

**3 States Trucking, Inc., and its successor, Southern Illinois Minerals Corporation and United Mine Workers of America. Cases 14-CA-9688, 14-CA-9700, and 14-CA-9714**

September 30, 1980

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On February 29, 1980, Administrative Law Judge Platonia P. Kirkwood issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified below.

The General Counsel excepts, *inter alia*, to the Administrative Law Judge's failure to grant the General Counsel's motion to strike the Respondent's answer and amended answer to the backpay specification issued herein and to her failure to treat as admitted all matters alleged in the aforesaid specification pertaining to the appropriateness of the formula used in computing backpay due employee John Fisher. Accordingly, the General Counsel contends that the Administrative Law Judge erred in permitting the Respondent to adduce evidence at the hearing challenging the selection of Dwight Jackson as the representative employee in computing the backpay due Fisher. Alternatively, the General Counsel excepts to the Administrative Law Judge's conclusion, based on the facts adduced at the hearing, that the earnings of Darryl Sanders, rather than those of Jackson, constitute the appropriate measure in computing Fisher's backpay. We find merit in the General Counsel's exceptions, on the facts and for the reasons set forth below.

The backpay specification duly served on the Respondent states that, pursuant to Section 102.54 of the Board's Rules and Regulations, an answer thereto shall be filed within the time required and, further, that to the extent such an answer fails to deny allegations of the specification in the manner required by the aforesaid Rules and Regulations, and the failure to do so is not adequately explained,

those allegations shall be deemed have been admitted as true and the Respondent shall be precluded from introducing any evidence controverting them.<sup>1</sup>

To the extent here relevant, the backpay specification alleges that an appropriate measure of the quarterly gross pay Fisher would have received from January 3 through November 25, 1977, is the average weekly hours worked during that period by Dwight Jackson, the individual performing the work Fisher would have performed, multiplied by Jackson's hourly rate of pay.

In its answer and amended answer, Respondent 3 States denies these allegations, asserting that it is without knowledge as to the appropriate measure of quarterly gross pay Fisher would have received during the period in question:

... for the reason that John Fisher would not have performed work for 3 States Trucking, Inc. nor for an employer in the operation of a mine beyond the date of February 9, 1977, nor would 3 States have had any control over the employment of Mr. Fisher after February 9, 1977 had he been employed.

The Respondent thus interposed two affirmative defenses: (1) that Fisher was ineligible for further employment because he lacked the required skills; and (2) that, in any event, 3 States is not liable for any backpay due Fisher after mine operations were

<sup>1</sup> Sec. 102.54(b) and (c) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides as follows:

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

taken over by Southern Illinois Minerals Corporation (hereinafter SIMCO), 3 States' successor, as 3 States has no control over SIMCO's hiring practices. The Administrative Law Judge rejected these defenses and we adopt her Decision with respect thereto.

As to the question concerning whether Jackson, or some other individual, should have been selected as the representative employee for the purpose of determining Fisher's quarterly gross pay after the takeover by SIMCO, the Respondent's answer amounts to no more than a general denial. The sufficiency of such an answer under the Board's Rules depends on whether or not, under all the circumstances in this case, matters relating to the selection of the representative employee may reasonably be considered to be within the knowledge of the Respondent. We find such knowledge attributable to the Respondent and, therefore, that its answer lacks the specificity required by the Board's Rules.

In this respect, the record shows and the Administrative Law Judge found that the Union struck 3 States on February 9, 1977, causing a total shutdown of the latter's mining operations. Thereafter, on February 23 and 24, James Burks, 3 States' general manager, hosted certain meetings at his home, which also served as the Company's "operating office," with a view toward ending the strike and resuming operations. In attendance at these meetings were representatives of 3 States, the Union, and certain individuals identified as "proposed new owners of a company to be known as SIMCO," including Burks himself and others identified as stockholders of 3 States.<sup>2</sup> The parties in attendance reached an agreement under which SIMCO, as an "independent contractor" and successor to 3 States, would own and operate the mines in question with the acquiescence of the Union. In turn, SIMCO, the proposed successor, would grant preferential employment to current employees of 3 States "who have the ability to step in and perform the work," to be selected from an agreed-upon list of names drawn up by the parties and, thereafter, grant "voluntary recognition" to the Union on proof of majority, once SIMCO hired its complement of employees.<sup>3</sup> Burks, who became SIMCO's president and general manager, was a central figure in determining employee "acceptability," because of his asserted knowledge of the 3 States employees, their qualifications, and the tasks they would be called upon to perform for the successor. Thus, he testified:

There were people that were not acceptable to myself and other people that were to be the owners of the new corporation known as SIMCO, as well as some of the proposed management people, foremen and so forth that we would have. We went over these lists and discussed it one by one, the names of the people, the qualifications, their abilities to do the job that we would have to be performed which would not necessarily have been things that had been done in the prior ten, eleven, twelve months or two years, whatever you want to discuss.

The foregoing facts, revealing Burks' familiarity with all of the employees involved and the tasks assigned to them by SIMCO, demonstrate clearly that, from the outset of resumed operations, the Respondent, through Burks, was in a position to ascertain which individual in its view should have been selected as the representative employee for the purpose of determining Fisher's quarterly gross pay. Therefore, had it chosen to do so, the Respondent could have challenged Jackson's selection as the representative employee for that purpose when it filed its answer and amended answer, "Setting forth in detail [its] position as to the applicable premises and furnishing the appropriate supporting figures."<sup>4</sup> Yet, this challenge was not raised until the second day of the hearing herein, indeed through the testimony of Burks himself. The Respondent does not claim that Burks was unavailable for that purpose during the time allotted for filing an answer to the backpay specification. Accordingly, no good cause to the contrary being shown, we shall strike those portions of the Respondent's answer and amended answer to the backpay specification, pertaining to the selection of Dwight Jackson as the representative employee in computing the backpay due John Fisher, and find those allegations of the specification to be true.<sup>5</sup>

However, even if we were to draw a conclusion on review of the evidence hereby excluded, we would nevertheless conclude, contrary to the Administrative Law Judge, that the allegations contained in the backpay specification, referred to above, are correct as set forth. In this respect we note that both Fisher and Jackson were employed in the classification of "laborer"; that individuals employed by SIMCO in that classification were paid at the same hourly rate without any differential established for those possessing different degrees of skill; that Jackson was originally hired by

<sup>2</sup> It was Burks' idea to form a new company which would take over the mines and operate in a climate devoid of labor disputes.

<sup>3</sup> Fisher's name was not on the list of preferred employees.

<sup>4</sup> See fn. 1, *supra*.

<sup>5</sup> *Airports Service Lines, Inc.*, 231 NLRB 1272 (1977), *enfd.* 589 F.2d 1115 (D.C. Cir. 1978).

3 States after Fisher; and that Jackson was also the first laborer hired by SIMCO who had less seniority than Fisher.

Nevertheless, the Respondent contends that Jackson's gross earnings at the coal preparation plant, which were higher than the earnings of other laborers employed at the mines, do not constitute an appropriate measure in computing Fisher's backpay, because Fisher, less skilled than Jackson, was not qualified to perform the work Jackson did at the plant.

The Respondent's contention is not substantiated by the testimony it adduced in support thereof. When asked to describe *Jackson's duties* at the coal preparation plant, Burks responded as follows:

Well, that is a—I don't want to say it is a complicated operation but it is a preparation plant where the raw coal from the mine is delivered for proper sizing, cleaning and application of oil for stoker use and coal is prepared in different sizes to go to different users. It is a lot of machinery, screening and—it is a little more skilled operation than just out doing manual labor.

No evidence was ever proffered as to precisely what tasks Jackson performed or what skills were required at the preparation plant, nor was a comparison made between his work and that previously done by Fisher at the mines, including, among other things, pumping water, making minor machinery repairs, drilling and packing holes with explosives, working with others in wiring the explosives, and replacing drag line cables. Burks merely asserts:

Dwight Jackson was on a specialized job. He was assigned and worked on the prepara-

tion plant, away from the mine site, like that preparation plant is at a different location, 20 miles away. There were like four people that were—that would work at that preparation plant and Dwight Jackson was one of the people that worked at the preparation plant.<sup>6</sup>

In these circumstances we would find that the Respondent has failed to demonstrate that Jackson's earnings were an inappropriate measure of the quarterly gross pay due Fisher for the period in question.

Based on the foregoing, we find that the total net backpay due Avery remains \$3,830, as shown in Appendix A attached hereto; and that, pursuant to the revised computations reflecting Jackson's selection as the representative employee for determining the quarterly gross pay due Fisher during the periods in question, as shown in Appendix B attached hereto, the total net backpay due Fisher is \$8,603.19, as shown in Appendix C attached hereto. We shall modify the Administrative Law Judge's recommended Order, accordingly.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and set out in full below, and hereby orders that the Respondent, 3 States Trucking, Inc., and its successor, Southern Illinois Minerals Corporation, their officers, agents, successors, and assigns, shall pay to William Avery the sum of \$3,830 and to John Fisher the sum of \$8,603.19, together with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

<sup>6</sup> No claim was advanced that Fisher would have been unable or unwilling to work at the plant in question.

#### APPENDIX A

NAME: William Avery

Calendar Quarter	Total Hours	Hourly Rate	Gross Backpay	Travel & Expenses	Net Interim Earnings	Net Backpay
1976-3	330.25	\$4.00	\$1,321.00	NONE	NONE	\$1,321.00
1976-4	627.27	\$4.00	2,509.00	NONE	NONE	2,509.00
Total Net Backpay						\$3,830.00

## APPENDIX B

NAME: John Fisher

Calendar Quarter	Avg. Hrs. Worked Per Week	Total Wks. Fisher Would Have Worked	Hourly Rate	Gross Backpay
1976-4	43.49	4	\$5.00	\$2,478.93
1977-1	43.49	5.6	5.00	1,217.72
	37.55	1	7.30	274.12
1977-2	37.55	4	7.30	1,096.48
	37.55	9	7.40	2,500.83
1977-3	37.55	4	7.40	1,111.48
	37.55	9	7.49	2,531.35
1977-4	37.55	4.2	7.49	1,181.25
	37.55	3.8	7.54	1,075.89

## APPENDIX C

NAME: John Fisher

Calendar Quarter	Interim Employer	Gross Interim Earnings	Travel & Expenses	Net Interim Earnings	Net Backpay
1976-4	NONE	NONE	NONE	NONE	\$2,478.93
1977-1	NONE	NONE	NONE	NONE	1,491.84
1977-2	Wilkins Implement Co. Self-Employed	\$947.70 30.00	\$50.00	\$927.70	2,669.61
1977-3	Wilkins Implement Co.	2,570.20	NONE	2,570.20	1,072.63
1977-4	Wilkins Implement Co.	1,366.96	NONE	1,366.96	890.18
Total Net Backpay					\$8,603.19

## SUPPLEMENTAL DECISION

## STATEMENT OF THE CASE

PLATONIA P. KIRKWOOD, Administrative Law Judge: This matter, heard by me in St. Louis, Missouri, on January 25 and 26, 1979, involves a determination of the backpay liability of Respondent 3 States Trucking, Inc. (herein called 3 States), and its successor, Southern Illinois Minerals Corporation (herein called SIMCO), for unfair labor practices 3 States committed in discharging discriminatees John Fisher and William Avery and refusing at the end of a strike to reinstate discriminatee William Avery.

The Board's Decision and Order in the underlying unfair labor proceeding was issued September 21, 1977.<sup>1</sup> The Board there found that 3 States had violated Section 8(a)(3) and (1) of the Act by: (1) refusing, after the end of a strike, to return Striker—William Avery to his job (or to a substantially equivalent one) when it became available on August 20, 1976; and (2) terminating John Fisher on October 7, 1976, because of his union or protected concerted activities. The Board, pursuant to an unopposed motion of the General Counsel, joined SIMCO as a party. (See 232 NLRB 242, fn. 1.) The Board directed 3 States and its "officers, successors and assigns" to reinstate discriminatees and to make them

whole for losses suffered as a result of 3 States' discrimination against them.

On October 16, 1978, the United States Court of Appeals for the Seventh Circuit enforced the Board's Order against 3 States and its successor, SIMCO.<sup>2</sup>

A controversy subsequently arose as to backpay liability; and the Regional Director for Region 14, for the National Labor Relations Board, issued the instant backpay specification (herein called Specification) and notice of hearing on January 2, 1979. The same was served on 3 States and on SIMCO.

An answer and amended answer to the specification was filed by 3 States, which admitted certain allegations of the specification, denied others, and asserted as to some that it was without sufficient information to admit or to deny.<sup>3</sup> Post-hearing briefs were filed with me by the General Counsel and by 3 States.

<sup>2</sup> *N.L.R.B. v. 3 States Trucking, Inc., and its successor, Southern Illinois Minerals Corporation*, No. 78-1223, unreported.

<sup>3</sup> SIMCO filed no answer, and no one entered a formal appearance on its behalf at the hearing. Accordingly, at the outset of the hearing, the General Counsel moved that the allegations of the specification be deemed admitted for all purposes as to it, and that a summary judgment order be entered against it. I granted those motions. However, as will hereafter appear, I find that certain deductions from the specification are in order. As the liability of SIMCO, as a successor-employer, for pay-

<sup>1</sup> The Board's decision is reported at 232 NLRB 242.

Continued

Upon the entire record in this case, including the briefs and arguments, and from my observation of the demeanor of the witnesses, I make the following:

#### FINDINGS AND CONCLUSIONS

##### I. WITH RESPECT TO THE ISSUES OF BACKPAY DUE TO DISCRIMINATEE AVERY

The specification alleges Avery's backpay period as commencing on August 20, 1976, and ending on December 5, 1976,<sup>4</sup> and computes gross backpay of \$1,321 for the third quarter of 1976, and \$2,509 for the fourth quarter or a total gross backpay of \$3,830. The General Counsel pleads no expenses in seeking work, nor any interim earnings for Avery.

3 States raises no question concerning the computations of Avery's gross backpay; but asserts that certain deductions are in order.

First, 3 States claims that, during the third quarter of 1976, Avery had interim earnings in excess of \$1,500, which would offset the gross backpay set out in the specification for that period. I find this claim unproved on the evidence before me.<sup>5</sup>

3 States adduced certain evidence which shows that on November 3, 1976, Avery filed an employment application with General Tire Company. Answering questions on that application, Avery stated that from September 1975 to October 1976, he had been employed by Avery Trucking Company as a truckdriver at a rate of pay of \$150 (without stating the period this covered) and that this job terminated when he was laid off for lack of work. Avery testified that the foregoing statements entered by him on the above application were untruthful; that, in truth, he never in fact worked for Avery Trucking—a business operated by his uncle; and that he had put the figure of "\$150 a week" on the application because that was what he had been earning at 3 States, his last previous employer. As explanation for the false statements on the application, Avery testified that he knew General Tire to be a nonunion employer, and, hence, felt that had he disclosed his most recent employment to have been at 3 States, whose involvement with the Union was a matter of common knowledge in the com-

ment of the amounts hereafter found to be due as backpay can be no greater than that of Respondent 3 States, the "Summary Judgment" order I issued at the outset of the hearing will be modified accordingly.

<sup>4</sup> Avery's backpay period ended December 5, 1976, by reason of his reinstatement on that date by 3 States.

<sup>5</sup> It is well established that:

... While the general burden of proof is upon the General Counsel to establish the damage which has resulted from Respondent's *established* discriminatory discharge, i.e., the gross backpay over the backpay period, the burden of proof is upon Respondent as to diminution of damages, whether from the willful loss of earnings by the failure to look for or keep a substantially equivalent job or from the unavailability of a job at Respondent's plant for some reason unconnected with the discrimination. . . . Absent a showing by Respondent that the individual claimant acted unreasonably or willfully or that a job would not have been available had the discrimination not occurred, the General Counsel has established a *prima facie* case. *Mastro Plastics Corporation and French-America Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1346-47 (1962). [Emphasis supplied.]

munity, he would not have been employed by General Tire.<sup>6</sup>

I am convinced and find that Avery's above-recited factual report was truthful.<sup>7</sup> There being no rebutting evidence,<sup>8</sup> I conclude that 3 States did not carry its burden of proving that Avery, in fact, had gainful employment with the Avery Trucking Company, as it claimed, during the third calendar quarter of 1976.

The additional claim advanced by 3 States is that, in any event, it is entitled to be relieved of the obligation to pay Avery any part of the backpay pleaded in the specification, for the asserted reason that Avery's testimony does not establish "diligent" efforts to look for a job at all material times herein. I have carefully reviewed Avery's testimony about his job-search efforts in light of the guidelines provided by here applicable Board law, and find no merit in Respondent's claim.

Avery credibly testified that during the backpay period he went to a number of coal mine operations in the area seeking work but that most of these were not hiring. When given an application to fill out, however, he completed it and followed through by checking back, in person or by telephone, to find out if work had become available.<sup>9</sup> Avery also maintained his registration at the state unemployment service during this period. Furthermore, as earlier set out, Avery filed an application for employment with General Tire and Rubber Company during the periods relevant herein, and ultimately got work (in February 1977) with that Company.

To be sure, Avery admitted that he did not go out filing applications for work for a 3-week period preceding 3 States' reemployment of him on December 6, 1976 (the terminal point of the pleaded period for the running of the backpay obligation imposed on Respondents). But, as review of all his testimony on that subject shows, he

<sup>6</sup> The record shows that about 60 days after being reinstated by 3 States, Avery was offered employment by General Tire. He then quit 3 States to work for General Tire, where he was employed at the time of the hearing before me.

<sup>7</sup> In arriving at this credibility determination, I have taken into account not only the favorable feeling left with me about Avery's veracity under oath, as I observed him on the stand, but also certain other considerations which lend an aura of credibility to his explanation of why he falsified his application to General Tire. It is clear from the Board's underlying decision in this case that at the time Avery filed that application, 3 States had rejected and ignored Avery's application to return to work at his former job for the unlawfully discriminatory reason that Avery had participated in the UMW strike. (See 232 NLRB 244.) In these circumstances, I have no difficulty in viewing, as understandable, his apprehension that any clue on the employment application form which would connect him with the Union or its strike activity would operate to the prejudice of his obvious interest in getting work. The fact that he saw fit to supply the name of an employer for whom he had not in fact worked in listing his experience proves no more, for purposes of this case, than that Avery needed work badly enough to go to the length of "falsifying" his job application so as to obtain such work by adding information he believed would aid him in so doing.

<sup>8</sup> 3 States did not, I observe, seek to subpoena Avery Trucking Company's records, nor call an agent of that firm to testify about the matters involved herein.

<sup>9</sup> Although Avery could not supply the precise dates of his visits to such companies, I do not regard his inability to recall those dates as proof that he had not made them. This hearing was held more than 2 years after the events here in issue and the difficulty of recalling precise dates in such circumstances seems to me quite understandable. Cf. *Southern Household Products Company, Inc.*, 203 NLRB 881, fn. 4 (1973).

had not done so because 3 States' general manager, Burks, had advised him, in early November 1976, that 3 States would be recalling him and several others back to work. I do not regard his conduct in this respect to be conduct "inconsistent with the inclination to work and to be self-supportive."<sup>10</sup> Nor would I find, without more, that he lost his entitlement to backpay because his search for work was not conducted on a regularly scheduled basis. Furthermore, while 3 States argues that Avery's job-search efforts were inadequate, it offered no evidence to show that work, which Avery was qualified to do, was readily available in the community, or even that any employers were advertising for workers with Avery's qualifications at dates herein relevant.

It bears repeating that an employer who has, by his unlawful action—put an employee into a state of unemployment—bears a heavy burden in a proceeding such as this to prove entitlement to offsets against backpay afforded that employee under the remedial policies of the Act. 3 States did not, I find, meet that burden with respect to Avery.

It follows from the above that Avery is entitled to backpay as pleaded in the specification. I so conclude.

#### The Issues With Respect to Backpay Due to Discriminatee John Fisher

##### 1. The "Joint and Several Liability" issue

The General Counsel fixes the backpay period for Fisher as running from October 7, 1976, through November 25, 1977, the date of his discriminatory termination by 3 States,<sup>11</sup> through November 25, 1977, the date on which SIMCO, the Employer named as the "successor" to 3 States in this case, made an unconditional offer to reemploy Fisher, which Fisher refused.

Inasmuch as the Court-enforced Board Order continuing the provisions for making Fisher whole for monetary losses attributable to his discriminatory termination imposes the make whole obligation on both 3 States and SIMCO; the General Counsel asserts that the two Respondents are jointly and severally liable for the total amount of net backpay due Fisher.

Although 3 States questions the accuracy of the specified "net backpay due" figure on certain other grounds later described, it is appropriate to take up first, its dispu-

tations, on certain other grounds, of the "joint and several" obligation the General Counsel would enforce against it for net backpay due Fisher not only for the period when it directly owned and operated the mines at which Fisher had worked before his discharge, but also for a period beyond that. The "special grounds" 3 States advances as reason for seeking relief from the "joint and several" obligation to finance the *whole* of the sum specified as being due Fisher as net backpay is that, fairly viewed, the recited evidentiary facts below establish either or both that: (a) it "lost" all power to provide Fisher or any other mine worker gainful employ, at will, because of strike activities engaged in by the UMW directed at its mines beginning February 9; or (b) in strike-settlement negotiations which, as will appear below, were held about February 24, and the terms for a takeover by SIMCO of the ownership of the mining enterprise and its reopening were set, 3 States could not do more than recommend to UMW and SIMCO, giving to Fisher "the same consideration as all other of its employees," in the effectuation of "hiring arrangements" the UMW proposed as a condition of letting SIMCO open the mines for operation, and to which SIMCO agreed.

The evidentiary facts underlying the above contentions are as follows:

On February 9, 1977, United Mine Workers (herein called UMW) struck 3 States' mines and set up picket lines which brought about the total shutdown on that very day of 3 States' mining operations. The strike is identified by 3 States' witnesses as a "recognition" strike. Certain efforts made by 3 States up through February 23, 1979, to resume operations proved unsuccessful.<sup>12</sup>

On February 23 and 24 certain meetings were held for the purpose of discussing the cessation by UMW of its strike and picketing activities, and the resumption of the operations at the struck facilities. Those meetings took place at the residence of James Burks, general manager of 3 States.<sup>13</sup> Present at portions or all of the meetings were Burks himself; certain officials of 3 States and 3 States' legal counsel;<sup>14</sup> and certain individuals identified in Burks' testimony as "proposed new owners of a company to be known as SIMCO."<sup>15</sup> The testimony of J.

<sup>10</sup> The quoted words appear in *Mastro Plastics Corp.*, *supra* at 1359, where the Board set out what it regarded to be "reasonable effort by a discriminatee . . . to find a substantially equivalent job." It stated, in relevant part, that, broadly speaking, such reasonable effort:

. . . requires conduct consistent with an inclination to work and to be self-supporting . . . [Such] inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.

<sup>11</sup> The allegations of the specification which describe the method used by the General Counsel to compute what Fisher would have earned as wages, but for his discriminatory termination, speak in terms of Fisher's hourly rate in certain "payroll periods," the first of which is payroll period for "October 3, 1976 through March 27, 1977." There is no contention and no claim that the General Counsel's computations include the 4-day period between October 3 and 7

<sup>12</sup> It appears, *inter alia*, that 3 States filed certain CB and CP charges with the Board naming UMW as the party charged shortly after the strike commenced; and that on February 21, it issued to all its "personnel" a notice stating, in relevant part as follows:

We can no longer permit our expenses to continue and to increase, without immediately resuming operations. If we are unable to resume operations on Wednesday, due to economic conditions, it will be necessary that the Company consider the possibility of closing down operations.

If employees are able to report to work under peaceful circumstances, we hope to resume operations Wednesday morning. (February 23.) It further appears that no employees accepted 3 States' above "invitation" to return to work.

<sup>13</sup> Burks testified that his residence had served, for over a year before, as "the operating office for 3 States."

<sup>14</sup> Attorney William Cody is the same counsel who represented 3 States in the instant proceeding.

<sup>15</sup> Burks testified that before the February 23 and/or 24 meetings above referred to took place, "there had been ongoing discussions be-

*Continued*

Kenneth Merten, 3 States' comptroller, I observe, contains statements indicating that the idea of forming a "new company" as "his own" originated with Burks and was presented by him to 3 States and the UMW, who both reacted favorably to it.

A written document titled "Settlement," and signed by a UMW official and dated February 25, 1977, was made part of the record in this case by stipulation of all parties that it was an "accurate representation" of certain oral understandings or agreements arrived at by the agents of 3 States, SIMCO, and the UMW on February 24, 1977. That "Settlement" contains, in part, provisions for the presentation by 3 States of a request for the withdrawal of all outstanding unfair labor practice charges it had previously filed against the UMW; the concurrent presentation by UMW of a request for withdrawal of all outstanding charges it previously filed against 3 States; and the reopening of the mines by (the new proposed company) and then operation by the latter as an "independent contractor" or employing enterprise. The "Settlement" also provides for SIMCO's grant, on takeover, of "preferential hiring" rights to "current employees of 3 States," but on the terms and conditions of employ to be set by SIMCO alone and on the basis of "seniority recognized by SIMCO"<sup>16</sup>; the issuance by 3 States of notice to its employees of "curtailment of operations and of their being laid off and . . . of its referring all its employees to SIMCO as Purchaser for consideration of preferential employment", the grant by SIMCO to UMW of "voluntary recognition" on proof of its majority once the latter hired its employees; the UMW's withdrawal of all "picketing by former 3 States employees upon the signing of this agreement," and its promise to "take all reasonable efforts to remove any 'stranger' United Mine Worker picketing."

Certain of the evidence provided through 3 States' witnesses to show the "context" in which the "hiring arrangements" of the "new proposed company" were discussed and formulated on February 23 and 24, for the purposes of arriving at the "Settlement's" terms, indicates that those present (including Burks) had before them a list compiled by 3 States of the employees on the latter's "current" payroll together with the dates of hire and their "classifications"; that Burks indicated he could not need as many men as were on that list; that Fisher's name was not on that list; that Fisher's name was brought up for discussion: that Burks said he would not

tween the existing owners at that time of 3 States and the new proposed owners of a company to be known as SIMCO," and certain legal counsel of each, looking to the establishment of new economic climate in which the business enterprise at the struck locations could be made operable without further strike or picketing pressures being exerted by UMW of a kind it had been exerting off and on over the previous "two and a half, three years." Burks identified certain of those interested in the formation of the "new proposed company" as 3 States stockholders. While Burks did not expressly identify himself as one of the then proposed "new owners," it is clear from the record that he was among that group. As will appear, he was installed as SIMCO's President and general manager when, later, SIMCO became the corporate owner-operator of the mine facilities involved herein.

<sup>16</sup> Certain language contained in that paragraph of the "Settlement" expresses the idea that SIMCO would not hire any "other person" until "current" employees of 3 States "who have the ability to step in and perform the work shall have been offered the right of first refusal to such employment." (Emphasis supplied).

hire him assertedly because he lacked the skills or abilities Burks would require in deciding "eligibility" for hire by the "new proposed company"; that the UMW agents "agreed" with Burks' characterization of Fisher's competence to "step into" a job at the new operation; that Attorney Cody (3 States' counsel) then tried to "get" the UMW agents to "settle" the 8(a)(3) charges involving Fisher; and that an interchange of talk between Attorney Thomas Gumbel, legal counsel for the UMW, and Attorney Cody took place. Remarks attributed to Gumbel indicate he expressed the idea that he could not "settle" the charges as the unfair labor practice case was then "before the NLRB";<sup>17</sup> that Cody then said, "Well, if there is any kind of payment, will the UMW pay it?" to which Gumbel replied, "No way I am going to pay the backpay due Fisher. It is going to be what the NLRB discusses." Cody then said, "O.K."

To go on with the chronological narrative of what took place of some import to the backpay-liability issue raised here by 3 States: SIMCO reopened the mines as the "new" owner and operator on or about March 3, 1979. James Burks, as president and general manager of SIMCO, selected the employees who composed SIMCO's initial complement. He made his selections for that complement from individuals named on the "referral" list supplied by 3 States to SIMCO. That list was identical in content to that which had been supplied at the pre-"Settlement" meetings. (Fisher's name was not on it.) Burks hired, in number, less than the number of men on the "referral list."

The Board, as noted, issued its Decision and Order on September 21, 1977; and about 2 months later, SIMCO made to Fisher the reinstatement offer which stopped the running of any backpay due Fisher.

Reviewing the above facts in its brief, the General Counsel asserts, in substance, that even though the economic circumstances in which 3 States "sold" the mining enterprise from which Fisher was discriminatorily fired, may be somewhat unusual, they do not, in the last analysis, provide a proper base for withholding application of the Board's "policy" ruling as enunciated in *Perma-Vinyl Corporation, Dale Plastics Co. and United States Pipe and Laundry Company*, 164 NLRB 968 (1967), and approved by the Supreme Court in *Golden State Bottling Co., Inc., Formerly Pepsi-Cola Bottling Co. of Sacramento, et al. v. N.L.R.B.*, 414 U.S. 168, 186 (1973). That ruling is that, in a successorship situation, both the initial and successor employers are to be held jointly and severally liable for any backpay due a discriminatee like Fisher. I must and do hold with the General Counsel on this matter.

In *Golden State, supra*, the Supreme Court expressly addressed, and resolved against the offending predecessor-employer (*Golden State*) a "challenge to the validity of the imposition of joint and several liability" by the Board's *Perma-Vinyl* rule on it, in circumstances where as is arguably here the case, it was "apparent that had

<sup>17</sup> The documentation of the NLRB proceedings show that Administrative Law Judge Welles, before whom the unfair labor practice case was heard, had issued his decision at that point, 3 States had taken exception to his 8(a)(3) findings, and that the issues raised by the latter had not been ruled on by the Board.

[the offending employer] already reinstated [the there named discriminatees] with backpay before the sale of its business" . . . to the purchase employer, the latter "would have no more obligation to employ him in the continuing business than it had to employ" any of the offending employer's "other employees."<sup>18</sup> In holding against Respondent Golden State on the issue it raised, the Court, *inter alia*, cited, with approval (414 U.S. at 186-187), the following language in the Board's *Perma-Vinyl* decision (164 NLRB at 970.):

With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer. 164 NLRB at 970.

The Court added to the above, its observation that:

. . . joint and several liability will more fully insure that the employee is fully recompensated by protecting him, e.g., against the insolvency of the successor. The possibility that the successor will unjustifiably delay reinstatement to the predecessor's prejudice can be met by a protective provision in the contract of sale.

I perceive nothing in the above evidence proffered to me by Respondent which suggests the existence of some special considerations of equity or policy overriding those which lie at the base of the Board's establishment of the *Perma-Vinyl* rule and its approval by the Supreme Court. I find unimpressive Respondent's apparent argument, to the contrary stressed by Respondent in its brief—that, as part of the bargain struck with it to "sell" its operational right or assets to SIMCO, it was "forced" to let SIMCO decide who it should hire and on what standards, and hence "lost" all power in fact or law, to do more for Fisher than it was able to do for any other of its employees. The loss by the seller of a business enterprise of the power to control or dominate the purchaser's hiring decisions is, it seems to me, a matter common to all successorship situations involving an

"arms-length" business transfer<sup>19</sup>—and certainly it was present in *Perma Vinyl*.<sup>20</sup>

In sum, I conclude and find that Respondent has not, with the above-recited evidence, made out a factually or legally valid case for tolling, as to it, the running of the backpay period for Fisher on or at any date after February 9.<sup>21</sup> It is the offending employer; its discriminatory terminations of Fisher and Avery are the heart of this case; and, having been ordered by the Board and the Court to take certain remedial action, specifically including a make-whole remedy for Fisher, it must, I hold, comply with the Board's "make-whole" order in the manner plainly called for by the *Perma-Vinyl* rule.

## 2. The question about the General Counsel's method of calculating Fisher's gross backpay.

As noted, the General Counsel specifies the period Fisher is due backpay to be from October 3, 1976, through November 25, 1977. For this total period, divided into five separate quarters, the General Counsel claims the gross backpay due Fisher is \$13,468.05; that, in addition, he is due \$50 as reimbursement for "fuel" expense incurred by him in seeking interim employment.<sup>22</sup>

<sup>19</sup> It bears mentioning here that, although I am responding to Respondent's arguments on the assumption that—as it seems to claim—its own contract with SIMCO covering the transfer of operational rights and assets to the latter was a "bona fide" transfer—i.e., one in which 3 States reserved no right to supervise or interfere with SIMCO's conduct of its business affairs once the transfer was consummated—I make no finding that this was in fact the case. No documentation was supplied of the transfer-arrangements between SIMCO and 3 States, and of the specific properties involved. All that appears, as part of Burks' testimony, is that on unspecified dates after February 25, . . . there was an agreement of intent and then there was agreement as to stipulated prices of different pieces of equipment. Another document covering leases. Another document covering a mining contract whereby we were to continue working under permits that were already outstanding to 3 States."

<sup>20</sup> See 164 NLRB 969—where the Board discussed that part of its decision which imposed remedial obligations on the successor, and stated:

In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he . . . continues to operate the business without any connection with his predecessor.

<sup>21</sup> In so holding, I have not overlooked the apparent "waiver" argument it has presented by referring me to evidence allegedly proving that the UMW and SIMCO agreed that Fisher should not be hired as part of the hiring arrangements, and the "consideration," therefore, given by the UMW to cease its strike activity and to request withdrawal of pending CA charges it had filed (which may have imposed more financial liability on SIMCO if pressed to adjudication, under the concepts here discussed).

To the extent that Respondent 3 States may be arguing that the Board should not enforce against it, the backpay obligation to Fisher (or a portion thereof) because the Union agreed to waive whatever "rights" Fisher might have had to be employed by SIMCO, I reject the argument. See *Safeway Stores, Incorporated*, 148 NLRB 860 (1964).

I observe, in addition, that SIMCO's failure to offer employment to Fisher has no real relevance to the applicability of the *Perma-Vinyl* remedial rule Respondent is resisting here.

<sup>22</sup> In the specification and notice of hearing, the General Counsel had included certain additional amounts as being due Fisher for "expenses" he would not have incurred during the backpay period were it not for 3 States discriminatory termination of his employ. After Fisher was examined at the hearing about such "expenses," 3 States moved that the "expense" items be struck from the specifications on grounds that the General Counsel did not prove that Fisher's claim of "expenses" were in fact expenses Fisher would not have incurred had he remained in the job from which 3 States had discriminatorily terminated him. I reserved ruling on that motion pending review of the record. Except for a \$50 item of "expenses," I grant this motion.

<sup>18</sup> The above-quoted words are to be found in the Supreme Court's decision, at 414 U.S. 166 and 189, fn. 10.

*Continued*

the General Counsel allows credits against that gross figure for moneys earned by Fisher in interim employment in the amount of \$4,914.86,<sup>23</sup> and sets the "net" backpay due Fisher, accordingly, in the amount of \$8,603.19. The computations of gross backpay made by the General Counsel were divided into two parts. For the period from October 3, 1976, through February 9, 1977, he used, as a basis for calculating the gross backpay, the average number of hours per week worked by Fisher when he was actively employed by 3 States as a "laborer" and multiplied this by Fisher's rate of pay immediately prior to 3 States' unfair labor practice. Respondent does not challenge the accuracy of the General Counsel's gross pay figure for this period.

For all the period beginning after SIMCO's takeover of the mine facilities, the General Counsel used as a basis for calculating the gross backpay figure, the average weekly hours worked during that period by employee Dwight Jackson, the individual who is identified by the General Counsel as an employee who occupied a job at SIMCO, representative of that Fisher had occupied at the mine facilities before he was discriminatorily fired. The General Counsel used as a multiplier the hourly rate of Jackson's pay during that period.

Respondent challenges the propriety of the General Counsel's identification of Dwight Jackson as occupying a job at SIMCO representative of that Fisher occupied at 3 States. Respondent asserts that Jackson's job and rate of pay was not an appropriate method of arriving at the gross pay figure, assertedly because Jackson worked at a different situs at the mines than that at which Fisher had worked, and performed tasks requiring higher skills than Fisher possessed.

Roy Hayden, the Board's compliance officer who was responsible for making the calculations, testified that he worked out his computations by reference to information, as supplied to him by 3 States and SIMCO, in written form, containing: (a) 3 States' list of its employees at dates here relevant, together with the employees' job titles and dates of hire; (b) SIMCO's similar list of its employees; and (c) SIMCO's payroll sheets which contained for all employees with "laborer" job titles, the actual hours and weeks worked by each such employee during the backpay period and a calculation both of the "average hours" worked by each per week and the average "weekly hours per laborer."

Compliance Officer Hayden further testified that he used Dwight Jackson as the "representative" employee because: (a) Jackson had been employed at 3 States as a "laborer" (Fisher's classification, as well) at the time Fisher was employed there, and had been hired by 3 States at a date later than Fisher; (b) Jackson was the first "laborer" hired by SIMCO who had a seniority date later than Fisher; and (c) employees carried on 3 States' payroll lists with job titles other than "laborers" ap-

In his post-hearing brief, the General Counsel acknowledges, in essence, the merits of 3 States position with respect to \$444 of the \$494 "expense" items pleaded in the specification as framed, and would correct the "net backpay" calculations in accord.

<sup>23</sup> Of this amount, \$30 represented moneys Fisher earned during the second quarter of 1977 from self-employment; the remaining \$4,884.86 represented wages earned for employment at Wilkins Implement Co., during the second, third, and fourth quarters of 1977.

peared to have—from their job titles certain specialized skills or jobs. SIMCO's "payroll sheet" also carried the hourly rate at which all employees classified as "laborers" were paid at dates herein relevant. It showed that all of them on each of three shifts were paid at the same rate; and that the first shift "laborers" received the lowest rate.

In arriving at the specification's figure reflecting the number of hours Fisher would have worked during the backpay period herein under consideration, Compliance Officer Hayden computed from the payroll sheet furnished him by SIMCO and from certain other information he obtained from the SIMCO office personnel, the average number of hours per week which Jackson had worked during the backpay period (including overtime hours converted to straight time hours);<sup>24</sup> and used that figure times the lowest hourly rate SIMCO's payroll sheet identified as being paid to "laborers" during the backpay period.

It was admitted by Compliance Officer Hayden, during cross-examination, that he had made no inquiry at all either as to the precise work tasks Jackson or any other of SIMCO's "laborers" were assigned to do, or as to the particular part of the mine operation to which each such "laborer" was normally assigned to work.

Respondent subsequently developed, through SIMCO's president and general manager, James Burks,<sup>25</sup> evidence showing *inter alia*, that Jackson, and one other of SIMCO's 16 "laborers" regularly worked at a coal-preparation plant; 4 such "laborers" were employed at the mine in general "laborer" work; and of the remaining "laborers" 2 were regularly engaged in driving trucks, 1 in operating a loader, 2 in mechanic-helper work, 1 as a licensed dynamiter, and 1 as the latter's assistant. Each of the above had been employed at 3 States in about the same kind of work.

Burks' testimony described the kind of work performed by Jackson at the coal-preparation plant (one located about 20 miles from the mine) as follows:

A. Well, that is a—I don't want to say it is a complicated operation but it is a preparation plant where the raw coal from the mine is delivered for proper sizing, cleaning and application of oil for stoker use and coal is prepared in different sizes to go to different users. It is a lot of machinery, screening and—it is a little more skilled operation than just out doing manual labor.

<sup>24</sup> As the sheet, on its face, indicated no hours worked by Jackson for a 12-week period, Compliance Officer Hayden, on inquiry to SIMCO's payroll office, found out that Jackson was actually at work during that time, but was on a "specialized" job assignment and was hence carried by SIMCO for that 12-week period on a different payroll sheet. For that 12-week period, Compliance Officer Hayden made an assumption for his computations, that Jackson had worked only 37-1/2 straight time hours per week. As for 1 of the 2-week payroll periods, which showed Jackson as working less than 48 hours, an assumption was made that the work was performed in a 1-week period.

<sup>25</sup> As noted earlier, Burks had served as 3 States' general manager while 3 States was operating the mining facilities herein involved.

In further testimony on the matter, Burks averred that:<sup>26</sup>

It took us quite awhile to be able to get back in operation so some of these gentlemen were put on as a laborer on an interim basis until the machinery could be started up and put in operation.

In another part of the record, and in response to questions asked, Burks testified that there were "other people" on his operation who "did the same category of work Fisher had performed", but that Jackson was on a "specialized job" at the preparation plant 20 miles away.

Reviewing all the above testimony and the record as a whole, I find, in accord with Respondent that Dwight Jackson's earnings during the gross pay period are not "an appropriate measure of the quarterly gross pay Fisher would have received." I find further that the earnings of Darryl Sanders, one of the four of SIMCO's "laborers" at the mines whose job was comparable to Fisher's, are an appropriate measure of the quarterly gross pay Fisher would have received, inasmuch as he was the first such "laborer" SIMCO hired with a seniority date (at 3 States) lower than Fisher's.<sup>27</sup> I have therefore recalculated the gross backpay for Fisher precisely as did General Counsel except for the substitution of Sanders' hours in lieu of Jackson's; and I have corrected the net backpay in accord. [(Appendixes B and C omitted from publication.)]<sup>28</sup>

<sup>26</sup> A part of Burks' testimony on the above-recited "laborer" jobs was received by me over objections made by the General Counsel on the ground that, inasmuch as 3 States answer merely denied "knowledge" of the specification's allegation identifying Jackson as the "representative" employee used for the calculations, 3 States was precluded from presenting affirmative evidence obviously directed at proving that General Counsel had erred in using Jackson's earnings for the computation. Thereafter, the General Counsel moved that I strike 3 States' entire answer and amended Answer (the Answer herein) for the asserted reason that Burks' testimony overall and particularly that portion the above quoted showed, contrary to all "denial of knowledge" averments in 3 States' answer to those portions of the allegations relating to "backpay due Fisher after SIMCO emerged as 3 States' successor," to be untruthful. I denied the motion to strike for reasons set out in the record. The General Counsel's brief renews his motion to strike, arguing *inter alia* that "it defies credulity to believe that Respondent was unaware of the employees hired by SIMCO and their respective job duties in view of the extended negotiations among SIMCO, 3 States and the Union in which employees were discussed."

The General Counsel also asserts that it was Respondent's obligation to propose, in his answer, the "formula" or method he believed to be correct to measure Fisher's gross backpay. I deny the General Counsel's renewed motion to strike, and stand by the rulings I made on record. There is little question that the General Counsel bears the responsibility of establishing the gross backpay due a discriminatee and that the adoption of a proper formula for arriving at such determination is part of that responsibility. See *Mastro Plastics Corp.*, *supra*, fn. 5. See also *American Manufacturing Company of Texas*, 167 NLRB 520 (1967).

<sup>27</sup> I have considered Respondent's proposal of the use of a "representative group" formula, as set out in his brief. But, in my view, except for the use of the wrong employee as the measuring stick of the gross backpay due Fisher, the General Counsel's formula was appropriate, and appears to me to best serve the interests of all parties herein.

<sup>28</sup> In calculating the "average weekly hours worked" figure, I, like the General Counsel, assumed that a less than 48-hour figure per payroll period in G.C. Exh. 3 represented work done in a 1-week period. I converted 1-week hours over 37.5 to overtime hours.

### 3. The alleged willful loss of earnings

Respondent claims that, during the second quarter of 1977, Fisher absented himself from the job market by taking vocational courses at John Logan College. I find no merit in this claim.

Fisher's uncontradicted testimony, which I credit, shows that his schooling was part time, without pay, and vocational in nature. He attended school in the morning; finished around noontime; and utilized his free afternoons to pursue job possibilities. Fisher continued to seek employment while attending school and continued to utilize the unemployment office services during this time. In testimony which I find credible, Fisher indicated that he would have left school had a job opportunity arisen.

The Board has held that an employee who attended trade school classes, but who was registered with state unemployment services and continued his job search, was not rendered unavailable for work by virtue of his school attendance. *American Compress Warehouse Division of Frost-Whited Company, Inc.*, 156 NLRB 267 (1965).

### 4. Alleged unreported interim earnings

Respondent contends that it is entitled to offset from net backpay, certain profits Fisher got from operating a hauling business during 1977. I find no merit in this contention. Fisher credibly testified that he had operated that same business from a time predating his termination at 3 States and was continuing to operate it notwithstanding his current full-time job.

Respondent also contends that it is entitled to offset as interim earnings, moneys received by Fisher for "swapping and trading" certain personal property he and/or his wife owned. I find no merit in this contention.

### 5. Other alleged offsets against gross backpay

Respondent claims that it is entitled to the tolling of gross backpay from May 26, 1977, or at best, from June 24, 1977 on, because: (a) on May 26, 1977, Fisher commenced work at the Wilkins Implement Co. and was still working there when, in November 1977, he rejected SIMCO's offer of reinstatement to his mining job; (b) on June 24, 1977, Fisher told Compliance Officer Hayden he was not interested in returning to work at the mines.

It is Respondent's position that although the job at the *Wilkins Implement Co.* carried a smaller pay rate than that reflected by the gross "backpay" figures, it should be interpreted, in the above circumstances, as the kind of "substantially equivalent job" which would relieve Respondent from backpay under the *Perma-Vinyl* rule, *supra*. I disagree with Respondent's interpretation. See *Burnup and Sims, Inc.*, 157 NLRB 366, 367-374 (1966) and (employees Davis and Harmon). See also *Heinrich Motors, Inc.*, 166 NLRB 783, 785 (1967); and *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978).

### Expenses

The General Counsel alleges that Fisher expended \$50 for gasoline during the second quarter of 1977 while searching for work. Fisher testified in affirmation and

produced certain records he and his wife maintained to show expenses during that period. Included therein is an item estimating gasoline used for his auto at \$10 per week in searching for work. I credit his testimony.

Inasmuch as Respondent's motion to strike expenses (see fn. 16, *supra*) covered all "expense" items contained in the specification, I have assumed Respondent is contesting this \$50 item as well. I reject Respondent's challenge of this item.

Although the \$50 represents an "estimated" sum, it does not seem overly high to me. I find this item allowable, as claimed by the General Counsel.

#### Concluding Findings

On the entire record in this case, I find that the sum, *infra*, in Appendixes A, B, and C [omitted from publication] are those which properly reflect the gross backpay, expenses, interim earnings, and net backpay for each of the employees named, as calculated on the basis specified in the Board's remedial order, 232 NLRB 244 and the

Judgment of the Seventh Circuit Court of Appeals enforcing that Order. Accordingly, I hereby issue the following recommended:

#### ORDER<sup>29</sup>

Upon the basis of the foregoing findings and conclusions, it is hereby ordered that Respondents, 3 States Trucking, Inc., and its successor, Southern Illinois Minerals Corporation, their officers, agents, successors, and assigns, shall pay to William Avery the sum of \$3,830, and to John Fisher the sum of \$5,124.16, together with interest on each of said sums to be calculated as provided for in *Florida Steel Corporation*, 231 NLRB 615 (1977).<sup>30</sup>

<sup>29</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>30</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).