Performance Friction Corporation *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 11–CA–16040 and 11–CA–18044

September 20, 2001

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On October 28, 1999, Administrative Law Judge Richard J. Linton issued the attached supplemental decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Charging Party and the Respondent (PFC) each filed exceptions, supporting briefs, answering briefs, and reply briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order Remanding.

I. THE BACKPAY FORMULA

The judge adopted the Region's gross backpay formula, finding that it employed a reasonable methodology and was reasonably designed to closely approximate the amount of backpay due to the four discriminatees at issue in this case.[2] The Region's formula is predicated on the hours and earnings of 18 comparable employees employed throughout the liability period.

The Respondent excepted both generally to the judge's finding that the backpay formula employed an accepted methodology and specifically to aspects of the formula which the Respondent claims unjustly reward the backpay claimants. We find no merit in the Respondent's general attack on the comparable employee formula and adopt the judge's finding that the comparable or representative employee approach is an accepted methodology, and appropriate here. See *NLRB v. S.E. Nichols of Ohio,* 704 F.2d 921, 924 (6th Cir.), cert. denied 464 U.S. 914 (1983); NLRB Casehandling Manual (Part Three) Compliance, Section 10532.3 (CHM Section). However, for the reasons stated below, we do find merit in the Respondent's specific exceptions to the Region's methodology as it relates to: (1) the average rate of pay level advancement, and (2) absenteeism.[3]

Both the Board and the courts have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). The Board is required only to adopt a formula which will give a close approximation of the amount due; it need not find the exact amount due. *NLRB v. Overseas Motors,* 818 F.2d 517, 521 (6th Cir. 1987), citing *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963). Nonetheless, the objective is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action. *American Mfg. Co. of Texas*, 167 NLRB 520 (1967); CHM Section 10532.1. Where, as here, the Board is presented with conflicting backpay formula arguments, the Board *must* determine the "most accurate" method of determining backpay. *Woodline Motor Freight*, 305 NLRB 6 (1991), affd. 972 F.2d 222 (8th Cir. 1992); *East Wind Enterprises*, 268 NLRB 655, 656 (1984). The Board may borrow elements from the suggested formula of each party to account for conditions described in the evidence and thereby meet its objective of accurately reconstructing backpay amounts. *Hill Transportation Co.*, 102 NLRB 1015, 1020 (1953).

The Respondent, PFC, has a pay level advancement system for its production employees whereby they can advance from level 1 (entry pay) through level 6 by demonstrating certain leadership skills and passing written tests. The Region projected the discriminatees' earnings by calculating the rate at which the comparable employees progressed through the six pay levels. In making those calculations, however, the Region removed an employee from the pool of comparable employees at the point when that employee failed to progress to the next higher pay level. Thus, for example, if comparable employee "A" never advanced beyond pay level 2, "A" was excluded from the Region's computations of the average length of time it took comparable employees to progress through levels 3 through 6.

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

[2] At the commencement of the hearing, six discriminatees were at issue. Two settled out, leaving the four discussed herein.

[3] We find no merit in the Respondent's exceptions that the Region's formula inappropriately used the comparable employees' average overtime hours and bonus earnings.

The Respondent excepts, arguing that this approach to measuring "average" pay level advancement is flawed because it does not account for numerous employees who "peak" or "park" at a particular pay level. We agree. The practical effect of the Region's calculations is to exclude those comparable employees whose extended stay in a particular pay level lengthens the group average.[4] This approach does not present a true "average" rate of pay level advancement.

The Respondent's specific exception regarding absenteeism also has merit. The Region's gross backpay formula is premised upon employees working 80 regular hours per 2-week pay period (plus average overtime hours and bonus earnings). PFC excepts, arguing that this formula does not account for unpaid absences,[5] an argument the judge never addressed. Since the record shows that PFC does not provide its employees with paid sick leave, we agree that gross backpay should be adjusted. However, contrary to PFC's proposal that unpaid absences be projected using the actual absence percentages of the backpay claimants, we find that unpaid absences should be calculated using the average absence rate of the comparable employees. The use of "average absenteeism" would thus be consistent with the use of average overtime and bonuses of the comparable employees.[6]

With these two modifications to the Region's backpay calculations, the comparable employee formula is otherwise adopted.

II. THE INDIVIDUAL DISCRIMINATEES

A. Martha Hinson

The judge adopted the Region's calculation that the Respondent owes discriminatee Martha Hinson $31,508 in backpay running from April 20, 1994 (the date she was discriminatorily discharged), to October 14, 1996. The Region, during its compliance investigation, determined that the Respondent, on September 27, 1996, had mailed a reinstatement offer to Hinson at her last known address. This offer gave Hinson until October 14, 1996, to respond. Hinson did not receive this reinstatement offer because she had moved. The Region claimed, and the judge found, that the backpay period for Hinson ended on the October 14 deadline date. The judge further found that Hinson had interim earnings in every quarter of the backpay period, and had made reasonable efforts to mitigate her losses.

The Respondent excepts, both to the judge's finding that backpay was tolled as of October 14, 1996, and to the judge's finding that Hinson properly mitigated damages. We find no merit to the Respondent's arguments regarding Hinson's mitigation efforts. However, for the reasons that follow, we agree with the Respondent that Hinson's backpay period closed on September 27, 1996, the date that the Respondent mailed its first reinstatement offer to her.

In tolling Hinson's backpay on October 14, the judge relied on *Cliffstar Transportation Co.*, 311 NLRB 152, 158 (1993), for the proposition that backpay is tolled on the date of actual reinstatement, on the date of rejection of an offer of reinstatement, or, as he found relevant here—in the case of employees who do not reply—on the date of the last opportunity to accept the offer. The Respondent argues that *Cliffstar* is inapplicable and that *Burnup & Sims, Inc.*, 256 NLRB 965 (1981), governs. Under *Burnup & Sims*, where a respondent has made a good-faith effort to communicate a valid offer of reinstatement, but that offer is not received, backpay is tolled on the date of the offer of reinstatement (defined as the date the letter was mailed). We agree with the Respondent that *Burnup & Sims* is applicable here.

The rule of *Burnup & Sims* has been applied generally in factual situations where a respondent has made a good-faith attempt to communicate a valid reinstatement offer to a discriminatee at his last known address, but, for some reason, that offer was not received.[7] The *Cliffstar* rule has been applied generally in factual situations where discriminatees received the offers of reinstatement, and, in the case of those who did not reply, the issue has usually been whether they were given a reasonable period of time to accept reinstatement and arrange a

[4] For example, the Region calculated the "Average Number of Weeks Between Pay Levels" as 25.7 weeks from level 1 to level 2; 39.3 weeks from level 2 to level 3; 46.1 weeks from level 3 to level 4; 34.5 weeks from level 4 to level 5; and 42.4 weeks from level 5 to level 6 (GC Exh.- 1(ff); app. E). Compare PFC's calculations of: 25.7 weeks from levels 1 to 2; 54.9 from 2 to 3; 75.0 from 3 to 4; 59.0 from 4 to 5; and 119.8 from 5 to 6 (GC Exh.-19(d), Exh. 3).

[5] The compliance officer amended his calculations during the hearing to account for unpaid holidays.

[6] The judge noted that the Region used averages because three of the four discriminatees had been employed by PFC about 6 months or less, a period too short to establish a representative employment history.

[7] The judge implicitly rejected the General Counsel's argument that *Cliffstar* modified *Burnup & Sims,* supra. As the judge noted (JD–26, fn. 7), if that were so, then the General Counsel failed to explain why, in *Hagar Management Corp*., 323 NLRB 1005, 1007 (1997), the Board did not correct the judge's citation to *Burnup & Sims* and reliance on the date of mailing to toll backpay. In *Hagar*, the credited testimony showed that the respondent had mailed a valid offer of reinstatement which was not received by the discriminatee. See also *Rental Uniform Service*, 167 NLRB 190, 197 (1967) (letter addressed to [employee] at last known address was returned "unclaimed"; employee testified she had moved; backpay liability was terminated with mailing of reinstatement letter).

return reporting date.[8] Hinson's factual situation falls within the former circumstance. There is no evidence that Hinson received the reinstatement offer which the Region determined the Respondent had sent her in good faith. Accordingly, under *Burnup & Sims*, the Respondent's backpay liability to Hinson was tolled on September 27, 1996, the date the Respondent mailed its reinstatement offer to Hinson.

In sum, we adopt the judge's findings that Hinson's mitigation efforts were reasonable, and find that Hinson's backpay must be recalculated only to account for our modifications to the backpay formula and to close the backpay period on September 27, 1996.

B. Manuel Mantecon

The judge found that the Respondent's backpay liability to discriminatee Manuel Mantecon was tolled as of September 23, 1994, rather than on October 14, 1996, as set forth in the amended compliance specification (ACS). The essential facts regarding Mantecon are not in dispute.

Mantecon suffered a heart attack on September 23, 1994. He applied for Social Security Disability Insurance (SSDI); his claim was initially rejected; he appealed that rejection; and his claim was subsequently granted on appeal. The Social Security Administration's (SSA) administrative law judge found, among other things, that Mantecon was unable to perform his past relevant work. Mantecon began receiving SSDI benefits in June 1996. Mantecon never obtained interim employment during the backpay period, either before or after his heart attack.

The judge here, finding *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), and *Superior Export Packing Co.,* 299 NLRB 61 (1990), "controlling," framed the issue as whether Mantecon sufficiently explained his apparently inconsistent claims before the SSA (that he was unable to work) and the Board (that he was able to work). The judge found that the parties had an opportunity to litigate this issue, and that Mantecon had not sufficiently explained the inconsistencies between his two positions. The judge characterized Mantecon's explanation (essentially that he never felt unable to work) as nothing more than a contradiction of his statements of inability to work before the SSA. Thus, the judge tolled Mantecon's backpay as of September 23, 1994, the date he entered the hospital for his heart attack. Finally, the judge found the testimony of the Respondent's vocational expert, that Mantecon should have been able to find a job within 6 months, was legally irrelevant.

PFC excepts, arguing that the judge erred in: (1) applying the "wrongdoer rules" to issues of testimonial credibility;[9] (2) crediting Mantecon's testimony and finding that Mantecon searched in good faith for employment;[10] (3) failing to consider Mantecon's intentionally misleading statements as a complete bar to backpay;[11] and (4) discounting PFC's expert witness.[12] We find no merit in these exceptions.

The General Counsel and the Charging Party except, arguing that the judge erred in: (1) finding that PFC's backpay obligation to Mantecon ended on September 23, 1994; (2) admitting into evidence, after the close of the hearing, certain documents from Mantecon's Social Security file;[13] and (3) incorrectly applying *Cleveland*, supra. For the following reasons, we adopt the judge's ultimate conclusion that PFC's backpay obligation terminated on September 23, 1994.[14] In so doing, however, we do not rely on the judge's analysis of *Cleveland*.[15]

The Board has traditionally applied the rule that an employer generally is not liable for backpay for periods when an employee is unavailable for work due to a disability.[16] For example, in *Southern Stevedoring Co.*, 236

[8] See also *Southern Household Products*, 203 NLRB 881 (1973); *Eastern Die Co.*, 142 NLRB 601, 604 (1963), enfd. 340 F.2d 607 (1st Cir. 1965), cert. denied 381 U.S. 951 (1965).

[9] The judge did not apply the "wrongdoer rules" to issues of testimonial credibility; rather, the judge stated that he shall "evaluate the truthfulness of the discriminatee's testimony under a traditional weighing of credibility, including demeanor." The judge noted that the wrongdoer rule applies to events or conditions.

[10] See fn. 1 supra and, *Alamo Cement Co.*, 298 NLRB 638, 645 (1990).

[11] The judge found that Mantecon did not make any intentionally misleading statements. *American Navigation Co.*, 268 NLRB 426 (1983), cited by the Respondent, applies in circumstances where there has been willful deception, not inadvertent error.

[12] See *Delta Data Systems Corp.*, 293 NLRB 736, 737–738 (1989) (generalized evidence offered by respondent too speculative and imprecise). See also *Sioux Falls Stock Yards*, 236 NLRB 543, 550 (1978).

[13] The Charging Party objects to the admission of R. Exhs.-103,-104, and -105; the General Counsel objects only to R. Exhs.-104 and-105. R. Exh.-103 is a letter from Mantecon stating that he wishes to appeal the initial SSA decision; R. Exh.-104 is a SSA "Reconsideration Disability Report" stating that Mantecon can "care for personal needs but cannot work"; R. Exh.-105 is a SSA "Request for Hearing by Administrative Law Judge" signed by Mantecon stating "I am unable to perform any work."

[14] Because we toll backpay as of September 23, 1994, arguments over whether *Burnup & Sims* or *Cliffstar* closes the backpay period are moot (see discussion regarding Hinson).

[15] *Cleveland* held that the receipt of SSDI benefits did not estop a recipient from pursuing an American with Disabilities Act (ADA) claim because an ADA suit claiming that a plaintiff could perform a job *with reasonable accommodation* might be consistent with an SSDI claim that a plaintiff *could not perform the job without it. Cleveland* dealt with the interaction between the ADA and SSA statutes, and cautioned that it did "*not* involve . . . the interaction of either of the statutes before us with other statutes." 526 U.S. at 802.

[16] An employer may be liable if the disability occurs because of an industrial accident suffered during the course of interim employment or is otherwise related to the unlawful conduct of the employer. This is

NLRB 860, 864 (1978), enfd. mem. 591 F.2d 101 (5th Cir. 1979), the Board found that an employee was not entitled to backpay for any period of time during which he claimed disability and was not physically able to perform his previous work as a longshoreman. See also *Canova v. NLRB*, 708 F.2d 1498 (9th Cir. 1983); *American Mfg.*, 167 NLRB at 520; CHM Section 10546.2. The question, thus, is whether Mantecon was unavailable for work, after September 23, 1994, due to his heart attack. We find that Mantecon was unable to perform his previous employment or substantially equivalent employment following his heart attack, despite his assertion that he felt able to work, and his testimony that he regularly sought interim employment.

In so finding, we focus on Judge Egan's factual determinations in the underlying SSA case.[17] Judge Egan's decision (R. Exh.-72) was admitted into the record without objection. Judge Egan credited Mantecon's testimony that merely walking to the mailbox made him out of breath and that showering fatigued and exhausted him. Judge Egan also credited Mantecon's testimony that, at the time of the November 1995 SSA hearing, he suffered from chest, shoulder, and arm pain, and that medication did not alleviate that pain. Finally, Judge Egan made the following affirmative findings:

> [Mantecon] cannot lift or carry more than ten pounds, sit or stand for prolonged periods, or occasionally push and pull with exertion, and . . . has a residual functional capacity for less than 'sedentary' work.
>
> [Mantecon's] past relevant work was that of a machinist. The vocational expert testified that the claimant's work as a machinist was skilled and required medium exertional capacity. The . . . claimant cannot return to his past relevant work, and . . . does not have skills transferable to work within his residual functional capacity. [Emphasis added.]

No evidence has been offered in this case which undercuts the validity of the SSA's factual determinations.[18]

We are mindful of *Superior Export Packing Co.*, 299 NLRB 61 (1990), where the Board held that the receipt of disability benefits, standing alone, is not prima facie proof that an employee is no longer in the labor market. Notably, in *Superior*, the claimant had, despite his disability, been working for the respondent's predecessor. Thus, it was clear that his subsequent receipt of SSDI was not indicative of a condition which would have precluded him from performing his previous job.[19] Here, by contrast, there is no evidence—other than that ultimately rejected by the SSA itself—that Mantecon could perform his previous duties for the Respondent. Indeed, the evidence indicates just the contrary.

Thus, it is not Mantecon's receipt of SSDI, standing alone, which underpins our decision. Rather, it is the specific factual findings of the SSA judge that Mantecon could not perform his past or similar work, findings not contradicted by the record, that form the basis of our conclusion. Accordingly, we toll Mantecon's backpay as of September 23, 1994.

C. Jerry Kennedy

The judge found that the Respondent's October 3, 1996 reinstatement offer ordinarily would have tolled Kennedy's backpay period on October 18, 1996 (under *Cliffstar*, supra, the last day for Kennedy to accept the offer of reinstatement), and terminated PFC's reinstatement obligation to Kennedy. However, because PFC made Kennedy a second reinstatement offer in June 1998, the judge found PFC thereby waived any argument that its 1996 offer terminated its reinstatement obligation.

The judge also found that, because Kennedy did not testify at the compliance hearing, none of Kennedy's signed or handwritten notes were admissions of a party opponent which could be used by PFC to establish interim earnings or a willful failure to mitigate, or by the General Counsel to establish Kennedy's interim expenses.[20] Since PFC denied the ACS's allegations regarding Kennedy's interim earnings, and since there was no evidence of interim earnings other than Kennedy's handwritten notes and NLRB Form 5224, the judge de-

because the disability is attributable to events "which would not have taken place, or to environmental factors which would not have been present, had the employee not been unlawfully removed from his employment." However, since the origins of heart attacks are usually not known, the Board has assumed that absences from work because of such illnesses would likely have occurred even if the employee had not been discharged. "As the claimant's loss therefore cannot be said to have a likely relationship to the unlawful discrimination, disallowance of backpay for all periods of unavailability because of such illnesses is proper." *American Mfg.*, 167 NLRB at 522.

[17] Because we premise our decision on the SSA's factual findings, we do not rely on contested R. Exhs.-103, -104, and -105. Accordingly, we need not reach the General Counsel's and the Charging Party's exceptions regarding those documents.

[18] The General Counsel and the Charging Party point to the December 1994 medical evaluation initially relied on by the SSA to deny Mantecon benefits (CP Exh.-8). Because the SSA ultimately reversed itself, this report is an insubstantial basis for finding that Mantecon was, indeed, able to work.

[19] Indeed, in *Superior*, supra, although the claimant had worked for the predecessor while on disability, he admitted that he subsequently stopped looking for work, thus tolling the backpay liability.

[20] Citing *Vencor Hospital-Los Angeles*, 324 NLRB 234, 235 fn. 5 (1997), the judge found that a discriminatee, who is not a charging party, is not a "party opponent" under Fed.R.Evid. 801(d)(2).

leted those interim earnings ($1698) shown for Kennedy for the last three quarters of 1994. Finally, the judge modified the ACS to impute "constructive interim earnings," mirroring what Kennedy's interim earnings at Hamlett Associates would have been from May 8, 1995 (when he voluntarily quit), through September 1996 (when Kennedy's employment with Hamlett would have otherwise ceased). The judge reasoned that the General Counsel had not demonstrated that Kennedy's voluntarily quit was reasonable.[21]

We find no merit in the Respondent's exceptions that the judge erred by: (1) concluding that none of Kennedy's handwritten notes could be used as substantive evidence;[22] (2) awarding Kennedy backpay during 1994 when Kennedy assertedly failed to engage in good-faith mitigation efforts;[23] (3) finding that Kennedy's resignations from interim employment did not constitute willful losses of employment;[24] or (4) failing to consider Kennedy's allegedly intentionally deceptive conduct as a complete bar to backpay.[25] We do, however, find merit in the Respondent's exceptions that the judge erred by failing to reduce Kennedy's gross backpay for the time Kennedy was in jail, and by finding that it waived any argument that it was not obligated to send a second reinstatement offer in 1998 by the fact that it sent one.

It is well established that backpay is tolled when an employee is incarcerated. *Sure-Tan, Inc.*, 234 NLRB 1187, 1193 (1978), enfd. in relevant part 672 F.2d 592 (7th Cir. 1982); *Gifford-Hill & Co.*, 188 NLRB 337, 338 (1971); *Hale & Sons Construction*, 219 NLRB 1073, 1079 (1975); CHM Section 10546.8. The Respondent produced evidence (R. Exh.-65, p. 3) showing Kennedy was incarcerated for 1 year starting January 18, 1996. Neither the General Counsel nor the Charging Party produced any evidence to rebut this.[26] The judge did not address this issue. We find that Kennedy was incarcerated from January 18, 1996, through January 18, 1997, and thus we modify the judge's findings to reduce Kennedy's gross backpay. Accordingly, the judge's constructive interim earnings would apply only from May 8, 1995 (when Kennedy quit Hamlett), to January 18, 1996 (when Kennedy began serving his 1-year sentence). After January 18, 1996, Kennedy's backpay would be tolled for 1 year, which, we note, carries Kennedy through either date that is argued for as the end of his first backpay period, October 3, 1996 (the date of mailing of PFC's first reinstatement offer via *Burnup & Sims*), or October 18, 1996 (the last day to reply to the offer via *Cliffstar*).

The General Counsel and the Charging Party except to the judge's failure to find that the Respondent remained obligated to reinstate Kennedy after October 18, 1996. They argue that PFC failed to prove that it communicated a valid offer of reinstatement to Kennedy at his last known address, that the offer was received, and that Kennedy refused the offer or never responded. We find no merit in this exception.

The Respondent placed into evidence a return receipt card (R. Exh.-23), dated "10/10" and apparently signed by someone other than Kennedy, which related to its October 3, 1996 reinstatement offer to Kennedy. As noted by the judge, PFC sent this offer to the address listed by Kennedy on both his 1993 and 1998 job applications at PFC, and on NLRB Form 5224, which Kennedy submitted for all four quarters of 1996. As the judge also noted, there is a rebuttable presumption that letters which are mailed are delivered to the addressee. *Ertel Mfg. Corp.*, 147 NLRB 312, 332 (1964), enfd. 352 F.2d 916 (7th Cir. 1965), cert. denied 383 U.S. 945

[21] No exceptions were taken to this latter finding.

[22] We agree with the judge that the consequence of PFC's denial was that PFC had to prove Kennedy's interim earnings. Since it failed to do so, the judge correctly showed no interim earnings' offset for 1994.

[23] Traditionally, the General Counsel carries the burden of proving damages, and the employer carries the burden of proving facts to mitigate the extent of those damages. Thus, an employee's alleged failure to make a reasonable search for interim work is an affirmative defense. Having denied the ACS's interim earnings figures, and having failed to subpoena Kennedy or otherwise offer affirmative proof, PFC does not discharge its burden of establishing interim earnings by simply offering evidence which allegedly impeaches the credibility of the discriminatee's efforts. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 324 NLRB 630, 632 fn. 3 (1997), enfd. mem. 159 F.3d 1345 (2d Cir. 1998).

[24] "[A] claimant who obtains a job but then leaves it for justifiable reason is not deprived of all further claims; the assumption is that the reason for his quitting the job would not have been present at Respondent's plant and therefore the job is not substantially equivalent." *Artim Transportation System,* 193 NLRB 179, 183 (1971), quoting *Mastro Plastics*, 136 NLRB 1342, 1349 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[25] Board law holds that backpay should be denied only for those quarters in which a discriminatee intentionally conceals interim employment unless, because of the claimant's deception, the interim employment cannot be attributed to specific quarters. *American Navigation Co.*, 268 NLRB at 428. Analogously, to the extent that Kennedy intentionally deceived the Board by hiding his incarceration and by representing that he searched for work while he was in jail, Kennedy's deceptive conduct would serve to bar backpay only for those quarters for which he concealed his incarceration, which time period can easily be attributed to specific quarters. As seen below, we are denying backpay for those quarters.

[26] The Charging Party makes much of the fact that the police officer who testified regarding Kennedy's "rap sheet" could only say with certainty that "the Kennedy" who was first incarcerated some 20 years ago was the same Kennedy who has repeatedly been jailed, and was not necessarily the same Kennedy at issue here. The "rap sheet" was generated using Kennedy's full name, social security number, and date of birth. The ACS accounted for time when Kennedy had admittedly been in jail, and Kennedy did not testify in this case apparently because he was in jail again. Under these circumstances, we find it reasonable to infer that this was the same Jerry Kennedy at issue here.

(1966). The presumption in this case is buttressed by the return receipt card. While Compliance Officer Pfeffer testified that Kennedy told him that he had not received this reinstatement letter, and that no one else would sign for him without his permission, Pfeffer's objecte-to hearsay testimony, not received for its truth, is not sufficient to rebut the presumption of receipt.

As stated above, the judge found that this "presumed" receipt not only tolled Kennedy's backpay, but also would have terminated PFC's reinstatement obligation, but for PFC sending a second reinstatement offer to Kennedy in 1998. A good-faith offer of reinstatement, whether received by the employee or not, tolls backpay. *Marlene Industries Corp*., 234 NLRB 285, 287 (1978), citing *Knickerbocker Plastic Co.,* 132 NLRB 1209 (1961). However, Board precedent also states that an employer's reinstatement obligation to an unlawfully discharged employee is not relieved, even by a bona fide offer of reinstatement, where the employee does not receive the offer. *Jay Co.*, 103 NLRB 1645, 1647 (1953), enfd. 227 F.2d 416 (9th Cir. 1954); *Ertel Mfg.*, 147 NLRB at 332. Since we presume receipt here, Kennedy's failure to respond to the 1996 offer acts as a rejection which ends PFC's reinstatement obligation.

Contrary to the judge's finding, this result is not changed by the fact that PFC sent a second reinstatement offer. PFC argues that it did so under protest and under threat by the Region of contempt proceedings (R. Exh.-24). Under these circumstances, we do not believe that PFC's act of sending second offers constituted a waiver of its right to argue that its first offer tolled its reinstatement obligation.[27]

In sum, Kennedy's backpay must be recalculated according to our revised formula and reduced by his jail time.

D. Merri Rowe

1. The initial backpay period

The ACS alleged two distinct backpay periods for Rowe: the first triggered by her unlawful discharge and running through the last date for her to accept PFC's September 1996 reinstatement offer; the second triggered by allegedly unlawful action taken against her after she accepted PFC's June 1998 reinstatement offer and continuing to date.[28] The judge made the following findings with respect to Rowe's first backpay period:

1. Rowe's initial backpay period ended on October 14, 1996, the last day for Rowe to accept PFC's first reinstatement offer (*Cliffstar* approach). Rowe was unaware of that offer; thus, PFC had a continuing obligation to offer reinstatement.

2. *Last three quarters of 1994*: Rowe searched in good-faith for interim employment. Rowe registered with the unemployment commission and credibly testified that she looked for work. Citing *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996), the judge found that Rowe's efforts must be judged over the life of the backpay period, not by isolated portions, and that she should not be penalized because her work search was unsuccessful. The judge found that PFC failed to show a willful loss of employment or that Rowe rejected permanent employment.

3. *First quarter 1995*: Rowe withdrew from the labor market when she cared for Billy Thomas, her boyfriend's father (no backpay for 1st qt. 95).

4. *Second quarter 1995*: Rowe did not withdraw from the labor market when she quit her job at Klear Knit. Her quit was reasonable.

With respect to the first backpay period, PFC excepts, arguing that the judge erred in: (1) concluding that Rowe's backpay period ended on October 14, 1996, rather than on the date the reinstatement letter was mailed; (2) awarding Rowe backpay during 1994 when she failed to engage in good-faith mitigation efforts; (3) finding Rowe's rejection of interim employment offers in 1994 did not constitute a willful loss of employment; and (4) failing to find that Rowe withdrew from the labor market during the second quarter of 1995. We find merit in the Respondent's first exception. Rowe testified that she did not receive the original reinstatement offer. Thus, consistent with our treatment of Hinson, and pursuant to *Burnup & Sims*, supra, we modify the judge's findings to close the initial backpay period on September 27, 1996, the date PFC mailed its first reinstatement offer. Otherwise, we find no merit in the Respondent's exceptions and, for the reasons stated by the judge, we adopt his findings.

The General Counsel and the Charging Party except to the judge's finding, again relative to the first backpay period, that Rowe did not actively remain in the labor market during the first quarter of 1995 when she nursed Billy Thomas, her future husband's father. We find merit in this exception.

Self-employment is an accepted method to remain active in the labor market, *Fugazy Continental Corp.*, 276 NLRB 1334, 1337 (1995), enfd. 817 F.2d 979 (2d Cir. 1987), and full-time self-employment is not construed as a withdrawal from the labor market or equated with a

[27] Having made the above findings with respect to Kennedy, we need not reach other issues raised by the parties related to the validity of PFC's second reinstatement offer or a second backpay period.

[28] While the ACS alleges that the second backpay period continues to run, the computations in this phase of the proceeding run through the fourth quarter of 1998.

willful loss of earnings. *Heinrich Motors*, *Inc.*, 166 NLRB 783, 784–785 (1967), enfd. 403 F.2d 145 (2d Cir. 1968); *Ad Art, Inc.*, 280 NLRB 985, 990 (1986); CHM Section 10541.3. The Board does not find a willful loss of employment by a discriminatee who is already working full time because the discriminatee did not search for a possibly better paying job. *Heinrich Motors*, supra at 784. The backpay period must be viewed as a whole and not in isolated portions. *Sioux Falls Stock Yards*, 236 NLRB at 551.

During the period in issue, Rowe was "just dating" Jackie Thomas, a man she married 4 years later. His dying father asked Rowe to care for him in exchange for housing and utilities in one of the rental units he owned. Having had her own utilities cut off, Rowe accepted. Thus, Rowe essentially began full-time self-employment as a nurse. The Respondent's reliance on *Coronet Foods*, 322 NLRB 837, 846 (1997), enfd. in relevant part 158 F.3d 782 (4th Cir. 1998), is misplaced. There, a father chose to stay at home with his baby while his wife worked; he received no pay or benefits in return. Here, however, Rowe accepted outside employment as a nurse, for which she was compensated, and the ACS properly charged her with in-kind shelter and utilities as interim earnings per CHM Section 10541.5. Thus, we modify the judge's findings to award backpay for the first quarter of 1995 when Rowe was self-employed (as the ACS had originally alleged).[29]

2. The second backpay period and the complaint case

The judge found, consistent with Board precedent, that Rowe's lack of receipt of PFC's first reinstatement offer tolled PFC's backpay obligation but not its reinstatement obligation. *Burnup & Sims,* supra. The judge rejected PFC's argument that its reinstatement obligation ended in 1996, because Rowe, through Charging Party's attorney, Marcia Borowski, had notice of PFC's 1996 offer and declined it.

PFC excepts, arguing that the judge erred in concluding that service of Rowe's reinstatement letter on Borowski in 1996 did not constitute service on Rowe or that Borowski was not acting as Rowe's personal attorney.[30] For the reasons stated by the judge, we adopt the judge's findings on these points.[31] Additionally, we note that *A. W. Behney Construction Co.*, 224 NLRB 1083 (1976), cited by the Respondent, is distinguishable because the reinstatement offers there were conveyed to a union business agent; the discriminatees were union members; and the discriminatees asked the business agent to represent their interests. None of those circumstances are present here.

[29] We thus treat Rowe's employment as a nurse consistent with the judge's treatment of Hinson's employment as a nanny, as discussed by the judge in sec. I,D,2 of his attached supplemental decision. While the judge apparently distinguished between Rowe's and Hinson's situations based on Rowe's "concession" that "she had no time to look for work" (sec. I,D,5,b), Rowe, as stated above, was not obligated to look for other work while she was briefly self-employed.

[30] As with Kennedy, PFC also argues that there can be no waiver, where, as here, it had been threatened with contempt proceedings if it did not offer reinstatement. As we stated respecting Kennedy, we agree.

[31] Like the Respondent, Chairman Hurtgen is troubled by the apparently opportunistic manner in which the Charging Party's attorney attempted to invoke the attorney-client privilege at the compliance hearing. Depending on the questions asked, Attorney Borowski's assertions of privilege inconsistently covered various time periods. For example, when Rowe was asked whether she talked to Borowski before giving her August 7, 1998 affidavit to the Board, Borowski invoked attorney-client privilege and said it extended back to August 8, 1997, the date of the Fourth Circuit's judgment in the underlying unfair labor practice case. 117 F.3d 763. Borowski explained that until that time, there were potentially 350–400 discriminatees; she did not know their identities or how to locate them all; and that the Fourth Circuit's judgment essentially limited the "class" to an identifiable group, at which time the privilege attached (Tr. 680–688). The judge sustained the objection. Later in the hearing, when the Respondent asked Rowe about contact she had with Borowski in September 1996, Borowski again asserted attorney-client privilege, this time stating that the privilege extended back to December 1994 when she first became involved in this matter. The judge also sustained this objection (Tr. 1369–1379). In a similar vein, Borowski objected during the hearing that she had not been served with subpoenas directed to the discriminatees by the Respondent, but claimed that she was not an agent for service of process of the 1996 reinstatement letters.

Despite these troubling assertions by counsel, Chairman Hurtgen joins the majority in finding that PFC's reinstatement obligation to Rowe continues because: (1) the judge credited Rowe's uncontradicted testimony that she did not receive the 1996 offer; (2) PFC produced no return receipt card signed by Rowe; and (3) the weight of the record evidence does not establish that either a personal attorney-client relationship existed between Borowski and Rowe in September 1996, or that Rowe ever designated Borowski to be her agent for service of process. Chairman Hurtgen notes that: (1) the Respondent asked Rowe whether she spoke to Borowski on the basis that she thought Borowski was providing legal advice to her, and Rowe answered: "It has always been my understanding and Ms. Borowski has stated to us many, many, many times . . . in the least over a hundred times during the duration of this four year thing that she does not represent us. She represents the union so—" (Tr. 681–682); (2) Rowe testified that: she had "very little" contact with Borowski in September 1996; whatever contact she had was by mail since she had an unlisted phone number; she spoke "with no one about the reinstatement letters"; and that Borowski never told the discriminatees anything about a mediation conference (Tr. 1368–1379). That Rowe was effectively "out of the loop" is confirmed by the testimony of Susan Hudson, who was the unofficial "mouthpiece" for the discriminatees "during the first part," but who had "no contact" with Rowe from April through August 1996 because she did not know how to contact Rowe (Tr. 1493–1502). Hudson also viewed Borowski as the "UAW attorney" and stated she had no advance knowledge from Borowski that she would be receiving a reinstatement offer (Tr. 1494, 1501).

Finally, the duty is on the employer to remedy its wrong by "seeking out the employee and offering reinstatement." *Greyhound Lines, Inc.,* 169 NLRB 627, 628 (1968), enfd. 426 F.2d 1299 (5th Cir. 1970).

We turn now to the 1998 reinstatement offer and the complaint case. The complaint alleged that the Respondent "failed and refused to properly reinstate" Rowe, and later constructively discharged her. The complaint also alleged that a supervisor "interrogated its employees concerning their activities on behalf of the Union."

Again, the essential facts are not in dispute. As noted earlier, PFC mailed second reinstatement offers to Rowe and Kennedy[32] in June 1998. Both accepted the offers, and were told to report to PFC on July 1 to complete the paperwork necessary to return to work. Rowe and Kennedy reported on July 1, and were asked to complete a "standard packet of information," which included an employment application, an emergency-contact information form, an I-9 form, an employment agreement, a statement of company policies for hourly employees, and an employee handbook.[33] Rowe and Kennedy were also asked for social security cards and photo IDs, and were advised that they needed to submit to a drug test. Both were directed to meet separately with Company President Don Burgoon, Controller Thomas G. Davis, and Human Resources Director Ryan Ramsey—meetings which were unprecedented for hourly production employees. During Rowe's meeting, she stated that she was back "to get a union in here." When Rowe asked Burgoon about her terms of employment, Burgoon told her she would be returned at pay level 1 with benefits as if she had continued working.

Rowe returned to work on July 12, 1998. A few nights later, Team Leader Randall Hamacher said to her: "Merri, you're not going to start the union stuff up again?" When she asked why, he said it was just the "Mafia's legal way to make money." Rowe said, "[W]hatever," and kept working.

On July 23, 1998, team member Elijah Hall and Team Leader Hamacher repeatedly told Rowe to "hurry up," stop "slacking," and other phrases to similar effect. She asked them to stop harassing her. Upset, Rowe clocked out about 15 minutes before the scheduled lunchbreak, walked out of the plant, and went to her car. There, the shift supervisors found Rowe trying to compose herself. On investigation, Shift Supervisor Dennis Wayne Hyder concluded that neither Hall nor Hamacher had done anything improper—that they were just applying "peer pressure" to meet production and quality goals. Hyder told Rowe that she had abandoned her job and quit. Rowe protested that she had not quit and offered to clock in early from lunch and finish the shift. Hyder would not allow her to clock back in, nor was Rowe permitted access the following night.

On these facts, the judge found that the 1998 reinstatement offers to Rowe and Kennedy were invalid. The judge reasoned that PFC treated them as new employees by: requiring them to complete the new employee "packet" of documents; requesting social security cards and a photo ID, which PFC did not need; returning them to entry level pay rather than projected pay levels;[34] and by requiring individual interviews with Burgoon, Davis, and Ramsey that were unprecedented and designed to intimidate.

PFC excepts, arguing that the judge erred in finding the 1998 reinstatement offers invalid. We find no merit in this exception. A Board order for reinstatement is designed to place the discriminatee in the same position he would have been in had there been no unlawful discrimination against him. If the discriminatee would have received an increase in wages, a promotion, or any other increase in benefits had he not been unlawfully discharged or refused reinstatement, the reinstatement offer must put him in that position. *Craw & Son*, 244 NLRB 241, 242 (1979), enfd. mem. 622 F.2d 579 (3d Cir. 1980). For the reasons stated by the judge, PFC's reinstatement offer did not place Rowe in the same position she would have been in had there been no unlawful discrimination against her.[35]

By treating Rowe as a new employee, PFC discriminated against her because it did not treat their employment relationship as continuing. *Domsey Trading Corp.*,

[32] As stated in the earlier discussion related to Kennedy, Kennedy's failure to respond to the 1996 reinstatement offer (which we presume he received) ended the Respondent's reinstatement obligation to Kennedy in 1996. Thus, the 1998 reinstatement offer to Kennedy conferred no further backpay or reinstatement rights on him.

[33] These are the forms required for new hires. The Respondent admits it was creating new employment files for Rowe and Kennedy, rather than updating their existing files.

[34] PFC suggests that it cannot be expected to "guess" what pay level the Region would ultimately determine that Rowe should have returned to. While that may be true as far as it goes, the record is nevertheless clear that most employees progressed through pay levels. It is reasonable to assume that Rowe, had she been constantly employed from 1994, would have progressed also; thus, the judge correctly states that returning her to pay level 1 evinces a lack of good faith.

[35] Requiring employees to complete job applications is invalid, unless an employer can show a legitimate business reason. *Woodlawn Hospital*, 233 NLRB 782, 794 (1977), vacated in part on other grounds 596 F.2d 1330 (7th Cir. 1979). Here, PFC showed no legitimate business reason other than to "update" its files; it could have accomplished that by merely requiring Rowe to confirm her address or complete a new emergency contact form. Moreover, a requirement that an employee undergo a physical examination generally renders a reinstatement offer conditional because that requirement treats the employee as an applicant for employment. *Craw & Son*, supra at 242. Nor can employees be required, as a condition of reinstatement, to submit to an interview. *Fugazy Continental Corp*., 231 NLRB 1344, 1357 (1977), enfd. mem. 603 F.2d 214 (2d Cir. 1979). PFC gave Rowe no assurances that her application was being used merely to update its records and that she was not being treated as a new employee. *Ivaldi v. NLRB,* 48 F.3d 444, 452–453 (9th Cir. 1995).

310 NLRB 777, 794 (1993), enfd. 16 F.3d 517 (2d Cir. 1994). Thus, we adopt the judge's finding that PFC's 1998 reinstatement offer to Rowe was invalid.

Despite having found Rowe's reinstatement offer invalid, the judge proceeded to rule on allegations that PFC violated Section 8(a)(3) by constructively discharging Rowe following her July 1998 return to work and Section 8(a)(1) by unlawfully interrogating her. The judge found no merit to these allegations and recommended that the complaint be dismissed. The judge also found that PFC's backpay obligation, and apparently also its reinstatement obligation, ended with Rowe's second separation from PFC.

The General Counsel and the Charging Party except, arguing that, having found the 1998 reinstatement offer invalid, the judge erred in ruling on the alternatively pled 8(a)(3) constructive discharge allegation. Alternatively, they argue that the judge failed to find that PFC unlawfully discharged Rowe a second time in July 1998.

We need not pass on whether the judge erred in ruling that PFC did not constructively discharge Rowe. Regardless of how we characterize Rowe's separation from PFC—as a voluntary quit, a lawful discharge, or a constructive (unlawful) discharge—the remedy remains the same under the circumstances of this case. If PFC constructively discharged Rowe, she is entitled to reinstatement and backpay. Moreover, whether Rowe either voluntarily quit or was lawfully discharged for abandoning her job, she is, as argued by the General Counsel and the Charging Party, still entitled to reinstatement and, as discussed below, backpay.

As a discriminatee who was not properly reinstated, Rowe was free to quit her new employment with the Respondent if she was not satisfied with her inadequate reinstatement. *Sumco Mfg. Co.*, 267 NLRB 253, 258 (1983), enfd. 746 F.2d 1189 (6th Cir. 1984), cert. denied 471 U.S. 1100 (1985).[36] If she was lawfully "discharged" by PFC, the result is the same, since the Respondent's obligation to make a proper reinstatement offer continues unless it can show that the conduct for which Rowe was discharged was so egregious as to require forfeiture of her right to reinstatement and further backpay. *Ryder System, Inc.*, 302 NLRB 608, 609 (1991), enfd. 983 F.2d 705 (6th Cir. 1993). PFC has not proven such egregious conduct. Thus, PFC's reinstatement obligation continues because a reinstatement offer ultimately found to be inadequate will not meet a respondent's reinstatement obligation.[37] To the extent that the judge found otherwise, we reverse the judge.

Because the judge found PFC's 1998 reinstatement offer invalid, he accepted the ACS's position that PFC's backpay liability to Rowe resumed on June 5, 1998 (the date the second reinstatement offer was mailed). PFC excepts to the finding that its backpay obligation resumed.

We reject this exception and find that PFC's backpay obligation to Rowe does, indeed, resume. However, contrary to the ACS and the judge, we find that backpay resumes as of July 1, 1998, the date PFC imposed invalid conditions on its reinstatement offer.[38] We further find that PFC's backpay obligation to Rowe continues until PFC makes her a valid reinstatement offer.

As to the actual amount of backpay owed to Rowe for the second backpay period, the judge made the following findings:

1. Rowe's drywall work should be treated as interim employment (offset against gross backpay) before her July 1998 reinstatement since she began doing drywall work during her initial backpay period. The judge calculated Rowe's interim earnings at $4.30/hr.

2. After July 1998, Rowe's earnings from her drywall work were supplemental (no offset to gross backpay) because she was entitled to keep her preexisting job. PFC did not prove that Rowe failed to mitigate her losses after her July 23, 1998 separation from PFC. Rowe credibly testified that she searched for night or weekend work; PFC offered no evidence that there were other

[36] Similarly, where a reinstatement offer is conditional and does not satisfy the Board's order of reinstatement, a discriminatee is not obligated to reply to or to accept such conditional offer of reinstatement. *Canterbury Educational Services*, 316 NLRB 253, 255 (1995). Refusal of an inadequate offer of reinstatement does not waive an employee's right to reinstatement. CHM Sec. 10529.2, citing *Holo-Krome Co.*, 302 NLRB 452, 454 (1991).

[37] See *NLRB v. Cowell Portland Cement Co.*, 148 F.2d 237, 245 (9th Cir. 1945), upholding a Board finding that reinstatement offers conditioned upon employees changing their union affiliation were "equivalent to absolute refusal to reinstate," citing *NLRB v. National Motor Bearing Co.*, 105 F.2d 652, 658 (9th Cir. 1939).

[38] See *A.P.R.A. Fuel Oil Buyers Group,* 324 NLRB at 630. In *A.P.R.A.*, an employee was discharged January 3, 1991; the backpay period began. The employee was rehired December 7, 1992, and terminated again June 9, 1993. The judge found: "Assuming that her original reinstatement had been valid and that her discharge in June was not discriminatorily motivated, her backpay would have ended on December 7, 1992." However, since her reinstatement was not in compliance with the Board Order, "and therefore invalid for the purpose of tolling backpay, her discharge in June 1993, serves only to resume the backpay liability." Id. at 631. See also CHM Sec. 10529.2.

We also find this case analogous to those where an employer makes a good-faith offer of reinstatement, but the discriminatee does not receive it, and the discriminatee subsequently learns of the offer, presents himself for reinstatement, and is denied employment. See *Jay Co.,* 103 NLRB at 1647, and *Rollash Corp.*, 133 NLRB 464, 465 (1961), where unsuccessful, good-faith attempts to offer reinstatement were held to toll employers' backpay obligations, which obligations recommenced when the employers subsequently denied employee requests for reinstatement.

employers with night shifts for whom Rowe could work or that Rowe rejected any offers of night employment. Thus, after her July 23, 1998 separation, and [contingent on Rowe prevailing on the complaint case,] Rowe's backpay is as alleged in the ACS.

PFC excepts, arguing that the judge erred in: (1) calculating Rowe's interim earnings at $4.30/hr.; (2) concluding that Rowe's earnings from her work at Thomas Drywall were supplemental; and (3) failing to find that Rowe's conduct after her July 23, 1998 departure from PFC constituted a willful failure to mitigate. PFC made no specific argument in support of these exceptions, but instead attempted to reserve a right to submit arguments if the Board overturned the judge's dismissal of the complaint.

Since we find, as stated above, that the second backpay period resumes on July 1, 1998, we need not pass on the judge's calculation of $4.30/hr. as an interim earnings offset between June 5 and July 1, 1998. We adopt the judge's finding that, after July 1998, Rowe's earnings from her drywall work were supplemental and thus should not be offset from gross backpay. The general rule requiring deduction of interim earnings from gross backpay applies only to earnings during the hours when the employee would have been employed by the respondent. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 fn. 7 (1941); *S.E. Nichols of Ohio,* 258 NLRB 1, 15 (1981), enfd. 704 F.2d 921 (6th Cir. 1983). Since Rowe had always worked the night shift at PFC, Rowe's daytime earnings from her drywall work should not be deducted as interim earnings from gross backpay.

Finally, we note that the ACS computed Rowe's backpay through the fourth quarter of 1998 and alleged that backpay was continuing. The judge found, assuming a favorable outcome to the Government in the complaint case, that Rowe's backpay was "both 'ongoing'" and, through 1998, as alleged in the ACS (JD–67, L. 67 through JD–68, L. 11). However, since the judge also found that PFC did not constructively discharge Rowe, the judge, in his final table (JD–102) "revised [Rowe's] backpay to end with 2Q98." This revision is in error because, as found above, Rowe's separation from PFC was not for reasons so egregious so as to terminate her right to backpay.

The parties litigated Rowe's mitigation efforts from July 23, 1998, through February 18, 1999, the date she testified in this case. (JD–66 to JD–67.) The judge found that PFC "failed to prove that Merri Rowe willfully failed to mitigate her losses following her July 23, 1998 separation from PFC" (JD–67, L. 38–40).[39] We adopt the judge's finding that Rowe properly mitigated her losses through February 18, 1999, and we remand to the Region to recalculate Rowe's backpay prior to that date.

Finally, with respect to the complaint's 8(a)(1) allegation, the judge found that: (1) Team Leader Hamacher was PFC's agent: thus, PFC was responsible for his actions and (2) Hamacher's question to Rowe: "Merri, you're not going to start the union stuff up again?" did not violate Section 8(a)(1). The judge reasoned that: the question was not accompanied by a threat; Rowe was an open union supporter; Hamacher was a low-level agent; the conversation was brief and at Rowe's work station; and Hamacher sought only to reassure himself that the union turmoil was not going to begin again.

The General Counsel and the Charging Party except, arguing that the judge erred in failing to find an 8(a)(1) violation. We agree. The test is whether, under all of the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985) (rejecting per se approach to interrogation of open union adherents); *Emery Worldwide*, 309 NLRB 185, 186 (1992). The factors to be considered in assessing whether an interrogation is unlawful include: background, nature of information sought, identity of the questioner, place and method of interrogation, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances of no reprisals. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

Here, there is a clear history of employer hostility and discrimination against union supporters. S*unnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Moreover, the nature of the question, "Merri, you're not going to start the union stuff up again?" strikes at the core of a union campaign. The question implies the threat that Rowe would be retaliated against if she started that "union stuff up again." The questioner, Hamacher, was Rowe's immediate supervisor her last night at PFC. Finally, Hamacher did not assure Rowe that no reprisals would be taken against her. Under all of these circumstances, we find that Hamacher's questioning of Rowe violated Section 8(a)(1).

ORDER

The Respondent, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

[39] Note JD–68, L. 4–11.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Clover, South Carolina, copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 1998.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for Region 11 for further appropriate action including the holding of a hearing before Administrative Law Judge Richard J. Linton should the judge deem it necessary. The Regional Director shall issue a new backpay specification recalculating the backpay owed by the Respondent to Martha Hinson, Manuel Mantecon, Jerry Kennedy, and Merri Rowe. Specifically, in accordance with our modifications to the judge's findings, the Region is directed to revise the backpay formula both to calculate (or to verify the Respondent's calculations) the average intervals between pay levels and to account for "average" employee absenteeism of the comparable employees. The revised formula must then be applied to each of the four discriminatees. Additionally, the backpay period must be adjusted (shortened) for both Hinson and Rowe (Rowe's first backpay period only) to reflect our finding that their backpay periods closed on the Respondent's good-faith attempt to communicate its 1996 offers of reinstatement to them at their last-known addresses. Kennedy's backpay must be reduced for the period he was incarcerated. Finally, the Respondent's backpay obligation to Rowe continues until the Respondent makes Rowe a valid offer of reinstatement.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in your exercise of the rights guaranteed you by Section 7 of the Act.

PERFORMANCE FRICTION CORPORATION

Ronald C. Morgan, Esq. and (brief only) *Frederick B. Adams II, Esq.,* for the General Counsel.

William L. Rikard, Esq. and *Stacy K. Weinberg, Esq. (Parker, Poe, Adams & Bernstein),* of Charlotte, North Carolina, and *Michael W. Bishop, Esq. (Edwards, Ballard, Bishop, Sturm, Clark and Keim),* of Spartanburg, South Carolina, for the Respondent, PFC.

Marcia W. Borowski, Esq. (Thompson, Rollins, Schwartz & Borowski), of Atlanta, Georgia, for the UAW.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This consolidated case brings together, under 29 CFR 102.54(c), a compliance specification (Case 11–CA–16040) and a related complaint case (Case 11–CA–18044). By his order dated September 29, 1998, the Regional Director for Region 11 of the National Labor Relations Board consolidated the two cases for trial. The compliance case is a proceeding to determine the amount of backpay which the Respondent, Performance Friction Corporation (PFC), owes to six employees (Martha K. Hinson, Susan P. Hudson, Jerry Kennedy, Manuel S. Mante-

con, Merri R. Rowe, and Hayward Steele) as a result of unlawfully discharging them during April-May 1994. Liability was determined against PFC in the underlying unfair labor practice case, reported as *Performance Friction Corp.,* 319 NLRB 859 (1995), mod. 117 F.3d 763 (4th Cir. 1997), and this is the "damages" portion (traditionally called a backpay case) of the overall case.

I presided at this 14-day trial. The first 13 days of trial were held in Clover, South Carolina beginning November 30, 1998, and ending May 6, 1999, pursuant to the November 24, 1998 amended compliance specification (ACS), and the November 4, 1998 amended complaint and notice of consolidated hearing (complaint), both issued by the Regional Director for Region 11 of the National Labor Relations Board. The Regional Director issued the ACS directly on behalf of the Board (see 29 CFR 102.54), and the complaint for the General Counsel on behalf of the Board (see 29 USC 153(d)). The two cases were consolidated for trial by the Regional Director's September 29, 1998 order. Although the September 29 order cited Section 102.33 of the Board's rules in consolidating the cases, without including a reference to Section 102.54(c), the latter is impliedly included.

Day 14 of the trial, in which I reopened the hearing, was conducted by telephone (by consent of all parties) on June 10, 1999, and lasted about 80 minutes. As I stated on the record (14:2383),[1] my purpose in reopening the hearing was to replace the initial portion (about 38 minutes) of the testimony of PFC's vocational rehabilitation expert, Dr. William Wayne Stewart. Stewart has a doctorate in Rehabilitation Services and Rehabilitation Counseling, and Vocational Evaluation and Work Adjustment. (14:2386–2387; RX 85). As is clear from 12:2134, the initial portion of Dr. Stewart's testimony is missing, and the court reporting service was unable to restore it. I address this procedural matter further in a moment.

Judge Philip P. McLeod presided at the trial of the underlying case. In the "Background" section of his April 6, 1995 decision, generally adopted by the Board, Judge McLeod describes PFC's business operation and the beginning of the Union's organizing campaign. 319 NLRB 859, 861–862. Briefly, PFC manufactures nonasbestos disk brake pads and other friction materials, and sells the pads directly to automobile manufacturers such as Ford Motor Company and to wholesalers and retailers in the replacement parts market. Other customers include many of the NASCAR Winston Cup, Indianapolis 500, and IMSA racing teams. PFC stresses its commitment to producing quality products. Don Burgoon is PFC's president and production manager. The Company grew from approximately 25 employees in 1986 to nearly 400 employees in 1994. Before me, Burgoon (13:2218–2221) describes PFC's business in much the same way as Judge McLeod summarized it. Burgoon puts the current employee population at a little over 400, with roughly 300 being production and maintenance. (13:2228)

The UAW (the "Union") began its organizing activities at PFC in early February 1994. Burgoon, who admitted his opposition to unionization of his company, soon learned of the organizing and, 319 NLRB at 862, set about to "nip it in the bud." One result of the Company's response was the unlawful discharge of the six. The Board ordered their reinstatement with backpay and interest. 319 NLRB 859, 859 fn. 2, 860. The Fourth Circuit enforced this portion of the Board's order, finding substantial evidence to support the Board's findings of unlawful discharge. 117 F.3d at 766–768. However, in rejecting other portions of the Board's decision, the Court vacated the entire remedial order and remanded it with directions that the Board modify it consistent with the Court's opinion. The Court directed that the Board's revised order direct reinstatement of only the six. 117 F.3d at 770.

The Board did not issue a revised remedial order. What happened, it appears, is that the Board simply accepted the provisions of the Court's judgment, and NLRB Region 11 proceeded with the compliance investigation. That investigation led to issuance of the compliance specification and, eventually, to the ACS of November 24, 1998.

Respecting the issue of backpay, when the parties could not agree on the amount of backpay due the six, the Regional Director issued a compliance specification, followed thereafter by the November 24, 1998 ACS. At trial a 7-page set (GCX 3) of revised figures and explanatory notes was received (1:29) as an amendment to the ACS. Thereafter, further revised figures were reflected on an updated version, GCX 32. (6:791, 828) At the (initial) close of the trial I received the Government's final updated version of the backpay numbers, GCX 77. (13:2363) Under these final revised calculations, the Government alleges the following totals, not including interest, as the backpay due for four of the six discriminatees. Two of the six have been withdrawn from the ACS based on settlements—Susan P. Hudson and Hayward Steele. Steele was amended out of the ACS during the last week of the hearing when the parties settled the case as to him. (11:1949) Shortly after the close of the hearing, the parties settled as to Susan P. Hudson. I now receive in evidence the General Counsel's May 19, 1999 motion (GCX 1jj) to withdraw Hudson's name from the ACS, and my May 21, 1999 order (GCX 1kk) granting that motion. As to the remaining four discriminatees, the revised numbers are (GCX 77):[2]

Martha K. Hinson	$31,508
Jerry Kennedy	34,160
Manuel S. Mantecon	47,981
Merri S. Rowe	32,190

The complaint case is relevant here. In addition to its single independent allegation of a violation of Section 8(a)(1) (alleged supervisor Randall allegedly coercively interrogated employees on July 15, 1998), the complaint also alleges that PFC failed

[1] References to the fourteen-volume transcript of testimony are by volume and page. Exhibits are designated as GCX for the General Counsel's, CPX for the Charging Party's, and RX for those of Respondent Performance Friction Corporation.

[2] 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).

and refused to reinstate Jerry Kennedy (paragraph 9) and Merri Rowe (paragraph 10) on July 1, 1998, and constructively discharged Merri Rowe on July 23, 1998. PFC denies.

As to the compliance case PFC defends on numerous grounds. For its general attack, PFC claims that the Region's procedure and figures were arbitrary and in disregard of provisions of the Agency's own casehandling manual, and that, as a result, the gross backpay formula and calculations thereunder are wholly improper. Second, PFC advances its own gross backpay formula which, it asserts, yields a more accurate result. Respecting the four (remaining) discriminatees, the Company raises various defenses, including the argument that much of the alleged backpay due is based on time periods when one or more of the four should have been treated as having withdrawn from the labor market.

Finally, on February 10, 1999 the Government issued a complaint in Case 11–CA–18226 alleging that PFC had violated Section 8(a)(4) of the Act by not paying four of the discriminatees here, whom Respondent had subpenaed, witness fees and mileage allowances for trial dates on and after December 1, 1998.[3] By motion (GCX 19e) dated February 11, 1999, the General Counsel sought an order consolidating the new case with the instant case. (6:763, 904, 916; 7:946) At the initial close of the trial, I granted the General Counsel's unopposed motion to withdraw the Government's February 11 motion to consolidate based on representations that the matter had been resolved. (13:2376)

Return briefly now to the subject of Day 14 (the June 10, 1999 telephonic testimony of Dr. Stewart). Two weeks after Day 14 (that is, on June 24, 1999), the Board issued its decision in *Westside Painting,* 328 NLRB 796 (1999), sustaining exceptions filed by the Respondent there who unsuccessfully had objected to taking the testimony of a key witness by telephone. After the parties here had reviewed the Board's reported decision in *Westside Painting,* they signed a 7-point written stipulation (RX 102) by which the parties, observing that I already had enjoyed "a full and fair opportunity to observe Dr. Stewart's demeanor and assess his credibility" (point 1), stipulated that no objections would be made or exceptions taken concerning the telephonic testimony, and that they preferred the telephonic approach rather than [the time and expense of] a reopened hearing or a deposition. (Point 6) Finally (point 7), the parties "waive any remand" on this matter. RX 102 is one of the exhibit numbers reserved by Respondent for late filed exhibits. (13:2332) I now receive RX 102 in evidence and place it in the official folder for Respondent's exhibits.

By my notes, Dr. Stewart's missing testimony lasted some 38 minutes (and covered the topics of his vita (RX 85), his education, training, work, his methodology, and a few statistics about the unemployment rate in the local labor market. At that point, 12:2134, the transcript picks up with Stewart's testimony about vocational factors as applied to discriminatee Manuel S. Mantecon—and continues on various topics to 12:2176, for another (by my notes) 70 minutes. Although Stewart's telephone testimony of 80 minutes slightly exceeds the 70 minutes of reported testimony during which I observed his demeanor (and not counting the 38 minutes of missing testimony during which I also observed his demeanor), I share the parties' view that I had "a full and fair opportunity" to observe Stewart's demeanor and to assess his credibility. [The 80 minutes were limited to the same topics as the missing 38 minutes, but when lawyers get a second chance, they usually ask more questions.] Moreover, I also share the implied premise of the parties' stipulation—that there was no concern that anyone was present with Dr. Stewart to coach him, or to intimidate him, during his telephone testimony. The sound of Dr. Stewart's voice over the telephone reflected no such stresses and matched the sound I heard in person at the trial. This includes any concern that Stewart may have been reading from a prepared text. I detected no such possibility from the spontaneity of his answers, and none of the parties expressed any such concern about his testimony. At the end of Day 14, I reclosed the hearing. (14:2430)

Despite all the normalcy here, the parties and I recognize the possibility that *Westside Painting* leaves no room even for the limited telephone situation such as we have here. In that event, the parties waive both objection and remand. (RX 102) It is hoped, however, that the rather unique circumstances here (entirely different from those in *Westside Painting*) will persuade the Board that the circumstances surrounding Dr. Stewart's testimony are such that the portion consisting of his telephone testimony may be considered nothing more than an extension of his earlier trial testimony, and therefore, the manner of taking his testimony, considered as a whole, is consistent with 29 CFR 102.30.

Sixteen witnesses testified (15 before me plus one, Christopher J. Hogue, who testified in a May 28, 1999 video deposition (RX 99) on his return from Europe following the close of the trial). For the Government's first of its five witnesses, the General Counsel called Earl Pfeffer, NLRB Region 11's Compliance Officer since February 1998. (1:46, 93). As the person who investigated the compliance matter and made the calculations for the ACS (1:47, 96–100), Compliance Officer Pfeffer explained the basis for each liability allegation of the ACS. Pfeffer testified for all of 4 days and a portion of a fifth day. Discriminatees Hinson, Hudson, and Rowe also testified during the Government's case in chief. Before resting, the General Counsel called Thomas G. Davis, PFC's controller, as an adverse witness under FRE 611(c). (7:958–959). Eventually the General Counsel and the Union (who called no witnesses) rested their cases in chief. (7:981–982, 1018) After I denied (7:983) Respondent PFC's motion to dismiss, PFC began its case in defense.

By the time (May 4, 1999) he was called to testify in PFC's case in defense, Davis was the company's treasurer, having been promoted about April 1, 1999. (11:8888) After calling Don Burgoon, PFC's president (13:2217), plus other witnesses, Respondent rested subject to, with other matters, holding the record open to receive the video deposition of Christopher Hogue on his return from a business trip to Europe. (13:2327–2328, 2335) The General Counsel called Pfeffer in rebuttal, offered certain documents in evidence, and rested. (13:2371) The Union then offered certain documents in evidence, and rested. (13:2374) PFC offered no surrebuttal evidence.

[3] See *Howard Mfg. Co.,* 231 NLRB 731 (1977); 1 NLRB Casehandling Manual 11780 (June 1989).

(13:2374) At the brief telephonic reopening on Day 14, the only testimony was by Stewart (to replace, as noted earlier, the portion missing from the transcript).

Among the witnesses PFC called during its case in defense were discriminatees Merri R. Rowe and Manuel S. Mantecon. When PFC moved to question Rowe (8:1297) and Mantecon (10:1640) under FRE 611(c), both the General Counsel and the Union said they had no objection. A respondent may call a charging party discriminatee as an adverse party under FRE 611(c), *Security Services,* 198 NLRB 1166 (1972) (interpreting old Rule 43(b), FRCP). However, an alleged discriminatee, not a charging party, is not a "party opponent" under FRE 801(d)(2) such that the respondent may offer his affidavit as substantive evidence. *Vencor Hospital–Los Angeles,* 324 NLRB 234, 235 fn. 5 (1997) (excluding discriminatee's proffered affidavit). The General Counsel and the Union properly did not object here. *Vencor* involved the concept of a "party opponent" in Rule 801(d)(2), whereas *Security Services* had before it the broader concepts, in Rule 611(c), of an "adverse party" and, particularly, a "witness identified with an adverse party." At the very least, discriminatees Rowe and Mantecon were, and are, "identified with" a party adverse to PFC.

About late April 1999, Merri Rowe and Jackie Ray Thomas (called by PFC as a Rule 611(c) witness) were married in ceremony. (10:1519). [Before that (apparently since July 1995) they lived together and were "known" as common law husband and wife. (RX 64 at internal page 8, item 4).] To avoid confusion with the change of names, Merri Rowe Thomas has no objection to her being referred to in this case by her previous name of Rowe. (12:2033)

The last late-filed exhibits all pertain to Manuel S. Mantecon and are copies of a very few of the documents contained in his Social Security Insurance Disability (SSID) claim file. They are CPX 16 and RXs 103 through 107. As I discuss later respecting Mantecon's case, I receive those late filed exhibits in evidence (overruling objections by the General Counsel and the Union to one or all of RXs 103, 104, and 105).

After having gone through the trauma of discriminatory discharges, the ordeal of the liability litigation, and survived, in this damages portion, the microscopic inspection of much of their circumstances, the testifying discriminatees here perhaps are recalling the second verse of that classic old Quaker spiritual, *How Can I Keep From Singing:*[4]

> Through all the tumult and the strife, I hear that music ringing; It sounds and echoes in my soul; How can I keep from singing?

In addition to the regular posthearing briefs that the parties filed, they also, with leave (RX 101), filed supplemental briefs (pertaining only to the documents from Mantecon's SSID file), and finally (on August 25, 1999), reply briefs. My bottom line is this. I dismiss the complaint, and, except as to Manuel Mantecon, I find substantially as the Government alleges respecting backpay (although no backpay extends beyond the close of the second quarter 1998 because of my dismissal of the complaint).

[4] *Gather* at 260 (GIA Publications, Chicago, 1988).

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

FINDINGS OF FACT

I. THE COMPLIANCE CASE

A. 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). As there listed, the 10 rules are:

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).

Second, respecting the close of the backpay period, an offer of reinstatement "must be unequivocal, specific, and unconditional." *A-1 Schmidlin Plumbing Co.,* 312 NLRB 191, 192 (1993).

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. In discharging the Government's burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result. *NLRB v. Overseas Motors,* 818 F.2d 517 (6th Cir. 1987); *Kansas City Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982). Nevertheless, an Administrative Law Judge need not recommend the General Counsel's gross backpay formula to the Board when a more accurate one is established in the record. *Frank Mascali Construction,* 289 NLRB 1155, 1157 (1988); *J. S. Alberici Construction Co.*, 249 NLRB 751 fn. 3 (1980).

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 (PFC, here). *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 (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.

Sixth, when a discriminatee voluntarily quits interim employment, the burden shifts from the Respondent to the Government to show that the decision to quit was reasonable. *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982); 3 NLRB Board Casehandling Manual 10545.4 (Sept. 1993). [On a single point, respecting concealment of interim earnings, the Board subsequently overruled *Big Three. American Navigation Co.,* 268 NLRB 426, 427 (1983). Other points in *Big Three* were not disturbed.]

Seventh, a discharge from interim employment, without more, does not constitute a willful loss of employment. *Ryder System*, id. At 610. As the Board stated there, to carry its burden:

> A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. Here we find that the Respondents failed to show that Larry Elmore's conduct fell within that standard. Elmore may have missed several scheduled deliveries, but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge. [Footnote citations omitted.] Without such proof, Elmore's discharge from [interim employer] ATS will not serve as a basis for tolling his backpay. [Footnote omitted.]

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).

Ninth, statutory "back pay" does not include reimbursement for collateral losses resulting from distress sales of a home, automobile, tools, or similar personal assets. *Laborers Local 38 (Hancock–Northwest)*, 268 NLRB 167, 170 (1983), modified slightly on unrelated point 748 F.2d 1001 (5th Cir. 1984); 3 NLRB Casehandling Manual Sec. 10530.1 (Sept. 1993). Thus, if a discriminatee must struggle to survive during the backpay period, any losses he sustains by having to pawn personal items, such as a wife's wedding ring, are not recoverable.

Tenth, as PFC is the wrongdoer who caused the discriminatees' initial unemployment, any ambiguities, doubts, or uncertainties are resolved against PFC, 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 (6th Cir. 1993); Big *Three Industrial Gas,* 263 NLRB 1189, 1190 fn. 8 (1982).

B. Credibility Resolved

Except where stated or implied, I generally credit those witnesses supporting the Government's position (Compliance Officer Pfeffer and discriminatees Hinson, Hudson, Mantecon, and Rowe, and Rowe's spouse, Jackie Ray Thomas), and I generally disbelieve the witnesses whose testimony conflicts with the former. In making my credibility resolutions, I have considered the demeanor of the witnesses, as well as other factors.

The wrongdoer rule (Rule 10, above) generates an important question. Does that rule apply to testimonial truthfulness as well as to events and conditions? In seeking an answer to that question, I note that, in Board law, the rule apparently originated with the two cases cited at *NLRB v. Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 573 (5th Cir. 1966)—*Merchandise Press,* 115 NLRB 1441, 1442 (1956), and *Spitzer Motor Sales,* 102 NLRB 437, 453 fn. 52 (1953). Those cases, including *Miami Coca-Cola*, applied the rule to events, not to testimonial veracity. Thus, in *Miami Coca-Cola* the Fifth Circuit reminds us that it first approved the Board's rule in 1956 when the court, in the earlier case, agreed with the Board that it would be impossible to determine when discharged members of the union would have joined a strike. 360 F.2d at 573, citing *East Texas Steel Castings Co.,* 116 NLRB 1336, 1339–1340 (1956), enfd. 255 F.2d 884 (5th Cir. 1958, per curiam). In *East Texas* the respondent employer argued that discharged employees, who then joined a strike, should have their backpay tolled as of the date of the strike rather than the date of offers of reinstatement. The Board said no because the discriminatory discharge had made it impossible to determine whether the employees, absent their discharge, would have joined the strike. A similar situation existed in *Merchandise Press.* [Note that the cases did not involve testimony, or proffered testimony, that the employees would have, or would not have, joined the strike at one time or another. The Board's court-approved rule apparently precludes such testimony as speculation and therefore unreliable.]

The rule also is applied to the estimation of employees expenses, *Aircraft & Helicopter Leasing,* 227 NLRB 644, 645 and fn. 2 (1976), enfd. mem. 570 F.2d 351 (9th Cir. 1978) (table); to doubts about whether employees would have worked overtime, *Intermountain Rural Electric Assn.,* 317 NLRB 588, 590–591 (1995), enfd. 83 F.3d 432 (10th Cir. 1996) (table); and to possibly ambiguous trial testimony by the discriminatee about his interim earnings, such that the ambiguity could be interpreted adverse to the discriminatee, *Basin Frozen Foods,* 320 NLRB 1072, 1075 (1996), enfd. mem. 139 F.3d 906 (9th Cir. 1998) (table), among other situations.

It therefore appears that, in matters involving everything short of positive evidence of a specific intent or motivation to cheat or to lie, the wrongdoer rule applies. So what about those situations in which there is positive evidence that would support a finding that a discriminatee has cheated or lied? In those situations it appears that judges apply the traditional test in evaluating the truthfulness of a witness—is he more likely or less likely to be telling the truth. (That is, a type of preponderance of the evidence rule.) If the analysis results in a 50/50 assessment as to truthfulness of a discriminatee witness, doubt is not resolved in favor of the discriminatee, so as to boost the positive percentage to some point above 50 percent, because the wrongdoer rule does not apply. See *American Navigation Co.,* 268 NLRB 426, 428 and fn. 7 (1983) (issue of willful concealment of interim earnings; Board observes, in footnote 7, that judges are capable of distinguishing honest error from de-

ceit based on their reasoned evaluation of objective criteria plus reasoned evaluations of witness credibility).

Accordingly, where PFC contends (as in Mantecon's case) that a discriminatee has engaged in fraud, and PFC has put forth positive evidence that would support such a finding respecting the discriminatee's search for interim employment or respecting interim earnings, I shall evaluate the truthfulness of the discriminatee's testimony under a traditional weighing of credibility, including demeanor. Even though, as we saw earlier, PFC has the burden of proving a willful loss of earnings, or of proving fraud by a discriminatee respecting concealment of interim earnings, the process of resolving the discriminatee's testimonial veracity, particularly including the demeanor factor, respecting fraud remains the same (preponderance of the persuasive evidence) just as the burden of persuasion remains on Respondent PFC to prove fraud. The reason for this is simple. PFC's discrimination made certain things impossible to know for sure (such as who would have worked overtime, or who would have been promoted, and when).

Consequently, the wrongdoer rule is equitable as to events or conditions because, ordinarily, the discrimination has made it impossible to know what would have happened had there been no discrimination. But if witness Jones takes the stand and asserts that a certain conversation occurred with a supervisor, or that he really was trying to find interim work even though he never got up from in front of his television set and went out and applied somewhere (and excluding concepts of the passage of years, poor records, and dimmed memory), there is no causal relationship between those examples and the Respondent's discrimination. Therefore, the wrongdoer rule should not apply, and the usual preponderance of the evidence evaluation process should.

C. Gross Backpay Formula

1.The Government's formula

a. Introduction

Paragraph 8 of the ACS sets forth the gross backpay formula advanced by the Government (1:55, Pfeffer). Paragraph 8 reads (emphasis added):

> An appropriate measure of the gross backpay due the discriminatees Martha Hinson, Susan Hudson, Jerry Kennedy, Manuel Mantecon, Merri Rowe, and Hayward Steele is the sum of the product of 80 regular hours per two-week pay period [Pfeffer testified that 80 was used because PFC has a 2-week pay period, 1:60-61] multiplied by the regular hourly rate of pay the discriminatees *would have received* [emphasis added to indicate an area of intense dispute concerning the representative employees selected], plus the product of the *average* [another point of dispute] overtime hours worked by representative production employees multiplied by the overtime hourly rate of pay the discriminatees *would have received* [again, a point of intense dispute], plus the *average* [a disputed point] mentor training bonus, POTA bonus ["Piece Of The Action" bonus, 2:164, Pfeffer], and Attaboy bonus earnings of representative production employees.

b. The Region's selection theory

Pfeffer testified that he spent nearly 2 weeks studying payroll records, plus other sources, in trying to select comparable employees for the gross backpay formula. (1:56) As Pfeffer explains, PFC was experiencing a "terrific" turnover (1:56; 2:185; 3:441–443) of employees which made tracking employees through the liability period very difficult. (1:56–57; 3:449).[5] Eventually Pfeffer settled on the concept of selecting all production employees, of whatever job classification, who worked through the entire liability period. That group, which would be the representative employees, numbered 18, and they are the ones named in ACS paragraph 9 and Appendix E.[6] (1:57–60; 2:173, 175; 3:446–449) Pfeffer does not know what total number of production employees who worked for PFC during the general liability period. Pfeffer is therefore unable to say what percentage the 18 selectees represent out of the overall numbers of production employees worked for all or part of the general liability period. (3:345, 347) He is able to say, however, that the 18 selected constitute 100 percent, 18 of 18, of those who worked throughout the entire liability period. (3:447) For Pfeffer, the 18 are a significant sample because they are 100 percent of the category of employees determined to be the best formula option available, as contrasted with, for example, a formula using replacement employees. (3:448–450)

The representative group formula is a time-tested method set forth in the NLRB Casehandling Manual (CHM), Part Three, at 3 CHM 10532.3 (Sept. 1993).

Turn now to the concept of averages. Having determined the best formula option available, and having found the number and names of employees who fit that option, Pfeffer proceeded to the next task—to chart the progress of the 18 during the general liability period of, roughly, April 1994 through October 1996. From personnel documents ("Employee Action Forms") which Pfeffer had obtained earlier (2:171), Pfeffer then compiled the advancement, from pay level to higher pay level, which the 18 achieved during the liability period.

This progression chart appears as Appendix E to the ACS. (1:60; 2:168, Pfeffer) Appendix E shows the time each of the 18 progressed, to the extent they did, from Pay Level 1 to Pay Level 6. Nonsupervisory employees can progress only through Level 6, Pfeffer testified. (1:62, 92) Under the new pay plan of November 1993, employees have to pass proficiency tests to progress to the next higher level. (1:57, 60; 2:171; 3:444) As ACS paragraph 16(e) asserts, Appendix E reflects the average number of weeks that the 18 remained in a pay level before they passed the higher level test and advanced to the next higher pay level. That average number of weeks is (ACS at 16):25.7 weeks to advance from Level 1 to Level 2; 39.3 weeks to advance from there to Level 4; 34.5 weeks to reach level 5; and, finally, 42.4 weeks to make Level 6. (1:66–67; 2:172) Those weekly averages, Pfeffer testified (1:66), are the real significance of Appendix E.

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[5] The general liability period (unadjusted as to the separate discriminatees) runs from April 19, 1994 to October 18, 1996. (1:58–59; 3:444)

[6] As shown in footnote 2 of Appendix E, one of the 18, Tracy Reid, was not employed at PFC for about 7 months during 1995. (ACS at 16)

As Pfeffer explains, with a relatively large representative group of 18, covering a period of some 2.5 years, the highs and lows of the individuals in the group tend to even out for the group averages. (1:110; 3:450, 483). There is a qualification to this. Not all 18 advanced through all the levels. As to each level, Pfeffer averaged only those who advanced to the next level. (2:172–177) This statistical methodology has generated strong opposition. PFC attacks this method as averaging only the achievers out of the 18, not the entire group of 18 that is supposed to be "representative." PFC therefore contends that Pfeffer's statistical methodology distorts the numbers and rigs them to unfairly favor the discriminatees.

That brings us to an assumption of the Government which is intensely disputed by PFC. The basic premise of ACS's paragraph 8's key phrase "would have received" is that the six discriminatees would have progressed from pay level to higher pay level at the same rate as the averages reflected in Appendix E. (1:75–76; 2:177) Pfeffer did not attempt any subjective evaluation of the work records of the discriminatees while they were at PFC, at their previous employers (3:451), or since they left PFC (3:451) in order to assess the likelihood that, as assumed for the ACS, they would have progressed at the averages of Appendix E.

ACS paragraph 16(d) asserts that, at the time of their terminations, the discriminatees were at the following pay levels:Kennedy, Rowe, and Steele were at Level 1; Hinson and Mantecon were at Level 2; and Hudson was at Level 3. Displayed in table form, the data laid out in ACS paragraph 16(f) shows when, the Government projects, the (remaining four) discriminatees would have reached the next higher pay level:

Name	*Level 2*	*Level 3*	*Level 4*	*Level 5*	*Level 6*
Martha Hinson		12-28-94	11-16-95	7-16-96	
Jerry Kennedy	4-29-94	1-31-95	12-20-95	8-19-96	6-11-97
Manuel Mantecon		8-13-94	6-22-95	2-20-96	
Merri Rowe	4-29-94	1-31-95	12-20-95	8-19-96	6-11-97

c. Overtime

ACS paragraph 9 takes up the matter of overtime, explaining that the "average overtime hours of representative production employees are based on the overtime hours worked by all hourly production employees in Departments 100 through Department 115 hired after Respondent revised its pay scale and method for progression within the pay scale on November 15, 1993, and who worked during the entire backpay period." Paragraph 9 then names the representative production employees, listing 18 names. Paragraph 10 informs that the average overtime hours of the representative production employees, as defined in paragraph 9, during the calendar quarters of the backpay period, are set forth in Appendix A attached to the ACS.

As shown on Appendix A, there are 10 calendar quarters, beginning with "2Q94" (second quarter 1994) through "3Q96" (third quarter 1996). Although the ACS properly reflects the figures on a quarterly basis, I note that totaling the 10 averages listed (as modified at trial, 1:62), and dividing by 10 yields an overall average of 24.4 average overtime hours worked by the representative group per quarter during the liability period. Pfeffer compiled a spreadsheet or worksheet in making his calculations. (2:158–164). Pfeffer's worksheet numbers for the overtime calculations are not reflected on the ACS, Appendix A, or on the other appendices listing the gross backpay (and other items) of the individual discriminatees. That is, the quarterly gross backpay figure shown on each of those appendices (Martha Hinson's figures are listed on Appendix F, for example) is a total number reflecting the gross backpay for each quarter. There is no breakdown of the quarterly gross backpay figure into its components (such as regular wages which would have been earned, overtime, bonuses).

By its February 8, 1999 amended answer, PFC admits the overtime hours and certain bonuses listed for the representative employees, but denies their applicability as to Hinson, Kennedy, Mantecon, and Rowe, contending that none of the three demonstrated any initiative for overtime or for work that may have resulted in bonuses.

d. Bonuses

(1) Mentor training bonus

The first of the three bonuses included in the gross backpay formula, the mentor training bonus, is described in Paragraph 11 of the ACS as follows:

> Respondent, during the backpay period, maintained a Mentor Training Bonus Program for experienced operators, Level 3 and above, who train and give guidance to less experienced proteges. The mentor training bonus payments received by the representative production employees, as defined in paragraph 9 above, during the calendar quarters of the backpay period are set forth in Appendix B attached hereto.

As PFC's Hourly Employee Handbook (RX 3) reflects, under certain conditions the Company provides bonuses to its employees. One of these bonuses is the mentor training bonus which is described in the Mentor Training Bonus Program. (RX 3 at 28-29) Appendix B shows that for the 11-quarter period of the second quarter 1994 through the fourth quarter 1996 the representative group of 18 received 29 mentor bonus payments totaling $1750. Pfeffer explains, as Appendix B reflects, that he prorated the average mentor bonus of $97.22 for each of the six discriminatees, calling for payments to them ranging from $8.84 to $10.07. (1:62–63, 85–86; 2:197, 204–207)

(2) POTA bonus

Another bonus described in the Hourly Employee Handbook is the Piece Of The Action (POTA) bonus. (RX 3 at 24–25) Pfeffer incorporated this into Paragraph 12 of the ACS. (1:164–165) ACS Paragraph 12 provides:

> Respondent, during the backpay period, maintained a Piece of the Action (POTA) bonus plan covering all hourly production employees. From January 1, 1994 until December 31, 1995 all pay level 2 through pay level 4 employees received a monthly POTA bonus. Pay level 5 and 6 employees received

> POTA x 2. Effective January 1, 1996 the POTA bonus was rolled into the base pay of pay level 2 through pay level 4 employees and pay level 5 and 6 employees then received POTA x 1. The average monthly POTA bonus by year during the backpay period was as follows:
>
> | | |
> |---|---|
> | 1994 | $0.63 per hour |
> | 1995 | 0.82 per hour |
> | 1996 | 0.61 per hour |
>
> The POTA bonus allocated to each discriminatee was based on total regular and overtime hours they each would have worked, excluding vacation and holiday hours as set forth in paragraphs 13 and 14 below. [Paragraphs 13 and 14 of the ACS describe PFC's liability for 6 paid holidays (paragraph 13) and for vacation pay (paragraph 14).]

By its amended answer of February 8, 1999, the Company admits the ACS paragraph 12 allegations "as they apply generally to Respondent's workforce, but denies that Hinson, Hudson, Kennedy, Mantecon, Rowe and Steele are entitled to backpay or POTA bonus pay due to their inadequate mitigation efforts." PFC goes on to aver that it "is without sufficient information and documentation to elaborate further without access to complete interim earnings information, job search records, tax returns, etc. It is expected that such information will be provided through subpoenaed documents and trial testimony."

(3) Attaboy bonus

PFC pays its employee another bonus, or did during most of the relevant time, given the name reflecting the compliment bestowed, "Attaboy." The attaboy bonus is described in ACS paragraph 15 (1:63, Pfeffer):

> Respondent, during the backpay period, maintained an Attaboy bonus program to reward employees for performance that drives quality improvements. The Attaboy bonus payments received by the representative production em-ployees, as defined in paragraph 9 above, during the calendar quarters of the backpay period are set forth in Appendix C attached hereto.

Appendix C lists the numbers and amounts of the attaboy bonuses received by the group of 18. Their 167 attaboys totaled $17,150. Pfeffer divided that total by 18, yielding an average attaboy bonus of $952.78 over the liability period. He then divided that number by the 11 quarters to obtain the $86.62 average bonus per representative employee per calendar quarter. He then factored that sum into the gross backpay figure shown on the appendix sheet for the individual discriminatees. (1:63–64) Pfeffer testified that, as with his calculation for overtime, he did not project whatever attaboy bonuses the discriminatees may have received (he did not ask them) before their terminations because, with the possible exception of Mantecon, their employment was too short to have provided any meaningful base from which to project. (1:109; 2:326)

By its amended answer of February 8, 1999, PFC avers (at 14):

> Respondent admits that during the backpay period, it maintained an Attaboy Program designed to reward employees, at the discretion of the Production Supervisors, for various performance indicators, including but not limited to quality improvements. Pursuant to the Attaboy Program, when an employee received ten (10) Attaboy cards without a write-up, a cash bonus payment of $100 was awarded. Respondent admits that Appendix C to the Amended Compliance Specification lists the Attaboy bonus payments received by the Representative Employees during the calendar quarters of the backpay period. Because the Attaboy Program ended on or about April 30, 1996, no new Attaboy bonus payments were made after that date. Respondent denies that Hinson, Hudson, Kennedy, Mantecon, Rowe and Steele would have received any Attaboy bonus payments based on the limited actual number of Attaboy cards they received during their entire employment with Respondent (Hinson—2 Attaboy cards; Hudson—0 Attaboy cards; Kennedy—0 Attaboy cards; Mantecon—2 Attaboy cards; Rowe—5 Attaboy cards; Steele—3 Attaboy cards).

2. PFC's gross backpay formula

As set forth in paragraph 8 of its amended answer of February 8, 1999, PFC's proposed gross backpay formula reads:

> To the extent Hinson, Hudson, Kennedy, Mantecon, Rowe and Steele are entitled to backpay, which Respondent denies, Respondent submits that an appropriate measure of gross backpay is based on the named individuals' work history and is no more than the sum product of: (I) 8 regular hours per day for 220 workdays per year, less unpaid plant shutdown days, unpaid holidays and projected unpaid absences (determined using the actual absence percentages of the named individuals during their entire employment with Respondent), multiplied by the regular hourly rate of pay that the named individuals would have received during the backpay period; (ii) the projected overtime (determined using the actual overtime percentages of the named individuals during their entire employment with Respondent), multiplied by the overtime hourly rate of pay that the named individuals would have received during the backpay period and, if applicable, (iii) the projected mentor training bonus, POTA bonus and Attaboy bonus (determined based on the actual number of Attaboys received by the named individuals during their entire employment with Respondent) that the named individuals would have received during the backpay period.

Treasurer Davis testified that PFC's alternate formula that he devised, and the exhibits attached to PFC's amended answer (GCX 19d), include employees who have "peaked," or "parked" at various points short of the top level (11:1962, 1964–1965), and use the actual work history of the discriminatees (such as whether they showed the initiative to take tests and volunteer for overtime). (11:1969–1970, 1972–1973) He did the same as to bonuses, excluding discriminatees, as appropriate, when they had not received any bonuses during their employment at PFC. (11:1984–11:1987). He disagrees that discriminatee Hinson's predischarge employment of 3 months is too short a period to establish a representative work history. (12:2081)

3. Discussion

What PFC would do is to substitute its proposed gross backpay formula, with all its flaws, for the Government's proposed gross backpay formula, with its shortcomings. The Government assumes that the discriminatees would have advanced along with the representative group. PFC argues that they would not have done so. In fact, there is no way we can know. We cannot know because Performance Friction Corporation, by discriminatorily discharging Martha K. Hinson, Jerry Kennedy, Manual S. Mantecon, and Merri R. Rowe, has prevented any of us from ever knowing what would have happened had PFC not fired the four. As PFC is the wrongdoer, it alone must bear the consequences of its unlawful action—an action that makes it impossible for us now to capture a past that never occurred. As the wrongdoer rule states, "an offending respondent is not allowed to profit from any uncertainty caused by its discrimination." (Rule 10, above.)

Because the Government's gross backpay formula employs an accepted methodology, I find that it is reasonably designed to closely approximate the amount of backpay due the four remaining discriminatees in this case. For the reasons stated above, I reject the alternative gross backpay formula proposed by PFC.

D. Backpay Calculations

1. Introduction

After applying all the factors in calculating the backpay due, by quarter, to the individual discriminatees, the Government alleges (ACS at 9) that the backpay due the discriminatees is the amounts shown in the specified appendices to the ACS. The final revised appendices are what we have in the form of GCX 77. Appendix F covers Hinson, Appendix H is for Kennedy, Appendix I applies to Mantecon, and Appendix J is Rowe's. Turn now to these individual appendices for the calculations by quarter for the backpay period. Recall that the backpay periods for Kennedy and Rowe remain open under the complaint portion (Case 11–CA–18044) of this consolidated case. Also, the backpay calculations on GCX 77 as to Kennedy and Rowe do not extend beyond December 31, 1998 and, if the evidence supports their cases, would have to be updated. Finally, and as Compliance Officer Pfeffer testified (1:82), interest on any backpay due is not calculated until such time as the backpay is to be paid. *Minette Mills,* 316 NLRB 1009, 1014 (1995).

2. Martha K. Hinson

Appendix F (part of GCX 77) of the ACS sets forth the data in the table which follows, plus 11 footnotes including explanatory notes about some of the entries, particularly the mileage entries, and the dates and names of Martha K. Hinson's interim employers. Compliance Officer Pfeffer testified concerning his compilation of the data, his conversations with Martha K. Hinson, and his explanations concerning the entries in the table below. Hinson also testified and was cross examined.

Appendix F (part of GCX 77) to the ACS reflects the backpay calculations as to Martha K. Hinson, whose backpay period is shown as April 20, 1994 to October 14, 1996. (1:68–74) In addition to listing the gross backpay, the appendices for the individual discriminatees, consistent with the Government's policy of administrative courtesy, reflect the data acquired by the Regional Office pertaining to interim earnings. Then, as part of the Government's burden, another column lists the interim expenses. That yields net interim earnings in another column, and finally net backpay per calendar quarter in the final column shown above. Explanations respecting interim earnings (including names of interim employers) and interim expenses (such as additional mileage) are shown on the appendices in footnotes. (1:68, Pfeffer) All this is totaled as to each individual. For Hinson, the total net backpay claimed to be due is $31,508, excluding interest.

The closing of Hinson's backpay period is disputed. As Pfeffer testified (1:68–74), the ACS, paragraph 1, closes on October 14, 1996. This was the last date left open for Hinson

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$3348	$1976	$317	$1659	$1689
1994	3	3872	1933	589	1344	2528
1994	4	3570	1685	618	1067	2503
1995	1	4441	1966	741	1225	3186
1995	2	4609	1966	741	1225	3384
1995	3	4391	1966	741	1225	3166
1995	4	4416	1966	741	1225	3191
1996	1	5268	1385	331	1054	4214
1996	2	5440	867	0	867	4573
1996	3	5734	2798	50	2748	2986
1996	4	1005	933	16	917	88
Totals:		$46,064	$19,441	$4885	$14,556	$31,508
Total net backpay due Martha K. Hinson:						**$31,508**

to respond to PFC's September 27, 1996 offering reinstatement. Although Hinson did not receive the letter because she had moved, NLRB Region 11 determined that the letter had been mailed to her last known address. Accordingly (1:71), backpay would terminate on the last day of the period allowed in the letter for responding, that being October 14, 1996. *Cliffstar Transportation Co.,* 311 NLRB 152, 154–155 (1993). Citing *Burnup & Sims,* 256 NLRB 965, 966 (1981), PFC contends (Brief at 36) that the correct date is the date the offer was made, that being the date of September 27 when, according to Treasurer Davis (12:2078–2079, 2089), the letter was mailed. As a discriminatee might well not decide to accept or to reject until the last day of the window period, I shall rely on *Cliffstar,* as did NLRB Region 11. I therefore find that Hinson's backpay period did not close until October 14, 1996. In June 1998 PFC sent Hinson another letter (GCX 8). She apparently received this one. In not accepting the 1998 offer, Pfeffer testified (1:74), Hinson rejected this (second) offer of reinstatement, as ACS paragraph 1 alleges.

As shown by Appendix F, Hinson had interim earnings in every quarter, and interim expenses in all but one backpay quarter. Most of the 11 footnote explanations pertain to mileage expenses. (2:165) Compliance Officer Pfeffer testified concerning practically all the entries.

Starting with the Second Quarter 1994 (2Q94), footnote 1 reflects that Hinson worked at the first interim employer, York Manufacturing (which later became Whitmire Manufacturing) from May 11, 1994 to June 17, 1994, and then with Meco Metal Finishing USA from June 12, 1994 to July 14, 1994. Hinson, as Pfeffer recalls, quit York/Whitmire because of 12-hour shifts and because of that employer's policy prohibiting smoking anywhere on its premises. Pfeffer considered her reasons for leaving to be reasonable and that quitting her job at York/Whitmire was not a failure to mitigate her losses. (2:165–168, 241–244, 280, 287–288:4:526) Hinson confirms these reasons for her quitting at York/Whitmire, and that no smoking was allowed there on the premises. Hinson smokes. (4:551) In any event, Hinson would have left Whitmire because of the 12 hour shifts and the nature of the work. (9:1440–1441)

Losing no time securing her next job at Meco Metal, Hinson was terminated there. (2:244–246; 4:552; RX 8) As the interim earnings report form (NLRB Form 5230) from Meco relates, Hinson's employment "ended" because "Police record found after hire." (RX 8) The reports from the interim employers were not received for the truth of the statements contained in them, but only as reports which Compliance Officer Pfeffer considered. Pfeffer's information is that Meco misunderstood the nature of the papers which Hinson showed Meco's plant manager at the time she was hired. Meco assertedly thought the papers were from a drug treatment center as opposed to probation papers. (2:246–248, 263–271)

In the Third Quarter 1994 (3Q94), after her July 14, 1994 termination by Meco, Hinson went to work a week later at Waffle House, a chain of restaurants owned by Hillcrest Foods, where she worked until February 8, 1996. At that time, it appears (2:289), she was discharged. Hinson also held, and left, a series of supplemental part-time jobs (Rauch Industries, Huddle House, River Hills Country Club) during that time frame while working her regular job at Waffle House. (2:271–283; 288–294; 4:552–556)

Although Hinson's reasons for quitting the supplemental jobs are reasonable, I need not pause to summarize them because such "moonlighting" earnings are not deductible from gross backpay. Thus, as provided at 3 NLRB Casehandling Manual 10542.4 (Sept. 1993):

> If the discriminatee had no second job before the unlawful action, but during the backpay period holds either two full-time jobs or one full-time job plus an additional part-time job, only the earnings from one full-time job should be deducted. This is consistent with the principle that interim earnings based on hours in excess of those available at the gross employer are not deductible. See Compliance Manual section 10542.3.

From February 9, 1996, the day following her discharge from Waffle House, to August 18, 1996, Hinson was employed as a "nanny/housekeeper" at a friend's residence for which Hinson was compensated with free room and board, clothes, and cigarettes, at a value of $66.66 per week. (2:283–294; 4:555) The Regional Office counted that 6-month period as similar to self employment and as not being a failure to mitigate her losses. (2:284–287, 294)

From August 19, 1996, the day after leaving her job as a nanny/housekeeper, to June 1, 1997, Hinson worked for Pomerantz Payroll Systems. (GCX 3 fn. 9; 2:289–290; 4:554–555) That employment extended beyond the close of her backpay period.

PFC's position is that Hinson failed to exercise reasonable diligence in searching for work, and that she even engaged in a fraud. Respecting events in the Second Quarter of 1994, PFC (Brief at 109–112) attacks Hinson's departure from York/Whitmire Manufacturing as unreasonable and her effort to secure employment at Meco a fraud based on lies about her past criminal record. I disagree. Hinson left Whitmire for more normal shift hours, possibly a higher hourly rate of pay, and a more desirable type work. She obtained the Meco job during her 4-day break in her shifts at Whitmire. I find nothing unreasonable in her desire to change.

Nor do I find any lying by Hinson about her application process at Meco. As Hinson credibly testified (9:1413), she was "up front" with Meco about her criminal record. [She was arrested and served time for distribution of marihuana on one occasion while working as a bartender. This is the offense she thought would show up on a criminal background check, and that such would not disclose an earlier bad check charge. She was wrong. (9:1451–1452).] PFC's video deposition witness (RX 99), Christopher J. Hogue, a production manager at Meco during the relevant time (RX 99-2 at 5), and one of the two persons Hinson interviewed with at Meco, denies (RX 99-2 at 8–9) that Hinson told him of any criminal record, denies (RX 99-2 at 11–12; RX 100 at 2) that Hinson showed him, at her interview, any document dealing with the matter, and asserts that he would not have hired Hinson had she shown him any such documents (RX 99-2 at 14). Hogue admits (RX 99-2 at 17) that Hinson spoke with the other person, Bill Axson, but he does not recall the sequence. He contends (RX 99-2 at 17–18) that, in the telephone conversation when he terminated Hinson,

Hinson protested, saying that she had told Axson about her criminal record. According to Hogue, he checked with Axson who said Hinson had not shown him any such documents.

Hinson was well aware that Meco did criminal background checks on job applications, for she saw that policy in Meco's lobby before she applied. (9:1412, 1414) She took her court papers with her when she interviewed at Meco and showed them to Hogue. (9:1412–1413, 1449) But when Hogue terminated Hinson, he told her that he had misunderstood, that he had thought the papers were about recovery at a drug treatment center. (9:1413, 1415–1416, 1450) I credit Hinson who testified with a favorable demeanor.

PFC suggests that Hogue, no longer at Meco, is a disinterested witness with no incentive to lie. That is not quite so. A witness may well consider his past record of excellence an important matter that he does not want sullied by any current (and inconvenient) disclosure of previously unpublished mistakes. Regardless of that, however, I find Hinson to be a credible witness.

Although the passage of nearly 5 years before Hinson testified about the events could have interfered with her recollection, so that she remembered Hogue rather than Axson (a possibility suggested by the Union, Brief at 12), I find that unlikely in view of her specific description at trial. In any event, I find Hinson to be a sincere witness.

PFC argues that Hinson's story defies logic because she knew in advance that Meco did criminal background checks. But that is the logic underlying Hinson's application. She already had a job at Whitmire. If being "up front" with Meco would result in rejection of her application, she would still have her job at Whitmire. But it the Meco officials saw nothing disqualifying in her court papers, then she could take the better job at Meco. No fraud was involved, and no willful loss of interim employment on quitting her job at Whitmire. Hogue simply was mistaken in his understanding of what the court papers were about. I so find.

A week after her termination from Meco, Hinson obtained work as a waitress with Hillcrest Foods, Inc. d/b/a/ Waffle House, for whom she worked (at different locations) until early February 1996. At her first location, in Gastonia, North Carolina, Hinson worked from 7 a.m. to 2 p.m. 5 to 6 days a week. It was, Hinson testified, a full time position. (9:1416–1417) Arguing that Hinson's job at Waffle House was not substantially equivalent employment because her earnings were much less at Waffle House, PFC contends that the income from Hinson's supplemental jobs during this period should all be rolled into one salary figure.

Hinson cannot be faulted for obtaining a job with Waffle House simply because she earned substantially less there than she would have at PFC. Recall that it is PFC's burden to show a willful loss of interim earnings. As the rule is stated in *Allegheny Graphics,* 320 NLRB 1141, 1144 (1996), enfd. 113 F.3d 845 (88th Cir. 1997):

> The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings; rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 575–576 (5th Cir. 1966).

Respecting Hinson's efforts, it is important to note that, on her discharge by PFC, she registered with South Carolina's unemployment office. (4:550; 9:1407–1408). At different times thereafter she had to fall back on unemployment compensation. To draw those benefits from the State, Hinson had to submit evidence that she was actively seeking employment. (9:1423, 1437). Such registration is prima facie evidence of a reasonable search for employment. *Allegheny Graphics,* 320 NLRB at 1145. Indeed, to determine whether a discriminatee engaged in a good-faith effort to find interim work, so as to foreclose a finding of willful loss, the lack of applications in a quarter or two is not determinative, for the entire backpay period must be scrutinized. *United States Can Co.,* 328 NLRB 334 (1999); *Allegheny Graphics,* 320 NLRB 1141, 1144 (1996); *December 12 Inc.,* 82 NLRB 475, 477 (1986), enfd. 838 F.2d 474 (9th Cir. 1988). Accordingly, I find without merit PFC's objections to the backpay figures listed for Martha Hinson for the Third Quarter 1994.

Respecting the Fourth Quarter of 1994 (4Q94) through the Fourth Quarter 1995 (4Q95), PFC's objections to the backpay figures for this one year period, when Hinson continued working for Waffle House, are generally a repetition of its foregoing arguments. My findings are the same. Turn now to 1Q96 and 2Q96.

As mentioned, on February 8, 1996 Hinson was terminated from her position with Waffle House. PFC does not contend that the job loss was caused by any deliberate misconduct by Hinson. However, PFC does argue (Brief 118–121) that Hinson's course in the weeks thereafter, when Hinson took a position as a nanny caring for two children (in exchange for room, board, and incidentals), constitutes a withdrawal from the labor market. [PFC also applies its continuing position that everything Hinson did with and after quitting her job at Whitmire constitutes a failure to mitigate her losses.]

While employed as a nanny, Hinson collected unemployment benefits and continued to search for other employment. (9:1425–1426, 1436–1441, 1447–1449, 1452–1453) Eventually her search efforts were successful, and on August 19, 1996 (in 3Q96) she began work for Pomerantz Payroll Systems. She worked there until well beyond the October 14, 1996 end of her backpay period. (9:1441) Hinson maintained no diary or other written record of her job search efforts and she did not fill out an NLRB Form 5224 to record her job search efforts during 1996 even though Jack L. Bradshaw, NLRB Region 11's Supervisory Compliance Officer in June 1995, advised her by his June 8, 1995 letter (GCXs 4, 37) to maintain the enclosed copies (RX 59) of Form 5224. ((:1432–1435, 1463).

Aside from her poor record-keeping habits, Hinson was quite irritated at NLRB Region 11, and blames the NLRB for getting her involved in the litigation. She (9:1442–1443) offers this to explain why, in an angry or flippant mood, she possibly told Compliance Officer Pfeffer, in a July 15, 1998 telephone conversation with Pfeffer, that, between her February 8, 1996 discharge from Waffle House and her August 19, 1996 hiring by

Pomerantz, "she did not" (as Pfeffer notes in his file memo of such date—RX 45 at 2) "search for work nor did she earn any money." (Pfeffer's memo goes on to recite Hinson's description of her work as a nanny for Lori Tinsley.)

Poor record keeping and an inability to recall the places visited in the job search do not automatically disqualify the discriminatee's efforts. *United States Can Co.* supra; *Allegheny Graphics,* 320 NLRB 1141, 1145 (1996), enfd. 113 F.3d 845 (8th Cir. 1997). And as noted earlier, Hinson's registration with South Carolina's unemployment office is "prima facie evidence of a reasonable search for employment." *Allegheny*, id. [PFC failed to call any witness from the State unemployment office to dispute Hinson's testimony that she had registered and that she regularly filed the required reports that she was searching for work.] Moreover, PFC offered no evidence, and the record does not show, that Hinson rejected a better paying job than the nanny position.

Finding no merit to PFC's objections to the figures for these two quarters (1Q96 and 2Q96), I turn now to the last two quarters.

For the Third Quarter 1996 (3Q96) and Fourth Quarter (4Q96), Hinson also had interim earnings. Some of this was from the nanny job until, as mentioned above, she found work for Pomerantz Payroll Systems on August 19, 1996. Hinson's backpay period ended 2 weeks into 4Q96. For its objections here, PFC repeats its position that the nanny work was a voluntarily withdrawal from the labor market and that she should not have left her job at Whitmire (in what, I have found, was a good faith, and reasonable, effort to find a better job). For the reasons stated earlier, I find no merit to these objections.

Finding no merit to any of PFC's objections respecting Martha Hinson's efforts to find work during her backpay period, I further find that PFC should be ordered to pay Martha K. Hinson the backpay figure of $31,508, plus interest to be calculated as of the time of payment, less deductions for taxes as required by law.

3. Jerry Kennedy

a. The backpay table as claimed by the Government

Appendix H (part of GCX 77) of the ACS sets forth the data in the table which follows, plus 17 explanatory footnotes. As with the other tables, Compliance Officer Pfeffer testified concerning his gathering the data and drafting the document. He explained the entries. Kennedy did not testify. The table follows.

b. Closing date of the backpay period

Respondent disputes the closing date for Jerry Kennedy's backpay period. By letter dated October 3, 1996 (RX 24 at 12), sent "certified mail, return receipt requested," PFC, by Donald Burgoon, addressed the following letter to Kennedy at 503 California Circle, York, South Carolina 29745:

> Performance Friction Corporation hereby offers you immediate reinstatement to your former position at Performance Friction, or if such position is no longer available, to a substantially equivalent position.
>
> Please call Judy Brown at (803) 222–8116 on or before October 18, 1996 if you intend to accept this offer, and she will make the appropriate arrangements for your return.

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$3338	$481	$52	$429	$2909
1994	3	3872	292	16	276	3596
1994	4	3820	993	0	993	2827
1995	1	4279	3256	0	3256	1023
1995	2	4609	2065	0	2065	2544
1995	3	4093	975	0	975	3118
1995	4	2388	480	0	480	1908
1996	1	4136	550	0	550	3586
1996	2	5440	1950	0	1950	3490
1996	3	1563	690	0	690	873
1996	4	1370	420	0	420	950
1997	1	0	0	0	0	0
1997	2	0	0	0	0	0
1997	3	0	0	0	0	0
1997	4	0	0	0	0	0
1998	1	0	0	0	0	0
1998	2	1683	0	0	0	1683
1998	3	6172	990	0	990	5182
1998	4	561	90	0	90	471
Totals:		$47,324	$13,232	$68	$13,160	$34,160
Total net backpay due Jerry Kennedy:						$34,160

Copies of the letter are shown to "Marcia W. Borowski, Esq." and "Robert Englehart, Esq."

There is no dispute that the stated address is the last known address which PFC had for Kennedy. It is the address which he listed on both his September 1993 job application (RX 20) at PFC, and on his July 1998 job application (RX 21) at PFC. Indeed, on the backpay forms, Form NLRB 5224, which he filled out by hand and submitted to NLRB Region 11 for all four quarters of 1996 (RX 5 at 15–22), Kennedy listed his address as "503 Calif. St., York, SCES 29745" (on one, the state's name is spelled in full). (3:396, Pfeffer) Date of delivery on the return receipt (GCX 5 at 2; RX 23) shows as "10/10." Because the "agent's" signature did not appear to Region 11 to be that of someone named Kennedy, Pfeffer called Kennedy on February 12, 1998. According to a file memo (RX 35) by Pfeffer regarding the telephone conversation of February 12, Kennedy told Pfeffer that he had not received any reinstatement letter. Kennedy requested that a copy be sent to him. Pfeffer did so. Kennedy faxed a response on February 27, 1998 to this in which he denies that the signature is his, or that of any Kennedy living there, and asserts that no one else would sign for him without his permission. (GCX 5 at 2; 3:397–398, 460, Pfeffer) Of course, the latter statement begs the question. That is, did someone else have permission to sign for him. Notably, in his handwritten message, Kennedy does not assert that the 503 California Circle address, where his mother lived or still lives, was no longer valid as to him.

Pfeffer testified that Kennedy also told him, in the telephone conversation, that during October-December 1996 he was living in Rock Hill, South Carolina. (3:455, 460) This evidence was received, over PFC's hearsay objection, for the limited purpose of explaining why Pfeffer and NLRB Region 11 took the course of action that they did. (3:460) In short, it is not substantive evidence that Kennedy in fact had been living in Rock Hill rather than with his mother at the 503 California Street address in York. Moreover, I note that, in his memo (RX 35) covering his February 12, 1998 telephone conversation with Kennedy, Pfeffer does not mention any statement by Kennedy that, during 4Q96, Kennedy was living in Rock Hill. And as observed at the end of the preceding paragraph, Kennedy makes no such claim in his February 27, 1998 handwritten note (GCX 5 at 2) to Pfeffer. (Yet it would seem to have been the natural thing for Kennedy to have done given the nature of the note. As he was denying receipt, the normal inclination would have been to add, after denying receipt, a statement explaining that in October 1996 he was living in Rock Hill, not in York. Possibly he simply goofed. But some two weeks earlier, in the telephone conversation with Pfeffer, did Pfeffer likewise goof by failing to record Kennedy's claim that in 4Q96 he was living in Rock Hill?) If Pfeffer's testimony quoting Kennedy's telephone statement (that he was living in Rock Hill during 4Q96) had been offered for the truth, not only would it have been hearsay, it appears that it would have been unreliable hearsay.

In late May 1998, NLRB Region 11 apparently informed PFC's counsel that, while PFC's September/October 1996 letters, having been sent in good faith to the last known address, were sufficient to terminate backpay liability, they did not end PFC's obligation to offer reinstatement, and a second letter would have to be sent. The Region relied on *Burnup & Sims,* 256 NLRB 965, 966 (1981).[7] Although PFC protested by letter of June 4, 1998 (RX 24), it nevertheless sent second letters, dated June 5, 1998, offering reinstatement. As mentioned earlier, Hinson declined the second offer, but Kennedy and Merri Rowe accepted. (1:71–74; 3:398, Pfeffer) I postpone discussion of subsequent events in 1998 until I reach the portion of this case dealing with the complaint allegations (respecting Kennedy and Rowe).

PFC also relies on, and cites (Brief at 36), *Burnup & Sims,* 256 NLRB 965 (1981). For the reasons stated earlier respecting Martha Hinson's case, and agreeing with the General Counsel's reliance on *Cliffstar Transportation Co.,* 311 NLRB 152, 154–155 (1993), I find that Kennedy's (initial) backpay period closed on October 18, 1996, the date of the last opportunity for Jerry Kennedy to accept the first offer of reinstatement.

Although I shall cover Kennedy's backpay period following the alleged unlawful refusal to reinstate him on July 1, 1998 (a backpay period which remains open), I shall postpone the reinstatement details until I summarize the unfair labor practice case. It is of some interest to address here two contentions of the parties. PFC "questions" the appropriateness of the 1998 backpay allegations "when there has not even been a finding that any unfair labor practices were committed by PFC in connection with the reinstatement and subsequent termination of Kennedy and Rowe." (Brief at 3 fn. 2) This "question" is of heightened interest in light of the General Counsel's argument (Brief at 9) that the unfair labor practice allegations as to Kennedy and Rowe should be judged under the legal burdens as allocated in compliance cases, rather than under those prevailing in unfair labor practice cases, because Kennedy and Rowe are simply two backpay claimants who have yet to receive a valid offer of reinstatement from PFC.

PFC's question about the appropriateness of the 1998 backpay allegations might well have raised an arguably valid procedural objection had PFC urged it at or before trial. By waiting until the briefs to mention its concern, PFC has waived any defect by proceeding to litigate the issues. Because PFC tried the matter by implied consent under FRCP 15(b), it will not be heard at this late date to complain about a possible procedural defect which it impliedly consented to as it proceeded into and through the trial. I therefore reject PFC's objection ("questions").

The General Counsel cites no authority for the Government's suggestion that the unfair labor practice allegations in this case should be judged under the rules pertaining to compliance cases. Every thing that exists had a beginning, and perhaps this case will be the beginning of a new line of authority as urged by the Government—unfair labor practice cases consolidated with compliance cases will be judged under the legal standards for compliance cases. The "beginning," however, will have to

[7] The General Counsel argues (Brief at 47) that the portion of *Burnup* providing for closing the backpay period on the date of the employer's letter offering reinstatement was modified by *Cliffstar Transportation Co.,* 311 NLRB 152, 154 (1993). The General Counsel fails to explain why, in 1997, the Board did not correct the ALJ's reliance on the date of mailing while citing *Burnup*. See *Hagar Management Corp.,* 323 NLRB 1005, 1007 (1997).

come from the Board (or from Congress), and not from me. I reject the Government's suggestion as having no basis in law or under the Act.

Finally, it is pertinent to look ahead at the alleged obligation to offer reinstatement in June 1998. As summarized above, Pfeffer's testimony about Kennedy's declaration that he was living in Rock Hill during 4Q96, and not at his mother's 503 California Street address in York, being objected-to hearsay, was not received for the truth. As I noted above, that information even appears to be unreliable hearsay. PFC suggests (Brief at 11–12, 36), but never really articulates, the theory that, while Pfeffer's testimony explains why NLRB Region 11 deemed PFC's obligation to offer Kennedy reinstatement a second time (because he reported to them that he had not received the first one), it does not substitute for positive evidence that Kennedy never, in fact, received the October 1996 letter which had been addressed to his last known (and 1998) address and signed for by someone. In other words, there is no substantive evidence that Kennedy did not receive the October 1996 letter (RX 24 at 12). Of course, the well-established principle is that a rebuttable presumption of receipt arises from evidence that a letter was mailed to a correct address. So far as the record evidence shows, the 503 California Street address was Kennedy's correct address. There is no substantive evidence of record showing that Kennedy disputes that such was his correct address in October 1996, nor is there any positive (substantive) evidence of record that Kennedy asserts that he never received the October 1996 letter offering reinstatement. Based on this state of the record, I find that PFC's October 3, 1996 letter (RX 24 at 12) offering reinstatement not only closed the backpay period as of October 18, 1996, but that, except for one problem, it terminated PFC's reinstatement obligation as well.

The problem is the choice which PFC made. PFC's June 5, 1998 offer, by letter, to Kennedy ostensibly was made in good faith. [No copy of this letter (1:73–74, Pfeffer) is in evidence, but the parties stipulated (5:727–728) that it (the text) is "probably identical" to the one (GCX 6) sent to Merri Rowe.] Certainly PFC would not contend that the offer was made in bad faith, or even that it was conditional (with the offer, and any employment in response, to self-destruct if it later developed that PFC had not been obligated after all to make the second offer). In other words, having made an unconditional second offer, PFC cannot now add a condition—that the offer, and any employment thereunder, was void ab initio because of the later determination (here) that PFC had no legal obligation to make the second offer because the first one was valid and terminated both backpay and reinstatement rights when Kennedy (deemed to have received the first offer) never responded to the first offer. Faced with the options before it, PFC wanted the right to litigate without having to risk a waiver. This it could not do.

The situation is analogous to that which prevails when a respondent, as the General Counsel and a Charging Party rest their cases in chief, moves for dismissal of the complaint. The respondent may so move, but having moved it must then decide whether it will rest on its motion or proceed to litigate. It cannot do both, for if it proceeds, it waives its motion. *Andrex Industries Corp.,* 328 NLRB 1279 (1999). Similarly, here PFC could have rested on its position that its first letter was sufficient, or it could make the second offer. But it could not keep its position and also issue the second letter. It had to make a choice, and by choosing the second option (issuing the letter), it waived its first option (resting on its position). In short, I must address the reinstatement issues, and I reach them later. Before turning to the backpay quarters, I must address an evidentiary problem.

c. Consequences attach to Jerry Kennedy's failure to testify

An evidentiary question arises from the fact that discriminatee Jerry L. Kennedy did not testify. As noted earlier, Board cases allocate the evidentiary burdens between the two principal parties (the Government and the Respondent) first with one then with the other as to the topics. One of the burdens PFC, as the Respondent, has here is the affirmative burden of establishing both the amount of any interim earnings by a discriminatee, and any willful failure by a discriminatee to mitigate his losses (that is, to show that he acted in bad faith). PFC does not discharge this burden simply by offering evidence which allegedly impeaches the credibility of the discriminatee's efforts. *United States Can Co.,* 328 NLRB 334 (1999), citing *A.P.R.A. Fuel Oil Buyers Group,* 324 NLRB 630, 632 fn. 3 (1997), enfd. mem. 159 F.3d 1345 (2d Cir. 1998). Indeed, a Respondent's obligation is specific and affirmative, as further appears in footnote 3 of *A.P.R.A.*:

> The evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore, and must show if, where, and when the discriminatee would have been hired had he applied.

To the same effect, see *Anna Erika Home For Adults,* 307 NLRB 133, 134 (1992), and *Champa Linen Service Co.,* 222 NLRB 940, 942 (1976). Thus, it avails PFC nothing to point to Kennedy's low interim earnings or to raise questions about information in Region 11's possession. While that impeaching-type approach will assist in supporting affirmative evidence of willful idleness, it is not a substitute for it.

That brings us to the General Counsel's argument that it was Respondent's burden to subpena Kennedy to attend the hearing and to elicit facts from him necessary to carry Respondent's evidentiary burden. PFC, the Government argues, consciously waived this right, and never offered any explanation. (Brief at 47–49) Even if, as it appears, Kennedy was in the Charlotte jail during our trial, PFC never offered evidence of any efforts to subpena his attendance by having him brought, under guard, to testify, or to have him testify by deposition at the Charlotte jail. (Recall that Respondent's witness Christopher Hogue testified by video deposition. RX 99.)

After arguing the foregoing, the General Counsel passes to other matters, and thereby fails to suggest the second half of the equation. That is, the Government does not articulate its theory as to what consequences attach (from Kennedy's failure to testify) in relation to the topics of interim earnings and interim expenses. Posed differently, the question now is, "What is the effect of no testimony by discriminatee Jerry L. Kennedy?" Consider that compliance officer Pfeffer's testimony, including his file memos regarding his telephone conversations with dis-

criminatee Jerry L. Kennedy, all hearsay if offered for the truth, was received merely to show how Pfeffer and NLRB Region 11 drafted the ACS as to Kennedy, calculated the numbers as to Kennedy, and arrived at Region 11's conclusions and decision regarding Kennedy's case. (At trial, and to some extent in its brief, PFC devoted much of its argument, at least in the first days, to contending that Region 11 acted arbitrarily respecting PFC. It therefore wanted to ascertain how Region 11 reached the decisions it made regarding the entries in the ACS.)

The pertinent question becomes, "What substantive evidence exists in the record regarding interim earnings and interim expenses?" And the answer is, "Almost none."

With Pfeffer's testimony and file memos out of consideration (not substantive evidence), that leaves only two possible sources of substantive evidence—(1) Kennedy's NLRB 5224 forms, and any notes submitted in his hand or signed (such as an affidavit) by him, and (2) the testimony of R.W. Hamlett, president and owner of Hamlett & Associates, a construction firm. (12:1998) As to the first possibility, the earlier cited case of *Vencor Hospital–Los Angeles,* 324 NLRB 234, 235 fn. 5 (1997), must be considered. In *Vencor,* Judge Clifford H. Anderson ruled that, in the absence of a Board case or Congressional action, an alleged discriminatee, who is not a charging party in the case, is not a "party opponent" under FRE 801(d)(2) and therefore the Respondent's offer of the pretrial affidavit as substantive evidence, as the admission of a party opponent, would be rejected. The Board adopted Judge Anderson's decision without comment on this point.

Must *Vencor* be interpreted as applying to compliance proceedings? Clearly it could be so interpreted. I need not decide whether it must be, for I conclude that *Vencor* should apply in these circumstances. Compliance proceedings frequently (and particularly this one) are as intensely adversarial as are unfair labor practice cases. The evidentiary burdens are somewhat different in the two types of proceedings, and presentation of the evidence differs somewhat. But the parties are the same opponents as they were in the liability stage. Indeed, the sole Charging Party here, a union (the UAW), was represented by an able and experienced labor lawyer. If, for example, Jerry L. Kennedy received an adverse decision from me in this case, and if the Government and the Union were to decide that, as to Kennedy, neither would appeal (file exceptions) to the Board, non-charging party Kennedy, although a discriminatee, would be "out of court" (and out of luck). That is, assuming Kennedy wired the Board that he wanted to appeal, and thereafter filed his own exceptions, the Board would reject both the request and the exceptions because Kennedy is not a charging party in this case. See *J. A. Jones Construction Co.,* 284 NLRB 1335 (1987); *Lincoln Technical Institute,* 256 NLRB 176 (1981), (dismissing alleged discriminatee Giacalone's request to file exceptions because he was not a party), and *Giacalone v. NLRB,* 682 F.2d 427 (3d Cir. 1982) (Giacalone's petition for review denied; court agrees with Board).

Granted, Kennedy could have filed his own charge here, or he could have moved to intervene as a party. As he did neither, he now must rely on the good graces of the Government or the Union to file any necessary appeal on his behalf. The point here is that Jerry L. Kennedy is in no sense a full party. Accordingly, applying the *Vencor* rationale here, I find that none of Kennedy's signed or handwritten notes (including his NLRB 5224 forms, and any handwritten notes or unsworn statements [Kennedy apparently signed no affidavit] which he submitted to Compliance Officer Pfeffer) may be counted as substantive evidence—not in support either of PFC's affirmative burden to show interim earnings or a willful failure to mitigate his damages (because they are not admissions of a party opponent) nor of the General Counsel's burden to prove any of Kennedy's expenses incurred in obtaining interim earnings (because such information would be hearsay). In short, those parties who needed Kennedy's live testimony to establish a point in their case must suffer the consequences for failing to secure his attendance, either at the trial or by deposition.

Turn now to the testimony of R.W. Hamlett, owner of the construction firm for whom Kennedy reportedly worked for about 4 months in early 1995. Hamlett testified that his superintendent, Mike Capehart, reported in May 1995 that Kennedy had stopped coming to work, and had sent word by other employees that he was sick and was planning to return to work. So far as Hamlett knows, Kennedy never returned to work for his firm. (12:2000, 2004, 2024); RX 82) Hamlett was quick to explain that, although his company notified NLRB Region 11 on NLRB form 5230 (an "Interim Earnings Report" form the compliance officer sends to interim employers for earnings data, 2:236) that Kennedy was "Terminated—stopped coming to work" (RX 6; GCX 42), that in fact Kennedy had not been fired. (12:2017, 2019) Company records show that Superintendent Capehart considered Kennedy's failure to report to work as a voluntary quit. (RX 82)

Compliance Officer Pfeffer did not consider Kennedy's failure to continue working at Hamlett a failure to mitigate because his investigation disclosed that Kennedy, who had no car or valid license to drive, had experienced a dispute with the person who had been providing the transportation to the Hamlett job in York, South Caroline. That left Kennedy with no way to get to work at Hamlett. (2:237-238; 3:464, 466).

Hamlett's testimony is direct evidence that Jerry L. Kennedy ceased reporting to work for his job with Hamlett Associates. That seems to establish, at least prima facie, that Kennedy had voluntarily quit his job with Hamlett. That fact shifts the burden to the Government to show that Kennedy's (prima facie) decision to quit was reasonable. This the Government failed to do because, other than explaining the choices Region 11 made respecting the ACS, it offered no substantive evidence on the matter. I therefore find that such prima facie voluntary quit of his job at Hamlett & Associates (with no showing, by substantive evidence, that the quitting was reasonable) tolls Kennedy's backpay from May 8, 1995 through September 1996 when Hamlett's jobs at the York, South Caroline location ceased. (12:2005–2007, 2010; RX 83) Turn now to the backpay quarters for Kennedy.

d. The backpay quarters

Compliance Officer Pfeffer's testimony about the gross backpay is based on his personal inspection of company records, and on admissions in the pleadings. Thus, that part is not based on hearsay. Although the parties dispute how the gross

backpay formula should be calculated, the numbers themselves are not hearsay.

Refiguring Kennedy's backpay, therefore, is as follows based on interim earnings of $300 a week at Hamlett & Associates ($7.50 per hour, RX 6, time 40 hours). The revised figures for the quarters are as follows, starting with the last three quarters of 1994. [See first table]

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$3338	0	0	0	$3338
1994	3	3872	0	0	0	3872
1994	4	3820	0	0	0	3820

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1995	1	$4279	$3256	0	$3256	$1023
1995	2	4609	3900	0	3900	1709
1995	3	4093	3900	0	3900	193
1995	4	2388	1800	0	1800	588

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1996	1	4136	3000	0	3000	1336
1996	2	5440	3900	0	3900	1540
1996	3	1563	2700	0	2700	0
1996	4	1370	0	0	0	1370
1997	1	0	0	0	0	0
1997	2	0	0	0	0	0
1997	3	0	0	0	0	0
1997	4	0	0	0	0	0
1998	1	0	0	0	0	0

As noted early in this decision, it is the Government's voluntary policy to offer the benefit of the compliance investigation respecting interim earnings and interim expenses. That pleading may be denied just as any other pleading. In this case PFC denied the Government's pleading as to interim earnings and interim expenses. The consequence of that denial meant that the matter of interim earnings and interim earnings had to be proved by substantive evidence. Having Compliance Officer Pfeffer explain how he arrived at the numbers for interim earnings and interim expenses merely aided in understanding what needed to be elicited from Jerry L. Kennedy or other witnesses (such as interim employers) who could give first hand, non hearsay testimony. For the most part, such competent evidence never came. Thus, for the balance of 1994 the gross backpay equals the net backpay. Turn now to the next period of 1995 through 1Q98. [See second table.]

The revision for the above portion begins with 2Q95 based on interim earnings of $300 a week at Hamlett & Associates ($7.50 per hour, RX 6, times 40 hours). At 2Q95, for example, compute interim earnings at $300 a week for 13 weeks. That produces an interim earnings figure of $3900. Subtracting that from the gross backpay of $4609 results in net backpay of $1709 rather than the $2594 figure claimed by the Government. Beginning in 4Q95 the Government reduces its backpay claim because, it appears, Kennedy was in jail for all but 6 weeks of the quarter. Multiplying $300 times 6 weeks yields constructive interim earnings of $1800. Subtracting $1800 from the gross backpay of $2388 leaves (with no interim expenses) net backpay of $588 rather than the $1908 claimed.

For 1Q96 the Government makes no claim for time it concedes Kennedy was in jail, that being for all but one day of the first 3 work weeks of January 1996. As a practical matter, it is unlikely Kennedy could have reported for work (assuming Hamlett would have accepted him back at work) before the following Monday, January 22, 1996. That leaves 10 weeks in 1Q96 at $300 a week (assuming that there were no job shutdowns for weather and that Kennedy would not otherwise have missed work), or constructive interim earnings of $3000 for 1Q96. Subtracting that from the $4136 gross backpay yields (as no interim expenses) the net backpay figure of $1336 for 1Q96.

2Q96 needs no explanation. For 3Q96 the Government makes no claim for August 1996. Accordingly, subtracting 4 weeks leaves 9 weeks times $300, or $2700 of (constructive) interim earnings for the quarter. Subtracting that from the gross backpay leaves net backpay of zero.

As I found earlier, Kennedy's initial backpay period closed on October 18, 1996, the date of his last opportunity to accept PFC's first offer of reinstatement. The gross backpay for 4Q96 is shown as $1370. Although Appendix H (GCX 77 at 3) of the ACS offers the figure of $420 as Kennedy's interim earnings for the first 18 days of October 1996 (when he no longer would

have been on a Hamlett job), PFC, by its February 8, 1999 amended answer (GCX 19d at 17–18 and Exhibit 9 attached to the amended answer) denied ("without sufficient information") the allegations pertaining to interim earnings, and asserts that it needs to cross examine "all of the claimants and review subpoenaed documents . . . ." As no substantive evidence ever was presented at trial concerning Kennedy's interim earnings during 4Q96, I find that the $1370 gross backpay is also the net backpay due for the quarter. The zeros shown for 1997 through 1Q98 simply indicate that no gross backpay accumulated during the period because, as summarized earlier, the initial backpay period closed on October 18, 1996, and the second backpay period, as alleged, did not begin until 2Q98.

4. Manuel S. Mantecon

a. Overview

There is no dispute that the beginning date of Mantecon's backpay period is May 24, 1994. The closing date of Mantecon's backpay period is disputed. For the reasons previously discussed respecting the closing of the backpay periods for Martha Hinson and Jerry Kennedy, and relying on *Cliffstar Transportation Co.,* 311 NLRB 152, 154–155 (1993), I find that, as alleged and argued by the Government, Mantecon's backpay period closed on October 14, 1996. That was the date of his last opportunity to accept PFC's offer (RX 24 at 9) of reinstatement. As I summarize later, including his reasons,

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
Totals:		39,908	$19,200	0	$19,200	$20,708
Total net backpay due Jerry L. Kennedy through 1Q98:					**$20,708**	

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$1938	0	0	0	$1938
1994	3	4242	0	0	0	4242
1994	4	4227	0	0	0	4227
1995	1	4410	0	0	0	4410
1995	2	4654	0	0	0	4654
1995	3	4466	0	0	0	4466
1995	4	4966	0	0	0	4966

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1996	1	5615	0	0	0	5615
1996	2	6252	0	0	0	6252
1996	3	6206	0	0	0	6206
1996	4	1005	0	0	0	1005
Totals:		$47,981	0	0	0	$47,981
Total net backpay due Manuel S. Mantecon:					**$47,981**	

e. Conclusion

As the second backpay period is closely related to the unfair labor practice allegations in the complaint portion of the case, I shall postpone any discussion of the second backpay period until I summarize the unfair labor practice allegations respecting Jerry L. Kennedy. Before moving to the backpay case of Manuel S. Mantecon, however, I now show the totals of the backpay figures for Jerry L. Kennedy. They are as follows for the backpay period 2Q94 through 1Q98. [See first table.]

Mantecon decided not to accept the offer. (10:1702–1704; 11:1826–1828, 1858, 1868; CPX 9; RX 43) Mantecon testified under FRE 611(c) as a witness called by PFC. With the numbers those as claimed by the Government (GCX 77 at 5, Appendix I), the backpay table appears as follows: [Second table]

As is immediately apparent, no interim earnings are shown for Mantecon. Mantecon's backpay case differs from the others in at least two major ways. First, during his entire backpay period of nearly 29 months, Mantecon never found even one day of interim employment. Second, during the backpay period Mantecon applied for and (after rejection, his appeal, and a hearing before a Social Security Administration (SSA) Administrative Law Judge, Judge Robert J. Egan), Mantecon has re-

ceived (and presumably is still receiving) Social Security Disability Insurance (SSDI) payments based on a finding of disability following a heart attack on September 23, 1994. These are the two areas which, PFC repeatedly insists, reveal that Mantecon is a liar, a fraud, and a cheat who should not be rewarded with a single dime of backpay. (Brief at 141-142, and Supplemental Brief at 3, for example.)

PFC vigorously argues that the doctrine of judicial estoppel applies here to bar payment of any backpay after September 23, 1994 because in the SSDI case Mantecon claimed that he was not able to do any work, but in this NLRB compliance proceeding he claims (10:1677–1678) that he has been able to do any of the jobs he applied for during his search for work. (Brief at 125–132; Reply Brief 27–31)

Although Mantecon submitted some 20 pages of NLRB work search forms 5224 showing that he visited 115 employers during the backpay period (RX 66 at 4-23), PFC argues (Brief at 135) that the reports are "a complete fraud." PFC's argument (which could be described as a bit overdone on the inflammatory side) relies on discrepancies in Mantecon's testimony about how many miles he traveled in visiting or applying at the 115 employers, the amount of medical bills incurred as a result of his heart attack, and in other respects. Most of PFC's contentions depend on a finding that Mantecon is not a credible witness, and much of Respondent's argument is focused in that direction. PFC paints a picture of someone planning and executing a sophisticated scam in order to milk one federal agency (SSA) of the taxpayers' money while fooling the second one (the NLRB) into ordering PFC to pay its money, as backpay, to Mantecon when Mantecon never in good faith wanted a job during the backpay period.

PFC's position suffers from fatal flaws. First, respecting Mantecon's job search, PFC focuses on the time following Mantecon's heart attack. As I note in a moment, Mantecon's pre-heart attack search also had been unsuccessful. There is no evidence that, in August 1994, for example, Mantecon knew he would have a heart attack in September, thereafter file for SSDI, and eventually (about a year and a half later) begin receiving payments. In short, PFC failed to show that Mantecon did anything different after September 1994 than he had done before in his search efforts. Thus, PFC's express complaint, that Mantecon was not seeking in good faith to find work (so that he could get and keep the SSDI payments and win backpay through the NLRB as well) loads more weight on the SSDI application than that matter can bear either factually or logically. (Factually, Mantecon was desperate for a job and an income. He had no way of knowing that his application would be successful. Indeed, initially, in December 1994, it was denied. Not until a year later did the SSA ALJ rule in his favor. Logically, as noted, PFC's argument does not fit because it does not explain why Mantecon had not been successful before September 23, 1994.)

Moreover, and as the Charging Party pointedly observes in its Supplemental Brief (at 1–2), the other half of the money equation—the idea of backpay through the NLRB—could not have been the basis for any planning because Judge McLeod's favorable decision did not issue until April 6, 1995 (319 NLRB 859, 859). Mere issuance of a complaint was not a decision in the litigation. The first litigated decision did not come until the one issued by Judge McLeod, and that was more than 6 months after Mantecon's heart attack. Even that decision had to be affirmed by the Board (on November 30, 1995), and PFC appealed that to the Fourth Circuit. As the record shows, Mantecon was not a wealthy person who could sit back, recline, and gamble that eventually money would flow from PFC through the NLRB and, for that matter, from the SSA. From the beginning Mantecon had to work, and he early (May 1994) filed for unemployment benefits. (RX 66 at 4)

Even if we were to count issuance of the complaint (on July 8, 1994, per Judge McLeod's decision) as some kind of incentive for Mantecon to relax and spend his time estimating just how much money he could milk from PFC through the NLRB, as backpay, and (based on his future heart attack) from the taxpayers through the SSA, his first work search sheet (RX 66 at 4) shows that he visited 9 prospective employers in June 1994—that is, in the weeks before the complaint issued. Mantecon credibly testified that he visited each of the employers shown and for the date listed. (10:1647–1648, 1654, 1695) As Compliance Officer Pfeffer testified (2:322–323), Mantecon did a very comprehensive job with his NLRB 5224 work search forms, for Pfeffer does not normally see discriminatees record "that many job references." Perhaps Mantecon did well because the South Carolina unemployment forms warn applicants that they must search for work each week and record that search on the form. (CPX 3, form obtained by Hinson, 9:1465–1466.) But issuance of the complaint is mostly irrelevant to this point. Even NLRB Region 11 waits for the Administrative Law Judge's decision before sending out the NLRB 5224 work search forms. Then Compliance Officer Bradshaw sent those to Mantecon by letter (GCX 40) dated June 8, 1995. (10:1755–1756; 11:1816)

PFC's implied complaint is that Mantecon simply was unsuccessful. As noted at the beginning (the Fifth rule of the legal principles described), the law does not require that a discriminatee be successful in his job search. *United States Can Co.,* 328 NLRB 334 (1999).

Respecting the attack on credibility by showing discrepancies between Mantecon's testimony and the 20 pages of reports on work searches which he submitted, again PFC lays too heavy a burden on the poor burro assigned to carry the load. First, these are internal discrepancies. Not one is an example of a witness from one of the 115 employers testifying that it has no record of any visit by Mantecon. Second, to the extent that Mantecon's estimates concerning his mileage, and the amount of his medical bills, far exceeded the reality, I attribute much of that to a trait that many have—a lack of perfection in record keeping. Besides, to someone who has no paycheck, medical bills of $30,000 might well seem to be $50,000 or even $70,000. And driving to a minimum of 115 employers (and apparently there were others) no doubt seems like a lot of miles.

The mileage error is entirely consistent with a simple addition error of supplying one too many zeros to the total. Thus, when Mantecon wrote Jack L. Bradshaw (Region 11's compliance officer at the time) on June 28, 1995 (CPX 10; RX 66 at 1), he asserted that he already had driven 32,000 miles in

searching for work. As of that June 28, Mantecon lists only 50 employers as being visited. RX 66 at 4–12. As Mantecon visited only one per day of work search, according to the list (10:1657), that computes to a roundtrip per job-hunting visit of 640 miles!! As nearly all of the 50 employers listed are in Charlotte, with some in Gastonia, and a sprinkling elsewhere, and as Mantecon agrees (10:1656) that Gastonia, where he was living (11:1886), is some 25 miles from downtown Gastonia to downtown Charlotte, it is clear that the 32,000 figure is wrong. When this matter came up at trial Mantecon immediately said that it was a mistake and that the correct figure was 23,000. (10:1655–1656) The next day he corrected that to 3200 total miles. (11:1879, 1184–1185) The total of 3200 divided by 50 yields the figure of 64 miles per job hunting trip—a realistic number. The 3200 is consistent with the possibility that Mantecon simply supplied one too many zeros to his total when he was writing then Compliance Officer Bradshaw on June 28, 1995. Agreeing with the General Counsel (Brief at 36-37), I note that any discrepancies respecting the sum of the medical bills and the miles driven are not impeaching mistakes anyhow because they are collateral matters in that the ACS makes no claim either for medical expenses or, as there was no interim income, for any offsetting interim expenses. In any event, I find that Mantecon simply made an honest error.]

PFC itself loses credibility when it persists in hounding (Brief at 137) Mantecon over his recording (RX 66 at 6) the date of his (heart attack) visit to Homelite Textron Co. as being on September 26, 1994. (Mantecon was admitted to the hospital on September 23 and not discharged until October 1) The visit to Homelite was really on the 23d. Even though PFC elicited from Mantecon the response (10:1650) that all his entries on his work search reports were "absolutely correct," the hounding occurs despite the fact that Mantecon repeatedly explained at trial that the mistake was an "honest error." (10:1695–1696, 1753) In one breath PFC contends that Mantecon has concocted a sophisticated scheme to defraud either the SSA [meaning the taxpayers] or the NLRB [meaning PFC who would be liable for the backpay], or both, and in the next breath vociferously attacks a mistake that is the opposite of sophisticated.

Moreover, the mistake has not the slightest relevance to credibility. It shows that Mantecon is more honest than he is accurate, but the mistake about the dates does not concern anything that would erroneously (whether by mistake or by design) inflate the amount of backpay due or help to establish his claim to backpay. Thus, for PFC to seek to impeach Mantecon with this mistake concerning an immaterial item, by pointing to his statement that all his entries were "absolutely correct," and then to argue (Brief at 137), based partly on this example, that "Mantecon simply cannot be trusted to tell the truth," is unpersuasive. Mantecon may be a bit overconfident of his ability to recall details, and he sometimes expresses himself in emotional terms or high numbers ("millions," as we see later) rather than with the restraint of caution and reflection. Nevertheless, I credit Mantecon.

The impression builds that much of PFC's nitpicking borders on being legally irrelevant. PFC's burden is to establish by affirmative evidence that Mantecon engaged in willful idleness. It must show, for example, that there were jobs available for him at specific employers and that he would have been hired had he applied. *A.P.R.A. Fuel Oil Buyers Group,* 324 NLRB 630, 632 fn. 3 (1997), enfd. mem. 159 F.3d 1345 (2d Cir. 1998); *Champa Linen Service Co.,* 222 NLRB 940, 942 (1976). Yet PFC did not call a single employer to testify that it would have hired Mantecon had he applied, or that Mantecon rejected even one offer of employment. PFC does not carry its affirmative burden simply by impeaching the testimony of discriminatee Mantecon. Thus, as Board-approved language provides in the recent case of *United States Can Co.,* 328 NLRB at 335:

> Thus [after the Government has established the gross backpay formula], it is the Respondent, not the General Counsel, which must produce facts to show that no backpay is owed because the discriminatees would not have transferred, or because they failed to mitigate their damages. In this regard, the Respondent cannot merely rely on its cross-examination of discriminatees and their alleged impeaching testimony to satisfy its burden of proof. *A.P.R.A. Fuel Oil Buyers Group, Inc.,* 324 NLRB 630, 632, fn. 3 (1997), citing *NLRB v. Inland Empire Meat Co.,* 692 F.2d 764 (9th Cir. 1982).

As noted above, the Board's decision in *A.P.R.A. Fuel Oil* was enforced, 159 F.3d 1345 (2d Cir. 1998) (table). I do not understand the reference to impeaching evidence to mean that such is not relevant to show willful idleness. For example, if PFC had brought in witnesses from the 115 listed employers listed who testified that Mantecon had never visited there asking for work, that would be appear to be quite relevant even though it would be impeachment. Other examples come to mind, such as the possible testimony of a private investigator asserting that he daily (Monday through Friday) surveiled Mantecon for 6 months out of the 29 and on each of those workdays, Mantecon never went near any of the employers he listed for that period, and instead went only to parks and shopping malls. No such evidence was offered.

Mantecon's work history at PFC is summarized by Judge McLeod in the underlying decision, 319 NLRB 859, 868–869, 872 (1995). Briefly, Mantecon began work for PFC in August 1992 on the third shift. From August 1992 to February 1994 he worked as a "wobble riverter operator." The evening of February 28, 1994, and over his protest that he was too short to work, Mantecon was transferred to the powder coater machine.[8] The very first night Mantecon sustained an injury to a finger as he was stretching to reach some parts. Because of the injury to his finger, Mantecon was off work from March 3 to May 24 when his doctor released him to work "full duty." Because the doctor failed to check a box on the form before the phrase, "Return to Full Duty," Mantecon's return to work was postponed to May 30. When he arrived for work on May 30, Mantecon was told he had been terminated on May 7, 1994. Mantecon was among the named discriminatees whom the Fourth Circuit, in agree-

[8] Although the evidence before Judge McLeod put Mantecon's height at 5'3" (319 NLRB at 869), the evidence here is that Mantecon is 5'1" (CPXs 8, 9; 12:2142) and that, in December 1994 when he was 49 (RX 67; 12:2142), Mantecon weighed 190 pounds (CPX 8, Dr. Dougherty's report, also describing Mantecon as "obese").

ment with the Board, found had been discharged because of their union activities. 117 F.3d 763, 766–768.

As mentioned above, following his May 24, 1994 discharge, Mantecon registered with the South Carolina Employment Security Commission (SCES) and began searching for work. (10:1646; RX 66). [May 24, 1994 is the date set forth in the ACS (at 3 paragraph 4) as the beginning of Mantecon's backpay period. In its amended answer (GCX 19(d) at 6), PFC admits that such date is the beginning of Mantecon's backpay period.] Mantecon went to SCES only about twice, for an employee there told him that individuals usually do better on their own. (11:1873). Mantecon's reports on his job searches (from late May 1994 to late September 1996) are listed on Respondent Exhibit 66, pages 4 through 23 (the quarterly "Claimant Expense And Search For Report" forms, NLRB Form 5224). I agree with Respondent's count (10:1654) that the 20 pages contain the names of 115 employers.

As previously mentioned, on September 23, 1994, the day he applied for work at Homelite Textron in Gastonia, North Carolina (10:1695–1696, 1753; RX 66 at 6), Mantecon, then 49 (12:2142; RX 67 at 1), suffered a heart attack. (10:1659, 1753; RX 68) He entered the hospital that day and was discharged from the hospital on October 1. Within a couple of days he resumed his search for work. (10:1661, 1665, 1705; 11:1809, 1819, 1823; RX 66 at 8) According to his medical instructions on discharge from the hospital, Mantecon was not to work for 4 weeks. (11:1821–1822; CPXs 6, 7). He nevertheless resumed searching for work because, in his words, he desperately needed a job. The family had to spend $3000 of the fund they were saving for their daughter's college expenses, the family's utilities were cut off, the family was evicted, and they had to move in with their elder son. For Mantecon, the experience was humiliating. (10:1700–1701, 1705; 11:1798, 1823)

While Mantecon was in the hospital, and the medical bills were piling up, a social worker suggested that Mantecon could apply for Medicaid and to the Social Security Administration (SSA) for disability benefits. (11:1799, 1801) Mantecon thereafter began that process on October 16, 1994 by signing a disability report (RX 68) and signing, on October 26, 1994, the formal application (RX 67) that was filed on November 7, 1994. (10:1657–1662; 11:1837–1838) Based, largely it appears, on the December 20, 1994 medical report (CPX 8, by Richard A. Dougherty, M.D., finding no medical impairment despite the heart attack) that Mantecon had to submit in relation to his application, Mantecon's application was denied by letter (RX 69) dated (as stipulated, 10:1671) as of late December 1994. [To be precise, the date is December 30, 1994, as I describe below when I discuss the matter of Mantecon's SSDI file.]

Mantecon appealed. (10:1676; RXs 103, 105) On November 30, 1995 a hearing was conducted before Administrative Law Judge Robert J. Egan whose December 21, 1995 decision (RX 72) was fully favorable (RX 71) to Mantecon. [Judge Egan's decision considered vocational factors as well as Mantecon's physical condition.] In June 1996 Mantecon began receiving SSA disability benefit checks of some $538 a month, retroactive to March 1995. (10:1687–1688; 11:1802–1804) Such checks continue. (10:1688) In addition, and based on Mantecon's disability determination, SSA checks arrived for his children while they were attending high school. One such check continues for the youngest (17) daughter who, as of early May 1999, was still in high school. Despite receiving these checks, Mantecon testified that he continued to search for work after June 1996 because he wanted to find a job. (11:1804)

Respecting Mantecon's continued search for work after June 1996, it is relevant to note that the SSA encourages those on disability to find work, if they become able to do so. SSA does not terminate their disability payments as soon as they begin earning paychecks. (10:1661, 1677, 1690, 1724–1725; 11:1851) Instead, according to an SSA pamphlet (GCX 41) in evidence, SSA rules provide for a delayed reduction of disability payments when earnings reach $500 a month, and also allow as a deduction from the "countable" earnings for the cost of work expenses (including prescription medicine) related to the disability. Similarly, see *Superior Export Packing Co.,* 299 NLRB 61, 61, fn. 2 (1990), and particularly *Cleveland v. Policy Management Systems Corp. [PMS],* 119 S.Ct. 1597, 1603 (1999), where the Court writes, in part:

> Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. For example, to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits.

Later, when covering PFC's contention of judicial estoppel, I return to the *Cleveland* case.

Earlier I noted that Mantecon's backpay period ended when he declined to accept PFC's October 1996 offer of reinstatement, and I indicated that I later would describe his reasons for declining. Mantecon testified that he declined out of fear PFC's President Burgoon would cause something tragic to happen to him. Mantecon bases this on the April 24, 1994 truck incident described in Judge McLeod's decision (319 NLRB at 867, 870) when a pickup truck driven by Burgoon, accompanied by Assistant Production Manager Mike Ford, raced up to union organizer Janice Landis and recently discharged employee Martha Hinson as they distributed literature outside PFC's gate. With tires screeching, the pickup skidded to a stop. (At its footnote 1, the Board states that it need not decide whether Burgoon admitted whether the truck left tire marks.)

For Mantecon, this incident was enough to cause him to believe that if he accepted reinstatement, Burgoon might well try to see to it that Mantecon sustained some serious accident at work. Thus, unless the other discriminatees returned to work, Mantecon decided that he would not return. (10:1702, 1704; 11:1827, 1858, 1867) By his one-page letter (CPX 9) dated October 4, 1994 to the Union's lawyer, Marcia Borowski, copy to NLRB Region 11, Mantecon described his fear rather vividly. The letter is relevant to Mantecon's credibility respecting his reasons for not accepting the offer of reinstatement (and as to his bias against Burgoon). Rather than quote some of his descriptions, without the context shown, I shall quote the letter in its entirety. In doing so, at points in the letter I have corrected spelling and modified the punctuation so as to break up run-on sentences in order to make the reading easier. The text,

as thus modified only as to form but not substance, reads (CPX 9):

Dear Marcia:

I received your letter of explanation in reference to reinstatement on 10/4/96. First, I want to express my deepest gratitude to each and everyone involved in justifying the unlawful discrimination inflicted to us by Merri Rowe. Burgoon and Performance Friction Corp., a matter which changed our lives in more ways than one by applying insult on top of injury to the families of the discriminatees. To date we have yet to hear an apology from Mr. Burgoon, nor will we ever hear one simply because it is not in his nature to do so regardless of his wrongdoings. As a vindictive being, he is totally disrespectful to humanity in every way, shape, and form. He has no regard for truth. His testimony proved that. In summation, Burgoon can best be described as the perfect picture of immorality.

If I am somewhat direct in my description of Burgoon, we must remember that I am only stating the whole truth and nothing but the truth of [about] an individual who has no values whatsoever. All one has to do is read Judge McLeod's document [Decision] and conclude that Satan dwells within Burgoon's soul. Which [This] clearly explains the games he is playing with the system in his efforts to keep from making a wrong–right. Again, where Satan dwells is where evil shows its true mentality in reference to the time Burgoon tried to run over Janice Landis and others with his truck, leaving black tire marks as he approached them directly at full speed causing them to jump out of the way of the truck or they could have been killed. Burgoon meant to bodily harm them that day. Who? But a monster full of malice would do something of that sort. He is unpredictable and dangerous indeed.

Another example of a malicious minded Burgoon is when he terminated me while I was undergoing treatment on a work related injury as stated by Judge McLeod in his document. I could go on, and on, and on of this Satan Burgoon because frankly one cannot find a positive word to say about him. Therefore, upon seriously considering the animal in Burgoon's being, I have decided it would not be beneficial to return to Performance Friction Corporation ever again under the circumstances stated herein. Burgoon's hatred, rage and vindictive disposition in general are reasons one could not possibly work and perform peacefully. I anticipate a great deal of pressure, stress, disrespect and discrimination to continue, and one cannot possibly perform their duties under those conditions. I will go so far [as] to say that Burgoon is cap-able to arrange in some way for harm to come to those who may return. I honestly admit that I fear returning to Performance Friction Corp. I feel extremely uneasy that something tragic may take place. I feel deeply that Burgoon is waiting for revenge in one form or another. As a discriminator, Burgoon is capable to make anything [of making anything] appear to look like an accident. I feel I should not take that chance by accepting his offer.

I fully understand the consequences of refusing to go back to work there, but I feel safer by not returning. I am respectfully asking that you and everyone else involved in justifying our cause understand my position. I am and have been deeply grateful for everything that's being done on our behalf by all those involved, and I hope that soon all resolutions of the court orders are honored and [the] case closed.

I will continue my search for employment as I have done, keeping records and receipts. I have mentioned to you that I feel that one of the reasons I've had a difficult time in my search is largely due to my approaching retirement age, or maybe my small stature at 5'1," or they just don't need help. I don't really know why. I have tried my best and in good faith complied with my obligation to the N.L.R.B. Please keep in touch, and thank you very much for everything.

Sincerely,

Manuel Mantecon

As of the trial Mantecon's opinion of Burgoon had not improved, for he now describes Burgoon as even "worse than" Satan because of the discrimination Burgoon has inflicted on his employees. (11:1878) In evaluating Mantecon's credibility, I have considered the fact that he is extremely biased against Burgoon.

b. Judicial estoppel

PFC's first major argument is that, because of his claims before the SSA that he was (is) not able to work, Mantecon is judicially estopped from asserting in this backpay case that, except for the week he was in the hospital, he in fact has been able to work. (Brief at 125, 127) PFC relies on *King v. Herbert J. Thomas Memorial Hospital,* 159 F.3d 192 (4th Cir. 1998), certiorari denied 119 S.Ct. 1576 (Mem.), as "dispositive" on this issue (Brief at 128), and asserts (Brief at 131) that *Cleveland v. PMS,* 119 S.Ct. 1597 (1999), is "inapposite." The Supreme Court's denial of certiorari in *King* on May 3, 1999, occurred only 21 days before the Court's decision in *Cleveland.* However, on June 1, 1999 the Court vacated and remanded *Moore v. Payless Shoe Source,* 119 S.Ct. 2017 (1999), citing *Cleveland.* From this sequence of events, PFC argues that as *Cleveland* and *Payless* involved ostensible conflict between the Social Security Act and the ADA (Americans With Disabilities Act) claims with their different disability standards, and *King* involves merely an SSDI claim and a claim of age discrimination under West Virginia's Human Rights Act, then the *Cleveland* rationale does not apply whereas the rationale of *King* does apply. *King* controls, PFC continues, because, like our case, *King* involved only one disability claim (SSDI) plus a discrimination claim (age) not involving a disability standard. In our case we have an SSDI claim plus a discrimination claim (National Labor Relations Act) not involving a statutory disability standard. Had the Supreme Court intended that *Cleveland* applied generally, rather than being limited to the situation of the standards of the Social Security Act and of the ADA, then the Court would have granted certiorari in *King* and, as it

did in *Payless,* have vacated and remanded *King* on the basis of *Cleveland.*

Similarly, PFC argues that *Superior Export Packing Co.,* 299 NLRB 61 (1990), is inapposite because the claimant there suffered from a disability, but had done so all through his employment and prior to the unlawful act giving rise to his backpay claim. "There was no evidence he could not perform the duties of his former job." And (Brief at 132):

> Mantecon, on the other hand, suffered his disabling event after his discharge from employment at PFC. Aside from his own self-serving statements which are incompatible with his testimony before Judge Egan, there is no evidence to suggest he could perform his PFC job, or any other job, after his heart attack.

Apparently deeming *Cleveland* applicable, the General Counsel argues that Mantecon's testimony satisfies the Court's admonition there, 119 S.Ct. at 1603, that the claimant must "sufficiently explain" a sworn application for disability benefits that he or she is "unable to work," for such a sworn statement "will appear to negate" an essential element of the ADA claim. Thus, 119 S.Ct. at 1603:

> For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

The Court continues by observing that lower courts, in many cases, have held that a party "cannot create a genuine issue of fact sufficient to survive a summary judgment simply by contradicting his or her previous sworn statement . . . without explaining the contradiction or attempting to resolve the disparity." *Cleveland,* 119 S.Ct. at 1597. The Union considers *Cleveland* to be controlling. (Brief at 17; Supplemental Brief at 5)

Deeming it pointless for me to speculate as to why the Supreme Court denied certiorari in *King,* I consider *Cleveland* and *Superior Export* to be controlling here. None of the Court's language in *Cleveland* indicates that its application is limited to competing claims under different disability statutes. Accordingly, I shall look to whether Mantecon offered a "sufficient explanation" of what, at first glance, would appear to be inconsistent claims (that is, not able to work on his SSDI claim, but able to and seeking work respecting his backpay claim before the NLRB).

Turn now to the contentions respecting the asserted factual claims of ability or inability to work.

c. Mantecon's SSDI file

(1) My inspection in camera

Any discussion of the competing factual claims requires a review of the documents, of record, from Mantecon's SSDI claim file. Production of that file had its origin in a subpena duces tecum served on Mantecon. Although the subpena was not offered as an exhibit, it is discussed at various places in the record (including 6:872–874; 9:1397–1399). While Mantecon was willing to request that his SSA file be sent directly to him, he was not willing that it first be sent to anyone else, such as attorney Borowski. Mantecon took that position because he understood that the file also erroneously contained papers pertaining to one of his sons and copies of his own medical records from the 1970s. In short, he wanted to purge the file of the papers he deemed irrelevant before the file was released to anyone else. (10:1729–1730) Eventually I ruled that if Mantecon would not sign a release form authorizing the SSA to send a copy of his SSDI file direct to me for my in camera inspection, then I would strike his testimony [not the related testimony of Compliance Officer Pfeffer, 11:1790] as a sanction under *Bannon Mills,* 146 NLRB 611 (1994) for refusing to comply with Respondent's subpena. (11:1779, 1790, 1795). See also 29 CFR 102.35(6) respecting striking all related testimony of witnesses refusing to answer any proper question.

At trial I explained the basis for my ruling. First, Mantecon indicated that he intended to purge his file before releasing it. (While the record does not shown him expressing that as a flat statement, I so understood him, as I stated several times on the record with the witness present, and counsel apparently so understood it. No party asserted that I had misunderstood the witness, and Mantecon himself never sought to correct any such understanding even (10:1731) when I asked him about it.) Second, in the usual situation involving respondents, the files or documents being subpenaed are in the possession of the respondents, and not in the possession and custody of a third person. As I said at trial (10:1733; 11:1785), respecting subpenas served on respondents, an Administrative Law Judge does not have the option of being able to send the state police out to seize the files or documents before respondents can purge "irrelevant" items. [From time to time new articles describe how the FBI has descended on offices, including certain government offices in Washington, D.C., and sealed off entire offices, but these apparently were cases involving alleged federal criminal wrongdoing.] The situation here involved the infrequent situation of a party's file being in the possession of a third party, here the SSA. That presented me with the opportunity, not usually available, to ensure the integrity of the file by my being able to obtain the file directly from the third party and to conduct an in camera inspection.[9] PFC was satisfied with this procedure, and even suggested it as an option, asserting that it would consider itself subject to the same procedure for any of its files residing in the custody and control of a third party. (10:1731; 11:1784, 1787)

Notwithstanding the objections of the General Counsel (11:1784–1785) and, particularly, of the Union (10:1732; 11:1782, 1788–1789), that the announced intent to purge a subpenaed file of documents the owner deems irrelevant does

[9] Nothing prevents a party issuing a subpena duces tecum, concerned about the integrity of a file being subpenaed, from inserting in the calls specified in the subpena duces tecum an admonition that if the served party considers that there are certain items in the file or files the served party deems irrelevant or privileged, the served party is to place them in a separate folder and submit them to the presiding administrative law judge for his or her in camera inspection and ruling either pretrial or at trial. The served party would be subject to questioning concerning compliance with the admonition. A failure to comply could subject the served party, if a party to the proceeding, to adverse inferences or, if willful noncompliance, possibly to more serious sanctions.

not constitute noncompliance, especially since respondents always have that opportunity and are not sanctioned, the Union's counsel announced that Mantecon was willing to sign a release authorizing a copy of his SSDI file direct to me for my in camera inspection. (11:1793) And that is what Mantecon did, on the record, signing a copy of RX 74. (11:1797–1798) [RX 74, of record, is a copy of the blank form, not of the signed release. Apparently Mantecon dated his signature as of May 3, 1999 (11:1797) rather than the actual date of that day's trial, May 4, 1999.]

Turn now to the SSDI documents. Eventually I received a submission of 119 pages from the SSA of documents appearing to be those from Mantecon's SSDI file. I notified the parties that the submission I had received appeared to have many documents missing. Thereafter, I received a second submission of 229 pages (apparently encompassing the original submission of 119 pages, plus more). While even the second one appeared to be a bit less than complete, it apparently was substantially complete, and I so informed the parties.

By my memo (not part of the record) of July 30, 1999 to counsel, I informed the parties that I had separated the 229 pages into four groups, and numbered the pages of the groups at the bottom right hand corner, with Group 1 (pages 1-159), as determined from my in camera inspection, being the only materially relevant group. Group 1 consisted of papers from September 23, 1994 forward. Group 2 consisted of Mantecon's medical records predating Group 1 and going back to the 1970s. Group 3 consisted of about 10 pages for Mantecon's son, and Group 4 (pertaining to benefits for Mantecon's school age children, while technically relevant, was not materially so because Mantecon already had testified about the topic). Thereafter, counsel focused on Group 1. By prearrangement, I sent copies of Group 1 (pages 1 through 159), first to Charging Party's attorney, then (with two redactions requested by the Union and found by me to be appropriate), to all counsel. The Union and PFC thereafter selected a few items which they forwarded for inclusion in the record. The General Counsel did not select any. The Union's submission for inclusion is CPX 16. Consisting of six pages (72–77) from Group 1, CPX 16 is a series of notes by an SSA agent concerning his or her (only the agent's initials appear) telephone contacts with Mantecon on four occasions in October, November, and December 1994.

PFC submits RXs 103, 104, and 105 for inclusion. RX 103 (page 43 from Group 1) consists of a one-page "To Whom It May Concern" memo by Mantecon. By this memo, dated February 23, 1995, Mantecon notifies SSA that he wishes to appeal the rejection of his claim for disability benefits. RX 104, a six-page (pages 45–50 of Group 1) "Reconsideration Disability Report," contains Mantecon's signature, dated March 14, 1995, near the bottom of the fourth page (page 48), and an SSA agent's signature, dated March 30, 1995, at the bottom of the last page.

Dated April 19, 1995 (file stamp marked May 24, 1995), RX 105 is the one-page appeal ("Request For Hearing By Administrative Law Judge") filed on Mantecon's behalf by his non-lawyer representative, Lynne Sizemore.

The General Counsel (Supplemental Brief) does not object to RX 103, but objects to RXs 104 and 105 as containing statements authored by someone other than Mantecon and therefore hearsay and not relevant. The Charging Party objects to all three exhibits (RXs 103–105) as immaterial, irrelevant, and hearsay. PFC does not object to the receipt of CPX 16.

Overruling the objections, I now receive into evidence CPX 16 and RXs 103, 104, and 105. Just as employer respondents are stuck with any admissions their representatives (whether lawyer or non-lawyer) make in, for example, precomplaint position letters submitted to the Board's regional offices during investigations of unfair labor practice charges, so too can anything stated by Mantecon's legal representative be held against him if it serves to impeach.[10] The Board's policy is to receive such position statements and weigh any admissions against the interest of the client-party. *McKenzie Engineering Co.,* 326 NLRB 473, 485 fn. 6 (1998); *Optica Lee Borinquen,* 307 NLRB 705 fn. 6 (1992); *Massillon Community Hospital,* 282 NLRB 675 fn. 5 (1987); *American Postal Workers Union,* 266 NLRB 317, 319 fn. 4 (1983). Indeed, a position letter attached to (an unsuccessful) motion to dismiss the complaint was considered and weighed in *United Technologies Corp.,* 310 NLRB 1126, 1127 fn. 1 (1993). Also, a clear statement in counsel's Opening Statement may constitute an admission against his or her party. *Riverwoods Chappaqua Corp. v. Marine Midland Bank,* 30 F.3d 339, 343 (2d Cir. 1994). And a lawyer's statement in a brief filed in a related case can be treated as an admission. *Purgess v. Sharrock,* 33 F.3d 134, 143–144 (2d Cir. 1994).

Nevertheless, as we are focusing here on a narrow issue pertaining to credibility, and a matter of credibility to the Supreme Court, I attach much less weight to statements by Mantecon's representative than I would if the same statements had been signed, or testimonially made or adopted, by Mantecon himself.

The arrangement for receipt of these late-filed exhibits from Mantecon's SSA file was made without any objection that Mantecon would have no opportunity to be confronted with any such documents and to respond from the witness chair about any specific language offered to impeach as contradictory behavior. Even so, I note that the thrust of Mantecon's testimony appears to address the areas covered by any "admissions" (impeachment) in these late-filed exhibits. I turn back now to pick up at the beginning of Mantecon's SSDI story.

(2) Mantecon's SSDI claim

As we are about to see, PFC already had obtained several documents (apparently from Mantecon either through this subpena or earlier versions of it) pertaining to his SSDI claim. We now need to consider the several documents relied on by PFC to argue that Mantecon has taken fatally contradictory positions before the SSA and the NLRB and therefore any claim for him in the backpay case (which was filed well after the SSDI claim) should be denied. "In general, backpay is tolled for a discriminatee who has been unable to work due to illness or injury for a period of 3 days or more." 3 NLRB Casehandling Manual

[10] Because he is only a discriminatee and not a charging party, Mantecon may be impeached, but any impeaching statements are not substantive evidence as the admissions of a party opponent would be. *Vencor Hospital–Los Angeles***,** 324 NLRB 234, 235 fn. 5 (1997). That distinction is immaterial to the issue at hand.

10546.2 (Sept. 1993); *Superior Export Packing Co.,* 299 NLRB 61, 65 (1990) Under Board law, if the illness or injury is one that is a risk of life generally, then backpay is tolled. Conversely, if the illness or injury is closely related to the nature of the interim employment, then backpay continues to accrue during the period of illness or injury. *Big Three Industrial Gas,* 263 NLRB 1189, 1199–1200 (1982), citing *American Mfg. Co. of Texas,* 167 NLRB 520 at 522–523 (1967). In 1983 the Board overruled *Big Three* on a single point (respecting concealment of earnings), but other points were left undisturbed. *American Navigation Co.,* 268 NLRB 426, 427 (1983).

Accordingly, as Mantecon's heart attack was a hazard of living generally, and not closely associated with any interim employment, then, to the extent he was unable to work as a result of that heart attack, his backpay would be tolled. Under the ACS, NLRB Region 11 never counted Mantecon as out of the labor market for the week he was in the hospital following his September 23, 1994 heart attack. Pfeffer did all the calculations for the compliance specification and the ACS. (1:47, 96, 98; 2:323) However, Pfeffer's first knowledge that Mantecon (1) had suffered the heart attack and (2) had filed for and eventually began receiving SSDI payments did not come until Thursday, February 11, 1999, when attorney Borowski informed Pfeffer. Mantecon confirms that he never told Pfeffer, but explains that such was because he already had reported the matter to then Compliance Officer Bradshaw. As late as the trial, Mantecon assumed that Pfeffer was operating on the basis of what Mantecon had told Bradshaw. (10:1720–1726) In testifying, Mantecon appeared sincere. I credit him on this.

After checking the law, Pfeffer determined that the mere fact of receiving SSDI would not affect the backpay liability. Acknowledging that the gross backpay figures would have to be reduced for the week that Mantecon was in the hospital and not in the labor market, Pfeffer stated that he would submit the recalculated figures later. He testified that there would be no offsetting medical insurance because, to his knowledge, PFC did not provide paid sick leave as a benefit. The General Counsel confirmed that Mantecon's Appendix I to the ACS would have to be amended. (6:860–870) However, memories are not perfect, no one remembered that this correction needed to be made, and it was not incorporated into GCX 77 at 5, Appendix I. I therefore note that for 3Q94 Mantecon's gross backpay should be reduced by $290 [$7.25 per hour (GCXs 69 and 75 fn. 3) times 40 hours] from $4242 to $3952.

Turn now to the SSDI documents. They begin with Mantecon's formal three-page SSDI application (RX 67) which he signed on October 26, 1994. The file stamp on the first page shows November 7, 1994. That file date is the date shown on the "List of Exhibits" (RX 106), a list of 22 exhibits apparently submitted at the hearing before Judge Robert J. Egan of the SSA. Judge Egan's December 21, 1995 decision (RX 72) refers to certain exhibit numbers. The list of exhibits (RX 106) is helpful in understanding those references and the corresponding numbers shown at the bottom right of some of the SSA documents received into this record. [With approval of the parties, in correspondence not a part of the record, I now receive in evidence RX 106, just mentioned. I also receive in evidence RX 107, a better photocopy of the first page of RX 69, the December 30, 1994 letter denying Mantecon's initial claim for Social SSDI benefits, with the date clearly shown.]

Returning now to Mantecon's October 26 (November 7), 1994 application, the lines in focus are the following sentences (RX 67 at 1, emphasis added):

> I became *unable to work* because of my disabling condition on September 23, 1994. [Meaning his heart attack. 10:1659]
>
> I am still disabled. [Mantecon told the SSA agent that he had resumed searching for work about October 3 or 4, 1994, and testified that in fact he had resumed on October 3. 10:1661; 11:1819–1820, 1823.]

Mantecon testified that being "disabled" under the Social Security Act is unrelated to being able to work, and that people can work while they are on disability. 10:1677, 1690. Indeed, "millions," he asserts, work while receiving SSDI. (10:1677) Although I doubt that "millions" are working while receiving SSDI, I take official notice that in 1994 there were nearly 4 million workers aged between 18 and 64 who were receiving SSDI benefit payments, and for 1996 the number had grown almost to 4,400,000.[11] By 1998 the number had grown to nearly 4,700,000, not counting the over 3,500,000, aged 18 to 64, drawing SSDI disability benefits. See SSA's March 11, 1999 website posting at www.ssa.gov/policy/pubs/dibreport .html at 9 ("Social Security and Supplemental Security Income Disability Programs: Managing for Today, Planning for Tomorrow"). I take this official notice not for anything pertaining to the merits in this case, but merely to understand that Mantecon's reference to "millions," while unsubstantiated as to that many working while receiving disability payments,[12] has a basis insofar as the overall number of persons drawing such benefit payments.

Mantecon is correct in his testimony that the SSA encourages workers on SSDI to obtain gainful employment as soon as they can. (10:1661, 1677, 1690d, 1724–1725) SSA booklets in evidence reflect that fact (GCX 41 at 2-13; CPX 5 at 20–23), a fact the Supreme Court noticed in *Cleveland v. PMS,* 119 S.Ct. 1597, 1603 (1999).

Despite the assertion in his SSDI application that he was "unable to work," Mantecon testified (10:1677) that he never felt that he was unable to work, and (10:1684, 1747) after the "roto rooter" procedure, the angioplasty, he felt a lot better. When he spoke with the SSA agent on November 14, 1994 he reported, as the agent recorded (CPX 16 at 3, Group 1 at 74), that despite feeling occasional small electrical shocks in his chest, he had been out looking for work, and had made a number of job applications the previous week, but that so far his efforts had been unsuccessful.

The first of two medical reports of record is that of the Sanger Clinic, by Dr. W. Kenneth Austin. Dr. Austin's September 30, 1994 report (RX 70) is a factual description of Mantecon's heart attack, the physical problem, and the surgical procedure made to reduce most of the arterial blockage. The

[11] 62 *Social Security Bulletin* 111, Table 1.B8 (Issue No. 1, 1999).

[12] The website's March 11, 1999 report, at 20–21, suggests that the number of disability workers who are working, or on a trial work program, is far less than even one million persons.

second report, the December 20, 1994 "Disability Determination Evaluation" by Dr. Richard A. Dougherty, ends with the conclusion that he sees no disabling impairment. (CPX 8) As earlier noted, apparently based largely on Dr. Dougherty's evaluation, the SSA, by letter dated December 30, 1994 (RXs 69, 107), denied Mantecon's SSDI claim.

In his February 23, 1995 "To Whom It May Concern" request (RX 103) for appeal forms, following the December 30, 1994 denial (RX 69) of his disability claim, Mantecon added, in hand, the following note (RX 103):

> Note:I disagree with the decision because my illnesses cause me a great deal of pain and constant dizziness. In addition, I believe I have arthritis of my left hand and wrist that pains me a great deal off and on.

Mantecon's formal appeal (RX 105) (SSA's exhibit 7 before Judge Egan per RX 106), a one page form signed by Lynne Sizemore, Mantecon's nonlawyer representative, is dated April 19, 1995. Apparently for SSA's purposes the appeal was deemed filed on April 24, 1995 (a date written at the top and entered on the "List of Exhibits," RX 106). Boxes checked by, presumably, Sizemore indicate that Mantecon had additional evidence to submit and that he wanted to appear at a hearing (before an Administrative Law Judge). For the box requesting a hearing before an Administrative Law Judge, the form's printed statement of "I disagree with the determination made on my claim because:" is followed by this typed response (emphasis added):

> *I am unable to perform any work.*

Next comes the "Reconsideration Disability Report" (RX 104), apparently a form designed to ascertain what medical developments or other changes have occurred since the claim was filed on November 7, 1994. (SSA's exhibit 10 before Judge Egan. RX 106.) Although Mantecon's signature appears on page 4 (RX 104 at 4, Group 1 page 48), opposite the date of March 14, 1995, the boxes checked by hand, and other hand entries, appear to be, and I find, those of the SSA agent who apparently recorded Mantecon's answers to the printed questions.[13] To most of the questions the answers are that there had been no changes and that Mantecon had not visited any doctors. To question 4, asking whether there was anything additional SSA should know, the handwritten answer reads:

> Pain in left wrist & thumb.
> Bronchitis—pulmonary problems—short of breath.

Question 10 asks how the illness or injury affected his ability to care for his personal needs. The handwritten answer (not Mantecon's hand, as I have found) reads (emphasis added):

> Can care for personal needs *but cannot work.*

The SSA agent signed and dated the form March 30, 1995.

As mention earlier, in finding, in his decision of December 21, 1995 (RX 72), that Mantecon met the Social Security Act's disability standards, Judge Egan considered a variety of factors, both vocational and well as medical and physical. The last few paragraphs of Judge Egan's discussion of the evidence read (RX 72 at 2-3, emphasis added):

> The claimant testified that he *is* out of breath after walking to the mail box, and that he *is* exhausted and fatigued after showering. He stated that he *suffers* chest, shoulder, and arm pain with numbness. *He* stated that he *takes* nitroglycerin for his chest pain, but the medication *does not* stop the pain.
>
> . . . .
>
> The undersigned finds the *claimant's description of his limitations is consistent with* the record when considered in its entirety. The undersigned determines that the claimant *cannot lift or carry* more than ten pounds, *sit or stand for prolonged periods, or occasionally push and pull with exertion, and that he has* a residual functional capacity for less than "sedentary" work.
>
> The claimant's past relevant work was that of a machinist. The vocational expert testified that the claimant's work as a machinist was skilled and required medium exertional capacity. The undersigned determines that the claimant cannot return to his past relevant work, and that he does not have skill transferable to work within his residual functional capacity.
>
> Given the claimant's residual functional capacity, and the vocational factors of his age, education and past relevant work experience, there are no jobs existing in significant numbers that the claimant is capable of performing. The claimant's limitations fall under the criteria set forth in Section 201.00(h) of the Medical-Vocational Guidelines, 20 CFR Part 404, Appendix 2 to Subpart P which directs a finding of "disabled." The claimant is under a disability as defined by the Social Security Act and Regulations.

Of Judge Egan's ten numbered "Findings," based on his consideration "of the entire record," Findings 2 through 10 read (RX 72 at 3):

> 2. The claimant's impairments which are considered to be "severe" under the Social Security Act are atherosclerotic cardiovascular disease and anterior ischemia disease.
>
> 3. The claimant's impairments do not meet or equal in severity the appropriate medical findings contained in 20 CFR Part 404, Appendix 1 to Subpart P (Listing of Impairments).
>
> 4. The claimant's allegations are found to be credible.
>
> 5. The claimant's impairments prevent him from engaging in basic work activity even at the "sedentary" work level.
>
> 6. The claimant is unable to perform his past relevant work.
>
> 7. The claimant was 49 years old on the date disability began, which is defined as a younger individual. The claimant has a high school education.
>
> 8. The claimant does not have transferable skills to perform other work within his physical and mental residual functional capacity.

[13] In any event, after comparing the several specimens of Mantecon's handwriting and signature in the record, I find that the hand is not that of Mantecon. FRE 901(b)(3) (trier of fact authorized to compare handwriting); *Traction Wholesale Center Co.,* 328 NLRB 1058 (1999).

> 9. Based upon the claimant's residual functional capacity, and vocational factors, there are no jobs existing in significant numbers which he can perform. This finding is based upon Section 201.00(h) of the Medical-Vocational Guidelines, 20 CFR Part 404, Appendix 2 to Subpart P.
>
> The claimant has been under a disability as defined by the Social Security Act and Regulations since September 23, 1994.

In the final section for "Decision," Judge Egan decided that Mantecon has been disabled since September 23, 1994, that his disability has continued at least through the date of the decision, and that Mantecon was entitled to disability benefits under both regular disability and supplemental security income.

Earlier I noted Mantecon's testimony that he never felt that he was unable to work. (10:1677) He also testified that he thought he could have done his former work at the brake machine at PFC (10:1747–1748), although that apparently was easier than working at the powder coater, the job he had been transferred to just before his discharge from PFC.

Mantecon had full opportunity to address the apparent contradictions between his two claims (even though he was not confronted with the late-filed exhibits) for two reasons. First, PFC's counsel, who called Mantecon for direct examination under FRE 611(c), asked Mantecon direct questions about his "unable to work" statement on his SSDI application (RX 67) as well as, among other matters, his testimony before Judge Egan and Judge Egan's findings. Although I generally credit Mantecon, I do not credit him to the extent he may suggest (10:1683–1685), contrary to the implication of Judge Egan's findings, that his description, before Judge Egan, of his physical well being did not include his then present tense condition. Thus, I find that, as Judge Egan's findings state, that Mantecon's testimonial description included the present tense. In short, the door was opened by PFC for any and all questions by any party on these matters. Second, already forewarned about the SSDI matter,[14] the General Counsel and the Union offered SSA pamphlets (GCX 41; CPX 5) showing that persons receiving disability payments are encouraged to return to the labor market and are given incentives to do so. In short, I find that the parties had full opportunity to litigate the issue of contradictory statements by Mantecon in his SSDI matter compared to his position and testimony before the NLRB.

d. Whether explanation is "sufficient"

Under the Supreme Court's formulation in *Cleveland v. PMS,* 119 S.Ct. 1597, 1603 (1999), the burden here was on the Government and the Union to have Mantecon provide a "sufficient explanation" of any apparent contradictions. There was no issue preclusion here, as in *NLRB v. Donna-Lee Sportswear Co.,* 836 F.2d 31 (1st Cir. 1987). See *Thalbo Corp.,* 323 NLRB 630, 631, 634–635 (1997), enfd. 171 F.3d 102 (2d Cir. 1999). Here the Government and the Union had the express right, the burden, and the opportunity to litigate the issue of apparent contradictions. As described, the parties litigated the issue.

I find that the explanation offered (essentially that Mantecon never felt he was not able to work) is nothing more than a contradiction of the statements of inability to work which he made before SSA. No offer was made, for example, of the results of a stress test, taken after he left the hospital, showing that he was in acceptably good shape. Although Dr. Austin advised Mantecon to have such a stress test (RX 70 at 2), Mantecon admits (10:1710–1711; 11:1820) that he never thereafter took one. Apparently he thought he did not need one. But that does not solve the problem here, and that problem is similar to a threshold that he must get across or a hurdle that he must clear. To clear these obstacles, he must do more than say, in effect, "Notwithstanding my statements before the SSA that I was unable to work, don't believe them. I think I could work, that I could have done any of the jobs I applied for during the backpay period, and even my old job back at PFC."

Such testimony does not satisfy the *Cleveland* test. More is needed. While certainly not the only possibility of something that would aid in explaining, a stress test showing good results would certainly help. Even a report from a doctor following an annual physical examination, showing good health and physical shape, would be a help in corroborating his testimony. But so far as the record shows, Mantecon never went for a medical checkup after he left the hospital on October 1, 1994. Nor does it suffice that Mantecon, as I find, was searching in good faith for a job in the months after his release from the hospital. This is not to say that he would have accepted any job offered. (Possibly some very bad jobs could have been offered, although not even any of that type were offered.) But, I find, had a reasonably good job have been offered, I find that he would have taken it. After all, such a job, even if it paid less than his former work at PFC, would have produced more income that the disability benefit. Although he also benefited by his school age children receiving SSA benefits based on his situation, that was a temporary situation. From a long term perspective, Mantecon, I find, was searching in good faith for employment.

That brings us to the testimony of Respondent's vocational expert, Dr. William Wayne Stewart. Although I find that Dr. Stewart was a sincere witness, the fact is that his testimony is legally irrelevant. This is because his opinion—that someone in Mantecon's situation should have been able to have found a relevant job within the first 6 months of searching, 12:2138, 2158; 14:2417—is based on what he thinks Mantecon (whom he never met and never counseled, 12:2140, 2164; 14:2413–2414) could have obtained in the job market of a seven-county area (12:2150) had he really been trying to find work. This is nothing but speculation, and speculation in the face of a long list of items which Stewart concedes are vocational negatives. Such negatives include Mantecon's (1) age of 49-51 during the backpay period; (2) height of 5'1"—a vocational negative for a male; (3) excessive weight—190 pounds in December 1994 (CPX 8); (4) foreign language accent (12:2143–2144); (5) fired by PFC. Stewart agrees that having to disclose this fact of

[14] The matter came up in mid-February 1999 when PFC served a subpena duces tecum on Mantecon asking for, among other matters, information relating to any SSDI claim. Mantecon apparently told attorney Borowski who then alerted Pfeffer to the facts she had just learned about the September 1993 heart attack and the subsequent claim for SSDI payments and his eventual receipt of such. (6:860–861, 865–868)

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$1938	0	0	0	$1938
1994	3	3952	0	0	0	3952
Totals:		$5890	0	0	0	$5890
Total net backpay due Manuel S. Mantecon:						$5,890

discharge to a potential employer would be a vocational negative, but that with counseling a job applicant can do a lot to minimize the damage. (12:2145) and that support from family and friends can help the applicant cope with the stress (12:2170–2171).

The negative vocational factors continue with: (6) union activist. With a bare 10 percent of employers in North Carolina and South Carolina organized, any history of having been a union activist would be a vocational negative. (12:2147) Finally: (7) Mantecon's lack of professional job search counseling could be considered a negative vocational factor. (12:2146–2147) The fact that he perhaps could have gotten such counseling free from state agencies (12:2169–2170) had he applied does not convert the negative into a positive. That Stewart considered these negative vocational factors in forming his ultimate opinion of a successful job search within 6 months (12:2138, 2167–2168; 14:2422) does not render his opinion anything less than speculation. Accordingly, I attach no weight to Dr. Stewart's expert opinion on the merits. *United States Can Co.,* 328 NLRB 334 (1999). To the extent that PFC argues that Stewart's testimony should be considered solely respecting Mantecon's credibility as to his good faith in searching for interim employment (PFC's apparent purpose, on Brief at least), I consider it for that purpose but, because of the wide gap between Stewart's sophisticated speculations and the practical aspects of Mantecon's specific job applications at specific employers, I still attach no weight to his opinion. In effect, Respondent, through Stewart, would penalize Mantecon for not being successful. As I have noted, well established Board law is that there is no legal relevance to whether a discriminatee has been successful in his job search efforts. Respondent, as previously mentioned, has the affirmative obligation to show that Mantecon willfully rejected one or more job offers. This Respondent failed to show.

e. Conclusion

Finding that Mantecon has failed the *Cleveland* test, I therefore find that his backpay ends when he entered the hospital on September 23, 1994. Based on the correction I made earlier for 3Q94, that means the total backpay due (for 2Q94 and 3Q94) is $5890, plus interest, as shown in the table which follows.

One might argue that this results in a windfall for PFC or, stated differently, that PFC will receive corporate welfare by the taxpayers picking up PFC's backpay tab through the SSDI benefit payments to Mantecon. In *Big Three Industrial Gas,* 263 NLRB 1189, 1190 fn. 10 (1982), the panel majority suggests that, in those cases involving a willful concealment of some interim earnings, that Respondents not have the windfall of escaping their obligation to pay all the backpay otherwise due and that, therefore, they should be required to pay an equivalent sum (to the amount denied the discriminatee as a penalty) into the United States Treasury. Here, however, there is no finding that backpay is due beyond 3Q94. That is because the Government and the Union did not carry their burden of satisfying the *Cleveland* test. Had that test been satisfied, the full backpay alleged would have been due. I find that the backpay due Mantecon is: [see table above.]

5. Merri R. Rowe

a. Introduction

Recall that Rowe is one of two persons (Kennedy being the other) whose backpay allegedly resumes after allegedly unlawful action against them when they appeared for reinstatement (Kennedy) or not long after they were reinstated (Rowe) in July 1998. Although I postpone discussion of those events, I cover here the backpay alleged to due as if merit will be found to the complaint allegations respecting her. For Rowe the initial period alleged is April 27, 1994 to October 14, 1996. That period resumes, or a second one starts, as alleged in the ACS, on June 5, 1998. The complete backpay table alleged in the ACS is (GCX 77 at 6):

Paragraph 5(a) of the ACS, at 3, alleges that Rowe's (initial) backpay period closed on October 14, 1996, "the date of the last opportunity to accept Respondent's offer of reinstatement sufficient to toll its backpay liability, but not sufficient to relieve Parsons of its obligation to reinstate Rowe." PFC's first letter offering Rowe (RX 24 at 10) reinstatement was dated (Friday) September 27, 1996, and gave Rowe until October 14 to respond. Apparently not hearing from Rowe, PFC deemed her backpay period to have ended on the September 27, 1996 date of the letter to her. (12:2079, 2089, Davis) Rowe testified that she was unaware of any letter from PFC offering reinstatement. (8:1372) As previously discussed, the backpay was tolled as of October 14, 1996. *Cliffstar Transportation Co.,* 311 NLRB 152, 154–155 (1993). Even so, PFC had a continuing obligation to offer Rowe reinstatement. *Burnup & Sims,* 256 NLRB 965, 966 (1981).

PFC also argues that its obligation to reinstate Merri Rowe reinstatement obligation ended in 1996. I shall address that argument when I reach the complaint portion of the case.

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$3017	0	0	0	$3017
1994	3	3872	0	0	0	3872
1994	4	3820	0	0	0	3820
1995	1	4279	720	0	720	3559
1995	2	4609	196	0	196	4413
1995	3	0	0	0	0	0
1995	4	0	0	0	0	0
1996	1	0	0	0	0	0
1996	2	0	0	0	0	0
1996	3	178	134	0	134	44
1996	4	0	0	0	0	0
1997	1	0	0	0	0	0
1997	2	0	0	0	0	0
1997	3	0	0	0	0	0
1997	4	0	0	0	0	0
1998	1	0	0	0	0	0
1998	2	1683	0	0	0	1683
1998	3	5610	0	0	0	5610
1998	4	6172	0	0	0	6172
Totals:		$33,240	$1050	0	$1050	$32,190
Total net backpay due Merri R. Rowe:						**$32,190**

for Rowe during the balance of 1994 following her April 1994 discharge from PFC. Called by PFC as an adverse witness under FRE 611(c), Rowe testified that, following her discharge from PFC, she registered with the South Carolina Employment Commission[15] (SCEC) (RX 55 at 1; 8:1298, 1308), and went there more than once (8:1382). Her application for unemployment was "turned down." (8:1308) Rowe apparently means that a penalty of some weeks was imposed, delaying the start of the benefits she would receive, for she began receiving unemployment benefits in July 1994. (8:1308)

Rowe also credibly testified that she has looked for work since her discharge from PFC (8:1319), including searching the newspapers and making calls (8:1389), even on a daily basis (8:1382, 1388). She filled out the work search forms, NLRB 5224, to the best of her memory, but the forms were not mailed to her until then Compliance Officer Bradshaw's letter of June 8, 1995 (CPX 2; 8:1383–1384), and she had not kept a daily diary to record her job searches (8:1306–1307), nor (8:1371)

[15] Such registration is prima facie evidence that Rowe was engaged in a reasonably diligent search for interim employment. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996); *Food & Commercial Workers Local 1352,* 301 NLRB 617, 620 (1991).

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in 2Q94, three in 3Q94, and three for 4Q94), these do not represent all her efforts (8:1303–1304). It must be remembered that (8:1328–1329) Rowe did not fill out the forms until about July 1995.

PFC argues that the evidence shows a lack of good faith on Rowe's part in seeking interim employment during the last three quarters of 1994 and that, therefore, no backpay is due for that period. PFC particularly notes that on two separate dates during 4Q94 Rowe, as she admits (RX 55 at 5; 8:1311–1312), had to decline two short-notice (2 hours) referrals by a temporary employment agency because she was unable to arrange for a baby sitter on such short notice. Respondent's objection has no merit. The Board examines a discriminatee's overall backpay efforts, during the whole backpay period and does not penalize a discriminatee for problems encountered during isolated portions of the backpay period. *Basin Frozen Foods,* 320 NLRB 1072, 1074 (1996), enfd. with slight modification on separate point 139 F.3d 906 (9th Cir. 1998) (Table). The balance of Respondent's argument respecting 1994 likewise is without merit because it really is a contention that Rowe should be awarded no backpay because her work search was unsuccessful. As noted earlier, such a contention is contrary to Board law. Moreover, PFC's burden was to show that Rowe willfully lost interim earnings. In this regard, and aside from the two temporary assignments that Rowe declined during 4Q94, PFC did not establish that Rowe ever rejected the offer of even one permanent job during the last three quarters of 1994.

Turn now to 1Q95. Interim earnings of $720 are listed for this quarter. Footnote 1 (not shown in my reproduction of the table above) states, "From 1/1/95 to 3/24/95, Rowe cared for an individual with cancer. In exchange for this care, Rowe was

provided free rental housing, at a value of $240 a month." Explaining the entry, Pfeffer testified that such was considered interim employment. (2:295–296) In effect, Rowe was working as a nurse caring for a cancer patient, Billy Thomas, the father of Rowe's boyfriend and future husband, Jackie Thomas. (2:295) The senior Thomas died on March 24, 1995. (2:295; 4:569; 8:1316, 1323)

Citing *Coronet Foods,* 322 NLRB 837, 846 (1997), mod. on different point 158 F.3d 782 (4th Cir. 1998) (discriminatee Logsdon left labor market to care for child), and 3 NLRB Casehandling Manual 10546.8 (Sept. 1993), PFC contends that Rowe should be deemed to have withdrawn from the labor market during this quarter. (Brief at 94) I agree. Rowe concedes that she had no time to look for work during this period because of all the personal and family matters she was tending to (including driving her future husband to and from work, as well as serving as the nurse for the elder Thomas). (8:1317–1318, 1354) It is immaterial that Rowe assumed the work of a nurse in order to have shelter for herself and her children, and even to be able to retain custody of her children. (8:1316) It is immaterial because, in this area, the law rewards the wrongdoer and punishes the discriminatee-victim for being in the economic predicament (little or no income) that the unlawful discharge places him or her.

That is, the law does not ask, had the discriminatee not been illegally fired and had been able to remain financially stable, whether the discriminatee would have quit and remained home to have taken care of a child, or served as a nurse, or attended to other personal matters.[16] That would be "speculative."[17] [But if the law required the wrongdoer to pay for child care, then the discriminatee could make a reasonably diligent search for work. The law does not so require.] Instead, the law simply focuses on whether the discriminatee has made a reasonable search for work, and not on whether the lack of income (from having been illegally fired) has interfered with the economic ability of the discriminatee to pay for child care, or other personal matters, while the discriminatee does her best to search for interim employment. Accordingly, I find that PFC's backpay liability for 1Q95 should be reduced from $4279 (or from $3559 when counting the $720 interim earnings) to zero.

Respecting 2Q95, Appendix J of the ACS reflects, at footnote 2 (GCX 77 at 6), that Rowe had interim earnings of $196 for the quarter by working for Klear Knit, Inc. during June 1995. She worked there about 3 or 4 days before quitting. (8:1335) Her work there was as a sewing machine operator. She had never operated a sewing machine before in a commercial setting. The job required production of a large number of shirts with first quality only (no seconds), and she did not think that she could perform at that level. (8:1335–1336, 1380–1381) Additionally, she felt emotional stress from the loss of certain close family members, and the death of Billy Thomas, during 1Q95, plus she was receiving hormone treatment for a medical condition that had begun while she worked at PFC. The job at Klear Knit increased her stress. In these circumstances, Rowe quit the job with Klear Knit. (8:1336–1338, 1381, 1387–1388)

The Government found Rowe's voluntary departure from Klear Knit to be reasonable, and not a failure to mitigate. (2:298, 300, Pfeffer) Rowe testified that she thinks she looked elsewhere during 2Q95 (8:1336), although she could not recall any names to list on her job search report, form NLRB 5224, for the quarter (RX 55 at 9–10). PFC contends that Rowe, as a result of the stress from her family situation, withdrew from the labor market for most of this quarter, and that the Government has not carried its burden to demonstrate that Rowe's quitting of the Klear Knit job was reasonable.

Agreeing with the Government, I find no withdrawal from the labor market. Rowe's stress from the deaths (during 1Q95) of certain close family members, and the senior Thomas, lingered during 2Q95, but that would have been so had she still been working at PFC (although, of course, she may never have stopped work to have become a nurse for the senior Thomas). Unlike the new and demanding work at Klear Knit, Rowe's work at PFC would have been, during 2Q95, familiar work and therefore therapy rather than additional stress. I therefore find the backpay due as alleged for 2Q95.

As Pfeffer explains (2:299), Appendix J of the ACS (GCX 77 at 6) reflects that Rowe "Withdrew from labor market beginning July 1995 in order to drive boyfriend to and from his work in his job as dry wall finisher." As reflected above in the backpay table, the Government (Br. at 63) therefore seeks no backpay for Rowe for this 1-year period. On brief PFC observes that even at earlier dates Rowe was driving her future husband to and from work. However, such driving is not shown to have excluded her from the labor market.

Turn now to 3Q96. On July 31, 1996 Rowe reentered the labor market when she applied to and was hired by Rauch Industries. Unfortunately, after about 2 days Rowe had to cease working for Rauch when she broke her left thumb in a nonwork accident. (8:1332–1333, 1342; RX 15; GCX 77 at 6 fn. 4) As the table shown earlier reflects, the Government tolls Rowe's backpay from her August 1, 1996 injury to the end of her initial backpay period on October 14, 1996. (GCX 77, Appendix J, fn. 4)

Following Rowe's initial backpay period, the Government seeks no further backpay until 2Q98 when events begin to occur regarding the second employment of Rowe at PFC. Although the backpay table ends with the calculation through 4Q98, the General Counsel contends (Brief at 63–64) that Rowe's backpay entitlement is "ongoing."

Turn then to 2Q98 through 4Q98. The Government alleges (ACS at 3, par. 5(d)) that the backpay period begins a second time on June 5, 1998 when PFC's offer of reinstatement was not made in good faith (even though Rowe accepted), as demonstrated, in part, by PFC's second discharge of Rowe on July 23, 1998. As to this termination, the Government alleges a constructive discharge. (GCX 1ff at 3 paragraph 5(d)) The unfair labor practice allegation I address later. At this point I cover just the backpay aspects of this second backpay period—a period that is "ongoing."

[16] As Rowe wrote to NLRB Region 11 on Jan. 21, 1997:"I do need employment and were I still employed with Performance Friction I would have been able with yearly and level raises to support me and my children without making the choices I have in the past years." (RX 56 at 2)

[17] See *Coronet Foods***,** 322 NLRB 837, 846 fn. 60 (1977).

Respecting 2Q98, the backpay table shows no interim earnings. Thus, the gross backpay is also the net backpay. This comes about, as the Government explains (8:1357: 10:1532, 1570), because Rowe already had a "second" job working full time as (8:1347, 1361–1364, Rowe) a sheetrock finisher with her future husband, Jackie Thomas. As such work was a preexisting second job, any earnings from the second, or supplemental, job would not be counted as interim earnings, the General Counsel argues.[18] At trial the General Counsel offered the additional ground that the Regional Office had received no evidence that Rowe had received any money from Jackie Thomas for performing her services as a drywall finisher. (8:1357) In the Government's brief, the General Counsel has abandoned the no-money ground. Moreover, the General Counsel observes that Rowe, following her July 1998 discharge from PFC also sought employment elsewhere. By such search efforts, Rowe made a reasonable effort to mitigate her losses. Accordingly, no offset against the gross backpay is proper. (Brief at 63–64)

For its part, PFC argues that no backpay is due because there is no merit to the alleged unfair labor practices, because the drywall work was Rowe's full-time job, not a "moonlighting" job (8:1358; 10:1533, 1571), or because she made no reasonable effort to find work following her July 1998 separation from PFC. In any event, PFC argues, the drywall work was interim employment the earnings from which should be offset against any gross backpay. (Br. at 100)

At one point in the trial the General Counsel argued that the terms "primary" or "second job" are irrelevant when addressing the question of whether another job is "supplemental" to that which the discriminatee held with the litigated wrongdoer, for the only relevant question is whether the returning discriminatee performed the two jobs simultaneously. (10:1572) [That is, whether the other job was full time or part time is irrelevant, as would be an inquiry into the amount of money the discriminatee earned at the "other" job. In theory, a discriminatee could become an expert at something, such as computer technology, during the backpay period, and become a highly paid consultant working either 40 hours a week, or a mere 15 to 20 hours a week. All that would be irrelevant so long as the discriminatee performed the job to which he or she is reinstated.] The General Counsel does not reiterate this argument in the Government's brief. I return to this subject in a moment when I address credibility.

In August 1997, Rowe testified (8:1351, 1359–1360), Rowe began working full time in the drywall business of her future husband, Jackie Thomas. The name of the business is "Thomas Drywall." (10:1523; RX 64 at internal page 7) According to Thomas, Rowe actually began full time about June 1995. Thomas describes how Rowe learned the drywall finishing skills much quicker than the 1 year it took him. From June 1995 to the present, Thomas asserts, the drywall work has been Rowe's principal business. (10:1521–1522, 1601–1602). The Government lists Rowe as withdrawn from the labor market when she began driving Thomas to and from work beginning in July 1995. (GCX 77 at 6; 2:299; 8:1355) She actually began such driving in early 1995. (8:1317, 1318, 1354, Rowe) Rowe testified that she did not begin assisting Thomas in finishing drywall, and in learning the trade, until late 1995 or early 1996. (4:657–658) Rowe testified persuasively, and I credit her.

Rowe implies (8:1312–1313, 1317, 1326) that she and Thomas began living together in early July 1995 when she moved her "residence" from York, South Carolina to Clover, South Carolina (a distance of some 11 miles, per the atlas). Apparently that was when Rowe and Thomas became "known as common law husband and wife." (RX 64 at internal page 8, item 4) [The matter of "residence" is a bit confusing in the record. Although Rowe may have maintained a "residence" in York until July 1995, she testified that, during 1Q95, she lived in one of the houses of Billy Thomas (the cancer patient and father of Jackie Thomas), apparently in Clover.] The difference of opinion between Thomas and Rowe as to when her "full time" work with Thomas Drywall began is, I find, merely a matter of degree. Until about the time school began in August 1997, Rowe apparently was still devoting personal time to her younger child during the day. Crediting Rowe's description, I find that she began "full time" with Thomas Drywall in August 1997.

Rowe credibly testified that, whenever the weather and the economy are good, when there are no sheetrock supply problems, and when everything is "clicking," she has worked 45–60 hours a week as a sheetrock finisher, although she estimates her overall weekly average at 30 hours. (8:1352–1353, 1367) Thomas puts Rowe's overall weekly average at about 25 to 30 hours. (10:1526) According to Thomas (10:1526, 1554), his business was "pretty wide open" (very active) in the summer of 1998, and he and Rowe were working 45 to 60 hours a week. [I note that Thomas was susceptible to leading questions. While such questions are properly posed to a witness examined under FRE 611(c), as was Thomas, I nevertheless take such leading into account. Thus, whereas Thomas initially answered affirmatively to a question about 30 to 60 hours in July 1998, he eventually agreed that for the "summer" he and Rowe worked 45 to 60 hours a week.] Rowe, however, asserts that there was a sheetrock shortage in the summer of 1998 and (in relation to her testimony on February 18, 1999) "here recently." (8:1367) Not specifically addressing whether there was a sheetrock shortage at any time in the summer or 1998, or in January or February 1999, Thomas states (as of his May 3, 1999 testimony) that he had not been working much for the last "couple of months" because of a sheetrock shortage. (10:1526)

Again I find no inconsistency in the testimony of Rowe and Thomas. As Rowe was assisting Thomas, she would be the first person affected by a sheetrock shortage. Their testimony is consistent with a finding, which I make, that in a sheetrock shortage, Thomas Drywall would first cut back the hours of Rowe rather than having both Thomas and Rowe work the same reduced hours. That is why, I find, Rowe recalls the sheetrock shortage of the summer of 1998, and why Thomas (although initially mentioning 30 to 60 hours) views the summer of 1998 as "pretty wide open." In any event, it is clear that, in estimating an overall average of hours, sheetrock short-

[18] *Hansen Brothers Enterprises,* 313 NLRB 599, 609 (1993); *U.S. Telefactors Corp.,* 300 NLRB 720, 722 (1990); 3 NLRB Casehandling Manual 10542.4 (Sept. 1993).

ages are a definite problem in the business of hanging and finishing drywall. [Normally, Thomas Drywall does only finishing, not hanging. (10:1520–1521, 1557).]

Although Thomas Drywall does not pay any money to Rowe as wages or salary, it is clear that she benefits from the income generated from the joint efforts of Thomas and Rowe. As both assert, they live together, with their children from previous marriages, as a family (RX 64 at internal page 8, item 4), and they put their money into "one pot" (8:1347, 1366, Rowe) which they share equally (10:1524, 1545, Thomas). [RX 64 is a response by Rowe and Thomas to a subpena duces tecum (copy attached to the exhibit) served on Jackie Thomas. Initially I received the exhibit on a limited basis (10:1597–1598). Rowe later, responding to questions by PFC, read and confirmed the cover statement that all the responses contained in the document are true and factual "to the best of" the ability of Rowe and Thomas to so render them. (12:2027–2028). I therefore treat the responses in the exhibit as adopted and incorporated into the testimony of Rowe.] Thomas and Rowe file joint tax returns that include, on the Federal 1040 form, Schedule C, Profit or Loss From Business. (RX 62 at 9 for 1998) Schedule C, for 1998, shows gross receipts of $35,983 and, after expenses, a net profit of $11,455.[19]

It could be argued, although no party has done so, that Thomas and Rowe worked as self-employed partners in their drywall business.[20] Whatever the state law may be respecting their situation, they have treated their income as joint and have filed joint tax returns. Has Rowe, even if considered individually, been self-employed? Under established Board law, self-employment is a common method of mitigating damages, and net earnings from such are counted as interim earnings so as to reduce the gross backpay due. *Regional Import & Export Trucking Co.,* 318 NLRB 816, 817–818 (1995); *Ryder System,* 302 NLRB 608, 610 (1991), enfd. 983 F.2d 705 (6th Cir. 1993); 3 NLRB Casehandling Manual 10541.3 (Sept. 1993).

Although Thomas Drywall has not treated Rowe as an employee (no paychecks, no taxes withheld, and presumably no W-2 forms issued), nor even as an independent contractor to whom a form 1099 issues, that would not keep either the IRS or the NLRB from treating Rowe as an employee of Thomas Drywall. If she were treated as an employee, how would her pay be calculated? On the basis of one half their joint income (net income from the business)? Rowe testified that she helped Thomas so that they (actually the business, Thomas Drywall) would not have to pay someone $15 to $20 per hour. (8:1347) Later Rowe testified that she was not familiar with what employees earned doing her type work for other companies. (8:1365) I find no inconsistency in her two statements. On the latter, she describes her lack of personal knowledge. The former is based on what, I find, she was told by Jackie Thomas concerning the value of her work. [Thomas did not testify, however, that he would have hired a helper, at any hourly rate, had Merri Rowe not been present.]

c. Discussion

Contrary to the Government's position, I view Rowe's work with Thomas Drywall (whether as a self-employed person or as an employee) as interim employment and her share of the net profits as interim earnings. Calling her work there as a preexisting second job is misleading. Although the Thomas Drywall job predated her July 1998 reinstatement at PFC, it began during the initial backpay period. It therefore took the nature of interim earnings—at least before Rowe's July 1998 reinstatement—and her interim earnings there are an offset against the gross backpay. A separate question exists respecting the alleged second backpay period (or resumption of the first). At this point, with my not having reached Rowe's July 1998 separation from PFC, I shall proceed as if backpay is to accrue from the June 1998 date alleged in the ACS.

Before that, however, the next inquiry is to determine the rate of Rowe's interim earnings as of June 5, 1998 and extending at least to her July 23, 1998 (second) departure from PFC. This is in the event that I (or the Board or a circuit court) determine that the second backpay period alleged is valid. First, recall that Rowe began working full time for Thomas Drywall in August 1997. Although at one point (10:1532–1533) the Union suggested that, if PFC continued with its position that Rowe's Thomas Drywall work was interim earnings, then the Charging Party would insist that the Government allege that gross backpay would be due all the way back to July 1995, the Government never moved to amend the ACS in that regard (or even back to August 1997), nor did the Charging Party ever insist that the Government do so. Accordingly, I find that there was no implied consent to litigate a backpay obligation (other than the 2 days or so at Rauch Industries) from, and including, 3Q97 (much less from 3Q95) to June 5, 1998 in 2Q98. Accordingly, by discussing any matters between August 1997 and June 1998, I do not mean to go behind the allegations of the ACS, which alleges that Rowe had removed herself from the labor market, except for a couple of days at Rauch Industries starting July 31, 1996, beginning July 1, 1995 up to the events of June 1998.

As I found earlier, overall Rowe has averaged working some 30 hours a week in her work of sheetrock finishing for Thomas Drywall. The summer of 1998, however, was fairly busy. By factoring in Rowe's credible testimony that, at some point during that summer, there was a sheetrock shortage, and observing that Thomas initially mentioned a range of 30 to 60 hours, I find that Rowe averaged 45 hours a week finishing sheetrock for Thomas Drywall during the summer of 1998. As Thomas reports, during the 2 weeks or so at PFC that July 1998, when Rowe worked the midnight shift at PFC and did sheetrock finishing during the day, she complained "the whole time" to Thomas, as they did their sheetrock finishing, about her lack of sleep. (10:1526–1527) Nevertheless, Rowe "was there" (10:1527) and never failed to work her night shift at PFC in order to finish sheetrock for Thomas Drywall after her PFC shift ended at 7 a.m. (10:1598–1599, Thomas).

[19] On very small jobs of $100 or so, Thomas sometimes is paid in cash. (10:1597) Some of the cash payments may not have been listed on the tax returns. (10:1541, 1543)

[20] Occasionally a customer makes a check payable to Rowe, but that is for convenience for Rowe's cashing the check while Thomas works, not as some accounting that Rowe has a legal right to be named the payee. (10:1546, 1547, Thomas)

If the employee option were the correct choice, then the weekly interim earnings of Rowe from her sheetrock finishing would be 45 hours times $15 per hour (using the low end of the range that Rowe cited) or $675 a week and $8775 for a 13-week quarter. On a yearly basis that would compute to $35,100—an artificially high figure which applies a busy summer schedule to the entire year when weather and sheetrock shortages sometimes knock Rowe completely out of work for an entire week, or more, and reduces the hours of Thomas. Indeed, as we have seen, even with cash payments thrown in, the gross receipts for Thomas Drywall for 1998 were less than $40,000—and that was with both Thomas and Rowe working. Moreover, as previously noted, gross receipts are not the same as net profits. Thus, it is not as if Rowe and Thomas each was working as an employee for employers and each earning a before-tax salary of $20,000 per year.

With that, turn now to the self-employment option. For Tax Year 1998, Thomas and Rowe had a gross income (excluding Rowe's earnings for her 2 weeks at PFC in July 1998) of $35,983, all from Thomas Drywall. From Thomas Drywall's gross receipts, however, expenses of operating the business had to be deducted. Such expenses amounted to $11,483. Expenses subtracted from gross receipts left a net profit (and a net income) for Thomas and Rowe of $11,455. (RX 62) For its calculations (Brief at 102), PFC erroneously uses gross receipts. Only net profits may be counted. *Regional Import & Export Trucking Co.,* 318 NLRB 816, 817–818 (1995); *Ryder System,* 302 NLRB 608, 610 (1991), enfd. 983 F.2d 705 (6th Cir. 1993); 3 NLRB Casehandling Manual 10541.3 (Sept. 1993).

Rowe's one half of the $11,455 would be $5728. Add another $1000 as her half of the $2000 or so (10:1543) received in cash payments in 1998,[21] and Rowe's total one half would be $6728 for the year. That equals a quarterly figure of $1682 and a weekly figure of $129. Using her overall weekly average of 30 hours, and dividing the $129 by such 30 hours, we see that Merri Rowe earned the princely sum of $4.30 per hour for the drywall finishing that she did in 1998. For 1998, the federal minimum wage rate was, and still is, $5.15 per hour.[22] With such figures, it is no wonder that Rowe, as she testified (4:653-655), accepted PFC's offer of reinstatement, and began working the midnight shift there, in order to "supplement" the family's income.

Of the two options, which is the closer to being more accurate or more appropriate for this case? For four reasons, my answer, and finding, is the net-profits choice. First, the hourly-rate option is based on speculation—postulating that, in the absence of Merri Rowe, Thomas would have hired (contrary to his past practice) a helper at $15 per hour. Second, the net-profits approach relies on what actually happened. Third, it is PFC's legal burden to show what the interim earnings were. Fourth, to the extent there is any doubt as to which choice is more proper, that doubt, per Rule 10 above, is resolved against the wrongdoer—PFC.

Because Rowe's earnings from her work at Thomas Drywall are "supplemental," as that term is used in backpay law, they are not counted as an offset against any gross backpay which accrues after July 23, 1998. *Basin Frozen Foods,* 320 NLRB 1072, 1075 (1996), modified on other point 139 F.3d 906 (9th Cir. 1998 (Table); 3 NLRB Casehandling Manual 10542.4 (Sept. 1993). If I later find, in accordance with the Government's allegations, that Rowe was unlawfully fired (constructively) on July 23, 1998, then the gross backpay due through 1998 would be as shown in the backpay table above. Gross backpay for quarters thereafter would have to be computed by NLRB Region 11 inasmuch as the pay rate may have changed for Rowe's skill level at some point in 1999 (and she may have secured a night job yielding interim earnings). In the meantime, however, using the gross backpay figure for 4Q98 to apply to the current quarters of 1999 should result in a close approximation of any gross backpay due (if no interim employment has been secured). That leaves mitigation matters that followed July 23, 1998.

Before addressing the post July 23 mitigation question, I need to return to the matter of credibility. On brief (Brief at 104, 106) PFC argues that Rowe's "grueling routine" during her 10 days or so at PFC during July 1998 reveal her lack of good faith about working for PFC, and demonstrates that she merely has used deceit in an effort to get backpay (while working at her "primary" job with Thomas Drywall). At trial, PFC argued that no human could perform two full-time jobs, especially when one of them, at least during the summer of 1998, required 45 to 60 hours of work [30 to 60, averaging 45 hours, as I found above]. (10:1573) When those physical hours are compared with her admitted statements about her motive for returning to PFC (to bring in a union, 4:585, 651), PFC argued (10:1573), it is clear that Rowe had no "true commitment" to the job at PFC.

Rowe specifically denies (4:653) that her motivation was to organize rather than to have employment. And as already noted above, Rowe also asserts that her motivation in returning was to supplement her family's income, and that her desire to bring in a union had nothing to do with her desire to work at PFC. (10:653–655) As we see later when I reach the unfair labor practice portion of the case, there is no dispute that Rowe, at least until her last shift, performed her duties well. Finally, PFC has one major problem here. The best way for PFC to have argued this point would be to have shown that it did everything it could to keep Rowe on the payroll, but that despite all its efforts, she quit anyhow after only a few weeks. Instead, as we see later, arguing that Rowe quit the morning of July 23 when she punched out and went out to the parking lot to compose herself, it rejected her request to return to work. By taking that action, PFC denied itself the best argument of all—that it tried its best to keep Rowe, but her "grueling" schedule (two full time jobs plus family responsibilities) forced her to choose between the job at PFC and her work at Thomas Drywall, and she chose to quit PFC. At this point, and subject to further

[21] To the extent that Thomas Drywall received something more than the $2000, such extra amount would be offset, in whole or in part, by an allowance for deductible business expenses. Cash payments are properly counted as interim earnings. 3 NLRB Casehandling Manual 10541.2 (Sept. 1993).

[22] See the Department of Labor's website at www.dol.gov/dol/esa/public/youth/mwtour4.htm at 1 and www.dol.gov/dol/esa/public/minwage/press.htm.

discussion during the unfair labor practice portion of this case, I find nothing to indicate that Merri Rowe did not make a good faith effort to perform and keep her job at PFC during July 1998.

Accordingly, the next inquiry is whether PFC proved that Rowe engaged in a willful failure to mitigate her losses following her July 23, 1998 departure from PFC. Keep in mind that, as Rowe held her supplemental job at Thomas Drywall before her July 1998 reinstatement at PFC, Rowe was entitled to keep her Thomas Drywall job and to perform it properly. That is, she was not required to sacrifice her job at Thomas Drywall in order to mitigate the losses she might sustain by her July 23 separation from PFC. Thus, if it develops that her July 23, 1998 separation from PFC was an unlawful (constructive) discharge, as alleged, then PFC simply has to pay the consequences. Those consequences would include the fact that during the daytime hours (when most prospective employers do their interviewing of job applicants), Rowe would be working at her supplemental job (and, as I have found, that averaged 45 hours per week in the summer of 1989), and Rowe would not be required to sacrifice that job to rescue PFC from the consequences of its unlawful action against her. The inquiry here, therefore, will focus on whether PFC demonstrated that Rowe made no reasonably diligent search for other employment consistent with her right to continue working her full time job at Thomas Drywall.

During the period from July 23, 1998 to her testimony on February 18, 1999, Rowe testified, Rowe has looked for third shift or weekend work. (8:1346, 1349) She went to the North Carolina Employment Security Commission regarding a possible job with Bali (apparently a company in Kings Mountain, North Carolina). However, when Rowe arrived at Bali she learned that Bali no longer was accepting applications. By telephone, Rowe spoke with a man at Bowling Green Spinning,[23] but he told her an applicant would need experience. Presumably she did not then apply. She asked two friends (discriminatee Susan Hudson respecting Burger King, and Traci Bowell who owns an environmental waste service company) about jobs. Hudson apparently told Rowe that she was ineligible because Rowe has a relative who is a manager with Burger King. The result of the inquiry with Bowell is not stated, but presumably the response was negative. (8:1350–1351)

Asked how she could be available during her day work at Thomas Drywall to interview with a prospective employer, Rowe answered that, on applying, she would give her cell phone number. Once called, she could arrange for an interview. She has had no job interview since her July 23, 1998 departure from PFC. (8:1360)

PFC argues (Brief at 104) that, to be entitled to consideration for backpay after her July 23 separation from PFC, "Rowe must establish that she was engaged in diligent, good faith efforts to seek additional full time employment substantially equivalent to that which she had with PFC." Of course, by the quoted statement, PFC would do two things, with both being wrong. First, PFC erroneously reverses the burden of proof so as to cast it away from itself and onto Rowe. Second, PFC wrongly implies that Rowe would have to sacrifice her day job with Thomas Drywall to make a "diligent" search for employment equivalent to that which she had "enjoyed" at PFC. As noted above, Rowe was not obliged to sacrifice her preexisting full time (day) job with Thomas Drywall to search for night work somewhere, nor was she obligated to forfeit her day job with Thomas Drywall to find another day job as a replacement for the night job which she had held at PFC.

Respecting PFC's burden to show a willful failure by Rowe, I observe that PFC offered no evidence that there were other employers with night shifts where Rowe could work. Nor did PFC show that, even assuming there were such other places with night shifts, whether if need be they would, either by practice or on request, interview an applicant after 5 p.m. PFC's question (8:1360) to Rowe (with her day job at Thomas Drywall, just how would Rowe interview for an additional job) reflects the difficulty Rowe faced. Aside from engaging in absenteeism from Thomas Drywall,[24] Rowe seemingly has extremely little opportunity to look for a night job. But of course, that is a consequence of her departure from PFC. If that departure proves to have been unlawfully caused, then PFC will have to accept the consequences which flow from that unlawful action.

Rowe's search efforts simply cannot be measured by the usual tests applied to the efforts of someone who is unemployed. Rowe's day job was, and is, full time. It is PFC's burden to show what a reasonably diligent person in Rowe's position of working days could have done, but failed to do, to find a night job to replace the night job at PFC from which she was separated on July 23, 1998. PFC does not carry its burden by demonstrating that, because she was working days, Rowe can show very little in the way of contacts with prospective employers. In this rather unique situation (a situation which, if the General Counsel prevails, is entirely of PFC's own making), PFC's rather common burden is to prove what Rowe failed to do specifically with specific employers. Carping about Rowe's efforts is not a substitute for the positive evidence required to carry the positive burden of showing which employers had night shifts, which ones of those had job vacancies in work that Rowe could do, and, of those, did Rowe reject any job offers. (At the very least, PFC's positive showing would include showing just how someone working a day shift could apply, and in what way was Rowe not reasonably diligent in not applying for such positions).

Because PFC failed to carry its burden to show these specifics, I find that it has failed to prove that Merri Rowe willfully failed to mitigate her losses following her July 23, 1998 separation from PFC. Accordingly (and contingent on a finding of merit to the unfair labor practice allegation), I find that Merri Rowe's backpay is both "ongoing" and, through 1998, is that

[23] Apparently Bowling Green, South Carolina, which, as an atlas shows, is located between Gastonia, North Carolina and Clover, South Carolina.

[24] Jackie Thomas credibly reports that Rowe, while working at PFC during July 1998, did not "lay out" from her PFC job in order to work with him at Thomas Drywall. (10:1598–1599) Presumably PFC would not now ask for Rowe to "lay out" from Thomas Drywall in order to look for a full time night job.

alleged in Appendix J (GCX 77 at 6) of the ACS as set forth in the backpay table copied at the beginning of the discussion concerning the case of Merri Rowe.

As the backpay is "ongoing," the General Counsel and Compliance Officer Pfeffer will have to provide the numbers for the quarters of 1999 and into 2000 whenever the additional compliance work can be done. For me to project those numbers now, based solely on the figures for 4Q98, would involve speculation as to the amount of any pay raises and whether Rowe possibly has been able to find night work to offset her losses in being separated from her night job at PFC on July 23, 1998. Of course, all this assumes a favorable outcome to the Government in the complaint case, to which I now turn.

II.THE COMPLAINT CASE

A. Allegations

Paragraph 7 of the November 4, 1998 amended complaint (complaint), Case 11–CA–18044, alleges that five individuals are "agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act." One of the five alleged is "Randall Hamacher—Supervisor." PFC admits as to the four, but denies as to Hamacher. Statutory supervisors, it is well established, also are statutory agents.[25] The allegation is rather ambiguous. That is, is Hamacher an agent by virtue of his being a supervisor, or is he a statutory agent independent of any supervisory status? Because PFC did not file a motion for a bill of particulars on this point, I consider the matter as tried by implied consent under FRCP 15(b)—that Hamacher's status as an agent under 29 USC 152(13) is alleged, and denied. Complaint paragraph 8(a) alleges that on July 15, 1998 Hamacher coercively interrogated PFC's employees "concerning their activities on behalf of the Union." PFC denies.

Complaint paragraph 9 alleges that about July 1, 1998 PFC "failed and refused" to reinstate Jerry Kennedy. PFC denies. Complaint paragraph 10 alleges the same as to Merri Rowe, and PFC also denies that allegation.

Paragraph 11 alleges that about July 23, 1998 PFC "constructively discharged, and thereafter failed and refused to reinstate" Merri Rowe. PFC denies.

As to paragraphs 9, 10, and 11, complaint paragraph 12 alleges that PFC took the action because of the union and protected concerted activities of the employees. Complaint paragraph 13 alleges that each of the three paragraphs (9, 10, and 11) to be, in effect, an independent violation of Section 8(a)(1) of the Act. Complaint 14 alleges that paragraphs 9 through 12 constitute violations of Section 8(a)(3). PFC denies as to all.

B. PFC's Contention Respecting 1996

As mentioned earlier, PFC argues (Brief at 23) that it was not obligated, after 1996, to reinstate Merri Rowe because Rowe had notice of PFC's 1996 reinstatement offer and declined to accept it. Pointing to certain events concerning a mediation and possible settlement, PFC argues that the copy, of the September 27, 1996 letter offering reinstatement to Rowe, served on attorney Borowski constitutes service on Rowe because Borowski was the Union's lawyer, Borowski was assisting the discriminatees in this case, and therefore Borowski was, in effect, Rowe's agent for service. I reject that argument because there is no evidence that Rowe appointed the Union's lawyer, attorney Borowski, as her agent for service. Moreover, as an offer of reinstatement ordinarily must be delivered to the discriminatee involved, any contention that the discriminatee has designated someone to be his or her agent for service of that offer must rest on very clear evidence. No such evidence exists here.

PFC also argues that the copy to the Union's lawyer serves as notice to Rowe because attorney Borowski not only was the Union's lawyer, but she became the personal attorney for the discriminatees and, particularly here, Merri Rowe. This is evidenced by, it is argued, the fact that at trial attorney Borowski objected and invoked the attorney client privilege whenever PFC asked a discriminatee about communications with attorney Borowski. Thus, it is argued, attorney Borowski cannot have it both ways, precluding inquiry into such communications on the basis of attorney client privilege, then crying foul when PFC argues that the invocation of that privilege proves there is an attorney client relationship between attorney Borowski and Merri Rowe. And if attorney Borowski was Merri Rowe's personal attorney, as well as the Union's lawyer, then notice to attorney Borowski was notice to Rowe and PFC's obligation to reinstate Rowe terminated in October 1996 when she did not respond to the copy served on attorney Borowski. First, even if attorney Borowski was Merri Rowe's personal attorney, it does not follow that a copy of a letter to her would satisfy PFC's obligation to serve the offer of reinstatement on Merri Rowe, and I find that it would not do so here.

Similarly, I find no merit to the argument that, by invoking attorney client privilege, attorney Borowski demonstrated that she was Merri Rowe's personal attorney. The Union was assisting the discriminatees in this case. Attorney Borowski is the Union's lawyer. It is not at all unusual to see, in different situations, a lawyer for a corporation assisting an official, or simply someone such as an engineering employee, of the corporation. But the lawyer is the attorney for the corporation, not for the employee. If there comes a time when their interests conflict, the employee must find his own personal attorney. Similarly, in representing the Union, and assisting the discriminatees, such as Merri Rowe, the discriminatees could consult with the Union's lawyer on legal matters pertaining to this case. That service is part of the Union's service to the discriminatees in this case. It does not make attorney Borowski the personal attorney Merri Rowe or for any of the other discriminatees. I so find.

On a related point, a question concerning waiver arose. (It actually arose in relation to a letter sent by Mantecon to attorney Borowski with a copy to NLRB Region 11, but I address it here briefly.) If a discriminatee consulted with attorney Borowski in the presence of the General Counsel, would that constitute waiver of the attorney client privilege? The answer is no because, as pointed out by attorney Borowski (10:1716–1719), the Union relies on the concept of common interest or joint prosecution of their case. Under that concept, parties with a common interest in a proceeding may share a consultation

[25] *Excel DPM of Arkansas,* 324 NLRB 880, 880 fn. 1 (1997).

without waiving the attorney client privilege. After discussion, (12:2176–2206), I so ruled (12:2206–2208). The concept is discussed in *In Re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 922 (and in the dissent at 939–940) (8th Cir. 1997), and in R. W. Higgason, *The Attorney-Client Privilege in Joint Defense and Common Interest Cases,* 34 The Houston Lawyer 20 (No. 1, July-August 1996).

Finally, regardless of the foregoing, in fact PFC made another offer of reinstatement to Merri Rowe in June 1998. That offer was not conditioned on the outcome of its argument that PFC's obligation expired in 1996. In short, the June 1998 offer mooted any argument which PFC had about 1996.

Accordingly, I reject PFC's argument that its obligation to offer reinstatement terminated in October 1996.

C. Introduction

Merri Rowe testified that she received two letters from PFC offering her reinstatement. (4:570-571) The first letter (GCX 6) is dated June 5, 1998. Dated 3 days later, June 8, the second letter (GCX 7), has a slightly different address. The identical text offers Rowe immediate reinstatement to her former position or, if such is no longer available, to a substantially equivalent position. The second and concluding paragraph requests that Rowe call "Terri Jones at (803) 222–2141 ext. 8249 on or before June 22, 1998 if you intend to accept this offer, and she will make the appropriate arrangements for your return." Both letters were signed over the typed name of "Donald Burgoon," with a copy shown to [Compliance Officer] "Earl Pfeffer."

Rowe accepted the offer by her letter dated June 8 (GCX 9), which she mailed on June 10 (GCX 10; 4:573–574). She also included her telephone number in the event PFC needed to contact her. Rowe showed copies to two Regional Office personnel (Pfeffer and Howard Neidig) plus (Attorney) Marcia Borowski. The return receipt reflects delivery the same date of June 10, 1998. (GCX 10)

Not hearing from Terri Jones, who worked in PFC's Personnel office, Rowe telephoned Jones the morning of June 22. (4:575) Rowe told Jones that she was confirming her acceptance. Jones said she would have to contact Rowe later. The next morning Jones called Rowe and informed her that it would be a couple of days before Jones could ascertain whether there would be a position available for her at that time. (4:576)

Thereafter hearing no word from Jones, on June 29 Rowe began telephoning NLRB personnel. On June 30 there was a message on her telephone answering machine from Controller Thomas Davis instructing Rowe to come to PFC the following day and fill out papers so that she could return to work. She then called Jerry Kennedy to learn whether he had received any response from PFC. Rowe then arranged for a conference call with her, Kennedy, and Davis that same day. In the conference call, Rowe asked Davis for some details of what they needed to do. Davis said that PFC was open from 8 a.m. to 5 p.m., and to speak to "someone" (Davis gave no name) in Personnel. (4:577–578)

The following day, July 1, 1998, Rowe drove the few miles to York, South Carolina, where she picked up Kennedy at an address on California, a street in York. (Rowe understood that Kennedy had no driver's license.) They arrived at PFC's plant between 11 a.m. and 11:20 a.m. The receptionist directed them to the Personnel Office where they spoke with Personnel Administrator Judy Brown. (4:578–579, 638–639, 641) Although mostly immaterial, Rowe's fiancé (Jackie Thomas) may have driven each leg of the trip, for, as Rowe explains (4:584, 588), he drove them to the plant.

Brown gave Rowe and Kennedy a batch of forms to complete, and asked for their Social Security cards and a photo identification. Rowe had a card with her Social Security number and she had a photo identification, but Kennedy had neither. (4:579–580) PFC's Thomas G. Davis, then the Controller and now PFC's Treasurer, knew that Rowe and Kennedy were coming that day, but testimonially does not recall who arranged the date and time. (12:2092, 2098) In any event, Davis asserts that the situation was rather unique in that Kennedy and Rowe had been gone for about 4 years. Because of that lengthy absence, Davis reports, PFC required the two to complete PFC's full "standard packet of information." (12:2093) This was because, as Davis asserts (12:2095), "We wanted to know what they had been doing in that four year period." The list of forms in the packet, or package, reads essentially like a list for new employees—including an application, emergency-contact information form, an I-9 form, employment agreement, statement of company policies for hourly employees, and an employee handbook. Moreover, Moreover, Davis told the personnel administrator, Judy Brown, to advise Kennedy and Rowe that they were to take a drug test. (12:2037–2039, 2093–2095, Davis) Davis concedes that all these matters are items that are required of new employees, and he admits that a new personnel file was created for Kennedy rather than adding to the one that existed from 1994. (12:2065).

Rowe and Kennedy went to the break room where they completed the forms. While they were there, Kennedy left to visit the men's restroom. On Kennedy's return they wen to Personnel and turned in their papers to Brown. Returning Rowe's card with her Social Security number and Rowe's driver's license (the photo identification), Brown to them that they had to take a drug test. The time was about 12 noon. Saying that she had already had put times on the papers for the test, and that Kennedy's was the earlier time. Kennedy informed Brown that he had just visited the men's room and that he would be unable to give a urine sample at that time. He asked if it would be permissible for him to submit a sample the next day when he returned with his Social Security card and his photo identification. Brown said yes, and that she would change the time on the papers. Rowe was able to provide a sample, and did so. Brown told them that PFC President Burgoon wanted to speak with them, but that he was in a meeting at the moment. Rowe and Kennedy stepped to a designated smoking area to wait, and Kennedy drank one of the free soft drinks available in the area, plus a bottle of water. (4:579–582, 587, 641–644)

While Rowe and Kennedy were in the break area, Supervisor Wiley came and spoke with them. Wiley told them that Burgoon was unavailable (either in a meeting or at lunch) and that they should make an appointment with the receptionist to return the following morning. Rowe said that was fine but she needed to make a call. As her fiancé had driven them there, Rowe had to call him to come get them. After the call she and Kennedy

returned to the lobby. The time was almost 2 p.m. The receptionist then told them that Burgoon had a quick meeting and could they wait because he wanted to speak with them. Rowe said yes. In less than 5 minutes Burgoon emerged and asked Rowe to come in (to an office, apparently). Rowe asked in Kennedy also could go and Burgoon said no, that he preferred to speak with them one at a time. Rowe did not object. (4:582–585, 645)

Rowe then met with Burgoon, Controller Davis, and a third man whose name she does not recall. [Davis identifies the person as Ramsey. (11:1892–1893; 12:2034–2035) Although Rowe thought the meeting was in the office of Davis, Davis (12:1240) and Burgoon (13:2221, 2227) explain that it was in Ramsey's office.] Burgoon shook Rowe's hand and said he was glad to have her back. Looking at Burgoon, Rowe said, "I bet you are." "We are," he replied. "Well, you know what I'm here for." When Burgoon said he did not, Rowe said, "To get a union in here." She asked if Burgoon had the same position on the union that he had when she left. Burgoon said he would not answer that question. Rowe said she would take his answer to mean that he still did not want the Union in there. (4:585, 646–647, 651, Rowe)

Rowe asked Burgoon about the benefits that she and Kennedy would receive on returning to work. Burgoon replied that the benefits would be as if they had continued working. She asked about their pay. Burgoon said it would be entry level, that entry level had just received a raise, and that with the raise she could make as much as $9 an hour. Had she been there all that time, Rowe replied, she would be at least a Level 5 as of that time. She asked when she and Kennedy would return to work. Burgoon said that it would be sometime between then and July 20, and that someone from the plant would call them. Asked if she had any further questions, Rowe said no. Burgoon then gave her an "additional" application because, he said, he did not have one for the file. Rowe completed it. [As Rowe asserts (4:586) that she assumed from this that Burgoon did not have her old application, the impression is given that she did not receive one from Personnel Administrator Brown earlier that day. The record is unclear as to this.] She returned to the lobby, and Kennedy went in for his interview. Her meeting with the three executives had lasted less than 10 minutes.

Because Rowe's children had to be picked up from summer camp at 2:30 that afternoon, Rowe called a cab to come get her and Kennedy. Earlier she telephoned her fiance and asked him to be sure and get the children if she was not ready in time for him to get her. In fact, earlier Rowe and Kennedy had waited outside for (Jackie Thomas) before the receptionist called them back in to meet with Burgoon. The cab arrived shortly, just as Kennedy emerged from his 5-minute meeting, and they walked outside to the cab. (4:585–588, 646–651; 5:723, Rowe)

During the June 30 conference call, Davis never said that Rowe and Kennedy should bring their Social Security cards and photo identifications, or that they would be give drug tests. Before July 1, no one with PFC told them that such items would be needed when they came in. Other than hearing Personnel Administrator Brown tell Kennedy that he could take his drug test the next day, Rowe heard nothing said to Kennedy that he had to take a drug test the next day, or by any date. (4:588–590, Rowe)

When Rowe and Kennedy left PFC on July 1, they went to Rowe's home. There they made a speaker-phone call to Howard Neidig at NLRB Region 11 and reported what had transpired. Around July 6 or 7 Neidig called Rowe and informed her that PFC said she could return to work on July 13. On July 12, 1998, Rowe reported for work for the third shift that began that night at 11 p.m. This was the first shift to start operating after the plant had a shutdown since July 4. Rowe was assigned to the team working on the powder coater under Team Leader Randall Hamacher and Shift Supervisor Dennis Wayne Hyder. (4:590, 594–595; 5:669, Rowe)

D. Jerry Kennedy

1. The interviews

So far as Davis can recall, it was unprecedented for such high company officials, including President Burgoon, to meet with an hourly employee when the new employee is "brought on board." (12:2035) Davis asserts that the purpose of the brief meeting (with Kennedy) was to discuss "expectations on both sides." (11:1893; 12:2035–2036) Davis reports that Burgoon welcomed Kennedy back to PFC, told him he would be treated the same as any other employee, informed him of where he would be working, and explained that his pay rate would be at (introductory) Level 1 (the same rate as new employees). Davis does not recall if Burgoon gave Kennedy a date to report for work (12:2043–2044), but acknowledges that his scheduled reporting date was about July 13, 1998 (12:2043–2044).

According to Burgoon, after welcoming Kennedy back, Burgoon asked if his "physical" had been completed all right, and whether Kennedy had any problems or questions or whether there was anything Burgoon should be concerned about. Kennedy said that everything was fine and that he had no questions. (13:2222, 2267) Other than the welcome and the reference to whether Kennedy had any questions, I do not credit Burgoon respecting this portion. Instead, I credit the account given by Davis. Burgoon seemed to me to be attempting to graft the drug test onto his welcome. The description by Davis (4:585, 651) is a more natural fit, and it also is consistent with Rowe's description of what Burgoon said to her, although she evidently said more (as will be summarized later) in her interview than Kennedy did in his.

According to Davis, as the brief meeting with Kennedy was about to adjourn, Davis told Kennedy that he needed to submit a urine sample for the drug screen before he left. Kennedy said he could not then provide a sample, and that his ride [Rowe] was waiting for him and that he had to leave. After a brief discussion, Burgoon told Kennedy that he had to return the next day and submit the sample. Kennedy said he would do so because he had to return anyway with some identification papers. Thirty minutes later Davis observed Kennedy and Rowe standing outside at the edge of the property. Kennedy did not return or telephone the next day or on July 3, 1998. (11:1893–1897) Davis never thereafter heard from Kennedy. (11:1903)

After cross-examination began the following day, Davis changed his story somewhat, now reporting that he told Burgoon that Kennedy had not submitted a urine sample.

(12:2045) This conforms to Burgoon's version which I describe in a moment. At some point on July 1, after Kennedy had left, Davis told Personnel Administrator Judy Brown that Kennedy would be returning the next day for the drug screen. (12:2047-2048) Davis concedes that Kennedy never said he was refusing to take a drug screen. (12:2053)

Burgoon asserts that, in the July 1 meeting, he looked Kennedy right in the eye and told him he had to take the drug screen. When Kennedy said he had to return the next day with his Social Security card or number, Burgoon told him he could give the sample the next day, "But you have to come back tomorrow morning and take it or we won't be able to employ you. It will be over." Kennedy said he would do so. Later Burgoon learned, or observed, that a taxi arrived to get Rowe and Kennedy. Kennedy did not return the next day to submit a sample. (13:2222–2224, 2267–2270) Burgoon added the quoted statements on cross examination. After further cross examination, he abandons any idea of a quote, and simply asserts that he told Kennedy he had to return the next morning and submit to a drug test, and Kennedy said he would do so. As with my earlier finding, here again Burgoon tries to "gild the lily"—that is, to add words not said in order to embrace his current version of the event. This is not to say that the embellishment is always inconsistent with the version that occurred at the event itself. It is just that Burgoon shoots himself in the foot by attempting to add words so as to conform his past remarks to fit what, perhaps, he now wishes he had said so that there could be no question of what he had intended to say. By comparison, Davis seems to misremember [26] some events.

As to Burgoon's testimony, I find that he spoke as he describes in the first example, except that he did not add the embellishment "... or we won't be able to employ you. It will be over."

Late the following day, July 2, Davis discussed with Burgoon the fact that Kennedy had not come in as promised. Burgoon said to give Kennedy one more day. (12:2050) Davis, reportedly in accordance with his standard custom, drafted a discharge notice respecting Kennedy. [Davis's account as to when he drafted the discharge paper is unclear as to whether he drafted it before or after talking with Burgoon on July 2. (11:1897; 12:2049).]. After further discussion the following day, July 3, between Davis and Burgoon, Burgoon decided that Kennedy should be discharged. The discharge notice (RX 77), prepared by Davis that July 2 (11:1897; 12:2047), was placed in Kennedy's personnel file. (11:1897–1900; 12:2049–2052, Davis; 13:2224–2225, 2273–2277, Burgoon) Davis acknowledges that no one from PFC tried to telephone Kennedy (before the discharge), but that, under prior practice, such an effort would be made only when there was a question whether a job applicant knew he was to come in to submit a sample for a drug screen. There was no such question respecting Kennedy. (12:2052)

The termination paper, which Davis drafted for Kennedy, actually is a typed form of one sentence (in all capitals) on three lines with a handwritten note below the signature of Davis. In the underlined space for the person's name, Kennedy's name is hand printed. Similarly, in the spaces for the date, the forward slashes are typed or preprinted. The document, in blank, would have all the appearance of a preprinted form maintained in bulk as needed for frequent use. The paper reads (RX 77):

> Jerry Kennedy WAS TERMINATED FROM Performance Friction Corporation on 7 /2 / 98 FOR FAILING TO COMPLY WITH THE company's SUBSTANCE ABUSE POLICY.
>
> /s/ Thomas G. Davis 7/2/98

Davis signed and dated the paper. (11:1897–1898) Davis (11:1898–1899) contemporaneously added his handwritten note, as follows:

> Mr. Kennedy came in to fill out employee paperwork on 7/1/98. Despite being here for approximately 3½ hours he claimed he couldn't go to the bathroom in order to give a urine sample for a drug test. He said his ride was coming and he had to leave, but he would come back the next day (7/2) to give his sample. He never showed up or called with a reason why he didn't come back.

Davis concedes that the note does not include any reference to Burgoon's asserted instruction to Kennedy that he had to return the following day (July 2) to give a urine sample for a drug screen. Asked why it does not, Davis states that it is because Kennedy volunteered that he was coming back the next day, and he was specifically told to do so. (12:2063–2065)

On the same day, July 2, that Davis drafted the termination paper (RX 77) for Kennedy, he also drafted such a paper (RX 78) for Margaret Matthews, a new applicant. (11:1901–1902) The initial preprinted paragraph is (aside from the name) identical to that on Kennedy's paper. The handwritten note which Davis added to this one reads (11:1902):

> Margaret came in to fill out paperwork on 7/1/98. She was to come back that afternoon for her pre-employment drug test. She did not come in. The next day she was called by [P]ersonnel to come in that day (7/2). She could not come in again.

There is some ambiguity respecting the reminder call to Matthews. Was there a question whether she was aware of the obligation to return? If so, the call fits under the past practice which Davis describes. If there was no question, then the reminder call went beyond that past practice. This ambiguity was not clarified by the parties. Although the Government sees disparity here (Brief at 66), any such disparity is not personally linked to Davis or Burgoon, particularly the latter. Moreover, as Davis explained, as pointed out by PFC (Reply Brief at 7), no call was made respecting Kennedy because he had been told specifically to return the following day and had agreed to do so. I find no disparity respecting Kennedy's case.

Turn now to the substance abuse policy cited in Kennedy's discharge memo. A copy of PFC's drug policy is in evidence (RX 51). Davis asserts that the policy has been in effect since September 1, 1991. (7:971; 11:1889) In that written policy, a distinction is made between new applicants and "reinstate-

[26] "'Misremember' means 'to remember incorrectly,' not 'to forget'." B. Garner, *A Dictionary of Modern American Usage 433* (Oxford University Press, 1998)

ments." Davis explains that the latter group includes employees who miss work for an extended period of time, 6 weeks or more per the policy (RX 51 at 7, Article III.C. Reinstatement, 2). (7:963–964; 11:1891) [The number system appears to be faulty because the "2" and "3" should be enclosed in parentheses but are not. Even so. they appear to be correctly placed in the section for "Reinstatement" under Article III.C, "Employees are subject to drug testifying as follows." The subheadings under III.C, such as "Reinstatement," are not numbered.]

That policy, as Davis reports (7:963–964, 971; 12:2124) requires a negative result before the employee can return to work. Thus, the written policy provides (RX 51 at 7, Article III.C, Reinstatement, 3):

> 3.Failure to provide a negative reinstatement test result will result in termination from employment.

Additionally, the policy also provides (RX 51 at 7, Article III. E):

> E. Refusal to Test: Refusal by an employee to submit to a drug or alcohol test [alcohol is covered by III.D], when requested to do so under the terms of this policy, will result in termination of employment.

By contrast to the provisions for reinstatees, new hires are in a separate category (Rule III.B; RX 51 at 4) and may be tested within the first 5 days of employment or, if there is an "immediate need," "as soon as is practical." (RX 51 at 4; 12:2066–2067, 2073, Davis) Asked why PFC's policy treats the two groups differently, Davis rambles but eventually appears to suggest that the reason is to facilitate the testing process when large numbers of employees are being hired, as in the early summer of 1998. (12:2072–2073, 2097) For example, in May 1998 PFC hired 61 new employees and in June 62 new employees. (GCX 17 at 2-4; 4:631–633) The stipulated list (GCX 21; no agreement that list complete, and list corrected at 7:949–950, 954) of drug tests administered in June and July, mostly July 1, there were 20 employees tested on June 3 and 38 tested on July 1. This supports what Davis asserts (12:2073) about the collection of the samples from large numbers of new hires being postponed so that it can be done by groups for PFC's administrative convenience. [Rowe is named on the stipulated list, GCX 21 at 2, as one of those tested on July 1, but Davis asserts that all others on the list were new hires. (12:2071).]

Despite the foregoing reference to the evidence about the numbers of employees PFC hired in June 1998, the record does not disclose the nature of those jobs or whether the jobs would have been substantially equivalent to the jobs which Kennedy and Rowe held before their discharges, much less the same jobs. Beginning July 1, 1996, Davis testified (12:2107, 2109), referring to the chart (Exhibit 3) on pay levels and types of jobs (A and B) for hourly employees attached to PFC's February 8, 1999 amended answer (GCX 19d), PFC divided its production jobs into type A and type B ("A-Scale" and "B-Scale). By late June of 1998, as that Exhibit 3 shows, the "A" group, or scale, consisted of only two job classifications: Mold Line and Fork Lift. By contrast, the "B" group included a dozen or more job classifications. Although Davis testified that the "A" group received a higher pay rate (12:2107, 2110), he evidently was referring to pay levels 1 and 2, for after that (as Exhibit 3 reflects), the higher pay levels are paid equally as between "A" and "B." Although asked by the Union about the types of jobs, "A" or "B," that employees were hired for during June 1998, Davis was unable to provide a clear answer other than at some point before July 1 PFC "stopped starting people for Type B jobs and made the decision that we would not start any more Type B jobs until after the 4th of July shutdown." (12:2098) Kennedy and Rowe, Davis testified (12:2097), were being brought back into Type B jobs. Apparently neither the Government nor the Charging Party subpenaed the records that would establish the types of jobs the 62 June new hires were placed in when hired.

Davis testified (11:1890–1892) that Kennedy and Rowe were considered under the Reinstatement section of PFC's drug policy. The drug screens they were to take, Davis testified, were to be reinstatement tests. (12:2071) If that is so, there was a miscommunication somewhere, for Rowe was not so tested. Her drug test result report ("Negative") is marked (GCX 35) by the testing service as a "Pre-Employment" test. The testing service, Davis acknowledges (7:966–967), puts the reason there based on what PFC says is the purpose they are referring the person for testing. The parties did not develop this point. As the purpose announced for Rowe could easily have been an internal miscommunication at PFC, I do not find that it shows that Davis intended that Rowe be given a preemployment test rather than a reinstatement test. Indeed, so far as the test itself is concerned, there is no evidence that the one differs from the other. The difference lies in the fact that PFC's drug policy treats differently the two classes of persons—new hires and existing employees.

Asked to name even one person who, before Kennedy and Rowe had been told to take a drug test under the "Reinstatement" section, Davis could not do so. That is because, Davis asserts, reinstatements (an absence of 6 weeks or more) are rare at PFC. (12:2074–2075) No evidence rebuts this testimony by Davis. Perhaps a major reason that Davis and PFC could offer no names of other reinstatees is that, as Davis concedes (12:2074), PFC has no "flag" in its system to signal the personnel department that a person is a reinstatee who must test negative for drugs before he can return to the payroll. Under its current and past procedure, PFC simply relies on the supervisor and the alertness of employees in Personnel to raise a signal that the person returning to the payroll is a reinstatee. (12:2074–2075) Initially Davis, possibly in a Freudian slip, said that it was at the "discretion" of the supervisor and Personnel "as to proper notification." (12:2074) He hedged that to say there is no "flag" in the system.

One would think that the return of anyone to the payroll would raise its own "flag" such that a determination would have to be made whether the person was being reinstated and a drug screen was in order. Even that "flag," however, would require a basic instruction for the clerks in Personnel. In any event, the record shows no examples by which PFC has disregarded its drug policy in the past by not requiring other reinstatees (absent more than 6 weeks) to test negative before they return to the payroll. So far as the record shows, PFC has adhered to the procedures specified for the separate categories of

employees as described in its written drug policy. Accordingly, I find that evidence pertaining to new hires is not relevant to the reinstatement tests specified for employees being reinstated from an absence of at least 6 weeks.

Once someone is directed to take a drug screen, Davis testified, it is important that he do so as soon as possible. (12:2072) New hires are treated differently under the policy, unless they are specifically asked. (12:2072–2073, Davis) As Burgoon explains, if the employee fails to comply once asked to take a drug screen, then the integrity of PFC's drug policy has been compromised because certain drugs can pass through a person's system quickly. (13:2224–2225, 2275)

On brief (Brief at 9–10), PFC asserts that Kennedy was terminated in accordance with Article III.E, and cites the testimony of Davis at 11:1897. At that cite, Davis does not mention the rule. In answer to the question of why Kennedy was terminated, Davis answers (11:1897, emphasis added), "For refusal to take a drug test."

At one or more points, Davis appears to merge the "Failure" concept under III.C, "Reinstatement," 3, of the drug policy with the "Refusal" provision of III.E. On brief PFC also argues that Kennedy "refused" to provide a urine sample. (Brief at 14; Reply Brief at 4) Such merging may be immaterial for our case, but the concepts are different. If "refused" means a vocalized "No," then there was no refusal because, as Davis acknowledges (12:2053), Kennedy never said that he was refusing to take the drug screen.

2. Discussion as to reinstatement

The Government contends (Reply Brief at 4-5) that, under cited case law,[27] I need not reach the 1998 discharges of Kennedy and Rowe (in the complaint case) because PFC still owes the two valid offers of reinstatement. This is so, the Government argues, because the reinstatements made or attempted in 1998, as to Kennedy and Rowe, were not valid. For the following reasons, I agree that the attempted reinstatements were not valid, but I see no way to avoid addressing the complaint's allegations. [I note that the General Counsel does not move to withdraw the complaint or to suggest that I dismiss it as being moot.]

First, Kennedy and Rowe were treated as new employees rather than as employees being reinstated by operation of law. [This is a broader concept than the limited issue concerning the requirement of a drug screen for reinstatees.] The new employment applications (indeed, the full new employee "packet" of documents), the requirement to produce Social Security numbers and photo identifications (when the existing records would show the former, and supervisors could identify Kennedy and Rowe), serve to demonstrate this. Second, the return at entry level pay rather than at their projected pay levels further proves the Government's point.. In support, the General Counsel cites *Alaska Pulp Corp.,* 326 NLRB 522 (1998) (invalid offers because Respondent's merit rankings order of reinstatement based on the unlawful assumption that economic strikers would be returning at entry level); and *Operating Engineers Local 68 (Ogden Allied Maintenance Corp.),* 326 NLRB 1 (1998) (offer invalid because not given promotion that seniority would have earned).

Arguing similarly, the Union (Brief at 31–32) cites several cases, including *Domsey Trading Corp.* 310 NLRB 777, 777 fn. 3, 795, 798 (1993) (requiring applications, Social Security cards, and "green" cards for the INS), enfd. 16 F.3d 517 (2d Cir. 1994); and *Frank Ivaldi,* 310 NLRB 357, 373–374 (1993) (new applications and required interviews), enfd. 48 F.3d 444, 452–453 (9th Cir. 1995).

PFC counters by citing cases such as *Coca-Cola Co. of Memphis,* 269 NLRB 1101 (1984) (in context of case, new applications not improper for returning unfair labor practice strikers); and *Oregon Steel Mills,* 300 NLRB 817, 825 (1990) (screening, including physical examinations and drug tests, for returning economic strikers gone over 6 months shown to be due, under circumstances, to legitimate and substantial business justification and therefore not unlawful), enfd. 47 F.3d 1536 (9th Cir. 1995).

At a fork in the decisional road, the cases take diverging paths. It appears that directional signs are posted at the fork. The arrow on one sign (sign "A," here) follows a legend reading, "This way if the circumstances in your case show that the employer had a good business reason for its conditions and apparently was not attempting to treat those being reinstated as new employees." Examples of cases taking this path are *Coca-Cola of Memphis* and *Oregon Steel Mills*, just cited.

The arrow pointing toward the other path follows a directional inscription reading (sign "B," here), "This way if the circumstances in your case show that the employer failed to prove a legitimate and substantial justification for the conditions imposed, and appeared to be treating those being reinstated as new employees." Among the cases taking this path are those cited by the Government and the Union, including those mentioned above.

The circumstances here, I find, indicate that his decision should follow the arrow on sign "B." Among the circumstances so indicating are these. First, PFC reinstated Kennedy and Rowe at "entry Level" rather than at a higher level consistent with what their continued seniority would have gained for them. I need not find that the level should be that shown for them under the gross backpay formula, that being at pay level 6, or $11.69 per hour. A level 4, and certainly a level 5, at least would have indicated a probable good faith attempt by PFC to place the two properly. But a level 1 shows no good faith at all.

Second, not only were Kennedy and Rowe treated essentially as new employees, but Controller Davis, in his conference call with Kennedy and Rowe, did not give Kennedy and Rowe the courtesy of advance notice that when they reported they would be expected to complete the "standard packet" for new employees, and that they therefore should have their Social Security cards and a photo identification, such as a driver's license. The closest Treasurer Davis came to an explanation, in his testimony (no explanation was given Kennedy and Rowe at the time), was that, in view of the long absence of Kennedy and Rowe, "We wanted to know what they had been doing in that 4 year period." (12:2095) That reason amounts to nothing more than curiosity, and quite likely a desire to ascertain what in-

[27] *A.P.R.A Fuel Oil Buyers Group***,** 324 NLRB 630, 630-632 (1997), enfd. mem. 159 F.3d 1345 (2d Cir. 1998) (table).

terim employment they would show so that PFC could estimate its backpay liability. In short, no valid reason was shown.

PFC did not need the Social Security cards and photo identifications to identify Kennedy and Rowe. Rowe was a prominent witness in the underlying unfair labor practice trial, as reflected in Judge McLeod's decision, 319 NLRB 859 at 866, 870, and Judge McLeod there notes, id. at 871, that Kennedy was "one of the three main union activists named by Burgoon." There is no evidence that the supervisors which Kennedy and Rowe had in 1994 were not available to identify the two on July 1, 1998. Even if they were, Burgoon and Davis could have done so (and neither testified here that he could not do so). Moreover, as Kennedy and Rowe were returning employees, they did not have to fill out I-9 forms or produce any documents to comply with INS regulations. As Judge Benjamin Schlesinger wrote in *Domsey Trading Corp.,* 310 NLRB 777 at 797, even if they had been aliens, INS regulations calling for a reverification of an alien employee's employment eligibility would not apply to them as participants in a "labor dispute." Certainly Kennedy and Rowe had been involved in a "labor dispute."

Respecting the new applications, PFC presumably had the existing ones dating from 1993 or 1994. Indeed, PFC had Kennedy's September 1993 application because it offered a copy (RX 20) in evidence. (3:365; 11:1940) A simple form to verify the current address would have sufficed, along with a current IRS W-4 form for any claimed exemptions, updated information on whom to call in an emergency, and possibly updated beneficiaries for any insurance coverage. To the extent that PFC argues that information it learned after July 1998 concerning the purported criminal record of Kennedy (RX 65), showing different Social Security numbers, justified the action PFC took on July 1, 1998, I reject that argument because PFC could only act on July 1 based on the facts before it at that time.

Third, unlike one of the cases PFC relies on, *Coca-Cola Co. of Memphis,* 269 NLRB 1101, 1110 (1984), where the employer assured the returning unfair labor practice strikers that they were not being treated as new employees, here PFC did not do that. (To a question by Rowe, Burgoon did say that they were being reinstated as if they had been there continually. But that was in the subsequent interview, not when they were given all the forms to complete by Personnel Administrator Brown.)

Fourth, the interview here was calculated to be intimidating. Rather than Burgoon's walking into the personnel office, or the break room, and there welcoming both Kennedy and Rowe in a nonmanagerial setting, Burgoon required that each appear separately in a manager's office to face him, Controller Davis, and Human Resources Director Ramsey. As Davis concedes, to have an hourly employee meet with Burgoon and two other executives of the company was unprecedented. (12:2035–2036) That Rowe was not intimidated by the meeting is no more the test for coercion than would be considering whether an employee feels intimidated by a coercive interrogation.

Fifth, Kennedy and Rowe were not told why they had to submit to a drug screen. No explanation was given that they were not being asked as new employees, but as employees returning under the "Reinstatement" section of PFC's written drug policy. In fact, PFC advised the testing service that Rowe's test (RX 35) was for the purpose of "pre-employment." (7:966–967, Davis)

Under the ACS, I therefore find that PFC's June 5, 1998 offer of reinstatement to Jerry Kennedy was not made in good faith (ACS, par. 3e), nor was the June 5, 1998 offer to Merri Rowe (ACS, par. 5d). Accordingly, and as alleged in the ACS, PFC's backpay liability continues on and after June 5, 1998 as to both Jerry Kennedy and Merri Rowe. Whether that liability continues indefinitely, as the ACS suggests, depends on the outcome of the allegations in the complaint case.

Respecting Jerry Kennedy, the General Counsel (Brief at 66) argues that PFC's reliance on its Substance Abuse Policy is pretextual because in all other respects it treated Kennedy as a newly hired employee. Certainly this is a close case. Thus, although the General Counsel was unable to show any disparity examples of PFC's reinstating employees, absent 6 weeks or longer, without the requirement of an immediate (or any) drug screen, Treasurer Davis seems to suggest that the supervisors have some discretion on whether they send such reinstatees for a drug screen. With that ambiguity in the record, I find no merit to the General Counsel's argument of pretext, and I therefore shall dismiss complaint paragraph 9 which alleges, in conjunction with complaint paragraph 12, that PFC was motivated by antiunion considerations when it failed and refused to reinstate Jerry Kennedy on July 1, 1998. Accordingly, I find that PFC's backpay liability to Jerry Kennedy ended when PFC discharged him effective July 2, 1998. [Actually, backpay would have ended at the close of 2Q98 because Kennedy would not have done any work the first 2 or 3 days in July 1998 in any event.] Turn now to the case of Merri Rowe.

E. Merri Rowe

1. Failure to reinstate on July 1, 1998

Although Kennedy never took his drug test, Merri Rowe did, and passed. She was not reinstated until July 12, 1998. Now it happens that this was the first production shift following the July 4 holiday shutdown. Compliance Officer Pfeffer testified that Rowe declined to work on a cleaning crew during the shutdown (3:451–453), and the Government offered no rebuttal to the testimony of Treasurer Davis that staffing for all Type B jobs was postponed until after the July 4 shutdown. As noted earlier, neither the Government nor the Union showed that any of the jobs filled during June 1998 were Type B jobs. The parties stipulated (4:574) to a June 28, 1998 want-ad by PFC of "Full-Time Jobs," but the closest description there of any specific job classification is for training in "Forklift Operation." As already noted, "Fork Lift" was then a Type A job (GCX 19d Exhibit 3) and none of the other training areas listed in the ad bears any similarity to Type B jobs. In any event, anyone interviewing on or after June 28 for Type B jobs would not have been put on the payroll before July 12, 1998. As no discrimination has been shown, I shall dismiss complaint paragraph 10.

2. Introduction to Merri Rowe's July 13, 1998 departure

As I covered earlier, PFC is committed to producing a quality product. Burgoon testified that the 300 or so production employees are organized by work processes and work cells. The employees function, Burgoon continues, as teams working

to produce a quality product at optimum productivity and with the continuing goal of ever improving quality. (13:2229) In March 1997, Burgoon testified (13:2233), PFC was certified (RX 87) as a member of the QS-9000 system. As the requirements book states, in the 1994 foreword to the first edition (RX 88, 3rd edition, at iv), Quality Systems Requirements QS-9000 was developed by a task force from Chrysler, Ford, and General Motors. (13:2231) The 1998 Third Edition copy in evidence (RX 88) has 142 numbered pages (although seven pages at the end are left blank for notes). Burgoon testified that, to meet the program's requirements, PFC has to have a "culture" of quality. (13:2233, 2241) Any company desiring to be a supplier to the automotive industry has to have a QS-9000 certification and operate under that philosophy. (13:2248, Burgoon)

Under the QS-9000 quality program, each employee, including Rowe Burgoon testified (13:2239, 2298), is given a little 3.5 x 4 inch card (RX 91) containing the points of PFC's "Quality Policy." Employees have the option of either carrying the card on their person or being able to recite the contents. (13:2239–2240)

Aside from the QS-9000 program, when Rowe was processed for "reinstatement" on July 1, 1998, she was given, and signed acknowledging receipt (RX 30), a copy (RX 3) of the February 1998 version of PFC's Employee Handbook. (5:720-722) In the section there for "Commitment To Quality," the last four paragraphs read (RX 3 at 6; 13:2229–2230):

> Zero defects is our goal on the production floor. That is ZERO DEFECTS. Employees are also required to be inspectors. Every employee is held responsible for the inspection of his/her own work, and is also expected to be aware of defects that may arise at previous operations.
>
> ASK QUESTIONS: Each employee has the right to be properly instructed on how to do the job and will be given the tools and equipment to do the job. If you have a question, then ASK! If you do not ask, then you will be assumed capable of doing the job properly. Each employee will be held responsible and accountable for the correct operating procedure, product inspection and product quality.
>
> Remember ZERO DEFECTS. Do not pass any defective part!
>
> We must continually strive to manufacture a product that CONSISTENTLY meets parts specifications. All employees are REQUIRED to work together in order to achieve this goal.

The relevance of all this attention to PFC's quality program is not that poor quality was a ground for her discharge. It has to do with credibility of the witnesses, particularly with that of PFC's witness Elijah Hall. This is so because Hall, whom Rowe considers her principal harasser the night of July 12–13, 1998, testified that he applied "peer pressure" that night in order to maintain production and quality.

The evening of Sunday, July 12, 1998, Rowe reported to work for the third shift, 11 p.m. to 7:30 a.m. (4:594–595, Rowe) Dennis Wayne Hyder was the shift supervisor on duty. (8:1190) Hyder, one of the four admitted statutory supervisors, testified that he was "a" shift supervisor on the third shift. (8:1189) The other shift supervisor on duty that night was Tony E. Dye, also one of the four admitted supervisors. Apparently because Dye was relatively new in his supervisory position, Hyder was serving as Dye's "mentor." (8:1289–1290, 1293–1294)

Hyder escorted Rowe to the powder coater machine, introduced her to Randall A. Hamacher [actually, Hamacher knew Rowe from when she had worked there previously (7:1109–1110; 8:1176)], informed her that Hamacher would be her team leader, told Hamacher that Rowe was a new member of his team and for Hamacher to put Rowe to work. (4:595, 655; 5:696, Rowe; 7:1110, Hamacher; 8:1190, Hyder; 8:1271, Dye).

The powder coater is a large machine used by PFC in the process of carbon coating brake shoes. (4:595, Rowe) Workers, or team members, load brakes onto a conveyor belt at the front (the "loading") end of the machine. (7:1112, Hamacher; 7:1191, Hyder) The brakes are then carbon coated and baked at a high temperature as the conveyor belt passes through the oven. (4:595) After the baking, the brakes emerge from the oven and proceed down the conveyor belt in four or five individual lanes. (7:1039, Hall) A date code is stamped on the brakes by an inkjet printer, and then team members (packers) take the brakes off the conveyor belt and place them in a box for shipping. (4:595–596, Rowe; 7:1113, Hamacher; 8:1192–1193, Hyder) Rowe testified that her job on the powder coater was similar to the job she had held on the bonder during per previous employment at PFC, but the brakes she picked up in the bonder section were not hot. (5:670–671)

The parties stipulated that Hamacher had the title of Team Leader during the relevant time. (4:622) Hamacher's team was composed of, besides himself, Richard Buckland (loading), Elijah Hall, Merri Rowe, and Montel Guinn at the "Domino" (or "Imaje") section, plus Belinda Ratcliff. (4:596, Rowe; 7:1109, 1112, 1122–1123, Hamacher) On brief, PFC does not address the disputed allegation that Hamacher was a statutory supervisor during the relevant time. Were I to reach that point, I would so find his status. However, it is not necessary that I determine whether he was a statutory supervisor for me to make findings respecting Hamacher's knowledge and actions if he was a statutory agent. See *Delta Mechanical,* 323 NLRB 76, 77-78 and fn. 7 (1997). As I discuss shortly, it is clear that, during the relevant time, Hamacher was at least a statutory agent of PFC.

The immediate events leading to Rowe's alleged discharge occurred during the night shift of July 22–23, 1998. For that shift, Hamacher's team was short by two members—Belinda Ratcliff (7:1022, 1057–1058, 1112) and (8:1173) an unfilled vacancy for one person. Had Ratcliff come to work that night, she would have processed some of the paperwork and assisted with the packing, Elijah Hall testified. (7:1058) Hall and Rowe were packing (7:1022, 1042, 1059, 1086) and Montel Guinn (7:1022, 1042, 1086) was operating the Domino. ["Domino" is the brand name of an inkjet printer used to print numbers on the brake parts as they come from the oven. The previous brand was "Imaje," and employees frequently use the names interchangeably. (7:1113, 1115; 8:1171–1172; 13:2226).] As I describe shortly, a short (2.5 minutes by my

count) videotape is in evidence (RX 52) showing the packing operation. It also shows, as the witnesses state, a person assertedly in the Domino or Imaje operation. On the video, however, the Domino person is not operating any inkjet machine. Rather, she is selecting which brake shoes (which only a few feet earlier came from the oven) she rakes off onto a different conveyor belt which runs to the packing section. The other brake pads, or shoes, that she does not send to the packers apparently go somewhere else. Just where the Domino inkjet printer is in this operation is not explained in the record.

The powder coater operation is described in some detail in the record, and the videotape (RX 52) shows mainly that portion of the operation we are most concerned with here—the packing. The videotape was received as an illustration of a typical operation. (7:1056) Elijah Hall testified concerning the videotape. As the videotape was played in the courtroom, Hall narrated concerning the operation of the machine and the functions of the workers in the demonstration. Hall explained which workers in the film correspond to the employees working at the powder coater the third shift of July 22–23, 1998—the shift on which the recently reinstated Merri Rowe allegedly was discharged. (7:1032–1042)

Burgoon reports that the powder coater specifications call for the brake parts to emerge from the oven with a temperature at less than 150 degrees. This temperature specification is important because the parts go directly to the (Domino brand) ink jet printer. If the parts have a temperature exceeding 150 degrees, the ink will not print the code numbers legibly because it evaporates too quickly. (13:2225–2227) Burgoon asserts that on many occasions, as he demonstrates the operation to visitors, he generally, with just his bare hands, picks up brake pads coming from the oven to show the visitors how the codes are printed on the pads. So far as he is aware, the heated pads never have created any blisters on his hands. He acknowledges that he has not picked up these hot pads for any extended period of time during a shift. (13:2227, 2281)

On the night of July 22–23, both Rowe and Elijah Hall were packing. (4:601; 5:707, Rowe; 7:1022, 1042, 1059, Hall) The matter is disputed, but Rowe asserts that she and Hall were working on the same side of the conveyor belt. (5:707) They were working as a team, with each one "catching" a part from the conveyor and, as he or she moved to put it in the waiting box, the other person moved up to "catch" or pick up the next part and then moved to put it in the box. They worked in this rotating fashion. (4:662; 5:671, 708; 7:1112) As I describe in a moment, Hall claims that they were on opposite sides of the conveyor belt with Rowe incorrectly working at the end of the belt on her side of the conveyor.

Before this night of Rowe's departure (in the early hours of July 23) from PFC, Rowe had not had any work problems with supervision during her previous eight (GCX 43) shifts since her return to work at PFC at 11 p.m. the night of July 12, 1998. Shift Supervisor Dye testified that he had observed her working during the previous eight shifts and had not seen her doing anything incorrectly, nor had he received any reports of improper work procedures on Rowe's part. (8:1266) Shift Supervisor Hyder testified that, for this night of July 22–23, he had seen Rowe working and had not observed her doing anything incorrectly, nor had anyone reported to him that Rowe was not performing her work properly. (8:1228, 1245, Hyder)

[Rowe does describe (5:698–699) an incident her first night back involving coworker Belinda Ratcliff. Apparently Hamacher informed Ratcliff that Rowe had worked at PFC previously. The rest of the shift Ratcliff found fault with all aspects of Rowe's work. At the end of the shift, during the day of July 13, Rowe telephoned Burgoon's secretary and complained about the treatment from Ratcliff and requested that one of them be transferred. There was no transfer, but management perhaps spoke to Ratcliff because Rowe describes no further problems with Ratcliff.]

Nevertheless, as I discuss shortly, improper work procedures by Rowe (as asserted by Hall and Hamacher), and harassment by those two, especially by Hall, as claimed by Rowe, are the incidents leading to Rowe's departure from the plant at 2:48 a.m. (the time when she clocked out, GCX 43). She went to her car in the parking lot to smoke a cigarette and to compose herself. Supervisor Hyder, accompanied by Supervisor Dye, conversed with her, returned inside to investigate, then, again accompanied by Supervisor Dye, returned to the parking lot where Supervisor Hyder again spoke to Rowe. Following the conversation, Rowe left but tried to return to work the next night. The security guard told her that Hyder said she was trespassing. After waiting a few minutes, Rowe left. Hyder prepared a report (RX 53) that Rowe had quit.

The disputed issues here principally involve credibility of the witnesses. Except where I expressly state, or impliedly find, otherwise, the witness I credit on disputed matters is Merri Rowe. She testified persuasively, her demeanor was favorable, and I believe her. The demeanor of the opposing witnesses was unfavorable, and I generally do not believe them. Although the witness lineup is not strictly Rowe against all others on any one point, even if it were it would not matter. This is because credibility does not turn on the "numerical superiority" of witnesses, but on the weight of the believable evidence. *Sahara Coal Co. v. Fitts,* 39 F.3d 781, 783 (7th Cir. 1994); *Riley–Beaird,* 259 NLRB 1339, 1367 fn. 115 (1982).

3. Agency status of Randall Hamacher

Among the facts showing the agency status of Randall Hamacher are the following. First. he was the team leader for the crew working at the powder coater. Second, when Burgoon addressed the team leaders during the Union's 1994 organizing campaign, his beginning remarks included statements such as, "You are supervisors," and "It does not mean that you represent management, but that you are a part of management." (GCX 16 at 1) [GCX 16 was received conditionally on the basis that PFC's counsel would have the opportunity to check the record in the underlying case to verify that GCX 16 is the first two pages from RX 62 in the underlying case, so that the parties could stipulate to authenticity. (4:629–631) Apparently by oversight, the parties never raised the matter again. Based on the General Counsel's representation (4:625–629) that GCX 16 is a document from the underlying case (eventually becoming pages 1317–1318) of the record before the Fourth Circuit, and because there appears to be no question as to its authenticity, I now receive GCX 16 generally.] Although President Burgoon

testified in this case, he never asserted that he no longer considered the team leaders to be supervisors and part of management. Accordingly, I find that his 1994 remarks on that subject remain PFC's corporate policy.

Third, in the 1996 version of its Substance Abuse Policy (RX 51 at 3), PFC defines the term "Supervisor" to include the category of "Team Leader."

Fourth, in PFC's job description (GCX 15) for the position of "Team Leader," PFC writes, in part, that team leaders, in addition to receiving greater monetary rewards than rank and file employees, "will be charged with the responsibility of the people under them . . . [and] will be held accountable for shift transition, quality of the people's work in his/her area, productivity, supplies, training, equipment PM, and clean-up. This will require leadership ability, competency, and the ability to train people."

The record evidence reflects that Hamacher functioned as described in the foregoing, and that he was viewed as such both by the employees and by admitted statutory supervisors. Clearly, PFC placed Randall Hamacher in a position where employees reasonably could believe that Hamacher spoke and acted on behalf of management. I therefore find that, during the relevant time, Team Leader Randall Hamacher was PFC's agent within the meaning of 29 USC §152(3). I further find that PFC is responsible for the statements and actions taken by Hamacher in his capacity of a Team Leader. *Delta Mechanical,* 323 NLRB 76, 77–78 and fn. 7 (1997).

4. Interrogation by Team Leader Hamacher

About 11:30 p.m. her first shift back at work (July 12, 1998), Rowe testified, Rowe observed that Burgoon came to the plant. During her previous employment, Rowe had never seen Burgoon come in during the graveyard shift. On this occasion, she observed that it was just Burgoon and Hamacher in the small production office. (4:597–598; 5:696) Within 5 to 10 minutes after Burgoon left the area, Hamacher came to Rowe and asked her how much money she had gotten from her lawsuit against PFC Rowe told him none because the case had never been settled. Hamacher asked what happened during the lawsuit. She replied that it was a long story, that she did not feel like discussing it, and she turned back to her work. (4:598–599) Hamacher concedes that, on Rowe's first night back, Burgoon came to the plant. There were operational problems resulting from the July Fourth shutdown and the workers were having trouble getting the equipment back on line. Supervisor Dye, for example, testified that when he came to work that night about 10:30 p.m. he saw Burgoon atop a press trying to get it up and running. Dye thinks that Burgoon left the plant around 1:00 a.m., although he does not recall seeing him leave. (8:1286–1287) According to Hamacher, Burgoon spoke to him only once that night (and not in an office), telling him to have the employees clean while the machine was idle. Hamacher denies that Burgoon said anything to him that night, or since that night, about Rowe. (7:1111, 1119–1120; 8:1176–1178)

A couple of nights later, or about the shift of July 14–15 [I will refer to it as July 15, per the allegation], as Rowe was assisting Hamacher in loading brake shoes onto the powder coater, Hamacher said to her, "Merri, you're not going to start the union stuff up again?" To her question of why he was asking that,[28] Hamacher replied that it was just "the Mafia's legal way to make money." Rowe responded "Whatever" and kept working. (4:600) Hamacher impliedly denies this conversation by virtue of his assertion that he had only two conversations with Rowe about union matters, the first being the lawsuit conversation, and a later one consisting merely of Rowe's volunteered comment that she was tired of the NLRB and the Union calling her after she got off work. (7:1120) I credit Rowe.

The Government argues for a finding that Hamacher's July 15 interrogation of Rowe violated Section 8(a)(1) of the Act, and PFC opposes. I find no violation. There was no threat, and Rowe had been rather confrontational on July 1 in telling Burgoon that she was back to organize for the Union. Thus, Rowe was open and obvious, at least to top management, about her union sentiments. Hamacher was just a low-level agent (and, probably, a statutory supervisor), and the conversation was brief and at Rowe's work station. In view of Rowe's aggressive announcement to President Burgoon on July 1, it can hardly be said that Rowe wanted to keep quiet about her union sentiments this time around. Hamacher's questions can be interpreted as nothing more than a desire to hear Rowe reassure him, as a worker in the plant, that all the turmoil of a new union campaign was not about to start again. I therefore shall dismiss complaint paragraph 8(a).

5. Merri Rowe departs

a. The night of July 22–23, 1998

(1) The asserted harassment

(a) Merri Rowe's testimony

At some point between the 11 p.m. start of the shift on July 22, 1998, and the first break at 1:00 a.m., Team Leader Hamacher came to where Rowe and Elijah Hall were packing and told Rowe that she was "slacking tonight." Rowe denied it. Thereafter, and before the 1:00 a.m. break, Hall told Rowe several times that she was not working fast enough, that she was slacking. As they left for their 1:00 a.m. break, Hamacher again accused Rowe of slacking, and again she denied it. (4:601–602) [Evidence differs whether the break is 10 minutes or 15 minutes. The difference is immaterial.]

During the 1:00 a.m. break Rowe showed Hamacher blisters that she had on the thumb and middle finger of her right hand, telling him that the blisters were caused by picking up the hot brake pads. Hamacher replied that her hands were just tender from not working with the pads. (4:602, 656–658)

After the first break, Hamacher and Hall kept telling Rowe to "Hurry up." Rowe began asking them not to do that "because when you rush me it causes me to make more mistakes." However, they continued. At one point she finally told Hall to "Shut up," but he said he was "just joking to make the night go faster." She told Hall that joking was acceptable until the other person said it was disturbing and then it should stop. Shortly after that, Hamacher came over and asked Rowe whether she

[28] On cross-examination, Rowe denies that her first night back she solicited for the Union. She explains that others approached her, not she them. (5:697–698)

was still slacking. Rowe asked him not to do that. Hamacher left and Hall said, "Hurry up, Merri," that she had received her week of training and that she should be up to speed. "At that point I was on the verge of tears because I had asked them several times all night long to please stop." Rowe told Hall that she was going home and that when she returned the next day perhaps he would appreciate her help and would see that she was performing her job. Rowe then clocked out and went to her car, started the engine to let it warm up, lit a cigarette, and sat there a moment to compose herself in order to be able to drive home. (4:602–604; 5:713–715) [Rowe clocked out on July 13, 1998 at 2:48 a.m. (4:607; GCX 43), or 12 minutes before the 3 a.m. lunch break started.]

Rowe denies that Hall asked her to move farther up the conveyor belt. Instead, Rowe asserts, she and Hall would rotate places as they worked. (5:709) Sometimes parts fell into a pan at the end of the conveyor belt, but that was because, Rowe states, the worker at the Domino station (Montel Guinn) was leaving the parts butted together rather than separated. (5:710) (That is, Rowe apparently suggests, with very little spacing between the parts, those packing have very little time to remove the parts from the conveyor.") Rowe also forcefully denies cursing and throwing parts in the pan. (5:712)

(b) The version of Hall and Hamacher

Because the team was short by an extra member that night, those who were there had to increase their speed to keep up. [This particularly applied to the packers, it appears, because they had to pull the brake pads off the moving conveyor belt.] PFC introduced a 2.5 minute video (RX 52) purportedly showing a typical packing operation. The video was offered to illustrate the process. As the video begins, the camera is looking down a conveyor belt at two female packers (one white in a white T-shirt, the other black in a black work shirt) working on opposite sides of the conveyor belt. After a few moments the camera angle switches so that it is behind the white woman packing and facing the black woman packing. (7:1032–1033) Eventually the camera moves back so as to show more of the scene, with the Domino person now coming into view and the parts coming from the oven on the right side of the screen (but coming at the camera). As the parts come from the oven on one conveyor, they, in just a few feet, drop onto a separate conveyor running perpendicular to the first conveyor. This now carries the parts from right to left across the camera and past the Domino operator. As the parts go by, the Domino operator then apparently selects which parts to rake off onto a third conveyor belt, running in the opposite direction as the first belt, toward the packers. In short, the three belts convey the parts in a "U" direction, from the oven and then back by one side of the oven.

Using the video as a device for illustration, Hall explains that he was on the near side (in the video) of the conveyor belt, in the position of the white woman (7:1032, 1042, 1082, 1085–1086), and Rowe was on the other side, in the position (in the video) of the black woman, except that Rowe was at the end of the conveyor by the metal pan. (7:1032, 1082) [Recall that Rowe asserts that, on the night of July 22–23, she and Hall worked on the same side and no one was working on the other side. (5:707–708).] According to Hall, he observed that Rowe was standing at the end of the conveyor belt to perform her work, and several times before the 1:00 a.m. break he told Rowe that she needed to speed up, and he asked Rowe to move up farther on the conveyor belt so that he could rotate and so that the brake pads would not fall onto the pan. (7:1023) [As the videotape shows, the pan is at the end of the packer's conveyor belt and any parts that have not been removed fall onto this pan. The box for packing is just beyond the pan. As noted in a moment, some defective parts are allowed to go into the pan. Thus, if good parts are not removed from the belt in time, and fall into the pan, it requires time to determine which are the good parts to be removed for packing in the box. This slows down productivity.]

As one can see from the videotape, the packers [whether on one side or both sides of the conveyor] work in a rotating fashion. That is, as one picks up parts, or brake pads, the other is packing her batch. When the one removing parts has picked up all she can hold in two hands and turns to go pack them in the box, the other packer is approaching the conveyor. By removing parts farther up on the conveyor as the equipment allows (and yet not too far from the box), a gap is created in the line of parts moving toward the packers and the end of the conveyor. This gap gives the second packer (or a third when they have the occasional assistance of a third person) time to return from the box and to step up and begin removing her batch of parts which, in turn, creates a gap for the first packer. In short, creation of the gap by a coordinated sequence of movements by the packers is an important element in keeping the moving parts from falling into the pan. Except for breaks and meals, this rotating process goes on all through the shift.

Because Rowe situated herself at the end of the belt, Hall asserts, it interfered with the rotation pattern needed to pick up all the brake pads. As a result, Hall asserts that, by her procedure, Rowe (7:1038) was permitting so many pads to fall into the pan that she was missing more than she was removing. (7:1023–1024, 1036–1039, 1043, 1051–1052, 1082–1083) As Hall explains, when brake pads fall into the pan they mix there with rejected pads. Retrieving the good parts slows production because a packer has to check to make sure that he or she is picking up a good part, not a defective part. (7:1034, 1058, 1083)

Rowe, Hall claims, was not receptive to his requests, and she told him that he did not tell her what to do. (7:1038) These exchanges apparently began shortly after 11:30 p.m., for it was 11:30 p.m. before the brake pads began a regular flow. (7:1039) Several times (no more than five) from about 11:30 p.m. to the 1:00 a.m. break, Hall acknowledges, he also (apparently in addition to asking Rowe to move up farther on the conveyor belt) urged Rowe by a variety of phrases to increase her speed. These included "Hurry up;" "You are not working fast enough;" and "Merri, you need to speed up." He recalls Rowe responding with phrases such as "Don't bother me" and "Shut up" (7:1062) plus (7:1038), as earlier noted, "You don't tell me what to do."

On another two or three occasions following their return from the 1:00 a.m. break, Hall again urged Rowe to move up on the belt and to speed up. He told her that they had to work as a team. She told him to leave her alone. Hall explained to her

that he was just trying to show her how to do the job correctly. Rowe replied that she had worked there before on the bonder. Hall said the packing job was different. At that point Rowe looked at Hall, said "Fuck it, I quit," threw her batch of parts into the pan, and walked out. (7:1023–1024, 1065–1066) [In a later version on cross examination, Hall changes the quote to, "Fuck it, I am tired of this." (7:1069).] To Hall, Rowe appeared to be upset and angry. (7:1069) Hall saw Team Leader Hamacher, who was working a few feet away, run after Rowe. (7:1024, 1064)

Team Leader Randall Hamacher generally confirms Hall's description of the exhortations he expressed to Rowe, and the basis for them. (7:1114–1115) Hamacher heard this a couple of times before they went on the 1:00 a.m. break. On those occasions, he did not hear Hall tell Rowe that she was "slacking" or not making production. On one occasion during the time before the first break, Hamacher himself told Rowe that it would make it easier for "both of them" (apparently meaning Rowe and Hall) if she moved up on the conveyor belt. At least once he heard Rowe tell Hall to "Leave me alone." (7:1123–1126)

After they returned from their 1:05 a.m. to 1:15 a.m. break (8:1158), and before Rowe walked out, Hamacher again heard Hall, on two or three occasions, say the same things to Rowe, telling her to move up on the belt, to speed up, and to work faster. Hamacher also again asked her to move up on the belt and to speed up. As before, she looked at Hamacher but ignored his request. (7:1127–1130) Hamacher acknowledges that he heard Rowe, on two or three occasions, tell Hall that he was getting on her nerves, and that one of those times could have been during the first break. Hamacher never told Hall to stop telling Rowe to speed up, and he never told Hall to leave Rowe alone. To Hamacher's observation, Rowe's temperament did not change until the very end when it seemed, to Hamacher, that she "blew her stack." (8:1159–1161)

That concluding eruption occurred when Hamacher, by his estimation, was about 6 feet away at the Domino section. He observed, and heard, Rowe say "Fuck it, I can't take it no more. I'm gone." Rowe left, heading toward the time clock. He ran after her, calling out her name. She did not look back. Hamacher saw Supervisor Dye, told him what had occurred, and that he guessed that Rowe had quit. Hamacher then returned to the powder coater. (7:1115–1118, 1130–1135, 1172, 1173–1175, 1179–1180) Before Rowe left, Hamacher never discussed with supervisors Hyder or Dye whatever production problem was being created by Rowe's actions. (8:1158)

Rowe denies the cursing accusation, and denies throwing any parts in the pan. (5:712) Supervisor Hyder saw Rowe going out the back door. (8:1195) Hyder then conferred with Supervisor Dye, and both went to the parking lot where they found Rowe in her car smoking a cigarette. (8:1196, Hyder; 8:1257, Dye)

(c) Preliminary discussion

At this point it appears that the (principally) two descriptions of events have substantial similarities. Rowe's version lacks some triggering event to explain why Hall and Hamacher would repeatedly be telling her to speed up and to move up on the conveyor. The unified version of Hall and Hamacher points to a reason—Rowe was situated incorrectly at the conveyor belt and refused to move.

But Rowe's attributed position and refusal raise other questions. Assuming that Rowe was correctly positioned the first eight shifts, why would she take the wrong position on this shift? Why would she refuse to move? Why did Supervisors Hyder and Dye, who both came by at separate times, not notice any irregularity in her position? Equally in point, why would Team Leader Hamacher, if unsuccessful in getting Rowe to obey his instruction to move, not call on Supervisor Hyder or Supervisor Dye to order Rowe to move up on the conveyor belt? Something just does not compute under the Hall-Hamacher version.

Returning to the videotape, we can see that if, as Rowe testified (and she testified before the videotape was introduced at trial), she and Hall worked side by side that night (5:707–708), that would explain why she would be at the end of the conveyor belt and why Supervisors Hyder and Dye did not notice anything wrong when each observed her that night. Moreover, Rowe asserts that Hall walked away several times and did not pick up parts. She did not complain to Team Leader Hamacher because that was not her responsibility. (5:711). Nor did she complain to Supervisor Hyder. (5:712)

As mentioned much earlier, I credit Rowe. Applying that resolution here, and crediting her account of events that night, to this point, I find that the events occurred generally as she describes. This resolution does not explain everything, such as why would Hall and Team Leader Hamacher harass Rowe. For the General Counsel (Brief at 73), Rowe was "driven" from her job by a "prearranged" plan of harassment "by Respondent." This speculation implies a conspiracy, even at the suggestion of, and certainly with the blessing of, President Burgoon. Certainly there is no direct evidence supporting such speculation. PFC describes the Government's speculation as a "figment of General Counsel's imagination." (PFC's Reply Brief at 9.)

Neither the General Counsel nor the Union pauses to cite the missing evidentiary link between the actions (harassment) by Elijah Hall and Team Leader Hamacher on one hand, and President Burgoon on the other. Even if the General Counsel and the Union are content that Team Leader Hamacher, as Respondent's agent, is responsible for permitting this harassment, even participating in it, they do not articulate any theory for connecting the purpose of the harassment as being to retaliate against Merri Rowe for her union activities. On this point more must be said, but I postpone that additional discussion.

In not crediting Team Leader Hamacher, I attach no weight to the fact that, in October 1998, PFC loaned, at no interest (8:1165), Hamacher a relatively substantial sum of money (GCX 36) for his mother's funeral. (8:1186–1187) I attach no weight because there is no evidence that President Burgoon ever spoke to Hamacher about Merri Rowe [in fact, Hamacher denies that Burgoon ever spoke to him about Rowe, (8:1176–1178)] in order for Hamacher to infer even an implied request from his benefactor that he return the loan favor by pressuring Rowe to quit. If the General Counsel is impliedly arguing that Hamacher did such on his own, that argument does not explain how Hamacher persuaded Hall to participate in the effort.

(2) The parking lot conversations

(a) The versions of Supervisors Hyder and Dye

I use the plural of the word here because Supervisor Dye's version, although frequently consistent with that of Supervisor Hyder, sometimes differs in significant respects.

According to Supervisor Hyder, when he and Supervisor Dye walked up to Rowe at her car, Hyder asked her, "Merri, what's up?" Rowe responded, "I quit." Rowe, using a curse word Hyder could not recall until cross examination, added that she was tired of "Elijah's" (Elijah Hall) "mouth" or "bullshit." To Hyder's question of what Hall had done to upset her, Rowe replied that Hall had been on her all night telling her she was not working fast enough, and she was tired of it. Hyder told her to wait, that he would go inside and get the story of the people there. Hyder told her this even though, as far as he was concerned, Rowe's employment ended when she said, "I quit." If she had declined to wait, he still would have investigated. (8:1196–1198, 1230–1233, 1238, 1252)

Dye generally confirms Hyder's account. One difference is that Dye asserts that Rowe said nothing about Hall's pushing her too hard. In response to a question, Dye replies that Hyder did not ask Rowe that if she had a problem with Hall why did she not go to her team leader. (8:1260, 1271–1272) As we see shortly, when the events were complete, Hyder prepared a written report (RX 53) of dismissal, as a "Quit," in which he claims that he told Rowe she should have discussed her problem with her team leader.

Hyder and Dye went back inside and spoke with Team Leader Hamacher who told them that Rowe had cursed, thrown parts in the pan, and walked out, and that Hall had simply been trying to help Rowe work more quickly and efficiently by telling her to stand farther up on the side of the conveyor belt. Hall was present and he confirmed that he had been telling Rowe to speed up, and Hamacher added that he, too, had told Rowe the same during the night. (7:1117–1118, 1135–1136 Hamacher; 8:1198, 1233–1235, 1239, Hyder; 8:1260, 1273–1276, Dye) Despite Hamacher's placement of Hall in the conversation (7:1135–1136), Hyder denies it, and puts his conversation with Hall as being on Hyder's return to the plant after his second conversation with Rowe in the parking lot (8:1251), as does Dye (8:1262, 1273, 1276). For Hyder's conversation with Hamacher between the first and second parking lot conversations, Dye asserts that Hamacher simply reported that Rowe had gotten fed up with Hall, thrown parts in the tray (pan), and walked off without saying anything. Indeed, Hamacher's report, according to Dye, is that Hamacher only heard the parts hitting the pan and did not hear Rowe say anything before walking out. (8:1260, 1273–1275)

Hyder and Dye then returned to the parking lot where Hyder told Rowe that he had talked with the "people" inside and that he could not see where they had done any wrong, that it was just a matter of one coworker telling another to pick up the pace. Rowe asked what Hyder thought she should do, whether she should return and "put up with Elijah's mouth?" Hyder said that was a decision for her to make, but that she already had made it when she clocked out and left the building and quit instead of coming to him over any problem she was having. As Hyder and Dye then turned to leave, Rowe made some remark about her lawyers and the NLRB. Hyder and Dye went and informed the security guard that Rowe no longer worked there and that her car should not be back on the premises. (8:1199, 1235–1237, Hyder; 8:1261, 1276–1280, Dye)

Dye generally confirms (8:1261, 1276) this account, although on cross examination he quotes Hyder as referring to Hall (8:1276) in this second conversation, whereas moments earlier (8:1275–1276) Dye testified that Hamacher had not said anything to Hyder about Hall. Dye is unable to explain the discrepancy. (8:1278)

After returning to the plant from the parking lot following the second conversation with Rowe, Hyder again spoke with Hamacher, then with Hall, and finally with Montel Guinn. (8:1200, 1203, 1240, 1251, Hyder) Dye recalls that they spoke with Hall. (8:1261–1262) Within the next 20 minutes or so (8:1202–1203, 1245, Hyder; 8:1280, Dye), Hyder prepared a report (RX 53) on the matter. (8:1200–1201) Dye also read it, agreed with it, and then signed it. (8:1245, Hyder; 8:1262, 1281, Dye) The two-page "Employee Action Report" (most of the document is in the form of preprinted lines of text listing, for example, 32 numbered offenses), dated July 23, 1998, is marked "Dismissal" with the hand printed word "Quit" alongside. None of the 32 listed offenses is checked, not even number 32 which reads, "Leaving before your shift ends without your supervisor's approval." Under that list, in the section for the supervisor's remarks, Hyder wrote comments that extended over to the second page (8:1240).

PFC offered the report both for the truth of the contents as well as for the limited purpose of course of events. The General Counsel and the Union objected to receiving the report for the truth of the description, arguing that the business records exception to the hearsay rule does not apply in this situation. I received (8:1210–1211) Hyder's report for the limited purpose of showing course of events and for whatever impact the document would have respecting considerations such as credibility. In so ruling, I referred to an Age Discrimination case, the name of which I could not recall, but which I now cite:*Pierce v. Atchison Topeka & Santa Fe Ry. Co.,* 110 F.3d 431, 443–444 (7th Cir. 1997) (within trial judge's discretion, under FRE 803(6), in weighing reliability of circumstances in a discrimination case, to exclude a memo to the employee's personnel file, and court would "not second-guess" the trial judge's determination of insufficient reliability). Similarly, in this discrimination case, with the litigation history as background, such circumstances indicate a lack of trustworthiness. I therefore reaffirm my ruling receiving RX 53 only for limited purposes, not for the truth of the contents.

The text of Hyder's hand printed remarks read (RX 53):

> At 2:45 a.m. Merri walked off the job. According to a co-worker and the team leader, Merri was picking parts up off the belt and throwing them in the tray at the end of the Imaje process. Elijah Hall (the co-worker) told Merri that the best thing to do was to pack the parts in the box so they would not have to be picked up twice. She said F___ it and walked off the job, punched out, walked past me

leaving the building. (This was not a scheduled time employees are to be in the parking lot.)

I then went and got Tony Dye. By this time Merri was in her car. I asked Merri what was up. She said she quit because Elijah was pushing her too hard. She asked me what I thought she should do and I told her she should have discussed her problem with her team leader. I then went and talked to Randall Hamacher, the team leader who was at the process at the time, and he said that Elijah did not do anything wrong in the way he spoke to Merri. Tony and myself then returned to the parking lot and told Merri that no one had done anything out of the way that was not needed to keep the process productive. She then asked me what she should do, if I thought that she should go back in and listen to Elijah's mouth, and I told her that was not for me to decide. [Dye agrees that, at this point, the account does not show Hyder's telling Rowe that she had already quit. (8:1281–1282).] She then said she would go home.

Supervisor Hyder testified (8:1212) that he submitted the foregoing report to the personnel department based on the hourly employee's handbook Rule C under Work Expectations (RX 3 at 15), which reads:

> C. No employee should leave the building during work shifts (other than lunch) for personal reasons without supervisory permission. Employee must punch out before leaving. Violation of this rule is considered to be a voluntary resignation.

(b) Merri Rowe's account

Turn now to Merri Rowe's account of the parking lot conversations. Rowe asserts that, in the first conversation, Supervisor Hyder, accompanied by Supervisor Dye, asked her what had happened. (Rowe emphatically denies saying that she "quit." 4:611) Rowe proceeded to describe the events, including the fact that at one point she had told Hall to "Shut up," and that when Hall had said he was joking she had told him it was time to stop because he was upsetting and disturbing her. Hyder asked why she had not come to him. Rowe replied that Randall Hamacher was the team leader, that Hamacher knew what was going on, and he should have taken the initiative to control the situation. In fact, Rowe said, she had asked Hamacher himself to refrain from what he and Hall were doing because it was very upsetting to her. Hyder said he would go speak with Hamacher and Hall. Rowe said it would be fine for all of them to go back. Hyder told Rowe to remain in her car. (4:604–605, 608; 5:715–716)

When Hyder and Dye returned a few minutes later, Hyder said, "Merri, you abandoned your job. You clocked out. Therefore, you quit." "No. I did not; I did not quit," Rowe replied. She said she had asked them to stop and they did not. Hyder replied that he had asked Hamacher and Hall about the matter, that they had agreed they had been doing what Rowe had claimed, but that Hyder had determined that they had just been applying "peer pressure" to make her work faster. "Peer pressure or harassment," Rowe responded, she could not perform with them applying that pressure. Rowe asked Hyder to please ask them to stop and she would clock back in, even clock in early from lunch, and finish the shift. "No, Merri, you abandoned your job. You clocked out. Therefore, you quit." Rowe said she would call the NLRB, and Hyder said he would write up the situation as that Rowe had clocked out and quit. She said he could write it up any way he wanted to. She then left. (4:605–606, 608; 5:716–718) When Rowe tried to return to work the following night, the security guard told her that Hyder had said to let her know she (Rowe) was trespassing and to call the police. After a few minutes, Rowe left. (4:606–610)

(c) Discussion

As before, I credit Merri Rowe. First, she testified with a more persuasive demeanor. Second, Supervisor Hyder was entirely unconvincing in testifying that the first thing Rowe said to him in the parking lot was "I quit." I also note that Supervisor Dye undercuts Team Leader Hamacher's earlier claim that he heard Rowe say she was quitting, as she threw parts in the pan, when Dye testified that Hamacher told Hyder, in Dye's presence, that Hamacher had just heard (the noise) of Rowe's throwing the parts and that Rowe had walked out without saying anything. (1260, 1274) Recall also that Elijah Hall switched from his initial testimony that Rowe said "I quit" when she threw parts in the pan as she left.

The inclusion of the "quit" in Hyder's written report (RX 53), concerning the first parking lot conversation, was, I find, an afterthought informed by the position he expressed to Rowe in the second conversation. Similarly, the inclusion, also on the second page of the report, of "I told her she should have discussed her problem with her team leader" was an afterthought to serve as a substitute for his telling Rowe that she should have come to him (Hyder). In short, Rowe is the more convincing witness both as to demeanor and as to facts. I find that her account is the substantially correct one, and I do not credit the others to the extent they differ.

(3) Other exhibits

To show disparity (4:612), the Government relies on (besides certain rejected exhibits) an October 6, 1997 warning (GCX 13) given to Randall Hamacher by Supervisor Kirk Wogon. The occasion apparently preceded the time when Hamacher became a team leader. The offense checked, number 21, if for "Failure to leave work area organized." In the section for the supervisor's remarks, Wogon wrote:

> Randall left plant at lunch time (3:01 a.m.) and did not return to his job. Randall has many work and home difficulties at this time.

First of all, Supervisor Wogon is not Supervisor Hyder. For warnings issued by different supervisors, more must be established, than is established on this record, that some discretionary difference in treatment of different incidents demonstrates that corporate policy was bent to give one employee just a warning, yet to the other employee something more severe. This is particularly true where the different supervisors were the decision makers. Second, the "remarks" in the Hamacher warning are a bit ambiguous. They could well mean that he had approval to leave (he is not charged with leaving without approval), but should have left his area neater and in proper

order—offense number 21, which is checked). I find this warning substantially different from the "Dismissal—Quit" prepared by Supervisor Hyder for Merri Rowe. Accordingly, I attach no weight to GCX 13.

PFC introduced a series of five warnings (RX 54), three occurring after July 23, 1998, and only two before Rowe's termination. All five employees were terminated for leaving the job. The are of no value for the analysis required here because none involved an employee who, as did Rowe, remained on the premises and who asked to return to complete her shift. I therefore attach no weight to RX 54.

b. Discussion

Recall that the allegation, complaint paragraph 11, which we are pursuing here is that PFC "constructively" discharged Merri Rowe. With such being the allegation, one would think that the parties would begin their arguments by citing and relying on, or distinguishing, the case (or its offspring) enunciating the doctrine of constructive discharge—*Crystal Princeton Refining Co.,* 222 NLRB 1068 (1976). None of the briefs does so.

In *Crystal Princeton* the Board there set forth the two elements which the Government must prove to establish a constructive discharge (222 NLRB at 1069, emphasis added):

> *First*, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign.
>
> *Second*, it must be shown that those burdens were imposed because of the employees union activities.

Later cases have clarified some of the reach of the constructive discharge concept, but for our purposes I need not survey those cases. The closest any party comes here to addressing the constructive discharge allegation is the General Counsel's argument (Brief at 73) that Rowe was "driven off her job" by a "prearranged . . . harassment." That theory at least is a start toward establishing the two elements required. However, the Government cites no cases in support of its argument that the events of July 22–23, 1998 "drove" Rowe from her job. Certainly Rowe's experience was unpleasant, perhaps even an "ordeal." But it lasted just 3 hours (an hour and a half before the 1:00 a.m. break and an hour and a half afterward). But can one 3-hour verbal ordeal satisfy the first element of *Crystal Princeton*? Rowe previously had complained to Burgoon's secretary about coworker Belinda Ratcliff. Could Rowe not have finished just this one shift and then again called Burgoon's secretary (assuming that Rowe decided not to first take her complaint to Supervisor Hyder)?

Clearly the verbal harassment here (which at least was work related and not personal in nature) does not match the first element evidence in *Pioneer Recycling Corp.,* 323 NLRB 652, 652 fn. 2, 659–660 (1997) (employee threatened with bodily harm, locked in rear of a garbage truck for 2 to 3 hours, and shot at and hit 3 times with a pellet gun). Nor is the 3-hour ordeal a match for the treatment administered in *Davis Electric Wallingford Corp.,* 318 NLRB 375, 376–377 (1995). I would find that Rowe's 3-hour ordeal, while bad, does not satisfy the first element of *Crystal Princeton.*

But, contrary to my thought, let us assume that Rowe's 3-hour ordeal would satisfy the first element. If so, then, as the Board instructs in *Davis Electric,* 318 NLRB at 376, the *Wright Line*[29] test must be applied to the second element. Applying that test here, I find practically nothing showing a prima facie case by the Government. The General Counsel argues "pretext" (Brief at 12, 71). The closest record evidence to pretext, as cited by the Government (Brief at 76), is the "fatal" admission by Treasurer Davis (discussing RX 54 at 7–8), that, in his 10-years' experience at PFC in examining disciplinary actions and on his knowledge of how the supervisors handle these matters,[30] an employee who clocks out early at lunch but who returns would not be treated the same as one who left and never returned. (11:1915–1919)

Close, but wide of the target. Once again, the Supervisor here is Wayne Hyder. Hyder elected to strictly apply Work Expectation "C," quoted earlier (leaving plant during shift without permission is considered a voluntary resignation). As Rowe's supervisor, Hyder told Rowe that she should have come to him with her problem. She did not have his approval to clock out early and to leave the plant. He treated the matter as job abandonment. [Hyder testified that, in his opinion, Rowe did not want to do her job properly that night. (8:1245) Hyder's opinion is based on hearsay reports that are contrary to his own personal observation of Rowe that night.] On brief PFC asserts (Brief at 30, 104) that Rowe did not intend to continue her night job at PFC because of her full-time day job and the needs of her children. Earlier in this decision, at I,D,5,c, I discuss this speculation. I reject it as having no merit.

However harsh Supervisor Hyder's action may seem, the fact is that no animus or disparity is shown in connection with Hyder, nor is there any evidence that President Burgoon dictated the result either by "prearrangement" or after the fact. Indeed, anything "after the fact" seems out of the question. About 7:30 that morning, as Supervisors Hyder and Dye were leaving the plant, they met Burgoon coming in. When they briefly referred to the incident and the documentation, Burgoon simply said, "Okay." (8:1223, Hyder; 8:1263–1265, Dye) As to any "prearrangement," Hyder explains that, in a separate conversation following a supervisors meeting on, apparently, Saturday, July 11, 1998, Burgoon informed Hyder and Dye that Rowe would be reporting to work the following night and that she should be treated fair the same as everyone else. (8:1223–1224, Hyder; 8:1263, 1285–1286, Dye) No evidence contradicts this testimony. Thus, there is no link between Hyder's strict application and (1) either an example showing disparity by Hyder, the decision maker and actor, or (2) any expression by Hyder reflecting animus by him because of Rowe's union activities, or (3) any suggestion by President Burgoon to Hyder that he find a way to get rid of Merri Rowe. As to the latter, Team Leader Hamacher

[29] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), certiorari. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 393–403 (1983).

[30] Note the implication in Davis's statement. The supervisors themselves apply the rules. They do not submit a recommendation to Davis, or even to Burgoon, for such higher officials to decide on the appropriate discipline. No doubt a supervisor could be overruled in some case, but in the first instance it is at each supervisor's interpretation.

denies (7:1110) that Hyder ever told him to make the job difficult for Rowe. And as noted earlier, nothing explains how Hyder or Hamacher persuaded Elijah Hall to join any effort to get rid of Merri Rowe or give a reason as to why Hall would consent to do so. The Government's suspicion and speculation simply will not satisfy its burden to establish, by a preponderance of the credible (record) evidence, a prima facie case demonstrating that PFC, by Supervisor Wayne Hyder, was unlawfully motivated when it dismissed (terminated) Merri Rowe as a "Quit" the early morning of July 23, 1998.

Based on the foregoing, I find that the Government has failed to prove, prima facie, both the first and second elements of *Crystal Princeton* , supra. Accordingly, I shall dismiss complaint paragraph 11. Having now dismissed all those paragraphs of the complaint that allege unfair labor practices, I shall dismiss the complaint in its entirety.

With the complaint dismissed in its entirety, I find that the backpay for Jerry Kennedy and Merri Rowe terminates at the close of 2Q98. It is time now for a recapitulation of the backpay which is due.

III.BACKPAY RECAPITULATION

A. Martha K. Hinson

Hinson's backpay totals (not including interest) for 2Q94 through 4Q96 are:

Yr	Q	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
Totals:		$46,064	$19,441	$4885	$14,556	$31,508
Total net backpay due Martha K. Hinson:					$31,508	

Jerry Kennedy

Now adding the backpay for June 1998, as set forth in the ACS, the revised totals (not including interest) for Kennedy for 2Q94 through 2Q98 are:

Yr.	Qtr.	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1998	2	$1683	0	0	0	$1683
Totals:		$41, 792	$19,200	0	$19,200	$22,592
Total net backpay due Jerry L. Kennedy:						**$22,592**

C. Manuel S. Mantecon

Mantecon's revised backpay figures (not including interest) for 2Q94 through 3Q94 are:

Year	Qtr.	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Backpay
1994	2	$1938	0	0	0	$1938
1994	3	3952	0	0	0	3952
Totals:		$5890	0	0	0	$5890
Total net backpay due Manuel S. Mantecon:					$5,890	

D. Merri Rowe

Rowe's backpay figures (not including interest, and revised to end with 2Q98) for 2Q94 through 2Q98 are:

Yrs.	Gross Backpay	Interim Earnings	Interim Expenses	Net I/Earnings	Net Back-pay
Total:	$21,458	$1050	0	$1050	$20,408
Total net backpay due Merri R. Rowe:					**$20,408**

CONCLUSIONS OF LAW

Respondent Performance Friction Corporation did not commit any of the unfair labor practices alleged in the November 4, 1998 amended complaint in Case 11–CA–18044.

[Recommended Order omitted from publication.]