Respondent actually hired employees and assigned them work based on a strict division between plumbers and pipefitters.

<sup>8</sup> Both of these "hire dates" are considerably later than the dates alleged in the compliance specification. It alleges that in the absence of unlawful discrimination, the Respondent would have hired Kerek on November 19, 1993, and Bohanon on November 29, 1993. (GC Exh. 1(e), app. 2.)

In sum, I find that the General Counsel has established the appropriateness of the starting dates alleged in the compliance specification for the discriminatees classified as pipefitters.

### C. Ending Dates

The specification alleges that for 20 of the 22 discriminatees, the backpay periods had not ended, but “continues until Respondent makes a valid offer of reinstatement.” (GC Exh. 1(e) at par. 11.)<sup>9</sup> Answering this allegation, the Respondent again denies “that any discriminatee is entitled to any backpay” and also “denies that Respondent was obligated to offer reinstatement.” (GC Exh. 1(m) at par. 11.)

I reject Respondent’s denials that it owes any backpay and that it has no obligation to reinstate any discriminatee. These denials seek to relitigate issues previously decided.

However, Respondent does raise additional issues which have not been litigated. It contends that it made offers of employment which tolled its backpay liability. It also argues that the discriminatees’ employment would have ended on completion of the projects at Amarillo and Dalhart.

With respect to the first of these arguments, Respondent’s answer states that it “did in fact make valid offers of reinstatement to each discriminatee, which offers were all declined.” (GC Exh. 1(m) at par. 11.) The General Counsel disputes that the offers of employment were valid.

The Respondent sent letters, dated August 15, 1996, to certain discriminatees. These letters stated as follows:

By this letter, Cobb Mechanical Contractors offers you reinstatement to either the position of Plumber or Plumber helper, depending on availability, to a Cobb jobsite in the state of Colorado. Please fill out the enclosed form and return it as soon as possible in the enclosed postage paid envelope.

(R. Exh. 15.)

At the top of the form enclosed with the letter were boxes labeled “Accept” and “Decline.” At the bottom of the form were lines for signature and date. The body of the form stated as follows:

I, \_\_\_\_\_ reinstatement to the position of Plumber or Plumber helper, depending on availability, at a Cobb Mechanical Contractor’s jobsite in the state of Colorado.

I am available to report to work on \_\_\_\_\_.<sup>10</sup>

I can be reached to discuss job assignments at \_\_\_\_\_.<sup>11</sup>

My current mailing address is \_\_\_\_\_.<sup>12</sup>

<sup>9</sup> The compliance specification alleges that the backpay period for Billy Culwell ended on February 1, 1995, and the backpay period for James Monroe ended on January 1, 1996, the dates on which those discriminatees retired. (GC Exh. 1(e) at par. 12.) Respondent answered that it “is without knowledge or information sufficient to determine the truth of the allegations concerning Billy Culwell and James Monroe” and therefore denies them. (GC Exh. 1(m) at par. 12.)

<sup>10</sup> The word “date” appeared beneath the blank.

<sup>11</sup> The words “Phone Number” appeared beneath the blank.

<sup>12</sup> The word “Address” appeared beneath the blank.

(R. Exh.15.)

As stated in *Adscos Mfg. Corp.*, 322 NLRB 217, 218 (1996), “A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional.”<sup>13</sup> In this case, the offer more precisely may be described as an offer of employment, rather than an offer of reinstatement, but the same principle applies.

Citing *Standard Aggregate Corp.*, 213 NLRB 154 (1974), the Board’s decision in *Adscos Mfg. Corp.* further noted that to toll the Respondent’s backpay obligation, the offer “must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee’s former or a substantially equivalent position.” In the refusal-to-hire context, such an offer must inform the discriminatee that the employer is offering unconditional and full employment in the same position for which the discriminatee would have been hired absent the unlawful discrimination, or in a substantially equivalent position.

The Respondent bears the burden of establishing that its offer complied with these requirements. I find that the Respondent has not met that burden.

Respondent’s letter does not unequivocally inform a discriminatee who is a plumber that he will be employed as a plumber. Rather, it tells him he will be hired either as a plumber or as a plumber’s helper, “depending on availability.” Such language falls short of informing the recipient that he would be put to work in the position which he was denied because of Respondent’s discrimination against him.

For discriminatees who were plumber’s helpers, the offer is similarly insufficient. A plumber’s helper lacks the license needed to work as a plumber and thus could not fill the job of plumber even if offered. The Respondent’s letter fails to state unequivocally that the plumber’s helper was being offered the same employment which he was unlawfully denied, the job he was qualified to perform.

In sum, I find that the offers of employment in Respondent’s letters to the discriminatees fall short of the requirements described in *Adscos Mfg. Co.* and *Standard Aggregate Corp.*, above. Therefore, they did not end the backpay periods for the discriminatees, and do not toll the Respondent’s backpay obligation.<sup>14</sup>

With respect to the second issue, the compliance specification clearly assumes that, but for its unlawful discrimination, the Respondent would have continued to employ the discriminatees after it finished its projects at Amarillo and Dalhart.<sup>15</sup> The Respondent challenges this assumption.

Respondent’s answer states that “[w]ith the exception of three discriminatees, any backpay should cease as of December 18, 1994, the approximate date of completion of the Amarillo and Dalhart projects. All discriminatees were offered positions

<sup>13</sup> See also *P. Litho, Inc.*, 325 NLRB 338 (1998).

<sup>14</sup> Respondent’s vice president of operations, Jerry Bitner, testified that he made offers of employment to some of the discriminatees by telephone. (Tr. 145–153.) Such offers will be discussed below, in connection with the backpay of each discriminatee.

<sup>15</sup> The compliance officer testified, “We took the position that when the discriminatee would have no longer had a job at the Amarillo and Dalhart job site, they would have been offered and accepted a job at some one of Respondent’s other jobsites.” (Tr. 60.)

in Colorado and declined. It is reasonable to assume that no discriminatee would have transferred to Respondent's Colorado projects following completion of the Texas projects if they later declined the same opportunity." (GC Exh. 1(m) at p. 7.)

The General Counsel opposes this argument, contending that "Respondent's customary business practice is to transfer its employees from job to job as the work neared completion. Respondent's hiring procedures, placed into evidence as GC Exhibit 2 in the unfair labor practice hearing, give first preference to transfers when staffing projects." (GC Br. at p. 17.)

However, these were the hiring practices which Judge Herzog criticized, stating that they "served to systematically exclude Union members from consideration for employment." (GC Exh. 1(a) at p. 17.) At another point in his decision, Judge Herzog stated as follows:

[T]he Respondent's hiring procedures are themselves evidence of Respondent's affirmative preference for individuals who are not only known to be competent, but also generally free of union influence. In *D.S.E. Concrete Forms, Inc.*, the Board affirmed the administrative law judge's conclusion that an employer's practice of using only existing employees, transfers from other employers with whom it had management contacts, or referrals from existing employees was unlawful in that "the practical effect of Respondent's first three job criteria was to preclude employment of union members at the jobsite." 303 NLRB at 897.

(GC Exh. 1(a) at 16.)

Judge Herzog's Order, adopted by the Board and enforced by the court of appeals, not only directed Respondent to cease and desist from the specific conduct alleged violative in the complaint, but also from "In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act." (GC Exh. 1(a) at p. 21.) Even assuming, as the General Counsel argues, that Respondent once had a "customary business practice" to "transfer its employees from job to job," I would be reluctant to assume without proof that such a practice continued unchanged after being so explicitly, and officially, criticized.

Moreover, Judge Herzog found that the Respondent applied its asserted hiring policies inconsistently. A reliable formula for computing backpay must make reasonable assumptions about the duration of employment if it is to approximate what the discriminatees would have earned had the Respondent not excluded them from employment.<sup>16</sup> However, the Respondent's inconsistent and discriminatory hiring practices at the Amarillo and Dalhart jobsites do not provide a reliable means of predicting how many and what kinds of employees it would have transferred from project to project in other circumstances.

Although the record in the proceeding before Judge Herzog does not establish that the discriminatees would have continued to work for Respondent after the completion of the Amarillo and Dalhart projects, the law creates a presumption to that ef-

<sup>16</sup> "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." *La Favorita, Inc.*, 313 NLRB 902 (1994).

fect. In *Dean General Contractors*, 285 NLRB 573 (1987), the Board rejected the concept that, in the construction industry, a worker's employment would be presumed to end at the termination of the project on which he was working. The Board noted the variation in employment practices from contractor to contractor, and stated, "Determination of whether an employee may have been transferred or reassigned elsewhere is a factual question and, as such, is best resolved by a factual inquiry at compliance." 285 NLRB at 573-574.

Significantly, the Board placed the burden of proof on the Respondent to show that a discriminatee would not have been transferred to other work.<sup>17</sup> Thus, it stated:

*If the Respondent establishes* at compliance that [the discriminatee] likely would not have been transferred or reassigned elsewhere, the Respondent's obligation toward [the discriminatee] will be to consider him eligible for employment at future projects, on application, on a nondiscriminatory basis. Evidence pertaining to transfer or reassignment may be considered both concerning the Respondent's reinstatement obligation towards [the discriminatee] and the date when the Respondent's backpay liability . . . may have terminated.

285 NLRB at 575 (emphasis added).

Citing *Dean General Contractors*, Judge Herzog's decision in this case stated that "the Respondent will have the opportunity in compliance to show that, under its customary procedure, an employee in the applicants' position would not have been transferred to another project after the one for which he was hired was completed, and that thus no backpay and reinstatement obligation exists beyond the time when the project as to which the discrimination occurred was completed." (GC Exh. 1(a) at 20-21.)

I find that Respondent has not met its burden of proving that the discriminatees would not have been transferred to its other jobs. If anything, the testimony of Respondent's vice president of operations, Jerry Bitner, would support the opposite conclusion.

Bitner testified that he would give a preference to a current employee as opposed to someone hired locally. He explained, "Well, obviously, they would already be on my payroll, so I wouldn't have to incur the hiring costs. If he's still employed with us, that means that he's—knows what he's doing and has a decent track record and is reliable and dependable." (Tr. 135-136.) Bitner also testified that he would give a rehired employee preference over someone locally hired, explaining, "as-

<sup>17</sup> Placing the burden of proof on the Respondent affects the resolution of this issue. On cross-examination, Respondent asked the compliance officer to identify the jobsites to which the discriminatees could have been transferred at the time the Amarillo and Dalhart projects ended. The compliance officer replied: "I do not know all of the jobsites that they had at the conclusion or even a little before the conclusion of the Amarillo and Dalhart job site as the Respondent did not provide those records, although they were repeatedly asked to by letter and by telephone conversation." (Tr. 60-61.)

However, the General Counsel does not have to prove that such sites existed. Rather, Respondent must show that it did not have such projects at which the discriminatees could have worked. I find that Respondent has not met this burden.

suming that the guy left our employ under good circumstances, we know his skills and abilities and productivity capabilities, and I would just as soon see the man rehired as to take a chance hiring someone off the street.” (Tr. 136.)

Bitner’s testimony does not overcome the presumption that the discriminatees would have continued to work for Respondent after the completion of the Amarillo and Dalhart projects, but rather is consistent with that presumption. Other evidence also does not overcome this presumption.

Therefore, I reject Respondent’s argument that the employment of the discriminatees would not have lasted beyond December 1994, when the Amarillo and Dalhart projects were finished. In sum, I find that the backpay periods continue as alleged in the compliance specification.

#### D. Method of Calculation

To compute the gross backpay, the Board’s compliance officer averaged the weekly earnings of employees working in a particular job category at the Respondent’s Amarillo and Dalhart jobsites.<sup>18</sup> Because the compliance officer averaged the earnings of plumbers separately from the earnings of plumber’s helpers, she obtained an amount representing the weekly earnings of an employee in each of these classifications.<sup>19</sup>

The compliance officer then assumed that if the Respondent had not unlawfully refused to hire the discriminatees, they would have worked rather than the persons who actually did.<sup>20</sup> The General Counsel’s brief gave the following example: “[I]f Respondent had seven plumbers and six plumbers’ helpers working during a given week, [the compliance officer] would take seven discriminatees and assign them weekly earnings using the average plumbers’ wages and then take six more discriminatees and assign them weekly wages using the average plumbers’ helpers’ wages.” (GC Br. at 9.)

In opposing the General Counsel’s method of computing backpay, Respondent advances a number of arguments which, in effect, seek to relitigate issues already decided and no longer in controversy. For example, it challenges the assumption that, but for its unfair labor practices, a discriminatee would have filled the job of a plumber whom Respondent transferred to

<sup>18</sup> The compliance officer used payroll records provided by Respondent to calculate these averages. These records covered the period from “the end of 1993 through the end of 1994” but did not go beyond January 1995. (Tr. 52.)

<sup>19</sup> The compliance officer included pipefitters in the same category as plumbers. (Tr. 55.)

<sup>20</sup> The compliance officer, Jenny Daniel, testified in part as follows: “[F]irst, based on the records that the Respondent provided . . . I determined the first 22 employees working as plumbers and helpers who had transferred or been hired at the Dalhart and Amarillo jobsites after the application date of the discriminatees. And I used that for the backpay beginning date for the discriminatees.

Second, I took the weekly earnings of the plumbers and helpers who were working at those two jobsites and averaged them to determine an average weekly earnings of comparable employees. Then, I took the average weekly earnings of those comparable employees and assigned them to the appropriate discriminatee in the appropriate quarter and added those weekly earnings up to get the gross back-pay amount for each of the discriminatees.

(Tr. 37.)

Amarillo or Dalhart from another jobsite. Thus, Respondent’s brief argues that its “practice of transferring current employees is non-discriminatory and not motivated by union animus; accordingly, positions filled by such current employees may not be considered available positions that discriminatees would have filled.” (R. Br. at p. 16.)

However, such an argument ignores Judge Herzog’s finding, adopted by the Board, that Respondent selectively used its employment policies to effect unlawful discrimination. That finding is not open to question now.

Respondent makes a similar argument with respect to its previous employees whom it rehired to work at the Amarillo and Dalhart jobsites. Again, Respondent may not relitigate now the issues which already have been resolved against it.

Respondent also challenges the accuracy of the backpay calculations because the compliance officer did not have records showing the number of employees working on Respondent’s other projects at the time the Amarillo and Dalhart projects ended. However, as discussed above, Respondent bears the burden of demonstrating that such employment opportunities did not exist. *Dean General Contractors*, 285 NLRB 573 (1987).

In finding that Respondent has not met this burden of proof, I note particularly the word “proof.” Respondent has provided an argument that it would not have transferred all the discriminatees to other projects but it has not proven any facts which would establish a reason for failing to transfer any discriminatee.<sup>21</sup>

Respondent bore the burden of proving that there were not enough job openings to be filled on its other projects to warrant the transfer of all discriminatees. Similarly, if there were any other lawful reason why a discriminatee would not have been transferred, Respondent bore the burden of proving that such a reason existed and that, based on this reason, the Respondent would not have transferred the discriminatee. However, Respondent did not carry this burden.

<sup>21</sup> Respondent’s brief states that only three discriminatees, Monroe (“who is comparable to Employee Sandlin”), Lindsey (“who is comparable to Employee Frizzell”), and Noland (“who is comparable to Employee Smith”) would have been transferred to other projects after the Amarillo and Dalhart jobs ended. The brief further states, in part, “When each individual discriminatee is compared to the corresponding newly hired journeyman plumber, it is very simple to discern who would have been transferred. Because not all employees were transferred, the General Counsel’s assertion that all discriminatees *would have been transferred* is simply unreasonable and unsupported in the evidence. Respondent has ‘show[n] that it would not have assigned [the discriminatees] to other jobs elsewhere after the projects in question ended.” (R. Br. at p. 35, emphasis in original.)

However, Respondent’s proof simply does not demonstrate that only these three discriminatees were “comparable” to the employees actually used on other projects. The record establishes the contrary. The discriminatees had acceptable qualifications.

When the qualifications of the discriminatees are considered together with the testimony of Respondent’s vice president of operations Jerry Bitner that he would give a preference to a current employee over someone hired locally, it is clear that Respondent has not met its burden of proving that it would not have transferred the discriminatees in the absence of unlawful motivation.

The Respondent also has challenged another premise implicit in the General Counsel's method of calculating backpay. The compliance specification listed the discriminatees in order of the date on which each discriminatee applied for work with Respondent. It then assumed that Respondent would have hired the discriminatees in that order on the dates when it put other employees to work at the Amarillo and Dalhart projects. However, Respondent disputes that it would have hired a discriminatee who was a journeyman plumber on a date when a plumber's helper began work.

At the hearing, Respondent adduced testimony that it did not hire plumbers to fill positions as plumber's helpers. Similarly, in its posthearing brief, Respondent argued that it "has a strict policy against hiring journeymen for helper positions." (R. Br. at p. 22.) It follows, according to Respondent, that the compliance specification erred by finding that journeymen would have been employed to fill such positions.

Before considering these arguments, however, I must examine the threshold questions of whether Respondent had a duty to raise this issue in its answer to the compliance specification, and if so, whether it satisfied that duty.

At hearing, the compliance officer testified that she assumed that the discriminatees would accept jobs as helpers on the basis of what the discriminatees told her. (Tr. 45.) This testimony provides information about the computation of backpay which is not easily apparent from the compliance specification itself. I would be reluctant to find that Respondent's answer had failed to challenge a premise in the compliance specification if the specification itself had not made that premise clear. Therefore, I will examine the specification carefully to determine whether it fairly put Respondent on notice of its assumption that discriminatees who were journeyman plumbers would have accepted positions as plumber's helpers if they had been offered those positions.

Paragraph 8 of the specification alleges that the backpay period for each discriminatee began "on the date the Respondent employed or transferred an employee to the Amarillo and Dalhart, Texas, jobsites instead of employing the discriminatee." Paragraph 9 states that the names of these employees are set forth in the specification's appendix 2. Each line of appendix 2 identifies an employee who actually worked for Respondent at one of these jobsites, a discriminatee who would have worked there instead of the employee, and a "backpay starting date," that is, the date the actual employee began work at the jobsite.

Appendix 2 does not identify the actual employees by job classification. Thus, it is not apparent from the specification whether the actual employee, in each case, was a plumber or plumber's helper. However, they were Respondent's employees, and Respondent obviously knew which jobs it hired them to do.

Therefore, I conclude that the specification placed Respondent on notice of the General Counsel's premise that discriminatees would have accepted employment as plumber's helpers even though they were journeymen. This conclusion draws support from paragraph 9 of Respondent's answer. That paragraph disputes the premise that certain of the employees identified in appendix 2 of the compliance specification took jobs which should have been filled by discriminatees. The Respon-

dent states, in part, "lawfully transferred plumbers, designated supervisors, *and plumber helpers* are not properly comparable individuals. See Exhibits 2 and 3, attached hereto and incorporated by reference herein." (GC Exh. 1(m) at par. 9, emphasis added.) Respondent understood the premise, and disputed it.

To challenge the premise, Respondent's answer must "specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures." Section 102.56(b) of the Board's Rules and Regulations. In exhibits 2 and 3, Respondent's answer lists the names of "journeyman plumbers and pipefitters" who, it contends, are the appropriate employees to use in determining the backpay starting dates of the discriminatees. (GC Exh. 1(m) at Exhs. 2 and 3.) I conclude that Respondent's answer has provided more than a general denial of the premise that discriminatees who are journeyman plumbers would have taken jobs as plumber's helpers, and suffices to raise this issue.

However, Respondent does not prevail on this issue. The alternative it advances for determining when discriminatees would have begun work improperly assumes that some of them would not have worked for Respondent at all. That alternative is not consistent with the findings implicit in Judge Herzog's Order, and does not effectuate it.

It should be stressed that Judge Herzog's Order does not mandate that every discriminatee receive backpay. It only requires that all be made whole "for *any* loss of earnings and other benefits that they *may* have suffered as a result of the discrimination against them." (GC Exh. 1(a) at p. 21, emphasis added.)<sup>22</sup> However, the order does require Respondent to offer employment to all discriminatees. Respondent's alternative proposal for calculating backpay does not comply with this requirement, but excludes certain discriminatees on the basis that there was "no comparable position available." (GC Exh. 1(m), Exh. 4.)

Therefore, Respondent's proposal is based on a flawed premise, and does not constitute an acceptable or appropriate alternative to the backpay computation formula alleged in the compliance specification. Moreover, Respondent's answer does not offer any other alternative for determining when the discriminatees would have begun work, in a manner which does comply with Judge Herzog's Order.

However, I do find that the General Counsel's backpay formula is reasonable and acceptable. In reaching this conclusion, I reject Respondent's argument that it had a strict policy of not hiring journeyman plumbers to work as plumber's helpers because they were "overqualified job applicants." (R. Br. at p. 22.) This argument appears disingenuous.

Respondent contends that such a policy is justified "to prevent high turnover on jobsites." (R. Br. at p. 23.) However, in view of Judge Herzog's findings about the Respondent's animus against the Union, it is difficult to believe that Respondent

<sup>22</sup> For example, par. 22 of the compliance specification admits that the net interim earnings of discriminatees Billy Culwell and Kris Kienast "either matched or exceeded their gross backpay." The General Counsel does not allege that either Culwell or Kienast is entitled to backpay. (GC Exh. 1(e) at par. 22.)

would be unhappy if the prounion discriminatees accepted employment only briefly and then quit.

Moreover, it appears clear that had the discriminatees been hired for helper positions, as assumed by the specification, they would only have received pay at the helper's wage rate. The compliance officer testified that she made separate calculations to obtain the average weekly earnings of plumbers and of plumber's helpers.<sup>23</sup> Therefore, the General Counsel's formula does not force the Respondent to compensate discriminatees who were helpers at the higher rate paid to journeyman plumbers.

In other respects, the backpay formula set forth in the compliance specification and described by the compliance officer during the hearing is reasonable and acceptable. Respondent has advanced no alternative formula which does not rest on premises contrary to findings in Judge Herzog's decision which are not at issue here.

The General Counsel also has established that its calculations of gross backpay are consistent with the formula. Therefore, I find that the General Counsel has proven the amounts of gross backpay set forth in Appendices 9 through 30 of the compliance specification. Each discriminatee's gross backpay is as follows:

<u>Discriminatee</u>	<u>Gross Backpay</u>	<u>Alleged In</u>
R. Bohannon	\$126,655.00	App. 9
V. Coronado	86,753.00	App. 10
B. Culwell	29,572.00	App. 11
L. Gallop	80,768.00	App. 12
D. Green	139,103.00	App. 13
J. Kerek	141,394.00	App. 14
K. Kienast	77,047.20	App. 15
M. Lea	82,263.00	App. 16
J. Lester	78,474.00	App. 17
T. Lindsey	128,952.00	App. 18
C. Monroe	138,680.00	App. 19
J. Monroe	83,982.00	App. 20
K. Monroe	132,515.00	App. 21
K. Naylor	138,680.00	App. 22
R. Noland	92,123.00	App. 23
D. Peyton	85,759.00	App. 24
D. Sarrett	136,376.00	App. 25 <sup>24</sup>
J. Simms	139,570.00	App. 26
G. Stevens	90,373.00	App. 27
E. Terry	130,596.00	App. 28
M. Thompson	88,732.00	App. 29
W. White	131,592.00	App. 30

<sup>23</sup> The compliance officer illustrated her method by referring to the Respondent's payroll period ending January 9, 1994. She computed that for that period, 5 discriminatees would have received the "average earnings of the comparable employees who worked as plumbers" and 10 discriminatees would have received "average earnings as helpers." (Tr. 50.)

<sup>24</sup> Certain documents spell Sarrett's name "Sarritt." See, e.g., Judge Herzog's decision (GC Exh. 1(a)) and R. Exh. 15. Sarrett did not testify. In this decision, I use the spelling given in the compliance specification, but note that another spelling may be correct.

### III. INTERIM EARNINGS, EXPENSES, SEARCH FOR WORK AND OFFERS OF EMPLOYMENT

The compliance specification computes net backpay beginning with the date on which the Respondent should have employed each discriminatee and ending with the last day of the second calendar quarter of 1997. However, the specification makes clear that Respondent also must pay interest on the backpay amounts,<sup>25</sup> and that backpay and interest continue to accrue "until Respondent makes each discriminatee a valid offer of reinstatement." (GC Exh. 1(e), par. 22.)<sup>26</sup>

My findings that Respondent owes certain net backpay amounts, discussed below, refer to backpay accrued during the periods computed in the compliance specification. However, payment of such net backpay amounts does not fully satisfy the Respondent's obligation to make the discriminatees whole for losses they have suffered because of the unlawful discrimination. When backpay continues beyond the period computed in the specification, the Respondent must pay it, as well as interest computed in accordance with the standard formula used by the Board.

The Respondent bears the burden of proving that during the backpay period, a discriminatee had earnings which must be subtracted from gross backpay to determine the net backpay that discriminatee is owed. However, in the compliance specification, the General Counsel has admitted that certain discriminatees had the interim earnings specified.

The Respondent also has the burden of proving that a discriminatee's backpay should be reduced because of his unavailability to do work or because he failed to make sufficient efforts to find work. However, the General Counsel admits in Paragraph 21 of the compliance specification that discriminatee Rex Bohannon was unavailable to work from November 15, 1996, to March 15, 1997, due to illness. (GC Exh. 1(e) at par. 21.)

The General Counsel bears the burden of proving that a discriminatee had expenses related to his interim employment which reduce his net interim earnings. The interim earnings and expenses of each discriminatee will be examined separately. The record did not establish that any of the discriminatees withheld or concealed information about interim earnings and I find that none did.

#### A. Raymond Rex Bohannon

Bohannon's gross backpay is \$126,655. The compliance specification admits that he had total interim earnings of \$29,864. The specification does not allege that Bohannon had any interim expenses. (GC Exh. 1(e) at app. 9.)

Respondent subpoenaed Bohannon to testify during the compliance hearing. Based on my observations of his demeanor, I credit his testimony.

<sup>25</sup> The specification also makes clear that the amounts of backpay principal are subject to the tax withholding required by Federal and State laws.

<sup>26</sup> Respondent does not have to make offers of employment to two discriminatees, Billy Culwell and James Monroe, to toll their backpay. Culwell retired on February 1, 1995, and Monroe retired on January 1, 1996. (GC Exh. 1(e), par. 12.)

I find that Respondent has failed to establish that Bohannon had interim earnings exceeding those alleged in the compliance specification, appendix 9. Although Bohannon had a period of sickness which prevented him from working, the compliance specification admitted that period and did not allege that Bohannon was due any backpay during that time.

The record does not establish that Bohannon was unavailable for work at any time during the period computed in the specification, except for the time he was sick which the specification takes into account. Respondent has not proven that Bohannon failed to search for work.

Respondent sent Bohannon a letter, dated August 15, 1996, purporting to offer him employment. (R. Exh. 15.) As discussed above, I find that this letter was not a valid offer of employment sufficient to toll backpay.

There is no evidence that Respondent tried to offer Bohannon employment by telephone. When asked "Did you talk to Raymond Bohannon?" Respondent's vice president, Bitner, replied, "The name doesn't ring a bell." (Tr. 169.) Therefore, I find that Bohannon's backpay period continues past the period described in the specification, and will continue until Respondent makes Bohannon a valid offer of employment. Further, I find that, for the time period computed in the specification (GC Exh. 1(e), app. 1), Bohannon is entitled to net backpay of \$97,186, with interest, as alleged.

#### *B. Viviano Coronado*

Coronado had gross backpay of \$86,753. The compliance specification admits that he had interim earnings of \$73,711. The specification does not allege that Coronado had any interim expenses. (GC Exh. 1(e) at app. 10.)

Coronado testified at the hearing, under subpoena by the Respondent. However, Respondent did not prove that Coronado had interim earnings above the amounts admitted in the specification and also did not prove either that Coronado was unavailable for work or failed to search for it during any part of the time period covered by the specification. Indeed, Coronado's interim earnings were so great that they resulted in his receiving no net backpay in four calendar quarters of that period.

I find that, for the time period covered by the specification, Coronado's net backpay is \$18,002, with interest, as alleged.

Although Respondent sent one of its August 15, 1996 form letters to Coronado, I have concluded that this letter was not sufficient to toll backpay. Respondent also asserts that its vice president of operations, Jerry Bitner, made Coronado an offer of employment by telephone.

Actually, Bitner testified that he did not speak with Coronado himself, but rather with a woman whom Bitner assumed to be Coronado's wife. "It was a rather strange call," Bitner testified. "At first, she said she didn't know of anybody by that name," but then told Bitner that Coronado was taking a bath.

When asked, "did you leave a message with her about the plumbing job?" Bitner testified that he did. However, the record does not reflect what that message was. (Tr. 147.)

Therefore, the evidence falls short of proving that Respondent made a valid offer of employment to Coronado. Even assuming that Bitner telephoned the right number, and even assuming that the woman with whom he spoke knew Coronado,

and even assuming that person delivered the message to him, the content of that message remains a matter of speculation. Clearly, Respondent has not met its burden of proving that it offered Coronado employment in accordance with its obligation under Judge Herzog's Order.

Therefore, I find that Coronado's backpay period continues past the period covered by the specification, and will not end until Respondent makes a valid offer of employment to him.

#### *C. Billy Culwell*

Culwell had total gross backpay of \$29,572. The compliance specification admitted that he had interim earnings of \$36,687, and did not allege any interim expenses. Because his net interim earnings exceed his gross backpay, Culwell is not entitled to any backpay for the period covered by the compliance specification's calculations.

Respondent's vice president of operations, Bitner, testified that he called Culwell on October 30, 1996, and that Culwell declined an offer of employment. (Tr. 146.) However, as noted above, Culwell retired on February 1, 1995, and his backpay period ended at that time.

In sum, I find that the Respondent does not owe any backpay to Culwell. Additionally, I find that Respondent has no present obligation to offer Culwell employment.

#### *D. Larry Gallop*

For the period computed by the compliance specification, Discriminatee Gallop had total gross backpay of \$80,768. The compliance specification admits that Gallop had total interim earnings of \$91,405, and does not allege any interim expenses.

Because total interim earnings exceed total gross backpay, it might appear that Gallop would not be entitled to any net backpay. However, the backpay formula subtracts interim earnings from gross backpay separately for each calendar quarter. During each of the four quarters of 1994, Gallop's interim earnings were less than gross backpay for that quarter. Therefore, the specification alleges, Gallop is entitled to net backpay of \$448 for the first quarter of 1994, \$318 for the second quarter, \$2835 for the third quarter, and \$3562 for the fourth quarter of that year, for a total net backpay amount of \$7163.

Respondent has not established that Gallop either was unavailable for work or failed to seek it. To the contrary, Gallop's interim earnings, as well as his testimony, indicate not only that he sought work but that he found it. I conclude that the calculation of Gallop's net backpay, described in App. 12 to the specification, is accurate. Further, I find that for the period computed by the specification, Gallop's net backpay is \$7163.

In October 1996, Gallop received a letter from Respondent, offering him employment. The record is not entirely clear as to whether this letter was the same as the August 15, 1996 letter to "Larry Gallop" which is in evidence as part of Respondent's Exhibit 15, but I infer that it is. There is no evidence to contradict this inference.

Moreover, Respondent's August 15, 1996 letter to Gallop, like similar letters to other discriminatees, was addressed to him "c/o National Labor Relations Board, Region 16" in Fort Worth. Presumably, a delay in forwarding the letter to Gallop

could account for the difference between the August 15 date of the letter and its receipt in October.

Gallop credibly testified that he and his wife sent a reply to Respondent, requesting more information. The record does not establish either that Respondent received Gallop's inquiry or answered it. The record also does not establish that Respondent made any other offer of employment to Gallop.

I have found that Respondent's August 15, 1996 form letter is insufficient to be a valid offer of employment. Therefore, I conclude that Gallop's backpay period continues, and will continue until Respondent does make Gallop a valid offer of employment.

*E. Donald L. Green*

For the period computed by the compliance specification, Green had gross backpay of \$139,103. The specification alleges no interim expenses. Significantly, it does not admit that Green had any interim earnings.

There is no doubt that Green worked during this period. Since 1991, he has been the Union's business manager, financial secretary, and training manager. In 1993, he earned \$38,107.60 in those positions, and earned about the same amount in later years. (Tr. 271–273.)

The General Counsel asserts that the money Green earned as a union official should not be counted as interim earnings to be subtracted from gross backpay. The General Counsel points to Green's testimony that if he had gone to work for Respondent in 1993, he would have continued to receive his salary from the Union (Tr. 290) and that a special representative of the International Union would have performed the union duties which Green was not available to do. (Tr. 289.)

In the General Counsel's phrase, Green's continued work as a union official would be "moonlighting." The General Counsel then argues as follows:

It is well established that earnings from a secondary job, which a discriminatee held prior to the unlawful discrimination and continued afterwards (i.e., a "moonlighting" job) are not offset against gross backpay. *U.S. Telefactores Corporation*, 300 NLRB 720, 722 (1990); *Plumbers Local 305 (Stone & Webster Engineering, Inc.)*, 297 NLRB 57, 61 (1989); *American Pacific Concrete Pipe Company, Inc.*, 290 NLRB 623, 627 (1988); *Cumberland Farms Dairy*, 266 NLRB 855 (1983); *Link-Belt Co.*, 12 NLRB 854, 872 (1939), mod. on other grounds 110 F.2d 506 (7th Cir. 1940), enf'd 311 U.S. 584 (1941). Accordingly, Green's earnings as a union representative, which remained constant both before and after the unlawful discrimination against him, are indistinguishable from any secondary or "moonlighting" activities engaged in by other employees.

(GC Br. at p. 27.)

The General Counsel is correct that when a discriminatee held another job before the time of the unfair labor practice against him, and would have continued to hold that second job even if he had been offered the employment unlawfully denied, the earnings from this second job do not constitute interim earnings subtracted from gross backpay. On the other hand, this principle does not reduce a discriminatee's obligation to

mitigate backpay by searching for work. Just as wages from the second job do not constitute "interim earnings," the job itself cannot be regarded as work eliminating the requirement that the discriminatee seek employment.

Green testified that he sought work at two of Respondent's projects in Colorado "in the spring of '96, I believe." (Tr. 278.) He also testified that he applied for work with three other contractors, C&E Mechanical, Scottco Mechanical, and Howards Mechanical, whose employees he wanted to organize for the Union. I credit this testimony but note that the record does not reveal when he did so. (Tr. 278.)

He did not obtain such work. In the 6 years since becoming a union official, Green testified, he had not worked as a plumber or pipefitter. (Tr. 297.) His duties as a union official consume at least 40 hours a week and, Green testified, "[I]t can run up to about probably 50." (Tr. 273.)

As the Union's business manager, he is responsible for operating the Union's hiring hall and maintaining its employment referral list. (Tr. 286.) Although some of the discriminatees sought work through the hiring hall during their backpay periods, the record does not indicate that Green did. Additionally, there is no indication that Green ever sought work through the state job referral service.

The Respondent contends that Green's search for work was inadequate: "Green testified that over the approximately three and one half year period that General Counsel asserts is the appropriate backpay period, Green applied for a grand total of three (3) other jobs. [Tr. 278: 16–17.] This is a pitiful attempt to mitigate damages." (R. Br. at p. 30.)

There is no doubt that Green is entitled to a remedy. His position as a union official certainly did not deprive him of status as an "employee" protected by the Act. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). Likewise, his intention to organize the employees of three contractors when he applied for work with them does not make this job search any less bona-fide, because Green would have accepted this employment, and done the work, if it had been offered.

Moreover, the fact that he already had a full-time job did not deprive him of the right to seek a second and to be made whole for any losses he suffered when denied it unlawfully. However, the Act's purpose is remedial, not punitive. The remedy in this case should not include backpay for any period where Green actually was not seeking a second job, on top of his 40–50 hours per week as a union official, or was not intending to perform such a second job.

Several factors persuade me that Green was not seriously looking for work. He did not provide any specific information as to when he applied for work at the three mechanical contractors. However, the backpay period computed for Green in the specification extends over 15 calendar quarters, that is, almost 4 years. Applying for work at three employers during this period does not reflect a serious intention to find and hold down a second job. There is no evidence that Green sought work through other means such as through his own Union's hiring hall.

Green's qualifications as a plumber are superb. He has been a journeyman nearly 30 years, and has additional education in plumbing and pipefitting. (Tr. 276.)

Moreover, his position as a union official brought him into contact with numerous employers. For example, he is a member of the Plumbing Education Council of Texas. (U. Exh. 6.)

Green also is involved in administration of the collective-bargaining agreements the Union has negotiated, and thus comes into contact with officials of companies which have established bargaining relationships with the Union and employ persons referred through the Union's hiring hall.

Besides having such contacts with many employers and excellent experience as a plumber, Green is personable and articulate. It is difficult to imagine a more desirable job candidate, or one better situated to know about employment opportunities. Yet in 6 years after becoming a union official, not once did he hold a job as a plumber or pipefitter. (Tr. 297.)

I cannot conclude that Green seriously sought employment as a plumber or pipefitter at any time during the backpay period computed in the specification. Similarly, I cannot find that Green made any serious attempt to mitigate backpay.<sup>27</sup> Therefore, I find that he is not entitled to any net backpay for the period computed in the compliance specification.

However, the backpay period for Green will continue to run until Respondent makes a valid offer of employment to him. Green testified that he received a letter from Cobb Mechanical offering him reinstatement. I infer that this was the August 15, 1996 (R. Exh. 15) which I have found invalid to toll backpay.

Moreover, Green credibly testified that he sent a letter back accepting that offer. However, no one from the Respondent contacted him. (Tr. 277.) Therefore, the evidence does not establish that Respondent has made any offer of employment which would end the backpay period.

#### F. James Kerek

For the period computed by the compliance specification, Kerek had gross backpay of \$141,394. The specification admits Kerek had interim earnings of \$74,802, and alleges that during the first calendar quarter of 1995, he had interim expenses of \$161. The specification does not allege interim expenses for any other calendar quarter. It alleges Kerek's net backpay for this period to be \$68,421. (GC Exh. 1(e), app. 14.)

<sup>27</sup> The General Counsel's posthearing brief argues that "Requiring union representatives to mitigate damages by seeking interim employment with unionized companies would necessarily require the representative to jeopardize or relinquish his or her secondary employment with the union." (GC Br. at 28.) I do not understand the thrust of this argument.

Traditionally, unions have discouraged their members from working for nonunionized employers. It appears that the Union here is making an exception to that principle because union members working for nonunionized employers would have the chance to organize their co-workers. However, that exception certainly doesn't imply that the Union now frowns on its members or officials working for companies with which it has collective-bargaining relationships, and the record does not provide a basis for such a conclusion.

Moreover, my finding that Green has not made serious efforts to mitigate backpay does not imply any requirement that he work for unionized companies. To the contrary, this finding is based on evidence that, during the 15 calendar quarters described in app. 13 of the specification, Green did not make substantial efforts to obtain work at either unionized or nonunionized employers.

Kerek testified at the hearing, pursuant to the Respondent's subpoena. However, the Respondent did not establish that Kerek had interim earnings exceeding those alleged in the specification for each calendar quarter.

On the other hand, the General Counsel bears the burden of proving that Kerek had interim expenses. I find that the record does not establish the alleged expenses of \$161, and will not reduce interim earnings for that calendar quarter by that amount. Excluding these alleged interim expenses results in \$8231 net backpay for the first quarter of 1995, and \$68,260 net backpay for the period computed in the compliance specification. I so find.

As discussed above, the Respondent's August 15, 1996 form letter to employees did not constitute a valid offer of employment ending the backpay period. However, Respondent also asserts that it made an offer of employment in a telephone call received by Kerek's wife. Respondent's vice president, Bitner, testified that he "spoke with [Kerek's] wife, and she indicated that he was out of town working in Burlington, Iowa, and said that he probably would not be interested." (Tr. 146.)

Kerek testified that he received no call from Respondent and that his wife had not told him she received a call from Respondent. Examined by Respondent's counsel, Kerek further testified, in part, as follows:

Q. Did—were you working in Burlington, Iowa, at that time?<sup>28</sup>

A. Probably.

Q. [S]he [Kerek's wife] said you probably wouldn't be interested in coming to work for at that time. Would that have been accurate?

A. If I was working, I probably wouldn't.

Q. How much were you making in Burlington, Iowa?

A. About 18, \$19 an hour.

Q. Okay. And if you had received a job offer from Cobb for \$15 an hour at that point in time in Avon, Colorado, or Montrose, Colorado, would you have been interested in that?

A. Not if I was working.

(Tr. 351.)

This testimony is much too speculative to establish either that Respondent did make a job offer to Kerek, through his wife, or that Kerek would have refused it.

More fundamentally, the evidence does not establish the content of Respondent's purported offer of employment. Assuming for the sake of analysis that Bitner read the August 15, 1996 letter verbatim to Kerek's wife, it would be no more valid orally than it was in writing.

Conceivably, Bitner may have revised the language to make it a valid offer. However, the evidence does not establish exactly what Bitner said. Respondent bears the burden of proving that it made a valid offer to Kerek, but it has not satisfied that burden.

<sup>28</sup> In examining Kerek, Respondent's counsel placed the date of this telephone call as around October 30, 1996. (Tr. 351.)

I find that the backpay period for Kerek continues past the period computed in the specification, and that it continues until Respondent makes a valid offer of employment to him.

*G. Kris Kienast*

For the period computed by the compliance specification, Kienast had gross backpay of \$77,047.20 and net interim earnings of \$124,383. Interim earnings exceeded gross backpay in all 15 of the calendar quarters computed. (GC Exh. 1(e), app. 15.) Therefore, Kienast is entitled to no net backpay for this period.

As discussed above, Respondent's August 15, 1996 form letter (R.Exh.15) did not suffice to terminate the backpay period. Respondent's vice president, Bitner, testified that he did not recall speaking with Kienast. I find that Respondent did not make Kienast a valid offer of employment. Therefore, Kienast's backpay period continues until Respondent makes him a valid offer of employment.

*H. Mike Lea*

For the period computed by the compliance specification, Lea had gross backpay of \$82,263. The specification admitted that Lea had gross interim earnings of \$67,026. It also alleged that during the first calendar quarter of 1994, Lea had interim expenses of \$250, and that during the fourth calendar quarter of 1995, Lea had interim expenses of \$1406. Subtracting these interim expenses from gross interim earnings in the relevant calendar quarters, the specification computed net interim earnings. According to the specification, after subtracting net interim earnings from gross backpay, Lea was entitled to total net backpay of \$28,875 for the period computed.

Lea testified at the hearing and produced documents subpoenaed by Respondent. The record does not establish that he had interim earnings exceeding the amounts alleged in the specification. Additionally, I find that there was no period of time when either he was unavailable for work or failed to seek work.

However, the record does not establish that Lea incurred the interim expenses alleged in the specification. The General Counsel bears the burden of proving such expenses but, I conclude, has not carried this burden.

I find that during the first calendar quarter of 1994, Lea had gross backpay of \$2011 and interim earnings of \$5930. My exclusion of interim expenses does not change the conclusion, set forth in appendix 16 of the specification, that he is entitled to no net backpay for this calendar quarter.

The specification only alleged that Lea had interim expenses in one other calendar quarter, the fourth quarter of 1995. In accordance with appendix 16 of the specification, I find that Lea was entitled to gross backpay of \$6708 and had interim earnings of \$5313 for this quarter. After excluding interim expenses from the calculation, I find that for the fourth calendar quarter of 1995, Lea is entitled to net backpay of \$1395.

Before calculating total backpay, however, I will consider the Respondent's assertion that it made an offer of employment which ended Lea's backpay period. Respondent sent Lea one of the letters which, I have found, are not sufficient to end the backpay period. Lea then telephoned the Respondent, and received a call from its Vice President Bitner on about October

30, 1996. In a second telephone conversation, Bitner told Lea that the work was on a county jail and condos, amounted to 40 hours of work per week, and paid \$15 per hour.

Lea told Bitner he had some things to take care of at his house and needed to fix his truck, and that he would call Bitner back the following Friday or Monday. Bitner testified that he never heard from Lea. (Tr. 151.) Lea testified that he tried to reach Bitner but "never could reach anybody at the number" even though he telephoned during regular business hours. (Tr. 402.)

Since Lea had already telephoned Bitner once, I conclude that the number was not incorrect. It appears unlikely that someone would have failed to answer this number because of an intent to avoid Lea. I find that Lea was offered employment, but failed to accept it.

The General Counsel argues that this offer of employment was not substantially equivalent to the job Lea would have done but for the unlawful discrimination against him, because it was not at the closest of the jobsites where Respondent's employees were then working:

Respondent has not shown that either the Montrose or the Avon jobsite was its closest project to Amarillo or Dalhart. To the contrary, Respondent's records indicate that during the period it made its offers to the discriminatees, it had projects ongoing in Lubbock, Texas, and Pueblo and Colorado Springs, Colorado. (U. Exh. 11.) All of these places are closer to Amarillo/Dalhart than the Montrose and Avon jobs. Respondent's offer was not that of "substantially equivalent" employment.

(GC Br. at 22.)

The General Counsel's argument, however, appears to ignore one fact. At the time Lea spoke by telephone with Respondent's vice president, in October 1996, the Amarillo and Dalhart projects already had been completed. Even if Respondent had employed Lea on one of these projects, he would no longer have been working there in October 1996.

The compliance specification assumes that on completion of the Amarillo and Dalhart jobs, Respondent would have assigned the discriminatees to work at other locations. (GC Exh. 1(e) at par. 13.) In explaining the basis for this assumption, the compliance officer testified that "records that we had indicated that plumbers and helpers that left these jobs [in Amarillo and Dalhart] were transferred back to Colorado." (Tr. 61.) It appears clear that if the discriminatees had been hired by the Respondent and reassigned after the Amarillo and Dalhart projects ended, in the manner assumed in the compliance specification, at least some of them would have wound up working in Colorado.

I cannot find that work on the Colorado project was not "substantially equivalent," because of its location, when the compliance officer based her calculations, in part, on the assumption that some of the discriminatees would have been reassigned to projects in Colorado and would have worked there.

Additionally, I cannot conclude that work on the project offered to Lea was not "substantially equivalent" because there

may have been other projects closer to Lea's home. The General Counsel's brief implies that Respondent may not have offered Lea employment at a site closer to home because it wanted Lea to reject the offer as unacceptable. However, that is merely speculation.

The compliance specification does not allege, and the evidence does not establish, that in transferring or reassigning its employees, the Respondent always put them to work on projects closest to their homes. The specification does not allege, and the evidence does not establish, that Respondent even tried to do so.

In the absence of evidence to the contrary, it would be most reasonable to assume that Respondent transferred employees to different jobsites based on its manpower needs. Such an assumption is consistent both with the high mobility of employees in the construction industry, and with a contractor's need to meet construction deadlines as they arose.

Moreover, I would be skeptical if a respondent, seeking to limit backpay liability, argued that it would not have assigned a discriminatee to a particular jobsite, even though work was available, because the jobsite was not the closest one to the discriminatee's home. For all of these reasons, I must reject the General Counsel's argument that the work offered to Lea was not "substantially equivalent" because of its location.

The General Counsel has not raised any other reason to support its contention that the work offered to Lea was not substantially equivalent. I find that it was. Therefore, I conclude that Lea's backpay period ended on October 30, 1996. He is not entitled to receive backpay for any time after that date.

Because Lea is entitled to backpay only for October 1996, and not for November and December 1996, he is entitled to receive only one-third of the net backpay for that quarter alleged in the compliance specification, appendix 16. However, Lea's interim earnings for that quarter exceeded gross backpay and the specification does not allege that he is entitled to any backpay for that calendar quarter. I find that Lea is entitled to no net backpay for the fourth calendar quarter of 1996.

For Lea's entire backpay period, my findings concerning his net backpay may be summarized as follows:

<u>Year/Quarter</u>	<u>Net Backpay</u>
1993-4	-0-
1994-1	-0-
1994-2	-0-
1994-3	-0-
1994-4	\$1,161
1995-1	6,708
1995-2	4,012
1995-3	1,395
1995-4	1,395
1996-1	655
1996-2	6,708
1996-3	-0-
1996-4	-0-
<b>Total</b>	<b>\$22,034</b>

I find that Lea is entitled to total backpay of \$22,034, with interest, and that Respondent has satisfied its obligation to offer him employment.

#### *I. John Lester*

For the period computed by the compliance specification, Lester had gross backpay of \$78,474. The compliance specification admits that during this period, Lester had interim earnings totaling \$100,037.<sup>29</sup> Although that amount exceeds Lester's total gross backpay, there were four quarters in which Lester's interim earnings, as admitted in the specification, were less than gross backpay. Therefore, he is entitled to backpay for those quarters. (GC Exh. 1(e), app. 17.)

Lester testified at the hearing. The evidence does not establish that he had interim earnings exceeding the amounts admitted in the specification. Additionally, I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it.

The Respondent contends that it offered Lester employment, tolling backpay. Lester received a letter from Respondent which, as found above, did not terminate the backpay period. I credit Lester's testimony that, in response to this letter, he telephoned Cobb Mechanical, and left his name and number with a secretary. However, he never received a return call from Respondent. (Tr. 420.)

It is not clear whether or not Respondent's, vice president Bitner, tried to reach Lester by telephone in response to Lester's call, or as part of Bitner's general efforts to telephone discriminatees. However, the record does establish that Bitner telephoned Lester's father, and then spoke with Lester's brother's wife. (Tr. 152, 420.)

According to Bitner, he "left a message with [Lester's] brother's wife about the plumbing jobs available in Montrose and Avon [Colorado]." (Tr. 420.) Bitner did not describe the exact content of this message.

Lester acknowledged that his father and his brother's wife had told him that someone from the Respondent had telephoned him. He testified that he tried to return the call: "I called them, and they—who I was supposed to talk to was never in. And the last time I called, he was on his way to Amarillo or Austin, I think, so I didn't get to talk to him either time, and I never got any more returns after that." (Tr. 420.) Based on my observations of the witnesses, I credit Lester's testimony.

I find that Respondent never made a valid offer of employment to Lester which would end his backpay period. The record does not disclose the content of the message which Bitner left with Lester's relatives, and Respondent bears the burden of proving that the message communicated satisfies all requirements of a valid offer of employment.

In offering employment to the discriminatees, Respondent also bears the burden of assuring that the discriminatee actually receives the offer. The record does not establish that either Lester's father or his brother's wife communicated to him a message which contained a valid offer of employment.

<sup>29</sup> The compliance specification does not allege that Lester had any interim expenses.

Therefore, I find that Respondent has not established that it made such an offer. Lester's backpay period did not end at the close of the period computed in the specification, and continues to run until Respondent makes a valid offer of employment to him. For the period computed in the specification, I find that Lester is entitled to net backpay of \$3092, with interest, as alleged in its App. 17. (GC Exh. 1(e), app. 17.)

*J. Todd Lindsey*

For the period computed in the compliance specification, Lindsey is entitled to gross backpay totaling \$128,952. The specification admits that during this period, Lindsey made interim earnings totaling \$129,261. Although total interim earnings exceed total gross backpay, in nine of the calendar quarters net interim earnings<sup>30</sup> were less than gross backpay and for those quarters, the specification computes, Lindsey is entitled to net backpay. According to the specification, Lindsey's total net backpay for the period computed is \$14,000. (GC Exh. 1(e), app. 18.)

Lindsey testified at the hearing. The record does not establish that he had any interim earnings exceeding the amounts admitted in the specification, but it does show that he satisfied his duty to mitigate backpay. I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it.

Respondent's vice president, Bitner, testified that he "left a message on his answering machine about the two jobs that we were hiring for at the time and asked him to call me back if he was interested in coming to work." (Tr. 147.) However, the record does not establish the content of that message.

Moreover, the record does not establish that Lindsey ever received it. Although Respondent called Lindsey as a witness, it did not ask him about this message. I find that the evidence fails to establish that Respondent made Lindsey a valid offer of employment.

For the period computed by the specification, I find that Lindsey is entitled to total backpay of \$14,000, with interest, as alleged in its Appendix 18. Further, I find that Lindsey's backpay period did not end at the close of the period computed in the specification, but continues until Respondent makes a valid offer of employment to him.

*K. James Christopher Monroe*<sup>31</sup>

For the backpay period computed in the specification, Monroe is entitled to gross backpay of \$138,680. The specification admits interim earnings totaling \$118,469 and alleges interim expenses totaling \$36,952.

Monroe testified at the hearing. Although the record establishes that there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it, no evidence substantiates his alleged interim expenses. I find that the General Counsel has failed to carry the burden of

<sup>30</sup> The specification does not allege that Lindsey had any interim expenses, and the figures admitted as net interim earnings and gross interim earnings are the same.

<sup>31</sup> Two discriminatees are named James Monroe. The compliance specification identifies James Christopher Monroe as "Chris Monroe."

proving such expenses. Therefore, net interim earnings are equal to gross interim earnings for each calendar quarter.<sup>32</sup>

Monroe testified that he received a letter from Respondent, which I infer was the August 15, 1996 form letter to discriminatees which I have found insufficient to end the backpay period. Based on my observations of the witnesses, I credit Monroe's testimony that he responded to this letter, and "told them I'd go to work if they had a job available." (Tr. 346.)

The record is not entirely clear on this point, but I infer that Respondent received this letter. Thus, Vice President Bitner, being questioned by Respondent's attorney, gave the following testimony:

Q. And how about Chris Monroe, on the bottom of your letter—the letter you received from Mr. Monroe?

A. Yes. I left a message—I don't recall whether it was his answering machine or whether I spoke to someone, because I didn't indicate here. It's possible I might have spoken to his wife. But I left a message about the two projects that we were hiring for and asked for him to get back in touch with me if he was interested.

Q. Did he ever get back in touch with you?

A. No, he did not.

(Tr. 148, emphasis added.)

Monroe testified that he did not receive such a message, but that after he mailed his letter to Respondent, he took a job in St. Louis and "was gone nearly a year that time when I went up there." (Tr. 346–347.)

This testimony is consistent with specification Appendix 19, which shows that during the fourth quarter of 1996 and the first two quarters of 1997, Monroe's interim earnings exceeded gross backpay. It appears clear that he was working steadily in St. Louis at this time.

Although I have found that Monroe is not entitled to any net backpay for these three calendar quarters, I do not conclude that his taking the job in St. Louis means that he would have rejected a job with Respondent if it had been offered clearly and unequivocally. Certainly, it would have been more convenient for Monroe to work closer to home than Missouri.

Respondent has the burden of proving that it made a clear and unequivocal offer of the same employment it unlawfully denied Monroe or a substantially equivalent job, but the evidence does not establish what message Respondent's vice

<sup>32</sup> Because gross backpay is computed on a quarterly basis by deducting net interim earnings during that quarter from gross backpay for that quarter, the exclusion of alleged interim expenses can have a decisive effect on whether or not a discriminatee receives backpay in a particular quarter.

Thus, in the fourth quarter of 1996, Monroe had gross backpay of \$10,478 and interim earnings of \$11,575. Interim earnings therefore exceeded gross backpay by \$1097, which would result in a finding that Monroe was entitled to no net backpay for that quarter. However, the specification alleged that Monroe had interim expenses of \$7924. If the General Counsel had proven those expenses, they would have been deducted from interim earnings, resulting in net backpay of \$6827 for that quarter.

Similarly, interim earnings exceeded gross backpay in the first and second quarters of 1997. Since the evidence does not prove the interim expenses, Monroe is not entitled to any net backpay for these quarters.

president, Bitner, left for Monroe. In fact, Bitner could not even be sure whether he spoke with a person or left a message on an answering machine. His testimony is absolutely silent on what he said.

I find that Respondent has failed to prove that it ever offered Monroe employment. Therefore, his backpay period did not end with at the conclusion of the period computed in the specification, but continues until Respondent makes a valid offer of employment in the same job Monroe would have held but for the unlawful discrimination, or in a substantially equivalent job.

My findings regarding Monroe's backpay during the period computed in the specification may be summarized as follows:

<u>Year/Quarter</u>	<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Net Backpay</u>
1993-4	\$1,463	\$3,152	-0-
1994-1	9,234	5,992	\$3,242
1994-2	9,626	9,685	-0-
1994-3	10,012	9,685	327
1994-4	10,934	5,976	4,958
1995-1	10,202	10,080	122
1995-2	10,478	7,700	2,778
1995-3	10,478	6,441	4,037
1995-4	10,478	6,441	4,037
1996-1	10,478	7,139	3,339
1996-2	10,478	10,156	322
1996-3	10,478	7,337	3,141
1996-4	10,478	11,575	-0-
1997-1	10,478	12,354	-0-
1997-2	3,385	4,756	-0-
<b>Total Net Backpay</b>			<b>\$26,303</b>

For the backpay period computed in the specification, Monroe's net backpay is \$26,303, plus interest. It continues to accrue, with interest, until Respondent makes Monroe a valid offer of employment, as described above.

#### *L. James Monroe*

For the backpay period computed in the specification, Monroe's gross backpay totals \$83,982. The specification alleges that he had interim expenses totalling \$10,205, and admits that he had interim earnings of \$60,152 during this period. (GC Exh. 1(e), app. 20.)

The specification alleges that Monroe's backpay period ended on January 1, 1996, when he retired. (GC Exh. 1(e), par. 12.) This date accords with Monroe's testimony at the hearing<sup>33</sup> and with his earnings during all four quarters of 1995. I find that Monroe's backpay period ended on January 1, 1996, as alleged.<sup>34</sup>

The evidence does not disclose interim earnings exceeding those admitted in the specification. Additionally, based on the

<sup>33</sup> Monroe initially testified that he retired January 1, 1995 (Tr. 380) but then corrected his testimony to state that the date was January 1, 1996. (Tr. 384.)

<sup>34</sup> Monroe testified that later, he received a letter from Respondent but sent back a reply, declining the job and advising Respondent that he was retired. (Tr. 387-388.)

record as a whole, I find there was no time, during the period computed in the specification, when Monroe was unavailable for work or failed to seek it.

The evidence does not establish that Monroe incurred the interim expenses alleged in the complaint. Therefore, I will not reduce quarterly interim earnings by the alleged quarterly expenses, resulting in net interim earnings for each quarter being equal to gross interim earnings. My findings regarding Monroe's backpay may be summarized as follows:

<u>Year/Quarter</u>	<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Net Backpay</u>
1993-4	\$2,359	\$2,773	-0-
1994-1	9,480	6,438	\$3,042
1994-2	9,626	9,576	50
1994-3	10,012	10,189	-0-
1994-4	10,934	11,038	-0-
1995-1	10,137	5,707	4,430
1995-2	10,478	6,268	4,210
1995-3	10,478	3,390	7,088
1995-4	10,478	4,773	5,705
<b>Total Net Backpay</b>			<b>\$24,525</b>

Respondent's make-whole obligation to James Monroe is discharged by payment of backpay in the amount of \$24,525, with interest. There is no continuing obligation to offer him employment.

#### *M. Keith Monroe*

For the backpay period computed in the compliance specification, Monroe's gross backpay totals \$132,515. The specification admits that Monroe had interim earnings of \$90,167, and alleges that he had interim expenses of \$15,508.

Monroe testified at the hearing. I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it. However, the evidence does not prove that he incurred the interim expenses alleged. Therefore, I will not reduce quarterly interim earnings by the interim expenses alleged for that quarter, and net interim earnings will be equal to gross interim earnings.

As discussed above, I have found that Respondent's form letter to the discriminatees does not convey a valid offer of employment which would toll backpay. Respondent also asserts that it made an offer to Monroe by telephone.

Respondent's vice president, Bitner, testified that although he did not speak with Monroe, he left a message on Monroe's answering machine, and Monroe did not call him back. (Tr. 152.) Bitner did not describe the specifics of this message.

Monroe acknowledged receiving the call, although he was not sure about the date. Monroe testified, in part, as follows:

A. I believe I just came home, and it was on my answering machine, and I returned the call, and that's when I believe he told me for sure, because on the answering machine, sometimes you can't understand everything. And he made it clear where the locations of the jobs were, and I thought I was going to be laid off soon, so I did tell him I

would talk to Don about taking the job if I did get laid off if there wasn't something here at home.

Q. Okay. So then did you ever get back to him? Did you ever call the company back after that?

A. No, sir. I believe I went to work somewhere else.

Q. Okay. So you weren't interested in—

A. I worked a little longer there. I got laid off. I went in and talked to Don<sup>35</sup> about whether or not he wanted me to go to work there, and he said he had a job at home for me, I believe.

(Tr. 458.)

Monroe also testified that he had a conversation with another person which caused him to believe that he would not be safe if he were working by himself at Cobb Mechanical. He did not contact Respondent to accept employment but instead "got a job at home." (Tr. 460.)

There is no evidentiary basis to conclude that any discriminatee had reason to fear for his safety if he accepted an offer of employment with Respondent. I received Monroe's testimony about what he heard from someone else only for its relevance to Monroe's state of mind, and not for the truth of the matter asserted. The General Counsel has not taken the position that Respondent engaged in any such threats, and the record before me does not provide any evidence of it.

However, Monroe's testimony, considered with the record as a whole, does establish that as of about October 30, 1996, he would not have accepted employment with the Respondent, but instead took another job which was closer to his home. In these circumstances, I find that Monroe's backpay period ended October 30, 1996.

My findings regarding Monroe's entitlement to backpay take into account this conclusion that his backpay period ended October 30, 1996, as well as my conclusion that the General Counsel had not proven any of the interim expenses alleged in the specification. These findings are summarized as follows:

<u>Year/Quarter</u>	<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Net Backpay</u>
1993-3	\$904.00	\$1,022.00	-0-
1993-4	7,089.00	8,267.00	-0-
1994-1	7,089.00	8,267.00	-0-
1994-2	7,285.00	10,255.00	-0-
1994-3	9,743.00	2,250.00	\$7,493
1994-4	10,309.00	4,999.00	5,310
1995-1	9,976.00	5,035.00	4,941
1995-2	10,478.00	5,304.00	5,174
1995-3	10,478.00	8,842.00	1,636
1995-4	10,478.00	8,842.00	1,636
1996-1	10,478.00	10,784.00	-0
1996-2	10,478.00	3,429.00	7,049
1996-3	3,492.66	2,468.66	1,024 <sup>36</sup>

<sup>35</sup> "Don" refers to Union Business Manager Donald Green.

<sup>36</sup> The amounts found for gross backpay and interim earnings for the third quarter of 1996 are one-third the amounts of gross backpay and gross interim earnings set forth for that quarter in app. 21 of the specification. Since I have found the backpay period ended about October 30,

**Total Net Backpay** \$37,823

I find that Respondent will discharge its backpay obligation to Keith Monroe by paying \$37,823 backpay, with interest. Respondent does not have a continuing obligation to offer Monroe employment.

*N. Kelton Naylor*

For the backpay period computed in the specification, Naylor's gross backpay is \$138,680. The specification admits that during this period, Naylor had interim earnings of \$69,569. It does not allege that he had any interim expenses. (GC Exh. 1(e), app. 22.)

Naylor testified at the hearing. Based on his testimony, which I credit, I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it. However, the record does not establish that he had interim earnings exceeding those admitted by the specification.

Naylor received a letter from Respondent, which I infer was the form letter, dated August 15, 1996, it sent to the discriminatees. He testified that he responded with a letter asking for more information.

Respondent's vice president, Bitner, testified that he did not speak with Naylor but left a message on Naylor's answering machine. He did not describe what that message said. (Tr. 147-148.) Naylor could not recall whether or not he received such a message. (Tr. 377.) I find that Respondent has not met its burden of proving that it made a valid offer of employment sufficient to end Naylor's backpay period.

Respondent introduced into evidence the transcript of portions of testimony Naylor gave during the previous hearing in this case. That testimony states as follows:

Q. [By Mr. Powers]: I have a question. You went out to work in the latter part of November for?

A. Plains Plumbing.

Q. Plains?

A. Uh-huh.

Q. If you had received a call from any representative from the company saying you have got the job at Cobb Mechanical and you were working for Plains, what would your reaction have been?

A. At that time I probably would have declined the job application at Cobb Mechanical because I had a better job at Plains Plumbing that would have lasted longer.

Q. At Plains?

A. At Plains Plumbing, yes. And it is with one of our contractors, one of our signatory contractors.

(R. Exh. 30.)

Respondent argues that this testimony establishes that Naylor would not have worked for Respondent and therefore, is not entitled to backpay. (R. Br. at pp. 28-29.) However, I find that

1996, Monroe would be entitled to backpay for only 1 month of this 3-month period. Net backpay represents the difference between gross backpay and interim earnings.

these questions and answers are much too speculative to support such a conclusion.

The most accurate way for Respondent to demonstrate whether the discriminatee would accept a valid offer of employment is for Respondent to make the discriminatee a valid offer of employment. A discriminatee's conjecture as to what he would have done *if* Respondent made such an offer is not as probative.

I find that Naylor's backpay period did not end with the period computed in the compliance specification, and that backpay continues until Respondent offers him the same employment it unlawfully denied him, or a substantially equivalent job. Further, I find that for the backpay period computed in the specification, Naylor's net backpay is \$69,111, with interest, as alleged.

*O. Randy Noland*

For the backpay period computed in the specification, Noland has gross backpay of \$92,123. The specification admits that he had interim earnings of \$62,671. It does not allege that he had any interim expenses. (GC Exh. 1(e), app. 23.)

Noland testified at the hearing. Based on my observations, I conclude that he was an honest witness, and credit his testimony. Further, I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it

The evidence fails to establish that Respondent ever made Noland an offer of employment valid to terminate the backpay period. I find that his backpay did not end with the period computed in the specification, and continues until Respondent offers him the employment it unlawfully denied him or a substantially equivalent job. Further, I find that his net backpay for the period computed in the specification is \$33,994, as alleged.

*P. Donald Peyton*

For the period computed in the compliance specification, Noland has gross backpay of \$85,759. The specification admits that during this period, he had interim earnings totaling \$126,663. It alleges that he had interim expenses of \$104,995. (GC Exh. 1(e), app. 24.)

Peyton testified at the hearing. Based on his testimony, which I credit, I find that there was no period of time when he was unavailable for work and no time when he did not make sufficient efforts to seek work.

The evidence does not establish that Peyton had interim earnings exceeding those admitted in the specification. On the other hand, the record does not prove that Peyton incurred the interim expenses alleged in the specification. Therefore, I find that such alleged expenses should not be subtracted from interim earnings, and that for each calendar quarter, net interim earnings equal gross interim earnings.

A question posed to Peyton by Respondent's counsel assumed that Respondent made some sort of offer of employment to Peyton at an unstated time in 1996. (Tr. 218.) Absent evidence to the contrary, I infer that Respondent's counsel was referring to the August 15, 1996 form letter it sent to discriminatees (R. Exh. 15.) which I have found insufficient to terminate their backpay periods.

Peyton testified that he responded by stating that he "wanted to be employed as a pipefitter." (Tr. 218.) He received a response stating "they had no openings for a pipefitter at that time." (Tr. 219.)

Clearly, Respondent's actions did not constitute an offer of employment. Rather, it continued the denial of employment which the Board has found unlawful. I find that Respondent has not carried its burden of proving that it ever offered Peyton the same job that he was unlawfully denied or a substantially equivalent job. Therefore, Peyton's backpay period did not terminate but continues until Respondent makes him a valid offer of employment.

My findings regarding Peyton's net backpay during the period computed in the specification are set forth in the table below. They take into account my conclusion that the evidence fails to establish the interim expenses alleged.

<u>Year/Quarter</u>	<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Net Backpay</u>
1993-4	-0-	\$5,763	-0-
1994-1	\$3,462	19,593	-0-
1994-2	6,336	720	\$5,616
1994-3	6,348	9,911	-0-
1994-4	7,075	16,368	-0-
1995-1	6,708	16,339	-0-
1995-2	6,708	11,521	-0-
1995-3	6,708	1,945	4,763
1995-4	6,708	7,906	-0-
1996-1	6,708	9,702	-0-
1996-2	6,708	9,434	-0-
1996-3	6,708	6,109	599
1996-4	6,708	2,678	4,030
1997-1	6,708	4,874	1,834
1997-2	2,166	3,800	-0-
<b>Total Net Backpay</b>			\$16,842

I find that for the backpay period computed in the specification, Peyton's total net backpay is \$16,842, with interest. Backpay continues until Respondent makes Peyton a valid offer of employment in the position he was unlawfully denied or in a substantially equivalent position.

*Q. Donnie Sarrett*

For the backpay period alleged in the compliance specification, Sarrett's gross backpay totals \$136,376. The specification admits he had interim earnings totaling \$149,009 during this period, but does not allege that he had interim expenses.

Sarrett did not testify. There is no evidence to establish that he was unavailable for work, or failed to seek it, at any time during the backpay period computed in the specification, and his very substantial interim earnings compel the opposite conclusion.

Respondent's vice president, Bitner, testified that he reached Sarrett by telephone. His entire account of that contact is as follows:

Q. How about Donnie Sarrett?

A. Yes, I spoke with Donnie Sarrett.

Q. And did you offer him a position in either Montrose or Avon?

A. Yes, I did.

Q. And what was his response?

A. He indicated that he was working out at the Pantex plant and that he was doing fine and he was not interested.

(Tr. 149–150.)

Respondent bears the burden of proving not only that it made the discriminatee an offer of employment, but also that it was to the same job which he had been denied unlawfully, or one substantially equivalent to it. Bitner's testimony does not carry this burden of proof. It is totally silent on details which would allow it to be compared to the position unlawfully denied.

Respondent has unique knowledge of such details, as well as the burden of proof. Its failure to describe the particulars of its offer is not consistent with meeting that burden. Moreover, the record contains no other evidence which would establish what Vice President Bitner offered. The record also fails to establish that Respondent made any other offer of employment to Sarrett sufficient to end the backpay period.

In sum, I find that Sarrett's backpay period is not limited to the period computed in the compliance specification, but continues under Respondent makes a valid offer to employ him in the position unlawfully denied, or in a substantially equivalent position. For the backpay period computed in the specification, I find that Sarrett's net backpay is \$344, with interest, as alleged.

*R. Joe Simms*

For the period computed in the compliance specification, Simms had gross backpay of \$139,570. The specification admitted that Simms had interim earnings of \$99,432 during this period, but did not allege that he had any interim expenses. (GC Exh. 1(e), app. 26.)

Based on my observations of the witnesses, I credit the testimony Simms gave during the compliance hearing. I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it.

Respondent advances two reasons for a finding that Simms' backpay period terminated in October 1996. First, it contends that on or about October 30, 1996, its vice president, Bitner, contacted Simms' and made an offer to employ him, thereby tolling backpay. Bitner gave the following testimony:

Q. Okay. How about Joe Simms?

A. Yes. I spoke with his wife. She did ask when the job would start, and I told her that the job was available as of that following Monday, on November 4 of 1996. And she indicated she would tell him about it and then ask him to get back with me. And I spoke with him [sic]<sup>37</sup> about the two jobs in Montrose and Avon.

Q. Was Avon the same as the Beaver Creek job?

A. Yes.

. . . .

Q. [By Mr. Siebert]: Okay. Did Mr. Simms ever get back to you?

A. No, he did not.

(Tr. 148–149.)

Simms credibly testified that his wife told him that someone from Cobb Mechanical had called, but he did not remember her saying that he should call the Respondent. Rather, Simms testified, "I think she said something about they might call back or something." (Tr. 504–505.) I find that after receiving this message, Simms did not try to contact Respondent.

For reasons similar to those discussed above with respect to Bitner's contacts with other discriminatees, I find that Respondent has not met its burden of proving that Bitner offered Simms a job substantially equivalent to the employment unlawfully denied.

Additionally, Respondent contends that Simms' testimony establishes that he would not have accepted employment. This testimony is as follows:

Q. Okay. Were you looking for work in October 1996?

A. Yes.

Q. You were?

A. October, yes. '96?

Q. Yes.

A. No. I was working in 96.

Q. So you weren't interested in other employment at that time?

A. No. I was working at Scottco.

(Tr. 505.)

Respondent's brief argues that "Simms made very clear that during the time he was working for Scottco, he was not looking, and would not have accepted, other employment such as might have been offered by Respondent." (R. Br. at p. 28.)

However, Simms' testimony is too speculative to support a finding that he would not have accepted employment with Respondent if Respondent had made a genuine offer of work in the same, or substantially equivalent position that Simms had been denied. During all four quarters of 1996, Simms' earnings were less than he would have made if employed in the position Respondent denied him. Indeed, in 1996, Simms would have made \$11,788 more if he had worked for Respondent than he actually earned.

If Simms had been presented with an actual opportunity to earn almost \$12,000 a year more, he might well have accepted it. Respondent did not give him that opportunity.

It is difficult for Respondent to argue convincingly that Simms had made a firm decision not to accept any offer of employment when it frames that argument in terms of what might have been offered, rather than what it actually did offer. To toll backpay, Respondent must show more than "might have been." It did not meet this burden.

<sup>37</sup> The notation "[sic]" appears in the official transcript certified by the court reporter, apparently prompted by the witness's use of the word "him" to refer to Simms' wife. There is no other indication in the record that Bitner spoke about employment with Simms himself, rather than Simms' wife, and I find that Bitner did not.

*S. William Garland Stevens*<sup>38</sup>

For the period computed in the specification, Stevens has gross backpay of \$90,373. The specification admits that during this period, Stevens had interim earnings totaling \$33,360. It does not allege that he had any interim expenses during this period. (GC Exh. 1(e), app. 27.)

Stevens testified at the hearing and, based on my observations, I credit his testimony. I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it.

Stevens testified that in September 1996, he received a letter from Respondent offering him employment. In the absence of evidence to the contrary, I conclude this was the form letter Respondent sent to discriminatees (R. Exh. 15), which I have found insufficient to terminate the backpay periods. Stevens sent a letter back to the Respondent, stating that he would be interested.

Respondent's vice president, Bitner, testified that he spoke with Stevens and offered him a position. According to Bitner, Stevens "said he was working and not interested, but he appreciated the call." (Tr. 146.)

Bitner did not describe the details of the offer. As Stevens' testimony establishes, Bitner did not provide many:

Q. And do you recall a conversation with a representative from Cobb Mechanical on or about October 30, 1996, offering you employment in Avon and Montrose?

A. They called me and told me it was someplace up in the mountains, and that's all he told me.

Q. Okay. And did you tell them that you were working and not interested—

A. Yes.

Q.—but you appreciated the call?

A. Yes. Told them I'd be interested later.

(Tr. 509–510.)

Stevens' testimony is uncontroverted. Bitner did not describe the specifics of his job offer to Stevens, and thus did not contradict Stevens' statement that Bitner only said "it was someplace up in the mountains, and that's all he told me." At the time of the hearing, Bitner was one of Respondent's corporate officials, and thus could have been recalled to the stand to refute Stevens' account, had it been false or incomplete.

However, Respondent did not recall Bitner, leaving his brief testimony about the conversation with Stevens' unamplified and unchanged. Based on that testimony, as well as Stevens', I find that Bitner only told Stevens that the job being offered was someplace up in the mountains.

Telling a discriminatee he can have a job "someplace up in the mountains," without other details, does not constitute a valid offer of employment in the same job unlawfully denied, or in a substantially equivalent job. The Respondent has failed to prove that it ever made Stevens a valid offer of employment which would end his backpay period.

For the period computed in the compliance specification, I find that Stevens is entitled to net backpay of \$58,646, with

<sup>38</sup> The compliance specification refers to this discriminatee as Garland Stevens.

interest, as alleged. Further, I find that Stevens' backpay period continues to run until Respondent offers him employment in the same job unlawfully denied, or in a substantially equivalent job.

*T. Eddie Dwayne Terry*

For the period computed in the specification, Terry has gross backpay of \$130,596. The specification admits he had interim earnings totaling \$88,218. It does not allege that he had interim expenses. (GC Exh. 1(e), app. 28.)

Terry testified at the compliance hearing. Based on my observations, I credit his testimony. I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it.

In September 1996, Terry received a letter from Respondent concerning employment in Avon and Montrose, Colorado. (Tr. 523.) I conclude this was the form letter (R. Exh. 15) which was insufficient to toll backpay.

On about October 30, 1996, Terry received a telephone call from Respondent's vice president, Bitner, . On direct examination by Respondent's counsel, Terry gave the following testimony about that conversation:

Q. Do you recall getting a call from a Mr. Bitner on or about October 30, 1996, offering you employment?

A. Yes, sir, I did.

Q. And at that time, you told him you were working for Plains Plumbing and you didn't want to leave.

A. Yes, sir.

(Tr. 524.)

Respondent did not request to treat Terry as a witness identified with an opposing party under Rule 611(c) of the Federal Rules of Evidence, but nonetheless, opposing counsel did not object to Respondent's use of leading questions on direct examination. In weighing Terry's testimony, I take into account that Respondent did not ask him what he told Bitner, or, for that matter, what Bitner told him.

Respondent has not established, as a predicate, that Bitner made Terry an offer of employment in the same position unlawfully denied to him or substantially equivalent to it. Respondent could have asked Terry about the details of Bitner's offer, but did not. Moreover, Bitner's own testimony does not establish what he told Terry. Bitner only described his conversation with Terry as follows:

Q. How about Eddie Terry?

A. Yes, I spoke with Eddie Terry.

Q. And what did Mr. Terry tell you when you offered him employment?

A. He indicated he was working for Plains Plumbing and, in his words, that he was, "Hooked up pretty good," and he didn't want to leave.

(Tr. 148.)

This testimony, also elicited with leading questions on direct examination, must be viewed critically to separate what the attorney assumed from what the witness testified. Such careful examination is even more important here because Bitner is one of Respondent's corporate officials and clearly cannot be identified with any opposing party.

The attorney, not the witness, said that Bitner offered employment to Terry. Various reasons support the well-established principle that the statements of counsel are not evidence even though, as officers of the court, they owe a duty of candor to the tribunal.

However, even assuming that Bitner would have testified that he made an offer of employment to Terry, if he had been asked that question, that statement alone falls short of proving that the offer met all requirements necessary to comply with the Board's Order and end the backpay period. Neither Bitner's testimony nor Terry's provides any basis to conclude that such an offer involved employment the same as, or substantially equivalent to, the job unlawfully denied.

Bitner, of course, knew better than anyone the substance of the offers he extended to the various discriminatees. His failure to describe them with any particularity raises the possibility that these offers were no more substantial than the facades on the set of a Western movie. Perhaps they were, but it is Respondent's obligation to prove it, and the Respondent has not.

The evidence suggests that Bitner made some kind of offer which Terry rejected. However, if Bitner phrased the offer in a manner to elicit rejection, or if the offer itself fell short of the Respondent's legal duty, then Terry's rejection of it says nothing about how he would have responded to an offer that was legally sufficient.

In the fourth quarter of 1996, when this conversation occurred, Terry had \$9115 in interim earnings, but he would have made \$10,478 if employed by Respondent in the job unlawfully denied him. Respondent has the burden of showing that it offered Terry such a job or one substantially equivalent. Respondent has not carried this burden.

I find that the purported offer did not terminate Terry's backpay period, which continues under Respondent offers Terry employment in the same job it unlawfully denied him, or in a substantially equivalent job. For the backpay period computed in the compliance specification, I find that Terry is entitled to net backpay of \$46,864, with interest, as alleged.

#### *U. Mike Thompson*

For the backpay period computed in the compliance specification, Thompson had gross backpay of \$88,732. The specification admits that he had interim earnings totaling \$67,728, and alleges he incurred interim expenses of \$4239 during this period. (GC Exh. 1(e), app. 29.)

Based on my observations when Thompson testified, I credit his testimony. The evidence establishes that Thompson was not unavailable for work during the backpay period computed in the specification, and that he made sufficient efforts to find work when unemployed.

I find that he did not have interim earnings exceeding those admitted in the specification. However, I also find that the General Counsel has not proven that Thompson incurred the alleged interim expenses.

Respondent's vice president, Bitner, testified that he spoke with Thompson, who expressed interest in going to work at one of its jobsites in Colorado. Although the record does not establish the date of this conversation, I infer that it was probably at the end of October 1996.

According to Bitner, Thompson said he would contact him if he felt that he could "get his affairs in order" and come to work in Colorado. However, Thompson never got back to Bitner. (Tr. 152-153.) Thompson confirmed that he spoke with Bitner, but did not get back in touch with him. (Tr. 538.)

Bitner did not describe the terms of the offer he made to Thompson, and Thompson's recollection was not precise. He could not remember whether or not the job paid fringe benefits, as well as wages. However, Thompson did recall that the hourly rate was "14-something, if I remember right." (Tr. 539.) Thompson's testimony implied that the job probably did not involve more than 40 hours of work per week.

Thompson explained that he decided not to pursue this job after comparing the wages it offered with the expenses involved: "I kind of figured it up, and the amount that I was going to be able to make, wasn't going to be able to—it just wasn't going to work out . . . you know, by the time you got to stay in a motel and the hours that they were working and everything, it wouldn't have been feasible to take a job like that." (Tr. 538-539.)

Respondent has not established the wage rate offered to Thompson, although, based on Thompson's credited testimony, I find that it was less than \$15 per hour. I find that Respondent has not proven that the job it offered Thompson was substantially equivalent to the employment he would have had but for the unlawful discrimination against him. Therefore, I conclude that this offer was not legally sufficient to satisfy the Board's order and end the backpay period.<sup>39</sup>

My findings regarding Thompson's net backpay during the period computed in the compliance specification are summarized below. Because the evidence does not prove that Thompson incurred the interim expenses alleged, I have not subtracted

<sup>39</sup> This finding, that Bitner did not offer Thompson a job substantially equivalent to that denied him, is consistent with my finding above that Bitner did offer Mike Lea such a substantially equivalent job. Before discussing why the offer to Lea is distinguishable, however, the method of determining the "substantial equivalence" of a job offer should be examined.

In determining what kind of employment would be substantially equivalent to the employment the discriminatees would have had if Respondent had not denied them work unlawfully, the date of the offer must be taken into account. Bitner made the offers to Lea and Thompson after the dates the Amarillo and Dalhart projects ended. Therefore, the sufficiency of these offers must be tested not by comparing them with the terms and conditions of employment on the Amarillo and Dalhart projects, but by comparison with the terms and conditions of employment at the sites to which they would have been transferred but for the unlawful discrimination.

Quite probably, at the time of Bitner's offers, some of the discriminatees would have been working at Respondent's Colorado jobsites if Respondent had not denied them employment. Therefore, a comparison of the job offer (work on a project in Colorado) with the jobs the discriminatees would have held (including work on a project in Colorado) would be expected to result in a conclusion of "substantial equivalence."

However, Thompson's credited testimony does not establish that Bitner offered him the \$15/hour wage rate which was standard for journeymen on this job. Bitner did offer that rate to Lea. The offer of a lower wage to Thompson means that the offer was not substantially equivalent.

such expenses from interim earnings. Therefore, gross interim earnings and net interim earnings are the same.

<u>Year/Quarter</u>	<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Net Backpay</u>
1993-4	-0-	\$2,727	-0-
1994-1	\$5,507	3,471	\$2,036
1994-2	6,336	9,849	-0-
1994-3	6,935	6,892	43
1994-4	7,341	3,541	3,800
1995-1	6,782	2,489	4,293
1995-2	6,708	2,822	3,886
1995-3	6,708	6,747	-0-
1995-4	6,708	9,391	-0-
1996-1	6,708	4,757	1,951
1996-2	6,708	4,589	2,119
1996-3	6,708	2,773	3,935
1996-4	6,708	1,601	5,107
1997-1	6,708	3,917	2,791
1997-2	2,166	2,171	-0-
<b>Total Net Backpay</b>			<b>\$29,961</b>

In sum, for the backpay period computed in the specification, I find that Thompson is entitled to net backpay of \$29,961, with interest. Thompson's backpay period continues to run until Respondent makes a valid offer to employ him in the position it unlawfully denied him, or in a substantially equivalent position.

#### *V. William White*

For the backpay period computed in the compliance specification, White has gross backpay of \$131,592. The specification admits that he had interim earnings of \$83,852 during this period. It does not allege that he had interim expenses. (GC Exh. 1(e), App. 30.)

White testified at the hearing, pursuant to Respondent's subpoena duces tecum. However, he did not produce certain documents described in the subpoena, most notably, income tax returns for 1995 and 1996.

The record does not establish why he did not produce a tax return for 1995. With respect to 1996, White stated, "I don't believe I made \$10,000 in '96" (Tr. 567), and he did not file a tax return for that year.

At the hearing, Respondent's counsel stated that he considered his client's due process rights to "have been severely violated . . . through the failure of the Union and the discriminatees to comply with the lawfully served subpoenas that they all admitted receiving." (Tr. 569.) However, the Respondent did not state on the record that it would request the General Counsel to seek judicial enforcement of the subpoena and did not request a continuance of the hearing for that purpose.

White testified that some of the documents sought by the subpoena may have been lost when he moved. He also testified that the subpoena had been sent to an address at which he did not reside, and he did not receive it until the Friday before the Friday before the hearing. Based on my observations, I credit his testimony.

I do not draw an adverse inference from White's failure to produce the subpoenaed documents. He obviously could not produce documents he did not have, and the relatively short

time between his receipt of the subpoena and his appearance as a witness did not allow as thorough a search for them as might otherwise have been possible. Moreover, White did produce other documents, such as W-2 forms, which were in his possession.

Respondent's counsel stated on the record that there appeared to be a discrepancy between the specification, which alleged \$10,852 in interim earnings during 1996, and the W-2 forms White produced, showing \$4000 in earnings. (Tr. 567.) However, Respondent suffers no prejudice because the specification admitted that White made more in interim earnings than the W-2 forms show; such interim earnings reduce the Respondent's backpay liability.

The General Counsel represented on the record that White had given the compliance officer an authorization to obtain reports from the Social Security Administration about his income, and that the interim earnings admitted in the specification were based on the information provided by the Social Security Administration. (Tr. 568.)

I take notice that such records of the Social Security Administration reflect practically all wages earned by employees. The evidence does not indicate that White engaged in any employment which would be exempt from reporting to Social Security, and certainly, any work he performed for a mechanical contractor would be reported, or at least should have been under the law.

No system of wage reporting assures 100-percent accuracy because there is always the possibility that a discriminatee might work in the "underground economy" for cash, and not report such wages as income. Apart from such hard-to-detect transactions, social security records provide one of the most reliable methods of detecting interim earnings, because they depend on income reported by the discriminatee's employer, rather than by the discriminatee himself.

I find no evidence here that White deliberately withheld records which had been subpoenaed, but instead conclude that he produced the records which were in his possession when he received the subpoena. Additionally, I find that the Respondent has not been denied due process.<sup>40</sup>

The evidence does not establish that White had interim earnings exceeding those admitted in the specification for any portion of the backpay period computed in the specification. Moreover, based on White's credited testimony, I find there was no time, during the period computed in the specification, when he was unavailable for work or failed to seek it.

Respondent's evidence indicates it sent a copy of its August 15, 1996 form letter to White (R. Exh.15), but White testified he never received such a letter. (Tr. 564.) I credit White's testimony, but note that even if he had received the letter, it did not constitute a valid offer of employment which would have satisfied the Board's order and ended White's backpay period.

<sup>40</sup> Respondent has raised similar contentions with respect to other discriminatees whom it subpoenaed, but who failed to produce all documents described in the subpoena. However, the evidence does not support a finding that any discriminatee withheld documents in his possession which the subpoena obligated him to produce. I do not find that the record warrants drawing an adverse inference with respect to any of these discriminatees.

The evidence does not establish that Respondent offered employment to White in any other way. Therefore, I find that White's backpay period continues until Respondent makes a valid offer to employ White in the same position unlawfully denied him or in a substantially equivalent position. For the period computed in the specification (GC Exh. 1(e), app. 30), I find that White is entitled to net backpay of \$57,424, with interest, as alleged.

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

## ORDER

The Respondent, Cobb Mechanical Contractors, Inc., Amarillo, Texas, its officers, agents, successors, and assigns, shall pay to the employees named below the indicated amounts of total net backpay and other reimbursable sums with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and less taxes required by law to be withheld:

Raymond Rex Bohannon	\$97,186
Viviano Coronado	18,002
Billy Culwell	-0-
Larry Gallop	7,163
Donald Green	-0-
James Kerek	68,260
Kris Kienast	-0-
Mike Lea	22,034
John Lester	3,092
Todd Lindsey	14,000
James Christopher Monroe	23,162
James Monroe	24,525
Keith Monroe	34,263
Kelton Naylor	69,111
Randy Noland	33,994
Donald Peyton	16,842
Donnie Sarrett	344
Joe Simms	41,316
William Garland Stevens	58,646
Eddie Dwayne Terry	46,864
Mike Thompson	29,961
William White	57,424

IT IS FURTHER ORDERED that Respondent shall take the following affirmative action:

1. Offer the following persons immediate employment in the positions unlawfully denied them, or if those positions no longer exist, to substantially equivalent positions, with the same seniority and benefits which they would have enjoyed if they had been continuously employed by Respondent beginning on the starting dates set forth opposite their respective names, and make them whole for all losses they suffered, after the backpay periods computed in the specification, because Respondent continued to refuse to employ them as ordered by the Board:

James Kerek	11/19/93
Raymond Rex Bohannon	11/29/93
Joe Simms	12/06/93
Donald L. Green	12/13/93
Kelton Naylor	12/13/93
James Christopher Monroe	12/13/93
Donnie Sarrett	12/16/93
William White	12/20/93
Eddie Terry	12/30/93
Todd Lindsey	01/03/94
Randy Noland	01/06/94
Garland Stevens	01/06/94
Mike Thompson	01/09/94
Viviano Coronado	01/09/94
Donald Peyton	01/10/94
Larry Gallop	01/10/94
John Lester	01/10/94
Kris Kienast	01/12/94

2. Comply in all other respects with the Order in the above-captioned cases issued on April 26, 1995, by the Honorable Frederick C. Herzog, Administrative Law Judge, and adopted by the Board by Order issued June 23, 1995, and enforced by the United States Court of Appeals for the Fifth Circuit on June 6, 1996.