Florida Steel Corporation *and* United Steelworkers of America, AFL–CIO. Cases 12–CA–6032(4) and 12–CA–6067(3)

March 1, 1978

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On November 26, 1974, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] directing Respondent, *inter alia,* to make whole W. C. Martin and Richard L. Purscell for their losses resulting from unfair labor practices committed by Respondent in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. Thereafter, the Board's Order was enforced, in relevant part, by the United States Court of Appeals for the Fifth Circuit.[2]

Pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 12, a hearing was held on May 9 and 10, 1977,[3] before Administrative Law Judge Robert C. Batson for the purpose of determining the amount of backpay due the discriminatees.

On September 29, the Administrative Law Judge issued the attached Supplemental Decision. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as herein modified.

We agree with the Administrative Law Judge's conclusion that employees Martin and Purscell did not incur willful losses of earnings by either quitting various interim jobs or moving from the Tampa area to other localities. We disagree, however, with the Administrative Law Judge's finding that the gross backpay for each of the discriminatees should be reduced by the amount listed in the specification as "earned accrued vacation pay" and that the backpay should be computed with interest at the rate of 7 percent per annum beginning with the third calendar quarter of 1975.

The backpay specification explicitly states that the net backpay due each discriminatee is the "sum of the calendar quarter amounts of net backpay plus accrued vacation pay due him" and sets forth these sums. Respondent did not allege in its answer to the specification that vacation pay was improperly added to backpay nor did it seek to amend its answer or otherwise raise the issue during the hearing. Indeed, it appears from the record that Respondent first raised this defense in its brief to the Administrative Law Judge. According to Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, "[t]he Respondent shall specifically admit, deny, or explain each and every allegation of the specification unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." In the instant case, Respondent's answer clearly admitted that "the footnotes [in the specification] accurately reflect the amount of vacation the claimants would have received at Florida Steel Corporation." Accordingly, on the basis of the foregoing, we find that Respondent is precluded from now asserting its defense to the inclusion of the vacation pay in the backpay award inasmuch as Respondent admitted in its answer the correctness of the specification and failed to timely raise its defense or amend its answer at the hearing.[4]

The Administrative Law Judge recommended that interest on the backpay award be computed as set forth in *Florida Steel Corporation,* 231 NLRB 651 (1977). However, the method of determining the interest rate set forth in that decision is not applicable in cases in which an earlier Order of the Board providing for a different interest rate has been enforced by a court of appeals. Accordingly, we shall order interest to be paid at the rate of 6 percent, as ordered in our original Decision and enforced by the court of appeals.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Florida Steel Corporation, Tampa, Florida, its officers, agents, successors, and assigns, shall make the following named employees whole by payment to them of the following amounts, together with interest at the rate of 6 percent per annum, less any lawful tax withholdings.

Richard L. Purscell	$10,934.71
W. C. Martin	$11,425.76

[1] 215 NLRB 97 (1974).

[2] 529 F.2d 1225 (1976).

[3] All dates hereinafter are 1977 unless otherwise indicated.

[4] *Southland Manufacturing Corp.,* 193 NLRB 1036 (1971), enfd. 475 F.2d 414 (C.A.D.C., 1973).

SUPPLEMENTAL DECISION

ROBERT C. BATSON, Administrative Law Judge: On May 4, 1976, the United States Court of Appeals for the Fifth Circuit entered judgment[1] enforcing, in part, the Board's reported Decision and Order[2] in this matter directing Respondent herein to, *inter alia,* make whole W. C. Martin and Richard Purscell for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest at 6 percent per annum. Controversy having arisen over the amount of backpay due Martin and Purscell under the terms of that Decision and Order, the issues raised in a backpay specification issued April 13, 1977, and answered April 26, 1977, were heard by me as supplemental proceedings at Tampa, Florida, on May 9 and 10, 1977.

Upon the entire record in this case, including my observation of the testimonial demeanor of the witnesses, and upon consideration of briefs filed by counsel for the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

There is no dispute as to the backpay periods for each of the discriminatees; for Purscell, June 11, 1973, to June 2, 1976; and for Martin, July 3, 1973, to June 2, 1976, or with respect to the formula upon which gross backpay is computed. Further, Respondent does not take issue with the accuracy of the General Counsel's admitted interim earnings for either claimaint. Respondent contends that each claimaint incurred willful loss of earnings by quitting various jobs which were suitable and substantially equivalent and moving from the Tampa area to areas which afforded less opportunity for suitable employment.[3] Respondent also takes issue with the travel and moving expense and failure to include strike pay as interim earnings as to Purscell.

Richard L. Purscell was employed by Respondent for more than a year as a rebar checker before his discharge on June 11, 1973, at which time he was earning $3.67 per hour. About June 19, 1973, he went to work as a general laborer for Cement Roofing Industries, Inc., at $3.50 per hour. Purscell quit after 1 week because he had received only 2 days' work due to inclement weather. About July 1, 1973, Purscell began work at Ware Construction Company as a carpenter apprentice, earning $2.50–$3 an hour. He quit this job about September 24, 1973, because he did not want to become a carpenter and began work at Robins Manufacturing Company as a truckdriver earning $2.50 an hour, for 40 hours per week. About October 24, 1973, Purscell quit Robbins and moved to Des Moines, Iowa, where friends had told him jobs were available. The General Counsel deducts from 1973–4 interim earnings $200 for moving expenses computed as $35, trailer and hitch rental; $35, meals and lodging (2 days and 1 night); and $130 at 10 cents per mile for 1,300 miles. Such expenses, if allowable, have been established.

Within 2 or 3 days of arriving in Des Moines, Purscell obtained employment at Rovner Sanitary Services, Inc., as a truckdriver earning a salary of about $160 per week, considerably more than at Robbins. About mid-December, he quit Rovner because he reasonably feared an impending layoff and immediately began work at Great Plains Bag Corp., as a forklift operator for about $2.75 an hour, with some overtime. After obtaining a job at AMF as a forklift operator earning $4–$4.50 an hour, with little or no overtime, he quit Great Plains about the middle of March 1974. About mid-June 1974 a strike commenced at AMF which lasted about 15 weeks, or until about the last week of September.[4] During the strike Purscell sought and obtained employment at J. C. Penney Company, Modern Moving and Storage, and Target Stores, and from such employment earned about $900. He also received $35 per week from the union, United Automobile Workers. He testified that he was available for work at those interim employers "except for those days I had to take off for picket duty which would be 1 day a week, and sometimes I didn't have to take off if it [the picket duty] was at night."[5]

The Union gave Purscell a statement of the amount received as strike benefits and instructed him to report such as income for income tax purposes. Presumably the Union did the same for all strikers receiving such benefits. Purscell reported such moneys on his income tax returns. In September 1974, the strike ended and Purscell returned to work. He worked until February 1975, at which time he

[1] *Florida Steel Corporation* v. *N.L.R.B.,* 529 F.2d 1225 (C.A. 5, 1976).

[2] *Florida Steel Corporation,* 215 NLRB 97 (1974).

[3] In its brief, Respondent raises for the first time an issue with respect to the computation of the vacation pay for both claimants. The contention is that this is "apparently . . . a clerical error in calculating . . . vacation pay." This issue will be dealt with *infra.*

[4] Purscell's testimony with respect to the dates he began work and left most of his interim employers is unreliable. He admittedly had a great deal of difficulty reconstructing such dates and had no concept of time after he moved to Des Moines. He testified that he worked about 6 weeks at Rovner Sanitary Services during late October, November, and December 1973, which is not incompatible with the admitted interim earnings from Rovner of $736.25 during the fourth quarter of 1974. He testified that he then worked for Great Plains Bag Corp., for about 3 months which is again compatible with the admitted interim earnings from Great Plains of $255.60 for the fourth quarter, 1973, and $1,712.08 for the first quarter, 1974. However, Purscell testified that he left Great Plains and immediately went to work at AMF in late January or early February 1974 and a short time later, in February 1974, participated in a strike for 8 months, or until September 1974. Based upon the admitted interim earnings from Great Plains of $1,712.08 for the first quarter, 1974, at the rate of pay stated by him, which amount or date is not disputed by Respondent. It appears that he would have had to work substantially the entire quarter with liberal overtime to have had these earnings. Moreover, he immediately went to work for AMF and is credited with interim earnings of $125.44 for the first quarter, 1974. He also has admitted interim earnings of $1,948.18 from AMF for the second quarter of 1974. This would require that he work a minimum of 10 weeks in the second quarter, 1974, assuming a rate of $4.35 per hour for 40 hours a week. Interim earnings from AMF of $132.07 are also admitted for the third quarter, 1974. While both counsel for the General Counsel and the Respondent, in their briefs, accepted Purscell's testimony that he was on strike from February to September 1974, or for a period of 8 months, and make their respective arguments with respect to the inclusion as interim earnings of strike benefits paid Purscell for that 8-month period, I find such to be totally incompatible with, and unsupported by, the record as a whole. Therefore, I have made the above finding that the strike started about mid-June and ended the last week in September, or a period of 15 weeks, based upon the record as a whole. There is no evidence that AMF continued to pay Purscell while he was on strike. I do not believe that Purscell deliberately prevaricated or testified falsely. He simply did not remember and had obviously not had the advantage of reviewing information upon which admitted interim earnings were based, for the purpose of refreshing his recollection.

[5] P. 30, ln. 20, of the official transcript is hereby corrected by changing "not" to "night."

was laid off until November 1975, when he was recalled; he continues to work at AMF. During his layoff, Purscell drew unemployment compensation, a condition of which was to apply for at least two jobs a week. He unsuccessfully sought jobs at John Deere Company, Massey Furgeson, Firestone Tire and Rubber, American Can, and others, some on more than one occasion. The $17.60 deduction from interim earnings for mileage searching for work during this period of time had been established by the General Counsel.

W. C. Martin was employed by Respondent for about 7 years as an overhead crane operator and, at the time of his discharge on July 3, was earning $3.67 per hour with about 2 hours per week overtime. About July 16, 1973, Martin obtained employment at Tampa Municipal Incinerator as an overhead crane operator at $2.98 per hour straight time for 48 hours per week. Martin testified the crane at Tampa differed in several repects from that which he operated at Respondent. The controls were located on the side as opposed to the front and the operation required a faster movement. After 1 week he quit for a job at Tampa Ship Repair & Drydock Co. as a gantry crane operator earning $4.49 per hour. Martin quit this job after 7 weeks and a near accident which he vividly described. Martin stated that on his last night of employment he was signaled to hoist a section of a barge weighing 15 tons. He set his boom for 20 to 25 tons as a margin of safety. He attempted to hoist the load which refused to give. He set his levers and left the cab, which is 70 to 80 feet high, to check his wheels, stating that it felt as if he were about to turn over. The ground crew continued to motion him to hoist and he tried a little more, then refused to hoist anymore for fear of turning over. He later learned that the barge section had not been cut free, as it should have, but was still welded down. Martin never returned to work at Tampa Ship Repair because of the near accident and his fear of operating the crane.

Martin immediately borrowed money, purchased a truck, and became an entrepreneur in the junk car hauling business. He remained in this unsuccessful enterprise about 2 months, during which he earned $353.35. In December 1973, Martin obtained employment at Tampa Wholesale Co. (Kash and Karry) as a selector at $2.90 per hour. After a 2-week training period he was converted to an incentive basis with a guarantee of $2.90 per hour. In May 1974, Martin quit Tampa Wholesale and moved to Foster, Kentucky, his home prior to moving to Tampa 16 years earlier. He testified that he went back to Kentucky to get help from his family since he was behind on "his bills" and had let his brother take up payments on his home in Tampa to avoid foreclosure. Furthermore, he had lost some furniture because he was unable to meet his payments and had lost a "piece of land" which he had purchased and upon which he had drilled a well in anticipation of building a home, prior to his discharge from Respondent. Jack L. Porter, office manager for Tampa Wholesale, testified that Martin had quit "in bad standing." Why Martin was in bad standing is not disclosed by the record. However, Porter stated that when a selector fell below a certain standard of production he would probably be terminated.

Martin immediately began seeking work in and around Bracken County, Kentucky. He testified that he sought work at Fort Thomas Sanitation in Campbell County, Kentucky, Campbell County Waterworks, Black River Mine in Pinkerton County, and Karpays Plastic Company in Augusta, Kentucky. Three or 4 weeks after moving to Kentucky he obtained employment at Butler Products at Butler, Kentucky, about 10 miles from his home. At Butler Products, Martin operated a drill and earned $2.60 to $2.70 per hour for 40 hours a week. Martin worked a short time at Butler Products and quit to work for Bill Strange Construction Co., at Cold Springs, Kentucky, about 30 miles from Martin's home, at a higher rate of pay. The record does not disclose what Martin's rate of pay has been, or what type of work he performed while with Strange. Martin continued to work for Strange for the remainder of the backpay period. Work was apparently regular except for the winter months when Martin was laid off due to inclement weather or lack of work. During his periods of layoff in the winters of 1974 and 1975, Martin sought employment through the Kentucky Employment Security Commission at Fort Thomas Sanitation, Campbell County Water Works, and a mine at Coyntown, Kentucky. Martin lived about 40 miles from the Employment Security Office, and during his layoff in 1974–75 he made seven or eight trips; during the 1975–76 layoff, he made five or six trips to the office. During these periods of layoff Martin at all times remained eligible for and drew unemployment compensation.

Analysis and Conclusions

Richard L. Purscell: Respondent contends that Purscell incurred a willful loss of earnings when he quit his job at Robbins Lumber Company in Tampa and moved to Des Moines, Iowa, and it is, therefore, entitled to an offset in Purscell's net backpay equal to what he would have earned at Robbins, or his actual interim earnings during each quarter, whichever is greater. It further contends that the $35 per week strike pay Purscell received while on strike at AMF in Des Moines should be added to the amount he would have earned at Robbins. It further contends that the $200 moving expenses claimed by the General Counsel should not be deducted from interim earnings, and that, apparently due to an error in computations of vacation pay, the General Counsel is claiming double vacation pay for Purscell. Respondent concludes that using this formula Purscell's net backpay for the 3-year backpay period is $5,489.50 and not $11,459.71 as claimed by the General Counsel.

Mitigation of damages, for which the burden of proof is on Respondent,[6] is the primary issue in these supplemental proceedings. It is well settled that a discriminatorily discharged employee must make a reasonably diligent search for suitable interim employment and must accept such employment if offered. *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177 (1941). It is equally well settled that,

[6] *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8, 1963).

having obtained substantially equivalent suitable interim employment, a discriminatee must prudently retain such employment or run the risk of being subjected to an exclusion from gross backpay the amount that would have been earned had such job been retained. *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209, 1212–16 (1961); *Gary Aircraft Corporation*, 211 NLRB 554, 557 (1974). Thus, the question posed here is whether or not Purscell's employment as a truckdriver at Robbins Manufacturing Company at $2.50 per hour for 40 hours a week is suitable interim employment and, if so, whether his reason for quitting, i.e., to move to Des Moines, Iowa, where friends told him employers were hiring, is an excusable reason.

In its brief, Respondent argues "[E]xcusable exceptions keys [sic] most frequently to the term 'unsuitable'; ordinarily applied to mean unprestigious, annoying jobs or those certain to create unacceptable disruptions in the discriminatee's private life." Respondent does not, apparently, recognize that the term "suitable" is also keyed to reasonably comparable pay for comparable work.

Respondent does not contend that Purscell's quitting Cement Roofing Industries, Inc., because of sporadic work, or Ware Construction Co., Inc., because he decided he did not want to become a carpenter, constitutes a willful loss of earnings. During the brief time Purscell worked at Robbins, he earned $2.50 per hour and worked 40 hours a week providing an income of $100 per week. During the same period of time Purscell's replacement, W. J. McQueen, whose earnings are used as the bases for gross backpay, which formula is admitted by Respondent, averaged 43.05 hours a week at $3.67 per hour for an income of approximately $158 weekly. Thus, Purscell's earnings at Robbins amounted to slightly more than 60 percent of those of his replacement. Purscell's work at Robbins was comparable to that at Respondent, for at the time of his discharge he was being trained to operate a tractor or truck. *Florida Steel Corporation*, 215 NLRB 97 (1974). However, I find that the pay was not comparable to that at Respondent and Purscell's job at Robbins was not suitable interim employment and his quitting upon reliable information that jobs were available in Des Moines, and moving to that city, does not constitute a willful loss of earnings. Indeed, had Purscell remained on the job at Robbins, incurring approximately $650 per quarter net backpay liability on Respondent, Respondent might well have complained that he did not make a sufficient effort to find a better job to further mitigate damages.

Within 2 or 3 days after arriving in Des Moines, Purscell obtained a job as a truckdriver for Rovner Sanitary Service, Inc., netting $145 a week. He testified that his gross pay was about $160 to $170 per week. Thus, the first job he obtained was substantially equivalent to that at Respondent. He left after several weeks when Rovner began laying off, because he feared he would also be laid off. Respondent does not attack Purscell's reason for leaving Rovner or contend that such incurred a willful loss of earnings. Purscell then went to work for Great Plains Bag Corp., as a truckdriver at $2.75 per hour with some overtime. He worked at Great Plains until late March 1974, when he went to AMF at $4 to $4.50 per hour, again comparable to what he would have been making at Respondent.

In mid-June 1974, Purscell participated in a strike at AMF, which lasted about 15 weeks.[7] Respondent does not contend that Purscell removed himself from the labor market during the strike, and the evidence does not establish such. He had three interim employers during the strike. Respondent contends that the $35 per week received from the Union as strike benefits should be added to Purscell's interim earnings. I agree. While there is some uncertainty in the record as to whether such moneys were earned by performing picket duty, and I am cognizant that such uncertainties are normally resolved against the wrongdoer whose conduct made the uncertainty possible,[8] in this case the uncertainty is not so great as to warrant the application of that principle. Purscell testified that he was not available for work on days he had to picket (once a week for 4 hours) and the Union gave him and others a statement of the amounts paid to them and instructed them to report such as earnings for income tax purposes. Purscell reported such earnings. The applicable law is well settled that where strike benefits received by a claimant constitutes wages or earnings resulting from interim employment they are proper deductions from gross pay. However, if these sums represent collateral benefits flowing from the association of the claimant with the Union, they are not deductible, *Rice Lake Creamery Co.*, 151 NLRB 1113, 1131 (1965). Collateral benefits flowing from association with the Union most often take the form of loans to be repaid in the event backpay is recovered from the employer, or they are payments based on the particular needs of striking employees.[9] The General Counsel argues in his brief that there is no showing that Purscell was required to picket 4 hours a week in order to receive these benefits. He apparently concedes that, if it is found that such was a requirement, then the benefits constitute interim earnings. While not given controlling weight by the Board, the fact that the Union considered, and presumably treated for its own tax purposes, these benefits to be earned income, such treatment is accorded some weight by the Board.[10] Moreover, by Purscell's own testimony he was not available for work on the "days he had to picket." Thus, I am persuaded that a condition of receiving these benefits was performing weekly picket duty. During this period of time the General Counsel was computing Purscell's gross backpay at approximately $164 per week, or slightly less than $35 per day. Whether Purscell is tolled 1 day a week for this period, which is the minimum finding permitted by this record, or the strike benefits are added as interim earnings, the net result is about the same. Therefore, I shall add $35 per week for a period of 15 weeks, 3 weeks during the second, and 12 weeks during the third quarter of 1974 to Purscell's interim earnings, such amount being $525.

Purscell returned to work at AMF in September 1974, at the conclusion of the strike, and worked until February 1975, at which time he was laid off in a reduction in force.

[7] See fn. 4, *supra*.

[8] *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 360 F.2d 569 (C.A. 5, 1966).

[9] See *Gary Aircraft Corporation*, 211 NLRB 554, 556 (1974); and *My Store, Inc.*, 181 NLRB 321, 325, 326 (1970).

[10] *My Store, Inc., ibid.*

He remained on layoff for 10 months, during which time he drew unemployment compensation. Purscell testified that throughout his layoff he sought work and, as a condition of drawing unemployment compensation, had to prove that he applied for at least two jobs per week. In its brief Respondent does not address the issue of willful loss of earnings or failure to mitigate damages for this period. Nor was any evidence adduced demonstrating a failure to diligently seek interim employment. The requirements to remain eligible for unemployment benefits have been held to be sufficient to satisfy requirements to remain eligible under the Act.[11] Respondent failed to present any evidence refuting Purscell's testimony in this respect. I find that he made a diligent search for employment.

Respondent's final contention, raised first in its brief, is that the General Counsel apparently made a clerical error in calculating the vacation pay for both Purscell and Martin by using 52 weeks each calendar year, based on the earnings of their respective replacements, and then adding the vacation pay, 1 week in Purscell's case for 1973, and 2 weeks, less vacation pay received from his interim employer, in each 1974 and 1975. Thus, Respondent argues that Purscell could not have worked 13 weeks each quarter and taken the vacation allowance in addition thereto. Appendix B of the backpay specification, which is the computation of Purscell's gross backpay based upon the earnings of his replacement, shows that the gross backpay was computed on the basis of 13 weeks each quarter, but does not indicate whether or not the replacement received vacation pay in addition thereto or whether such vacation pay is included in the gross earnings. In any event, it appears that the gross backpay includes all wages and benefits paid Purscell's replacement for a 52-week period each year and, based upon the General Counsel's formula for computing such, which does not specify additional vacation pay, I conclude that the amount Purscell would have received as vacation pay is already included as gross backpay and I shall reduce the gross backpay by the following sums; third quarter 1973, $146.80; first quarter 1975, $252.40; and, first quarter 1976, $264.

W. C. Martin: Respondent contends that Martin's quitting his jobs at Tampa Municipal Incinerator and at Tampa Wholesale constitutes a willful loss of earnings, and that it is entitled to an offset against gross backpay for his potential earnings for either of these jobs for the remainder of the backpay period. It proposes that, since Municipal Incinerator was the first job Martin quit, that his potential earnings from that job be offset. Respondent elicited from C. H. Haley, assistant superintendent of Municipal Incinerator, testimony as to the raises its crane operators received after Martin quit and according to its computations of Martin's potential earnings, based upon 48 hours per week to January 1, 1975, when the employer began paying overtime, and 52 hours[12] per week thereafter, its net backpay due Martin is $954.92.

As noted, at the time Martin was at Tampa Municipal Incinerator he earned $2.98 per hour straight time for 48 hours a week. Thus, Martin was working 48 hours a week to earn $15 less than his replacement at Respondent who worked approximately 42 hours a week. While this job was substantially equivalent to the one at Respondent under current Board standards, I cannot fault Martin for quitting to take a much higher paying job, $4.49 per hour, at Tampa Ship Repair & Drydock Company as a gantry crane operator. It is true that Martin had no experience as a gantry crane operator, but it is not shown that he had no reasonable expectancy that he would be able to learn the operation of the gantry crane, nor is it shown that Martin was aware that the job was temporary. Joe E. McGlomery, personnel manager for Tampa Ship Repair & Drydock Co., testified that Martin's replacement was laid off in October 1973, as Martin would have been had he not quit earlier. McGlomery also stated that Martin would probably not have been recalled since they obtained their crane operators through the Operating Engineers' hiring hall. Therefore, I find that Martin did not incur a willful loss of earnings by quitting Municipal Incinerator.

Martin quit Tampa Ship Repair & Drydock after 7 weeks and the near accident heretofore described, after which he testified that he was "scared" to operate the gantry crane. I find that Martin's fear of the crane after the near accident was genuine and not without grounds. Therefore, his quitting was justified. Indeed, the Board has held that under some circumstances quitting a job because one dislikes it is justifiable if such dislike is reasonably grounded. In *My Store, Inc., supra* at 341, the Administrative Law Judge found that claimant Mahan was justified in quitting his job with Peabody Coal Company after being transferred to underground work, simply because he did not like to work underground.

After leaving Tampa Ship Repair and Drydock, Co., about September 1973, Martin purchased a truck and for 2 months was self-employed hauling junk cars. The Board has held many times that it will not penalize an individual who attempts to start in business for himself and is thereafter unsuccessful, particularly, where, as here, Martin did not unduly belabor his venture after earning only $353 in a 2-month period.

In December 1973, Martin started work at Tampa Wholesale, as a selector at $2.90 an hour for 2 weeks and was thereafter on an incentive basis. He quit this job in May 1974 and moved to Foster, Kentucky. Respondent urges that this move by Martin was foolish and imprudent in view of the fact that during the last 17 weeks of employment he had averaged working 45 hours a week and earned an average of $143 per week, which is within 90 percent of what he would have earned at Respondent. Respondent contends that it is at least entitled to an offset in the amount of his potential earnings at Tampa Wholesale for the remainder of the backpay period. Respondent also contends that, while in Tampa, Martin did not search for crane operators jobs; Respondent cross-examined him extensively concerning his failure to read the classified advertisements of certain publications of a local newspaper where such jobs were purportedly available. No such evidence was introduced and Respondent has not shown that such jobs were available or that Martin would have been hired had he applied for them. Similarly, Respondent

[11] *J. H. Rutter-Rex Manufacturing Company, Inc.*, 194 NLRB 19, 24 (1971).

[12] There is no record evidence that Martin would have worked 48 and 52 hours during this period.

elicited testimony from C. H. Haley, assistant superintendent of Municipal Incinerator, that Martin was eligible for rehire. However, there is no testimony that any overhead crane operators were hired, except Martin's replacement, or that Martin would have been hired had he applied.

As heretofore noted, Martin quit his job at Tampa Wholesale and moved to Foster, Kentucky, located in Bracken County, with a population of about 7,000, according to a stipulation of the parties based upon the 1970 U.S. Census. Respondent contends that Martin moved back to his home area for personal reasons and convenience and a desire to be with "his family," rather than, as Martin claims, that the move was prompted by economic necessity to obtain assistance from his family to "get back on his feet" and to extricate himself from the economic plight brought about by his unlawful discharge by Respondent.

Martin testified credibly, and without contradiction, that after his discharge by Respondent he was forced to let his brother assume the payments on his home to avoid foreclosure; that he lost some land he was purchasing and upon which he had drilled a well in anticipation of building a home, and he had some furniture repossessed because he was unable to make payments on it. He further testified that he was getting further behind with "his bills." With respect to Martin's economic plight, Respondent observes in its brief, "[I]f the entire truth were known, it was probably this futile attempt at self-employment [the 2 months in which Martin was engaged in the junk car hauling business] which caused all of Martin's alleged financial difficulties and could have been avoided if Martin had used just a little common sense." One might ponder the validity of this observation; however, one need not ponder the fact that at this time, some 10 months after his termination by Respondent, he had already sustained losses in excess of $2,500, or about $250 per month, as a result of his unlawful discharge, which obviously played a far greater role in his economic plight than his brief venture as an entrepreneur.

In support of its contention that Martin's motivation in moving back to Kentucky was a desire to be with his family and because it was home, Respondent elicited testimony from Patricia Caudill, an investigator for Pinkerton's Incorporated, and introduced into evidence an interview report based upon an interview with Martin in March 1975. After surreptitiously gaining admission to Martin's home under the pretext of looking for a "Martin" with a similar name, Caudill engaged Martin in what appeared to be casual conversation. During the course of the conversation, according to Caudill, Martin told her that he had lived in Florida a number of years and had worked for Florida Steel, but had moved back to Kentucky because it was home and he enjoyed living there. He further told her there were plenty of jobs in Florida. Martin testified that he told her that he moved back to Kentucky because he was having difficulty making a living in Florida and denied that he told anyone there were plenty of jobs in Florida. Respondent contends that Caudill should be credited and that Martin's statement to her with respect to his reasons for moving to Kentucky and the fact that there were plenty of jobs in Florida should be construed as an admission against interest. On cross-examination Martin did not remember any conversation with Caudill. However, after Caudill testified, Martin's memory was refreshed to some extent. Even then I am of the opinion that Martin had little independent recollection of this casual conversation occurring 2 years earlier. While I was impressed with Martin's simple honesty and forthright answers, I believe that Caudill's version of the conversation is more accurate. I disagree with Respondent that the statements allegedly made by Martin under these circumstances constitute an admission against interest. Apparently Respondent would contend that Martin owed an obligation to a stranger to candidly disclose intimate details of his life, including the embarrassing admission that he could not make a living in Florida and had come back home to get help. Therefore, I accord no weight to Caudill's testimony.

In determining whether a backpay claimant incurs a willful loss of earnings by quitting a substantially comparable job and moving to a less densely populated area, all the circumstances, including the claimant's economic position, should be considered. Having obtained substantially comparable employment, the Board has held only that a claimant must exercise a degree of prudence in retaining the job and not foolishly quit and incur a willful loss of earnings. The Board has never held that a claimant must always exercise the legendary wisdom of the biblical Solomon or unerringly pursue the course which hindsight reveals would have greater mitigated a respondent's backpay liability.

Respondent does not take issue with the financial plight that Martin was in at the time he made the decision to move back to Kentucky and get assistance from relatives, nor does it propose, even in retrospect, a viable alternative Martin might have pursued in Tampa to extricate himself from this plight except to remain in Tampa at a lower paying job and get further behind in "his bills." While other courses may have been open to Martin which would have ultimately resulted in a greater mitigation of backpay liability, I find that under all the circumstances here Martin's actions were not so imprudent or foolish as to warrant an offset from gross backpay the amount he would have earned had he remained at Tampa Wholesale. Moreover, there is a serious question as to whether Martin would have had the option of remaining at Tampa Wholesale for the remainder of the backpay period. As heretofore noted, Respondent elicited testimony from Jack L. Porter that at the time Martin quit he was in bad standing. However, Respondent did not adduce testimony as to why Martin was in bad standing or whether it was because of some avoidable misconduct on his part. In this case I must apply the usual rule and construe the uncertainty against the wrongdoer whose conduct made the uncertainty possible. *Miami Coca-Cola Bottling Co., supra.*

Respondent has not sustained its burden of establishing that Martin's move to Kentucky was foolish or imprudent in that he removed himself from a good job market to one where job prospects were dim. The parties stipulated that based upon the 1970 U.S. Census Bureau report the population of Hillsbourgh County, Florida (Tampa), was 484,000 and Bracken County, Kentucky, was 7,000. There is no evidence as to the population of the counties

surrounding Bracken, e.g., Campbell, Pinkerton, and other areas in which Martin sought work. Furthermore, there is no evidence as to the amount of or types of industry, compared to the population in the two areas. Undoubtedly an inference is warranted that there are more industry and jobs in the Tampa area than in the Bracken County area, as counsel for the General Counsel aptly observed in his brief, so there are also more people seeking those jobs.

In support of its contention that Martin's move from Tampa to a less populated area is the type of action which the Board has construed constitutes a willful loss of earnings, Respondent cites *Midwest Hanger Co.*, 221 NLRB 911, 920–921 (1975). In that case the Board affirmed without comment the Administrative Law Judge's finding that claimant Buckley incurred a willful loss of earnings by quitting an interim job paying $1.70 an hour (she had been earning $2.10 an hour at the time of her discharge) and moving from Kansas City to Smithville, Missouri, a town of less than 5,000 population. Buckley stated as her reason her inability to pay the higher rent in Kansas City on her reduced income and that friends had told her she would be able to obtain employment at a hospital in Smithville. Buckley did not make inquiry of the hospital prior to moving and tried but never did obtain a job there. She actively sought employment at Smithville. However, she had no private transportation and public transportation was not readily available at Smithville. Moreover, there were concededly few jobs in the area. It appears that, in Buckley's case, one of the factors considered in finding that she incurred a willful loss of earnings by moving to a small town was the fact that she had no private transportation, and public transportation was not available, as in Kansas City, and she, therefore, further limited herself in accepting jobs which may have been available in the area. In Martin's case he was available for, and sought employment, in a three-or four-county area in Kentucky, and while I find there were fewer jobs than in the Tampa area it has not been shown that Martin's chances of obtaining a comparable job there were relatively less than in Tampa. Indeed, it appears that, during the remaining 25 months of the backpay period after Martin returned to Kentucky, his interim earnings were comparable to those he had during the initial 10 months after his discharge in Tampa.

Therefore, I find that Martin did not incur a willful loss of earnings by quitting his employment at Tampa Wholesale, employment which there is some uncertainty about whether he could have retained, and moving to Kentucky. In view of the factors motivating Martin in his decision to move to Kentucky, I shall not offset any amount for the 2 or 3 weeks which it took him to get settled in Kentucky and obtain employment at Butler Products. Respondent does not contend that Martin incurred any willful loss of earnings in Kentucky by failing to make a diligent search for employment or that he refused any suitable employment. Moreover, the record establishes that Martin actively sought employment in a wide area and accepted all employment offered. Also, during period of layoff from Bill Strange Construction Co., Martin sought employment and at all times qualified for unemployment compensation.

As in the case of Purscell, the General Counsel computed Martin's gross backpay based upon the earnings of his replacement for 13 weeks each quarter and then adding an amount equal to 80 hours pay at the straight time hourly rate as vacation pay. For the reasons set forth in the section of this Decision dealing with Purscell, I shall deduct from Martin's net backpay for the first quarter 1974, $293.60; the first quarter 1975, $316; and for the first quarter 1976, $357.60.

THE REMEDY

For reasons set forth above, I find that Respondent's obligations to the discriminatees herein will be discharged by the payment to them of the respective amounts shown in the Appendix annexed hereto. Such amounts shall be payable plus interest at the rate of 6 percent per annum to accrue commencing on the last day of each calendar quarter of the backpay period for the amount due and owing for such quarter as set forth in the Appendix, from the beginning of the respective backpay periods through the second quarter, 1975, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and from the third quarter, 1975, at the adjusted prime interest rate, currently 7 percent per annum, and continuing at such rate, as modified from time to time by the Secretary of the Treasury as provided in the Board's Order in *Florida Steel Corporation*, 231 NLRB 651,[13] and continuing until the date this Decision is complied with, minus any tax withholdings required by Federal and state laws in accordance with the Board's formula in *F. W. Woolworth Company*, 90 NLRB 289 (1950).

The gross backpay figures in the Appendix are based upon those set forth in the specifications and admitted by Respondent. The net interim earnings in the Appendix are based upon those set forth in the specifications as amended at the hearing after deducting travel expenses as established by the General Counsel, except as modified herein with respect to the inclusion of earnings by Purscell from the United Automobile Workers.[14] The next backpay due each quarter is based upon those set forth in the specifications as amended, except as to the deduction of additional vacation pay as found herein.

[13] The Board's Decision and Order in *Florida Steel, supra*, issued August 25, 1977. At fn. 12 the Board stated, "We shall apply the current 7-percent rate to pending cases for backpay and other monetary awards accruing in periods prior to the issuance of this Decision in which the 'adjusted prime interest rates' as used by the U.S. Internal Revenue Service in calculating interest on tax payments was at least 7 percent." On July 1, 1975, the U.S. Internal Revenue Service began calculating interest on tax payments at 7 percent.

[14] The Appendix does not name the interim employers inasmuch as the record does not establish any error, except as noted herein, in those admitted in the specifications.

ORDER[15]

The Respondent, Florida Steel Corporation, Tampa, Florida, its officers, agents, successors, and assigns, shall make the following named employees whole by payment to them of the following amounts, together with interest as set forth in the section of this Decision entitled "The Remedy," and continuing until the amounts are paid in full.

Richard L. Purscell	$10,271.51
W. C. Martin	$10,458.56

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX

YR. & QTR.	GROSS BACKPAY	NET INTERIM EARNINGS	NET BACKPAY
Richard L. Purscell			
1973-2 (from 6-11-73)	$ 473.98	$ 136.50	$ 337.48
1973-3	2,053.92	1,383.38	670.54
1973-4	2,045.76	930.91	1,114.85
1974-1	1,965.65	1,873.52	128.13
1974-2	2,093.37	2,053.18	40.19
1974-3	2,131.69	1,448.56	683.13
1974-4	2,198.91	1,883.59	315.32
1975-1	2,189.20	1,524.01	665.19
1975-2	2,298.96	106.43	2,192.53
1975-3	2,373.12	.00	2,373.12
1975-4	2,409.36	975.44	1,433.92
1976-1	2,418.00	2,765.20	.00
1976-2 (to 6-2-76)	1,675.20	1,358.09	317.11
			$10,271.51
W. C. Martin			
1973-3 (from 7-3-73)	$2,083.39	$1,398.15	$ 685.24
1973-4	2,111.97	713.67	1,398.30
1974-1	2,073.00	1,851.50	221.50
1974-2	2,138.17	1,223,62	914.55
1974-3	2,157.73	1,819.00	338.73
1974-4	2,213.07	1,553.00	660.07
1975-1	2,158.46	239.00	1,919.24
1975-2	2,271.52	1,209.75	1,061.77
1975-3	2,347.91	2,345.38	2,53
1975-4	2,384.16	1,702.60	681.56
1976-1	2,385.12	284.50	2,100.92
1976-2 (to 6-2-76)	1,654.15	1,180.00	474.15
			$10,458.56