

**The Bauer Group, Inc., Bauer Communications, Inc., and Bauer Financial Reports, Inc., and Sangriale Fulger.** Case 12–CA–17150

February 27, 2002

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On December 8, 1999, Administrative Law Judge Richard J. Linton issued the attached supplemental decision. The General Counsel and the Respondent each filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply brief.

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.

ORDER

The National Labor Relations Board orders that the Respondent, The Bauer Group, Inc., Bauer Communications, Inc., and Bauer Financial Reports, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall make whole the employee named below by paying her the amount set forth opposite her name, plus interest as

<sup>1</sup> In adopting the judge's finding that the Respondent would not have retained discriminatee Sangriale Fulger after it closed the survey room in October 1995, we rely on the credited testimony of the Respondent's owner and president, Paul A. Bauer, and Fulger's supervisor, Caroline Jervey. Bauer testified that he was dissatisfied with Fulger's work before he learned of her protected concerted activity and that he wanted to "get rid of" Fulger. Bauer further testified that he did not do so because Jervey wanted to keep Fulger, but that he told Jervey that he "didn't want her for anything else" since he "wasn't happy with her performance." Jervey's testimony corroborated Bauer's. Based on this testimony, we agree with the judge that the Respondent has established that it would have terminated Fulger when the survey room was closed.

<sup>2</sup> The judge concluded that Fulger should be charged as unavailable for work for 3 days in the third quarter of 1995 when she attended depositions related to her civil rights action against the Respondent for her unlawful discharge and for 7 days in the first quarter of 1996 when she attended the trial in that case. Accordingly, the judge reduced her gross backpay by \$168 in the third quarter of 1995 and by \$448 in the first quarter of 1996. Because we agree with the judge that the backpay period for Fulger ended when the survey room was closed on October 13, 1995, 2 weeks into the fourth quarter of 1995, we find it unnecessary to pass on the issue of whether Fulger was unavailable for the 7 days she spent at the trial of her lawsuit against the Respondent in 1996. Although the judge found that the deposition occurred in the third quarter of 1995 and reduced Fulger's third quarter gross backpay by \$168, the record shows that the deposition occurred in the fourth quarter of 1995 and not the third quarter of 1995. Therefore, we have restored that amount to her backpay total for the third quarter of 1995, and have modified the judge's recommended Order. We find it unnecessary to pass, however, on whether Fulger was unavailable for work for the 3 days of the deposition in the fourth quarter of 1995 because, as the judge found, her interim earnings for that quarter exceeded any gross backpay due.

prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and State laws:

Sangriale Fulger	\$6914
------------------	--------

*Shelley B. Plass, Esq.* for the General Counsel.  
*Daniel F. Blonsky, Esq.* (Aragon, Burlington, Weil & Crockett), Miami, Florida, for the Respondent, Bauer.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a backpay case. It is a compliance proceeding to determine the amount of backpay which the Respondent, The Bauer Group, Inc., Bauer Communications, Inc., and Bauer Financial Reports, Inc. (Bauer Group, Respondent or Company), owes to Sangriale Fulger and Gregory Lyons as a result of unlawfully discharging them during November–December 1994. Liability was determined against Respondent Bauer Group in the underlying unfair labor practice case tried before Administrative Law Judge David L. Evans in February–March 1998. Judge Evans issued his decision (JD) on April 24, 1998 (with a correcting erratum issued on June 26, 1998). Because the Company did not file exceptions (did not appeal), the National Labor Relations Board, by its Order of June 10, 1998, adopted Judge Evans' decision. The Board's order, and the (corrected) decision of Judge Evans, which are part of this record as GCX 1(a)<sup>1</sup>, are not reported in the Board's bound volumes.

I presided at this 2-day trial in Miami, Florida on July 22–23, 1999, pursuant to the December 30, 1998 compliance specification (CS), as subsequently amended, issued by the Regional Director for Region 12 of the Board. The Regional Director issued the compliance specification on behalf of the Board pursuant to the authority granted by 29 CFR 102.54(a).

Respecting the issue of backpay, when the parties could not agree on the amount of backpay due the two discriminatees, the Regional Director issued the compliance specification. By her order of July 20, 1999 (GCX 1m), the Acting Regional Director issued an amendment to the compliance specification revising the backpay figures. As reflected there, the total backpay figures claimed are:<sup>2</sup>

Sangriale Fulger	\$26,652
Gregory Lyons	7,210

Shortly after the start of the backpay trial, the parties settled as to Gregory Lyons, and his case was severed (in effect remanding to the Regional Director respecting compliance with

<sup>1</sup> References to the two-volume transcript of testimony are by volume and page. Exhibits are designated as GCX for the General Counsel's and RX for those of the Company.

<sup>2</sup> The figures are expressed in dollars only, no cents. This is consistent with the Internal Revenue Service procedure American taxpayers are familiar with in calculating their federal income taxes. The Region apparently rounded pennies of line items to the nearest dollar. Thus, 50 cents and more are reflected at the next higher dollar, and 49 cents and less are rounded to the next lower dollar. See *Minette Mills*, 316 NLRB 1009, 1010 fn. 2 (1995).

the terms of the settlement). (1:25–26) The settlement stipulation, which I approved, is part of the record as General Counsel Exhibit 2. Thus, the only case remaining is that pertaining to Fulger. In the underlying unfair labor practice case, and in this proceeding, the name of Sangriale Fulger has been spelled in different ways. While the spelling in the case below, and in the formal papers here, may not be the correct one, it is the one that has been used. To be consistent with that spelling, and to avoid confusion, I continue the spelling that has been used as reflected above.

By its amended answer of July 15, 1999, Company raises numerous defenses. These principally include the defense that Fulger failed to exercise reasonable diligence in searching for work and that her job duties would have been eliminated no later than October 16, 1995 when her position (rate surveyor) was eliminated. Company asserts that Fulger is not entitled to any backpay.

As reflected in the pleadings, and based on the findings in the liability stage, Fulger's backpay period begins on November 29, 1994, the date Company unlawfully discharged her. It ends some 42 months later on May 18, 1998, the date Company (by letter, GCX 3) unconditionally offered Fulger reinstatement. But Fulger, having moved up, effective June 1, 1998 (RX 4 at 22; 1:154), to a salaried position paying her \$24,000 a year at her current interim employer, a position she still holds (1:158), declined (1:30) the offer of reinstatement. Actually, Company's letter (GCX 3) offering reinstatement is dated May 8, 1998. The compliance specification uses the date of May 18 because that is the closing date given Fulger to respond to the offer for a reinstatement date of May 26, 1998. (1:39–1:40)

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent Company, I make these findings and conclusions.

#### FINDINGS OF FACT

##### I. GOVERNING LEGAL PRINCIPLES

The controlling legal principles are well settled by many cases. Ten of the rules are listed in *Minette Mills*, 316 NLRB 1009, 1010–1011 (1995). Because all 10 rules are not involved here, I quote only those that are, using the sequence numbers set forth in *Minette Mills*. Thus:

First, when loss of employment is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), *enfd.* on point 876 F.2d 678 (8th Cir. 1989).

Third, in compliance proceedings, the General Counsel bears the burden of proving the amount of gross backpay due. *Florida Tile Co.*, 310 NLRB 609 (1993); *Arlington Hotel*, *id.* [I need not complete the quotation of Rule 3 because the Company here admits the gross backpay formula as alleged in the compliance specification.]

Fourth, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Florida Tile*, *supra*. Thus, the burden of showing the amount of any interim earnings,

or a willful loss of interim earnings, falls to the Respondent. *Arlington Hotel*, *supra*. Although it is the Respondent's burden to establish a discriminatee's interim earnings, if any, it is the General Counsel's voluntary policy to assist in gathering information on this topic and to include that data in the compliance specification. *Florida Tile*, *supra*; *Arlington Hotel*, *supra*; 3 *NLRB Casehandling Manual* Secs. 10540.1 and 10629.9 (Sept. 1993). The voluntary policy is nothing more than an "administrative courtesy." *Ryder System*, 302 NLRB 608, 613 fn. 7 (1991), *enfd.* 983 F.2d 705, 142 LRRM 2290 (6th Cir. 1993).

Fifth, even though a discriminatee must attempt to mitigate his or her loss of income, the discriminatee is held only to a reasonable assertion rather than to the highest standard of diligence, and success is not the test of reasonableness. *Florida Tile*, *supra*; *Arlington Hotel*, *supra*. Interim employment means comparable work—substantially equivalent employment. Thus, it is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment. *Arlington Hotel*, *supra*.

Eighth, if a discriminatee incurs any reasonable and necessary expenses in earning interim income (above what would have been incurred working for the Respondent), it is the General Counsel's burden to establish the amounts of those expenses. *Arlington Hotel*, *supra*. Such expenses are deducted from interim earnings. They are not added to gross backpay. 3 *NLRB Casehandling Manual* Sec. 10544 (Sept. 1993).

Tenth, as Respondent is the wrongdoer who caused the discriminatees' initial unemployment, any ambiguities, doubts, or uncertainties are resolved against Respondent, the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination. *Florida Tile Co.*, 310 NLRB 609, 610 (1993); *Ryder System*, 302 NLRB 608 and fn. 4 (1991), *enfd.* 983 F.2d 705, 142 LRRM 2290 (6th Cir. 1993); *Big Three Industrial Gas*, 263 NLRB 1189, 1190 fn. 8 (1982).

Respecting Rule 4, above, and the General Counsel's policy of voluntarily assisting in gathering information as to interim earnings, I suggest that the Government has more of a reason for doing this than simply one of "administrative courtesy." Thus, the Government has an interest in spending tax dollars wisely. A disservice would be done both to the Agency and to the taxpayers if the Government did not (as it ordinarily does) gather information about interim earnings, only to learn at the backpay trial that the discriminatee was mistaken about or had concealed substantial amounts of interim earnings (with such mistake or concealment possibly having blocked settlement efforts). This is one reason why the Agency's Compliance Manual emphasizes the compliance officer's investigation of interim earnings. See 3 *NLRB Casehandling Manual* 10540 (Sept. 1993). As Finley Peter Dunne's "Mr. Dooley" would say (in proper text), "Trust everybody, but cut the cards."

II. THE EVIDENCE

A. *The Six Witnesses*

Six witnesses testified before me. For the first of the Government's two witnesses, the General Counsel called Stephen Jacoby, a supervisory examiner with NLRB Region 12 and the Region's Acting Compliance Officer from about July 1997 until early April 1999. (1:28) It was Jacoby who gathered the information for the compliance specification, did the computations, and drafted the compliance specification, and the amendment to the CS. Compliance Officer Jacoby explained the basis for each liability allegation of the CS. The General Counsel next called Fulger to testify about the limited interim expenses claimed for her in the compliance specification. The General Counsel then rested the Government's case in chief, as did Fulger respecting the Charging Party's case in chief. (1:77-78)

Company then called Charging Party Fulger (to cover her search for interim employment), Steven Boyar (an owner of the employment agency which Fulger called upon for referrals to interim employment), Dorothy McDaniel Stein (president of an employment agency, called to give expert testimony about Fulger's chances for interim employment in the Miami area), Paul A. Bauer (owner and president of Respondent and its component entities, who describes his business and asserts that Fulger would not have been transferred elsewhere in Company (to any of the other corporate entities) at or before the department she had worked in closed), and Caroline Jervey (an officer of Company who reinforces Bauer's testimony respecting Fulger, and giving more details).

For the rebuttal stage, the Government recalled Compliance Officer Jacoby and Charging Party Fulger and then (2:434) closed. Company presented no surrebuttal. (2:434)

B. *The Backpay Claimed*

On a quarterly basis, the Government claims backpay for Fulger (as listed in Appendix C to the July 20, 1999 amendment to the CS) as follows:

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	4	1288	0	12	0	1288
1995	1	3640	1642	0	1642	1998
1995	2	3880	1079	0	1079	2801
1995	3	1344	349	0	349	995
1995	4	4160	1582	0	1582	2578
1996	1	4160	2392	24	2368	1792
1996	2	4160	2392	0	2392	1768
1996	3	4160	2392	24	2368	1792
1996	4	2752	1478	0	1478	1274
1997	1	4160	1230	14	1216	2944
1997	2	4160	1950	0	1950	2210
1997	3	3840	1950	0	1950	1890
1997	4	4160	2700	0	2700	1460
1998	1	4160	2925	0	2925	1235
1998	2	2112	1485	0	1485	627
Totals:		52,136	25,546	74	25,484	26,652

Total net backpay due Sangriale Fulger: \$26,652

C. *Numbers claimed reflect offsets applied*

1. Introduction

Unlike the usual procedure of having the compliance specification (CS) show (frequently by footnotes to the affected numbers) whatever adjustments have been made to the gross backpay or other categories of numbers,<sup>3</sup> the (July 1999) CS here, with its appendices of quarterly forms, plus a summary table (as shown above), does not do that. Instead, former Acting Compliance Officer Jacoby testified that, in effect, the numbers claimed by the Government already reflect the adjustments. Respecting the gross backpay, although the pay rate and weekly hours are given in paragraph 2 of the CS, the actual computation is not shown and a quarter of 13 weeks must be assumed in order to match the gross backpay figures. Turn now to a listing of the adjustments made to the December 1998 numbers as reflected (in the totals, but not in the calculations) in the July 1999 numbers.

2. 3Q95

The first adjustment is for the third quarter of 1995 (3Q95). Jacoby subtracted \$2816 from the \$4160 gross backpay to give a new gross backpay figure of \$1344 as the corrected (as of July 1999) gross backpay for 3Q95. Thus, this is a \$2816 (\$8 per hour x 40 hours x 8.8) offset, or reduction, from the \$4160 gross backpay based on an 8.8 week absence (vacation) by Fulger (1:106-108) from the work force during the quarter. (1:32-34, 111-113; 2:420) Paragraph 2 of the CS alleges that Fulger's pay rate was \$7 per hour until May 22, 1995 when it would have increased to \$8 per hour for the balance of the backpay period. By its answer, Company admits as to the \$7, but denies as to the \$8. At this point I show the corrected figures as claimed by the Government.

3. 4Q96

Jacoby testified that the (July 1999) figures, as shown above, already reflect the result of his having subtracted \$1408 (\$8 per hour x 40 hours x 4.4) from the \$4160 gross backpay (leaving \$2752) to account for a 4.4 week absence from the work force in December 1996 because of complications (morning sickness) from Fulger's pregnancy. (2:421, Jacoby; 2:431, Fulger). A second correction for the quarter was made to the original to reflect interim earnings for 2 months (\$1478), rather than 1 month, from Ultimate Life Services—so a reduction in net backpay. (1:37-38, 40-42)

4. 3Q97

Finally, Jacoby (in drafting the July 1999 amendment) reduced the \$4160 backpay for 3Q97 by \$320 to \$3840 based on Fulger's being unavailable to work for one week because of a miscarriage in late September 1997. (2:422-423; RX 1 at 1)

<sup>3</sup> So that everyone (ALJ included) can understand the numbers, the Agency's compliance manual calls for the calculations to be shown. See 3 *NLRB Casehandling Manual* 10621.5 (Sept. 1993).

#### D. Offsets Overlooked or Not Applied

On brief Company complains that gross backpay was not reduced for three additional times when Fulger was unavailable to work. (Brief at 24) These occasions were 3 days in 3Q95 when Fulger attended depositions in her race discrimination suit which Fulger filed against Bauer Group over her discharge,<sup>4</sup> and the 7 days when she attended the trial of that lawsuit in 1Q96. (2:329–332, 427–428) The third occasion was when Fulger suffered a miscarriage in May 1997 (2Q97) and was unavailable for work for 3 days. (2:431)

As for the miscarriage, Jacoby agrees that if Fulger was unavailable to work as a result, then that time should be deducted from the gross backpay. (2:416) Generally, backpay is tolled as a result of pregnancy complications that result in work unavailability. 3 *NLRB Casehandling Manual* 10546.3 (Sept. 1993).

As to the civil rights lawsuit, Jacoby was uncertain. (2:416) On brief, the Government argues that Fulger should not be declared as unavailable during her 10 days of attendance at her civil rights litigation because that litigation resulted from Fulger's unlawful discharge. (Brief at 19 fn. 9) That argument confuses apples with pumpkins. Whether the discharge was unlawful under the Civil Rights statute is something that would be determined, and accounted for, there. I doubt that the Government would have agreed to be bound here by the outcome there. [Good thing. The jury found in Company's favor. (2:329).]

Finding no merit to the Government's argument, I further find that Fulger should be charged as unavailable for work by attending the proceedings in her civil rights lawsuit for 3 days during 3Q95, or by \$168 (\$7 per hour x 24 hours) and 7 days during 1Q96, or by \$448 (\$8 per hour x 56 hours). Additionally, her gross backpay must be reduced for the 3 days she was unavailable in 2Q97, or by \$192 (\$8 per hour x 24 hours), as a result of her miscarriage. Thus, with the numbers for those quarters now revised, the corrected figures are reflected in the following revised table:

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	4	1288	0	12	0	1288
1995	1	3640	1642	0	1642	1998
1995	2	3880	1079	0	1079	2801
1995	3	1176	349	0	349	827
1995	4	4160	1582	0	1582	2578
1996	1	3712	2392	24	2368	1344
1996	2	4160	2392	0	2392	1768
1996	3	4160	2392	24	2368	1792
1996	4	2752	1478	0	1478	1274
1997	1	4160	1230	14	1216	2944
1997	2	3968	1950	0	1950	2018
1997	3	3840	1950	0	1950	1890
1997	4	4160	2700	0	2700	1460
1998	1	4160	2925	0	2925	1235
1998	2	2112	1485	0	1485	627
Totals:		51,328	25,546	74	25,484	25,844

<sup>4</sup> In his decision at 4, 5, and 11, Judge Evans mentions the lawsuit.

Total net backpay due Sangriale Fulger: [Modified claim] \$25,844

#### E. Fulger's Interim Earnings

Much of the evidence relates to Fulger's interim earnings and her search for work. I need not cover this evidence in detail for several reasons. First, Company apparently has misperceived its burden of proof. Under Rule 4, above, it is Company's affirmative burden to establish, by positive evidence, that Fulger willfully failed to mitigate her damages. A party does not carry its affirmative burden (does not generate positive evidence) by calling its opponent and persuading the trier of fact that its opponent's assertions of good faith efforts are not credible, when the discredited testimony is the only evidence on the point in issue. *NLRB v. Hawkins Construction Co.*, 857 F.2d 1224, 1227 fn. 3 (8th Cir. 1988); *Roper Corp.*, 712 F.2d 306, 310 (7th Cir. 1983); *Precision Industries*, 320 NLRB 661 at 661 (1996) (disavowing ALJ's implication that, disregarding other evidence, he was required to find a violation of Sec. 8(a)(3) solely because he did not believe the testimony of Respondent's witnesses concerning reasons for the action at issue), *enfd.* 118 F.3d 585 (8th Cir. 1997). Stated differently, a Respondent cannot merely rely on its cross examination of discriminatees (or its direct examination of them as witnesses called under FRE 611(c)) "and their alleged impeaching testimony to satisfy its burden of proof." *United States Can Co.*, 328 NLRB 334, 338 (1999). Yet, in large measure, that is what Company seeks to do here.

Similarly, Respondent misperceives discriminatee Fulger's obligation under Rule 5, above, to exercise reasonable diligence in seeking interim employment. It avails a Respondent nothing to introduce a batch of newspaper ads, such as RX 10 here. Such advertisements of jobs in newspapers generally are irrelevant, and are so here, because the evidence does not show, for example, whether the jobs would have been available had Fulger applied, nor whether Fulger would have been hired had she applied. *United States Can Co.*, 328 NLRB 334, 344 (1999); *A.P.R.A. Fuel Oil Buyers Group*, 324 NLRB 630, 632 fn. 3 (1997), *enfd.* 159 F.3d 1345 (2d Cir. 1998) (table).

To the same effect is testimony of most "experts" who compare a discriminatee's list of skills, education, age, and work experience with the expert's knowledge of the local job market. Company called Dorothy McDaniel Stein (owner and operator of an employment agency in the Miami area) as a vocational expert who, in general, asserts that, with her skills, education, and experience, Fulger should have been able to have found comparable work rather quickly. Even assuming that Stein would qualify as an expert (a point I need not reach), her evidence is entitled to no weight for at least two reasons. First, Stein simply points to a good economy, with plentiful jobs, and opines that, had Fulger hustled (and particularly had she sought Stein's assistance), jobs were there for the taking. Thus, Stein describes the market potential, and speculates on Fulger's chances. Such evidence by vocational experts is meaningless. *United States Can Co.*, 328 NLRB 334, 343–344 (1999); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621–622 (1991); *Delta Data Systems Corp.*, 293 NLRB 736, 736–738 (1989). Certainly it does not show a willful failure by Fulger. What it does show is that Fulger, for a long time, was not suc-

cessful in finding comparable work. But as Rule 5, above, states, success is not the test of reasonable diligence.

The second reason I attach no weight to Stein's testimony is that she employed the wrong standard of diligence. Contrary to the law's standard of reasonable diligence, she espouses a standard of high, even highest, diligence. Never mind that you and I might use that standard for ourselves, the standard under the law for the general public is "reasonable" diligence. Rule 5, above. Thus, Stein's system defines job hunting as "a full-time job," "that's what you do from morning to night, . . ." (1:257) The law does not require such constant job hunting. *December 12*, 282 NLRB 475, 477 (1986). On this point the law recognizes the obvious—Fulger, as well as most other discriminatees, sometimes have to take part time jobs just to have some money coming in so that they can survive. In their off time, they look for work.

And this is what Fulger did. Initially, she registered with the Florida Unemployment Commission. She had to submit weekly work search reports to that government agency. (1:86–88) That registration is prima facie evidence of a reasonable search for employment. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), enf.d. 113 F.3d 845 (8th Cir. 1997). Fulger checked the newspapers (1:83, 85, 104–105, 130, 139), called friends (1:90, 139, 141, 114–115), and registered with one private employment agency, "A Job For You." [The latter referred Fulger to some temporary jobs that possibly could have developed into full time jobs. Steven Boyar, an owner of that employment agency, suggests that Fulger could have obtained more job placements through his agency. (1:192) Such testimony is rather similar to that of Dorothy McDaniel Stein. I attach no weight to such speculation. In any event, Boyar concedes that the computer notes of his employees may not be complete concerning Fulger's contacts with his agency (1:217–218), and (1:191) that Fulger's record with his employment agency is not unusual when compared with other job applicants using the placement services of "A Job For You."]

Similarly, Company faults the number (as shown on the work search forms (RX 1) which she submitted to NLRB Region 12) of Fulger's job contacts over the course of her 42-month backpay period. [On brief, Company counts 14, perhaps on the basis that there may be 14 names. But some of the names, such as the employment agency Fulger worked with, were contacted more than once, and in different quarters, yielding, by my count, at least double the contacts suggested by Company.] In any event, Fulger's efforts eventually paid off. On March 5, 1997 she was hired for part time work at Celebrity Cruises at \$6 per hour as a reservations agent. (1:142; RX 4 at 10) ["Part time" apparently can be a misleading term, for the term, at least at Celebrity, apparently referred to the classification rather than to the number of hours worked. (1:148).] Fulger looked forward to the completion of her 90-day probation period so that she could obtain group medical coverage. (1:146) Initially she did not look for full time work elsewhere because she wanted to gain the experience she needed to qualify for a full time position with Celebrity. (1:147) Eventually she began looking elsewhere for full time work, but, fortunately, on October 20, 1997, Fulger was promoted by Celebrity to full time with a wage increase to \$6.65 per hour. (1:148; RX

4 at 16) [Although RX 4 at 16 was not one of the pages received in evidence at trial, I receive it in evidence now because it simply confirms the testimony.]

About February 1998 Fulger was loaned by Celebrity to Royal Caribbean Cruises. Sometime that spring, or summer, the two companies merged. While Fulger was on loan to Royal, a vacancy developed in a salaried position for an automation support representative. On April 24, 1998 Fulger applied for the position and was hired, effective June 1, 1998, at the annual salary of \$24,000. (1:150–157; RX 4 at 21–22). Fulger's persistent efforts and eventual success bring up another rule of law favoring her—a discriminatee's work search efforts are evaluated on the basis of the backpay period as a whole, not on any isolated portions, even if there was no work search in a quarter here or there. *Acme Bus Corp.*, 326 NLRB 1, 4 (1998); *Operating Engineers Local 68 (Ogden Allied Maintenance Corp.)*, 326 NLRB 1, 4 (1998); *Allegheny Graphics*, id. at 1144; *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996), mod. on other point mem, 139 F.3d 906 (9th Cir. 1998); 282 NLRB 475, 477 (1986). As the backpay table in this case shows, except for the balance of the first quarter of her discharge, 4Q94 (a time when she was depressed following her discharge), Fulger had interim earnings in every quarter thereafter. Fulger did her best, and eventually her job hunting strategy paid off when she was able to move up to successively better positions, eventually even a permanent, salaried position earning nearly double the \$6.00 rate for the part time job that eventually lead to her salaried position.

As noted earlier, after Company fired her, Fulger needed at least a part time job because she needed money to survive. Aside from the practical problems of little or no money to buy gas to drive to a lot of job prospects (1:142), and mechanical problems with her car (1:67–68; RX 1 at 10), Fulger had the additional problem of whether to disclose or conceal from prospective employers the fact that she had been fired by Company (1:137, 163). In this connection, when Company fired Fulger, it could have done itself a big favor by giving her some assistance in finding work elsewhere. (After all, if the discharge were found to be unlawful, the legal burden would be on Company to show that, for any periods of unemployment, Fulger had willfully failed to mitigate her damages.) In short, it was in Company's best interests (in avoiding potential backpay liability) to offer Fulger some assistance, or at least some suggestions and guidance.

Instead, Company made Fulger's situation even more difficult. First, the discharge occasion was "hostile." (1:164) For awhile, Fulger was depressed over her discharge. (1:137) To avoid a prospective employer's receiving a negative report from Company [to avoid "compelled self defamation"], Fulger, most of the time, did not show Company as a previous employer on her job applications. (1:162–163; 2:300) Actually, Company's policy respecting inquiries from prospective employers is to disclose, as to former employees, only their dates of employment and rates of pay. (2:315) Unfortunately, Company did not provide to Fulger this critical information about its policy. (1:162–164; 2:316)

Additionally, the thrust of Company's criticism of the number of job contacts made by Fulger during her backpay period

disregards the extremely important point that it was not until 2 years after she filed her May 22, 1995 charge that she received from NLRB Region 12 the Region's first notice (GCX 7, letter of May 29, 1997), with work search forms (Form NLRB 5224), and cautions about the need to fill out the forms. [The complaint in the underlying case did not issue until April 28, 1997.<sup>5</sup>] The 2-year delay in sending out the work search forms comes from the fact that NLRB Regional Offices are instructed to send out Form NLRB 5224 when (or shortly after) a complaint issues in a case. 3 *NLRB Casehandling Manual* 10540.2 (Sept. 1993). That is NLRB Region 12's practice. (1:43-44, Jacoby) Thus, for her first 2 years, Fulger, who did not make any work search records (other than what she submitted to the Florida Unemployment office), had to rely on her memory to fill out the batch of forms she received "after the fact." She did the best that she could. (1:74, 77, 88, 93-94, 104; 2:300-302, 306) The date stamp of NLRB Region 12 for June 12, 1997 is on several of the forms in evidence. I find that Fulger, doing her best, filled out these forms, as her memory allowed, and submitted the first batch to Region 12 which stamped their receipt as June 12, 1997.

[Although, as just explained, it is clear why NLRB Region 12 did not send out the work search forms until 2 years after Fulger had filed her charge in the underlying case, it remains unexplained, either in this record or in the judge's decision in the underlying case, just why some 2 years elapsed between the time Fulger filed her charge and the date that the complaint issued in the underlying unfair labor practice case. Although the median time for the Agency's Regional Offices to investigate a case, reach a decision on the merits, and, in merit cases, issue a complaint, has nearly doubled in the last few years, the median time was still just 86 days for Fiscal Year 1997, which closed on September 30, 1997. See 62 *NLRB Annual Report 1997* at 10, Chart 6, and 164, Table 23 (1998).]

That Fulger could not recall many of the places she contacted, particularly during the first 2 years, and that she did not keep good records, is neither unusual nor surprising. Fulger testified that she contacted more places than are shown in her Form NLRB 5224 work search reports. (1:93-94, 104) In light of Fulger's not having any forms or instructions for the first 2 years of the backpay period, and that she did not keep good records either before or afterwards, yet she contacted many places or friends, found work, and eventually found an excellent salaried opportunity, the fact that her work search forms show only some of her contacts is at the point of being legally irrelevant. It is well settled that poor recordkeeping and an uncertain memory do not automatically classify a discriminatee's work search efforts as inadequate. *United States Can Co.*, 328 NLRB 334, 345, 356 (1999) (Robert Bennett; Carl Menhennet—claim of three job contacts per week by Menhennet, but he could not recall a single one during three quarters in 1989; not unusual); *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), enfd. 113 F.3d 845 (8th Cir. 1997); *Basin Frozen Foods*, 320 NLRB 1072, 1076 (1996), mod. on other point, 139

<sup>5</sup> I take official notice of the date the complaint issued. By posthearing correspondence, not part of the record, counsel advise that they have no objection to my taking such official notice.

F.32d 906 (9th Cir. 1998) (table); *December 12*, 282 NLRB 475, 477 (1986).

Finally, Rule 10 (the "wrongdoer rule") is a formidable block against arguments based on uncertainties, speculations, and criticisms of a discriminatee's uncertain memory and spotty records—especially where, as here, interim earnings are recorded in virtually every quarter of the backpay period and the discriminatee eventually, by her own efforts (and with no help from the wrongdoer), finds a part time job that ripens into a full time job that leads to a promotion to a salaried position. None of these problems would be a problem had the Respondent not violated the law by discharging Sangriale Fulger in the first place. No amount of legal argumentation can obscure the fact that the primary cause of all the problems here is that unlawful act of discharge. The law does not permit a wrongdoer to profit from its illegal activity.

In light of the foregoing, and all the record, I find that Company has failed to show that, during the backpay period, Sangriale Fulger willfully failed to mitigate her damages or that she failed to exercise reasonable diligence in seeking interim employment.

#### F. Fulger's Interim Expenses

The compliance specification shows only \$74 in interim expenses (for gasoline or mileage expenses), and, of this, only \$62 is claimed as an offset against interim earnings. Recall from Rule 8, above, interim expenses are deducted from interim earnings; they are not added to gross backpay. (1:38, Jacoby) Aside from its denial of the allegations respecting expenses, on brief Company does not bother to contest the matter. Nevertheless, there is one problem associated with the claim for the expenses that the Government's case does not address. The oversight pertains to the part of Rule 8 declaring only those expenses eligible that exceed the expenses the discriminatee would have incurred had she remained working for the Respondent. As Fulger testified that her daily commute while working for Company was 40 miles roundtrip (1:66), only that mileage exceeding the daily 40 miles qualifies as an allowable interim expense.

Turn now to the first expense listed, that of \$12 in 4Q94. I need not cover the brief testimony for this 4Q94 expense for the simple reason that no interim earnings are listed, and it is not claimed there in computing the net backpay. Its presence among the numbers is confusing, and I therefore shall delete that \$12 from the backpay table.

For 1Q96 the CS claims a \$24 expense for 80 miles of travel on a single day. (1:62-63, 69) Disallowing half of that expense, I find the allowable expense to be \$12. [If the Government actually made the proper deduction in its calculations (there is no evidence that it did), but did not show them on the CS, that is unfortunate, for discriminatee Fulger must now pay for the same gasoline a second time.] I make the same finding regarding the \$24 expense claimed for one day of travel, at 80 miles, in 3Q96. (1:64-65, 68-69)

Finally, we have the 1Q97 expense of \$14. This occurred when Fulger drove some 45 miles over the course of several days. (1:65-66) I shall disallow the \$14 because it is less than she would have spent had she not been fired. That brings the

backpay table to show a total of \$24 as allowable interim expenses, with the new numbers shown for the corrected claim by the Government in the table that appears in a moment. First, however, some adjustments are necessary for interim income not reported.

#### G. Interim Income Not Recorded

The record reflects , and Acting Compliance Officer Jacoby concedes (2:417), that Fulger earned some \$857 on temporary jobs obtained through the “A Job For You” employment agency that is not recorded on her work search forms. [I credit Fulger in her testimony that she recorded what she could recall. (1:74, 77, 88, 93–94, 104–105; 2:300–302, 306).] This additional income came as follows: 2Q95, \$241; 4Q96, \$436, and 1Q97, \$180. Note that all three quarters occurred before, even well before, Fulger received, in May 1997, the work search forms and instructions from NLRB Region 12. Although the Government, on brief, does not move to amend the compliance specification to make these adjustments, and to show the corrected numbers, I do so in the revised table that follows (both as to the revised interim expenses and the unrecorded interim income of \$857):

Year	Quarter	Gross Back-pay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Back-pay
1994	4	1288	0	0	0	1288
1995	1	3640	1642	0	1642	1998
1995	2	3880	1320	0	1320	2560
1995	3	1176	349	0	349	827
1995	4	4160	1582	0	1582	2578
1996	1	3712	2392	12	2380	1332
1996	2	4160	2392	0	2392	1768
1996	3	4160	2392	12	2380	1780
1996	4	2752	1914	0	1914	838
1997	1	4160	1410	0	1410	2750
1997	2	3968	1950	0	1950	2018
1997	3	3840	1950	0	1950	1890
1997	4	4160	2700	0	2700	1460
1998	1	4160	2925	0	2925	1235
1998	2	2112	1485	0	1485	627
Totals:		51,328	26,403	24	26,379	24,949

Total net backpay due Sangriale Fulger: [Corrected per findings] \$24,949

#### H. Whether Net Income, Rather Than Gross Income, Reported

Company contends (Brief at 21–22) that Fulger recorded her net pay, not her gross pay, and that, therefore, all the figures shown for interim earnings in the compliance specification, as amended, should be increased “accordingly.” [Company does not suggest the numbers to use.] The testimony of Fulger on which Company relies for this contention is her part time work at Eckerd Drugs during 1Q95 and 2Q95 shown as \$83 per week (1:95–96; RX 1 at 19–22), and her hourly work at Celebrity Cruises starting in 1Q97 (1:149).

Regarding her work at Eckerd, Fulger does indicate that the \$83 a week she recorded was after taxes. (1:95–96) She worked at minimum wage. I take official notice

that, in 1995, the federal minimum wage was \$4.25 per hour. See the Department of Labor’s website at [www.dol.gov/dol/esa/public/minwage/press.htm](http://www.dol.gov/dol/esa/public/minwage/press.htm). As Fulger’s regular week at Eckerd was 20 hours, her regular weekly gross would have been \$85. Apparently her taxes (probably only Social Security taxes) would have been \$2.00 per week, leaving her with a net of \$83. Fulger also suggests that in some weeks she may have worked more than 20 hours, but the record is ambiguous as to that point.

Although the \$2 a week would seem to be de minimis under the law, the real problem, in determining the numbers, is that Company did not discharge its burden of showing what Fulger’s gross earnings were at Eckerd Drugs. Company could have subpoenaed an Eckerd official, but apparently did not do so. [Company did seek to offer a letter (RX 2 – Rejected) from Eckerd Corporation showing the dates of Fulger’s employment there (but nothing about earnings), but, on the Government’s hearsay objection, I excluded the document. (1:103).] Company also could have subpoenaed Fulger to produce copies of her federal tax returns (and required her to obtain copies of them, and the W-2 forms, from the IRS). Company apparently only requested production. (1:128, 143–144; 2:308–309)

Because Company did not carry its burden to show Fulger’s earnings at Eckerd, I shall not speculate on the number of weeks that Fulger worked there. Thus, there is no basis for me to add \$2.00 a week (largely a de minimis amount in any event), for an unknown number of weeks, to Fulger’s interim earnings. In short, I find that, in effect, Company waived its opportunities respecting any discrepancy as to Fulger’s interim earnings at Eckerd Drugs.

Respecting the other cited reference (1:149) pertaining to Celebrity Cruises, Company apparently attempts to interpret a vague phrase there by Fulger, “After the pay taken out . . .” as meaning that Fulger recorded on the work search reports (RX 1), as to Celebrity, only her net pay, not her gross pay. There is some basis in the record for concluding that such occurred. Thus, in addition to the cited reference in Company’s brief, elsewhere Fulger indicates that the weekly income of \$225, which she reported by telephone to Jacoby on December 18, 1997 (RX 7), “possibly” was take-home pay. (2:306–307)

As pointed out earlier, on October 20, 1997 Fulger was promoted by Celebrity to full time status with an increase in pay to \$6.65 per hour. Fulger acknowledges that full time was 40 hours per week. (2:307) Fulger’s pay apparently was increased to \$7 an hour about December 1997. (RX 7; 2:306–307) At \$7 per hour, a 40-hour week would yield gross pay of \$280—not \$225. Multiply the \$280 by 13 weeks gives us a per-quarter gross interim earnings of \$3640, not the \$2925 listed on the compliance specification’s Appendix A-14 and Appendix C for 1Q98. [This was not simply an error in arithmetic by NLRB Region 12. Region 12 simply accepted without question the figures submitted to it by Fulger. (1:31, 45–46). Indeed, that was Region 12’s pattern. Thus, while it may not be Region 12’s normal practice to contact interim employers for confirming data, and such was not done here (1:45), the Agency’s Compliance Manual, section 10540.4, not only calls for it to be done, but, at Appendix 2, supplies a sample letter for that purpose. Again, although it may not be the normal practice for

Region 12 to obtain a copy of the discriminatee's federal tax return and W-2 forms as a secondary source for confirming data about interim earnings (1:46), the Agency's Compliance Manual, Sections 10540.4 and 10531.3, describes them as such when interim employers have not furnished such information.]

Applying a 20 percent tax rate to the \$3640 gives us an after-tax figure of \$2912 ( $\$3640 \times 80\%$ )—very close to the \$2925 listed in the compliance specification for 1Q98. Assuming that the \$225 figure is accurate, the actual rate of deduction (presumably for taxes) would be 19.64285 percent ( $\$3640 - 2925 = \$715 \div 3640 = 19.64285$ ).

If Fulger reported all her Celebrity income at approximately 80 percent, then a 25 percent increase of the Celebrity earnings shown in the CS ( $\$2925 \times 25\% = 731 + 2925 = \$3656$  for 1Q98), applied to all quarters at Celebrity from 1Q97 forward, would be appropriate. (Actually, the exact multiplier would be 24.444444%. [ $\$3640 - 2925 = 715 \div 3640 = 19.64285\% \times 3640 = 714.99974$ , or  $\$715 + 2925 = \$3640$ ].)

However, I shall postpone further discussion of this subject until I address the topics that follow, especially the one dealing with closing of the survey room. For if Fulger would not have been retained beyond the October 1995 closing of the survey room, any discrepancy in Fulger's reporting of her income at Celebrity Cruises, starting in 1Q97, would be moot.

#### *1. The Pay Increase*

Recall that the backpay period begins on November 29, 1994 and closes on May 18, 1998. As part of the Government's burden of proof, the General Counsel alleges, in paragraph 2(d) of the compliance specification, that from November 29, 1994 to May 21, 1995, Fulger would have been paid at the rate of \$7.00 per hour (Company so admits in its answer), and at the rate of \$8.00 per hour (Company denies) from May 22, 1995 to May 18, 1998. The \$1.00 per hour increase is the issue here.

In arriving at his conclusion respecting the pay increase for Fulger, Acting Compliance Officer Jacoby testified that he so concluded primarily because, as reflected in President Paul A. Bauer's May 19, 1998 letter (GCX 4) to Jacoby, rate surveyor Luis Alvarez received a \$1.00 pay increase on May 22, 1995. (1:47) Jacoby considered Alvarez to be a "direct comparator." (1:48, 51)

As Judge Evans noted in his decision (JD) of April 24, 1998 at 2 (GCX1a), Fulger was hired by Company as a rate surveyor on May 16, 1994 at \$6.00 per hour. "About two months" after Fulger began working at Company, she received a \$1.00 per hour wage increase. Although that would place Fulger's wage increase about mid-July 1994, the more specific reference in Judge Evans' JD is at page 8 where he refers to a memo by Jervey that the \$1.00 pay raise for Fulger was granted on August 16. The August 16 date is consistent with Jervey's testimony here. (2:383). I find that the date of Fulger's pay increase was August 16, 1994.

In mid-August Jervey was "extremely happy" with Fulger's work performance. (JD at 8, line 7) Some 2 months later, on October 14, Jervey gave Fulger another review in order to give Fulger the opportunity "to improve on several points," with one of those points being that Fulger now needed too much supervision. (JD at 8, lines 8-9) By November 28 it reached the point

of a reprimand of Fulger by Jervey because of low productivity and excessive tardiness. (JD at 2, 8. Although Judge Evans, JD at 2, refers to the (reprimand) meeting as having occurred on November 16, elsewhere, JD at 3, 8, he makes clear that it was on November 28.) Moreover, it is apparent that it was not until that November 28 meeting that Company had any idea that Fulger was talking with other employees about wages. This is so because it was at that meeting that Fulger said she knew what another employee was earning, and, at that point, Fulger asked for another pay increase for herself. Jervey promptly denied Fulger's request for a pay increase. (JD at 2, 3, 8) The point of this summary is that Fulger, who, as a witness, made an unfavorable impression on Judge Evans (JD at 11), clearly was heading down the road toward termination because of her poor work performance. Company simply shot itself in its own foot when it included, as one of the grounds for her discharge (JD 13, 14) her discussion of wages with other employees.

When Fulger was fired on November 29, 1994, she had been with Company some 6.5 months. Bauer asserts that Company's practice is to give a \$1.00 per hour increase to employees after the completion of their 3-month probationary periods, and to review them for the possibility of another raise between 9 months to 1 year later. (2:313-314) Caroline Jervey's experience is that Company's practice has not been an automatic 1 year review after the probationary period (and no mention of it occurring before a year later), and thereafter it is "sporadic." (2:382) Counting 9 months from mid-August 1994 lands us at mid-May 1995. Thus, under President Bauer's own description, in theory Fulger could have received another \$1.00 per hour raise as early as mid-May 1995 (or as late as mid-August 1995, or none at all).

Turn now to Luis Alvarez, the "direct comparator." Alvarez was hired February 17, 1995 at \$7.00 per hour, and 3 months later, effective May 22, 1995, his pay rate was increased to \$8.00 per hour. (GCX 4 at 4; GCX 9) On cross examination, Jacoby conceded that he was unaware that Fulger had received a pay increase in August 1994. (1:49-50) Thus, comparing their 3month probationary terms, both Fulger and Alvarez received hourly pay increases of \$1.00. Look now at the 12-month mark. Alvarez, the "direct comparator," did not receive another pay increase. Thus, in his 13 months with Company, Alvarez received only the one pay increase in May 1995. (GCX 9) This is so even though, as we see in the next section, Bauer did everything he could to keep Alvarez on the payroll because he considered Alvarez to be such a good and diligent employee. (2:348-349, 352, 363)

In this compliance proceeding, I ordinarily would attach little, if any, weight to Bauer's descriptions (2:349-351, 354) of Fulger's insufficiency for anything beyond survey work (and even as to that he is dubious), or to Jervey's assertion (2:383) that Fulger had a lot of problems that needed correcting. This is so because, in addition to the fact that Jervey did not fare so well herself before Judge Evans, under Rule 10 all doubts about what would have occurred had there been no unlawful discharge are resolved against the wrongdoer who created the situation. Thus, we can never know for certain what would

have developed because Company unlawfully fired Fulger. That illegal action is the cause of any doubts.

However, we are not limited here to post-discharge statements of a self-serving nature. [Most evidence offered is intended to be self-serving.] Instead, we know from Judge Evans' decision that in October 1994 Jervey did a discretionary performance review of Fulger and told her that she needed to improve on several points, including the fact that she needed too much supervision. A bit over a month later, on November 28, Jervey reprimanded Fulger, telling her that she needed to improve her productivity and reduce her tardiness. (JD at 2, 3, 8) As Judge Evans notes, aside from the matter that Fulger had been discussing wages with other employees, Company "had its other problems with Fulger . . . ." (JD at 13, 14)

In short, I find it very reasonable, even required, that I consider the evidence that company had counseled and then reprimanded over her work performance and attendance even before (in the same interview as the November 28 reprimand) Company had any indication that Fulger was discussing wages with other employees. Moreover, as that pre-knowledge counseling (October 1994) and reprimand (November 28, 1994) bear directly on the issue here, I now attach weight to the criticisms by Bauer and Jervey respecting Fulger's work performance. I also note that, in concluding that Fulger would have received a \$1.00 per hour pay increase in May 1995, Jacoby did not consider Fulger's work performance at company. (1:50-55) Finally, and in considering her demeanor as acceptable before me, I credit Jervey in her testimony (2:383) that, "at the rate she was going," Fulger would not have received a pay increase in August 1995 (when Jervey asserts that Fulger would have become potentially eligible for her next one).

To conclude on this issue, I find the evidence insufficient to support the Government's burden. Pay increases 9 months to 1 year after the initial pay increase were not automatic, particularly as company's business took a downturn, as the wage history of the Government's own "direct comparator" (Luis Alvarez) demonstrates. That specific evidence, combined with the credited testimony of Caroline Jervey that it is unlikely Fulger would have received a pay increase in August 1995, far outweigh any support the Government can draw from the generalized testimony by Bauer that there can be pay increases 9 to 12 months after the first increase.

Agreeing with Company's position, I therefore find no basis for including a May (or August) 1995 pay increase of \$1.00 per hour (to \$8.00 per hour) for Fulger. Accordingly, I shall revise the backpay table to reflect numbers based on a pay rate of \$7.00 per hour throughout Fulger's backpay period.

### *J. Company Closes the Survey Room*

#### 1. Introduction

As established and admitted in the underlying case, and as reflected in the decision on that case, at all relevant times Company has been composed of three corporate entities—The Bauer Group, Inc., Bauer Communications, Inc., and Bauer Financial Reports, Inc.—and they constitute "a single integrated business enterprise and a single employer within the

meaning of the Act." (JD at 2) Paul A. Bauer is the sole shareholder and president of all three companies. (2:310)

The Bauer Group "is simply a management firm that I use to consolidate those things like payroll, insurance, rent, and then allocate to the other two companies their appropriate payments." (2:311, Bauer) In his decision, Judge Evans notes that The Bauer Group employed no employees. (JD at 2)

Bauer Financial Reports "analyzes banks and credit unions, using data provided by the Government, which we purchase. We analyze them and we have a rating system from zero to five stars where we rate them. The primary business is that we supply reports to banks on other banks, either for compliance or for competitive analysis." (2:311) The receptionist for all three companies worked directly for Bauer Financial Reports. (JD at 2)

Bauer Communications (since the earlier trial named Bauer Newsletters) is a newsletter publisher publishing financial newsletters for corporate and consumer investors, for bank presidents, and "at one time we had an on-line service for [bank CD] rates." Judge Evans notes that, in 1994, Bauer Communications employed six employees, with Caroline Jervey being the managing editor. That is the entity that directly employed Fulger. (JD at 2) Bauer recalls that in 1994 Bauer Communications had some four to five rate surveyors, three sales persons, a computer "maven," and a switchboard operator. (2:312) The three companies share office space in Coral Gables, Florida. (JD at 1; 2:311) Bauer estimates that in 1994 the group of companies had about 15 employees, including himself. (2:311) Today, or as of our trial, the total number of employees was down to 5, including Bauer. (2:311)

Fulger was employed by Bauer Communications as a rate surveyor from May 16, 1994 (2:356) through November 29, 1994. Her duties consisted of receiving a printout of banks, telephoning the bank's contact person, obtaining jumbo CD rates and consumer CD rates, entering those rates into a computer, and serving as a relief receptionist. (JD at 2; 2:312-313, Bauer)

#### 2. Cyberspace spelled with red ink

Compared to the printed newsletters, which requires Company to survey rates only once a week, the survey room work was for an internet service, "CD ONLINE" (RX 14), that provided continuous rates to customers in cyberspace. (2:317, 376-378) The daily (constant) surveying was a "tremendous" job, and Company had to hire employees to staff the survey room. (2:317) Responding to a newspaper ad (GCX 16; 2:355-357), Fulger was one of those hired.

But as sometimes happens in the plans of mice and men, something was overlooked. That something was that most of the customers for the on-line service were simply Company's print customers shifting over to the cyberspace service. That shifting generated no additional income, yet the on-line service itself was very costly to maintain. Bauer Communications was slowly [not the "closely" rendering at 2:318] killing itself financially. (2:317-318, Bauer; 2:368, Jervey) That entity's 1995 federal tax return (RX 8) is in evidence and shows a loss of nearly \$7000 for the year. (2:318)

In view of the red ink flowing from its venture into cyberspace, Company began reducing the operation by attrition. (2:317, 363) From a high of four or five (2:312) rate surveyors in 1994, Company was down to one, Luis Alvarez, as of April 17, 1995, when David Garcia was terminated. (GCX 4: GCX 8; 2:348) From April 17, 1995 to the closing of the survey room in mid-October 1995, Alvarez “did all the surveying on his own.” (GCX 4 at 1; 2:312, 316, 360, 362–363) Bauer testified that, “I went out of my way to try to keep Alvarez” (2:349) because he was an “exceptionally conscientious young man” (2:348), a “very diligent” employee (2:349), a “good worker” (2:363).

Company disconnected the telephone service and closed the survey room on October 13, 1995 (RXs 11, 12, 13; 2:360, 368–376). In addition to the rate surveyors who (with the exception of Luis Alvarez) had been laid off or terminated, in January 1998 Company laid off the remaining two sales persons, thereby leaving Bauer as Company’s “sales office.” (2:312, 361–362; GCX 18 at 2). [GCX 18 is a two-page document that Jervey prepared for her own use for this trial. The document lists all employees who worked from November 29, 1994 to July 22, 1999. Jervey also submitted the document to Company’s attorney. By inadvertence a copy of the document was turned over with other items in response to a subpoena duces tecum from the Government. At trial counsel objected on the basis of attorney work product, although I stated that it appeared that the privilege which was applicable, if any privilege attached, was that of attorney client. The General Counsel argued waiver. I received GCX 18 subject to briefing. (2:399–409) Although the General Counsel addressed the matter in the Government’s brief (Brief at 10 fn. 5), Company failed to do so. Accordingly, treating the matter as abandoned by Company, I now receive GCX 18 without limitation.]

The record shows that some of the short-term employees, who had on occasion did some survey work, also did some clerical work for Bauer Financial Reports (BFR). And in his effort to keep a good employee, Bauer transferred Luis Alvarez to BFR to do general office work as well as the, apparently, one day a week surveying for the printed newsletter—“because I wanted him.” (GCX 4 at 1; GCX 9; 2:352, 413–414) Unfortunately, Alvarez was unsuccessful in the general office work, and he was laid off on March 15, 1996. (GCX 4)

Respecting the question of whether Company would have transferred Sangria Fulger to Bauer Financial Reports, as it did Luis Alvarez, the answer is a vigorous “No” from Bauer and Jervey. Thus, “Ms. Fulger would never have worked for Bauer Financial Reports, the other company or Bauer Group. I wouldn’t have had her.” (2:349) Asked why, Bauer responded that he wanted to get rid of Fulger right after the summer [early September, presumably], and the only reason they retained her was that Jervey said that Fulger did good surveying work. Bauer told Jervey that he would not have Fulger anywhere else. “I was very unhappy with Sangria’le Fulger.” This largely was because, as Bauer describes, Fulger created problems by going to lunch with the receptionist when they were supposed to relieve each other. Bauer fired the office manager, Betty McDavit, in October 1994 for failing to control the situation. “And Ms. Fulger used to goof off most days at 4:00 o’clock.

She thought the work day was over at 4:00 o’clock. She was to me, a terribly disappointing employee.” (2:349–351)

Caroline Jervey was in charge of the survey room (2:350, Bauer; 2:368, Jervey; JD at 2 lines 26–27, 36), and, Bauer testified (2:351–352), Jervey wanted to keep Fulger because it is difficult to find employees who will do the work of constantly telephoning banks. Not wanting to “second guess” his managing editor (JD at 2, lines 26–27; 2:366–367) of Bauer Communications, Bauer did not overrule Jervey. (2:351) Nevertheless, Bauer told Jervey, “You keep her. You keep her for yourself.” (2:351) And if Jervey, in any effort to find a place for Fulger when the survey room closed, had asked to have Fulger transferred to one of Bauer’s other companies, Bauer “would have said no.” “I didn’t want her for anything else. I wasn’t happy with her performance.” (2:354) Agreeing with Bauer that Fulger would not have been transferred because Bauer did not want her, Jervey observes that she would not even have suggested such for fear of losing her own job. (2:381–382)

### 3. Discussion

Recall that staffing of the survey room dropped to one employee (Luis Alvarez) on April 17, 1995 when David Garcia was fired. (2:410; GCX 18 at 1) It can be asked whether, had Fulger still been on the payroll following Garcia’s termination, she or Alvarez would have been laid off or transferred. At this point the evidence becomes too speculative even though Jervey asserts (2:414) that, as an employee, Alvarez was superior to Fulger. Very likely, at that point, Fulger would have been laid off. A small doubt remains, however. Perhaps Jervey could have persuaded Bauer to let Fulger remain on the BCI payroll, doing some of the survey work, with both Alvarez and Fulger also doing some of the clerical work for BFR (as some of the recent hires, who did not last long, had been doing). Jervey could have been successful in this effort only so long as Bauer would have thought the situation was temporary until the survey room closed. Although such a possibility is highly unlikely, given Bauer’s strong opposition to Fulger, the wrongdoer rule (Rule 10, above) requires that all doubts as to events be resolved against the wrongdoer. Resolving those doubts against Company, I find that Fulger would have remained on the payroll until the survey room was closed on October 13, 1995. At that time she would have been terminated, and not transferred to either of the other Bauer companies. Although Alvarez did some survey work thereafter, it apparently was part of the weekly surveying for the printed periodicals. (2:317, Bauer; 2:396–397, Jervey)

The Government argues (Brief at 12–13) that Company’s May 8, 1998 letter (GCX 3) offering reinstatement to Fulger “as a rate surveyor for Bauer Communications, Inc. at \$7.00 per hour to begin May 26, 1998. You will be employed by The BAUER GROUP, Inc.” in fact “demonstrates the existence of the same or an equivalent position for Fulger to assume.” Not so. Bauer testified (2:319–320) that there was no job available for Fulger and that he was required to make the offer by Jacoby’s letter (RX 9) of May 12, 1998 (by which Jacoby advised that he had been assigned to secure compliance with Judge Evans’ decision). Obviously, what Bauer means is that he (no doubt after consulting with his lawyer) had decided not

to appeal Judge Evans' decision of April 24, 1998 (a fact that led to the Board's June 10, 1998 adoption order) and he therefore sent the May 8 letter offering reinstatement as required by Judge Evans' order. That is, the letter was sent to close the backpay period, not because there in fact was a job available.

Indeed, as Jervey's document (GCX 18) of employees hired discloses, by October 1996 the general office classification was down to three employees. One of those resigned on November 10, 1997, and another (hired November 4, 1997) on November 25, 1998. That left Miriam S. Anon, rehired November 5, 1996, as the only employee classified as "general office." Only one shipping employee, Aldo N. Egas (hired February 12, 1996) remained after February 1996. The last of the customer sales representative departed with the closing of the sales office on January 7, 1998. Other than two general office employees (Miriam Anon and one other), and the one shipping employee, the only other persons employed by Company as of May 1998 were in the "professional" classification—Paul A. Bauer, Karen L. Dornway (position not described in the record), and Caroline P. Jervey. (GCX 18) Thus, the record shows very clearly that Company, which already had drastically cut back all its workforce, and which would lose its next to last general office employee on November 25, 1998, had no substantially equivalent job available in which to place Fulger in May 1998.

The Government's final argument (Brief at 11–13) seems to be that Company, as a single employer, would be liable for backpay, under the remedial order, so long as there was any substantially equivalent position at any of Company's corporate entities which Fulger could have filled. As a practical matter, that means any general office position (Bauer Financial Reports). As we have seen, that would have been out of the question given Bauer's opposition to her—an opposition, I find, based on her poor work performance.

Does the remedial order override Bauer's (lawful) opposition to Fulger's employment anywhere outside the survey room? Company (Brief at 19) relies on facility-closing cases, analogizing the closing of the survey room to such cases. Such reliance is misplaced. A better comparison is with those cases involving a curtailment of operations. See, for example, *Thalbo Corp.*, 323 NLRB 630, 636–637 (1977) (immaterial that hotel contracted out operation of bar and food service where hotel had other jobs available, eventually offering the discriminatee, Paulette DiMilta, a position at the front desk), *enfd.* on point 171 F.3d 102, 113–114 (2d Cir. 1999).

The closer question is whether an employer who already had begun nondiscriminatory disciplinary actions against the future discriminatee forfeits its lawful rights of discipline merely because, as Company did here, it later adds one unlawful ground to the mixture. That is, does that one unlawful ground taint everything so that the employer cannot be heard to say, at the compliance proceeding, "The department where she was working is the only one where I would tolerate her presence—union or no union."

Compare *Wellstream Corp.*, 321 NLRB 455, 46–462 (1996), where Judge Lawrence W. Cullen found that the earlier unlawful motivation still tainted its opinion in the compliance case. A big difference, however, is that *Wellstream* apparently advanced the same reasons earlier found pretextual. In our case,

as is reflected in Judge Evans' decision, Company had "other problems" with Fulger aside from the one found to be unlawful. *Wellstream* stands, in part, for the proposition that a respondent has the right to prove that the discriminatee would have been laid off (had he or she not been unlawfully terminated) for non-discriminatory reasons. In effect, that proposition is an application of the test for a Respondent's affirmative defense as articulated in *Wright Line*, 251 NLRB 1083 (1980).

Applying that test here, I find that Company proved that it would have terminated Fulger on October 13, 1995 when it closed its survey room. In making this finding, I recognize that President Bauer never asserts that he would have disregarded Fulger's earlier protected activities in deciding that he would not have accepted Fulger in a transfer from the survey room. I have weighed that fact. Similarly, I have weighed the fact that there is nothing in writing by Bauer, before Company gained knowledge of Fulger's protected activities in the underlying case, in which he expresses his discontent with Fulger's work performance. Bauer was president, but Jervey was the department manager. Thus, it is not likely that Bauer would have seen any need to put any of his comments about Fulger to Jervey in writing. In any event, in light of Bauer's vigorous and detailed opposition to Fulger, and the documented dates of an October 14, 1994 counseling and November 28, 1994 reprimand as reflected in Judge Evans' decision, it seems clear that the protected activities of Fulger that came to light during and after the reprimand of November 28, 1994 played no part in President Bauer's opposition to any transfer by Fulger. Additionally, I credit both Bauer and Caroline Jervey in their testimony respecting this matter based on their demeanor and on all the record.

In light of the foregoing, and of all the record, I find that the backpay period for Sangriale Fulger ended on October 13, 1995 (that is, 2 weeks into 4Q95), and I shall adjust the numbers to reflect my findings (including the finding that Fulger's pay rate would have remained at \$7.00 per hour throughout the backpay period) as shown in the following revised backpay table.

### III. Final Backpay Table

Year	Quarter	Gross Back-pay	Interim Earn-ings	Interim Ex-penses	Net I/Earn-ings	Net Back-pay
1994	4	1288	0	0	0	1288
1995	1	3640	1642	0	1642	1998
1995	2	3880	1320	0	1320	2560
1995	3	1008	349	0	349	659
1995	4	560	1582	0	1582	0
Totals:		10,376	4652	0	4652	6746
Total net backpay due Sangriale Fulger:						\$6746

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>6</sup>

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings, conclusions, and

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

## ORDER

The Respondent, The Bauer Group, Inc., Bauer Communications, Inc., and Bauer Financial Reports, Inc., its officers,

---

recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

agents, successors, and assigns, shall pay backpay as follows, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and less taxes withheld as required by law:

Sangriale Fulger	\$6746
------------------	--------