

**Airports Service Lines, Inc. and R. Paul Pfeiffer and
Lynn Sawyer.** Cases 7-CA-11110 and 7-CA-
11163

September 12, 1977

**SUPPLEMENTAL DECISION AND
ORDER**

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On March 29, 1977, Administrative Law Judge Elbert D. Gadsden issued the attached Supplemental Decision in this proceeding.¹ Thereafter, Respondent filed exceptions and a supporting brief.²

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

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,³ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

Respondent excepts to the Administrative Law Judge's finding that Respondent never offered reinstatement to Lynn Sawyer. In adopting the Administrative Law Judge's finding in this regard, we take administrative notice of the fact that, in the underlying unfair labor practice decision, a Board panel majority noted that a letter was sent to Sawyer purportedly offering her reinstatement, but decided to leave to compliance any determination as to whether the offer allegedly made was a proper one.⁴ In its answer to the General Counsel's backpay specification, Respondent alleged that a valid and proper offer of reinstatement had been made by the above letter to Sawyer. However, at the subsequent hearing held herein, Respondent did not offer the letter into evidence or elicit any testimony in support of the validity of the offer. Respondent's only reference to the letter was in connection with its stated purpose for sending it: to induce Sawyer to contact Respondent so that Respondent could

inform her that her job had been eliminated. The failure on the part of Respondent to establish that an offer had been made resulted from a change in the theory stated in Respondent's answer to the backpay specification; i.e., that an offer of reinstatement had been made. At the hearing, Respondent asserted for the first time that the position found to have been held by Sawyer in the underlying unfair labor practice case, i.e., dispatcher/trainee, was not the position she in fact held, but rather that she was a telephone operator. This latter assertion was not pleaded in Respondent's answer to the backpay specification as required by the Board Rules.⁵ Thus, the Administrative Law Judge was correct in finding, in the absence of any evidence supporting the defenses asserted in the answer, that no valid offer of reinstatement had been made. Moreover, the determination as to whether Sawyer's job classification was that of a telephone operator rather than a dispatcher/trainee was not in issue, since the Board had already made a finding of fact in the underlying unfair labor practice case that Sawyer had been employed as a dispatcher/trainee. The Board's Rules provide explicit instructions concerning the pleadings in a backpay proceeding, and the Administrative Law Judge found that Respondent did not adhere to that procedure. Since the defense pleaded in the answer was not supported by evidence at the hearing, and the defense asserted for the first time at the hearing was improperly raised because it was not specifically pleaded in the answer, we fully agree with the Administrative Law Judge's conclusion that there was insufficient evidence to support Respondent's defense.⁶

As noted above, Respondent shifted its defense at the hearing to assert that the job which Sawyer allegedly held, i.e., telephone operator, was probationary or temporary and had been abolished, and thus that there was no similar position to which she could have been reinstated. We agree with the Administrative Law Judge's disposition of this "probationary" defense raised by Respondent. This defense was raised for the first time at the hearing and was not pleaded as an affirmative defense as

¹ *Airports Service Lines, Inc.*, 218 NLRB 1160 (1975), enfd. Case 75-2046 (C.A. 6, Feb. 2, 1977).

² Subsequent to the issuance of the Administrative Law Judge's Decision, Respondent filed a motion to reopen the record for the purpose of adducing new evidence that Lynn Sawyer was incapable of working during all or a substantial portion of the backpay period. The General Counsel filed a brief in opposition. Respondent based its motion on Sawyer's refusal to undergo a physical examination by its company doctor as requested in a letter offering her reinstatement, dated May 20, 1977. The facts alleged in the motion, even if true, would not affect our determination herein. Accordingly, the motion is hereby denied.

³ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to

credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and briefs adequately present the issues and positions of the parties.

⁴ Member Jenkins, in his dissent in part, concluded that the alleged offer of reinstatement was never received by Sawyer, and thus there was no further need to inquire into the validity of that offer.

⁵ Rules and Regulations and Statements of Procedure, Series 8, as amended, Secs. 102.54(b) and (c).

⁶ *Interstate Equipment Co., Inc., et al.*, 186 NLRB 121 (1970).

required by the Board's Rules and Regulations regarding backpay proceedings.⁷ Thus, the Administrative Law Judge in his Decision correctly reversed his ruling made at the hearing which had permitted the introduction of evidence on this issue. Moreover, we agree with the Administrative Law Judge's conclusion that, were there to be a finding on such improperly admitted evidence, Respondent failed to establish that Lynn Sawyer was hired as a probationary employee in a job that was experimental or temporary.

Respondent also excepts to the finding of the Administrative Law Judge that, at the time of the discharge, Sawyer's hourly wage rate was \$2.30 per hour and that it increased to \$2.50 per hour in June 1975, as the result of a wage increase negotiated by the Union. The Administrative Law Judge based his finding on Respondent's answer, which admitted that the backpay specification was correctly calculated, thereby offering in the answer no alternative figures which could have been proved at the hearing. In any event, Respondent contended at the hearing that the wage rate was \$2.10 per hour and remained at that level, relying on Sawyer's testimony as to such a rate, and on a subsequent employment application she had filed showing that rate. However, as found by the Administrative Law Judge, since Respondent did not specifically plead in its answer the basis of its claim, accompanied by supporting data revealing Sawyer's wage rate at the time of the discharge, we conclude that Respondent improperly attempted to litigate this matter at the hearing. Therefore, we affirm the Administrative Law Judge's conclusions for the reasons stated by him.

Finally, Respondent excepts to the Administrative Law Judge's finding that Lynn Sawyer made a reasonable and diligent search for alternative employment. Respondent contends that newspaper want ads revealed numerous job openings; Sawyer went to Las Vegas for 3 months to visit friends; and she quit an interim job as a beautician at a health spa. We note that Sawyer registered with the state unemployment bureau, checking back periodically; she regularly checked newspaper want ads, visiting numerous establishments to submit applications for

employment; she went to Las Vegas with friends to find work, but was unsuccessful; and the job opportunities revealed by the newspaper want ads introduced into evidence by Respondent were largely for beauty shop work, work which she cannot perform because of an allergy she developed from keeping her hands in water. In this regard, it should also be noted that it was her allergic condition which caused her to quit her interim job at the health spa. Therefore, as Sawyer made a reasonable and diligent search for other employment, and as the newspaper want ads did not establish that the jobs would have been available if Sawyer applied or that she would have been selected for any available positions, the Administrative Law Judge was satisfied, and we agree, that Sawyer made a diligent search and sought to diminish backpay by seeking other employment.

The Administrative Law Judge concluded that Respondent was liable for the amount of backpay set forth in the amended backpay specification, as further amended during the hearing. This sum is the amount set forth in the backpay specification less deductions for the periods when Sawyer could not work because she was ill or otherwise incapacitated.⁸ However, the Administrative Law Judge's Decision did not contain a computation of the total net backpay, quarter by quarter, nor did it show in a chart how and where he adjusted the net backpay total. We have shown those computations in the Appendix to our Order. Based on our computations, the net backpay due Sawyer is \$13,274.24.

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 hereby orders that the Respondent, Airports Service Lines, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall pay Lynn Sawyer the sum of \$13,274.24 plus interest as set forth in *Isis PlumJing & Heating Co.*, 138 NLRB 716 (1962) and *Florida Steel Corporation*.⁹

⁷ See fn. 5 and 6, supra.

⁸ The record discloses and the Administrative Law Judge found that Sawyer was not available for work because of illness during the month of September in the third quarter of 1975, and the month of March in the first quarter of 1976. We have therefore made the appropriate deductions from the gross backpay for each of those quarters. We further note that Sawyer was unavailable for work for 3 weeks in the month of May in the second

quarter of 1976. We have likewise made the appropriate deductions from gross backpay for the second quarter of 1976.

⁹ In accordance with our decision in *Florida Steel Corporation*, 231 NLRB 651 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

APPENDIX

Qtr.	Days Available	1/ Total 2/ Hours	Wage Rate	Gross 3/ Backpay	Net Interim Earnings	Net Backpay
1974 - 2	50	549	\$2.30	\$1,262.70	- 0 -	\$1,262.70
- 3	65	713.7	2.30	1,641.51	- 0 -	1,641.51
- 4	65	713.7	2.30	1,641.51	- 0 -	1,641.51
1975 - 1	65	713.7	2.30	1,641.51	- 0 -	1,641.51
- 2	65	713.7	2.30	1,641.51	\$44.50	1,597.01
- 3	44	483.12	2.50	1,207.80	- 0 -	1,207.80
- 4	65	713.7	2.50	1,784.25	- 0 -	1,784.25
1976 - 1	41	450.18	2.50	1,125.45	- 0 -	1,125.45
- 2	50	549	2.50	1,372.50	- 0 -	1,372.50
TOTAL NET BACKPAY:						\$13,274.24

1/ Based on a 5-day workweek, this column represents the total number of days in each quarter that Lynn Sawyer was available for work.

2/ Computed by multiplying the average daily hours (10.98) by the number of days available for work (from the previous column).

3/ Computed by multiplying the wage rate by the total hours.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Pursuant to a decision and order of the National Labor Relations Board in Cases 7-CA-11110 and 7-CA-11163, directing Airports Service Lines, Inc., herein called Respondent, to make whole discharged employees for losses occasioned by Respondent's unfair labor practices in violation of Section 8(a)(1) and (3), the United States Court of Appeals for the Sixth Circuit having on February 2, 1976, entered its consent judgment enforcing in full the backpay provisions of the Board's Order, and the controversy having arose over the amount due under the terms of the Board's Order, the Regional Director for the National Labor Relations Board for Region 7 issued this backpay specification and notice of hearing on August 19, 1976, alleging the amount of backpay due under the Board's Order.

With respect to the amount of backpay due Lynn Sawyer as alleged in the backpay specifications, Respondent filed an answer on September 7, 1976, admitting that the backpay for discriminatee Sawyer commenced on April 18, 1974, but denying that it continued to this date (September 24, 1976); and it affirmatively averred that discriminatee Sawyer made no effort to obtain other employment to mitigate Respondent's money liability. Respondent also admitted the backpay specifications with respect to discriminatee Sawyer as set forth in Appendix B attached to the complaint, except as qualified by its aforesaid denials and affirmative defenses.

The hearing in the above matter was held before me at Detroit, Michigan, on September 24, 1976. Briefs have been received from counsel for the General Counsel and

counsel for Respondent, respectively, which have been carefully considered.

Upon the entire record in this case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT

I. BACKPAY SPECIFICATIONS

The undisputed and credited evidence of record established that the National Labor Relations Board (herein called the Board) issued its Decision and Order on June 30, 1975, 218 NLRB 1160, directing the Respondent, Airports Service Lines, Inc., to offer reinstatement to R. Paul Pfeiffer and Lynn Sawyer, and make them whole for any loss of earnings they may have suffered as a result of Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On February 2, 1976, the United States Court of Appeals for the Sixth Circuit entered its decree enforcing the Board's Order in full, including the backpay provisions. A controversy having arisen between the parties concerning the amount of backpay due under the terms of the Board's Order, the Regional Director for Region seven issued this amended backpay specifications alleging that backpay due under the terms of the Board's Order of June 30, 1975, is as follows:

1. The gross backpay due to discriminatees R. Paul Pfeiffer and Lynn Sawyer is the amount of wages each would have earned but for the discrimination against them.

2. (a) The backpay period for discriminatee Pfeiffer commenced on April 18, 1974, when Respondent discharged him and continued until September 10, 1975, when he refused an offer of reinstatement.

(b) The backpay period for discriminatee Sawyer commenced on April 18, 1974, when Respondent discharged her and continues to date, as no valid and proper offer of reinstatement to her former position of employment has been made by Respondent.

3. The gross backpay due discriminatees Pfeiffer and Sawyer was computed on the following basis:

(a) An appropriate measure of the average weekly hours which would have been worked during the backpay period is the average weekly hours worked by them during representative periods of employment prior to their discharges.

(b) An appropriate measure of the hourly wage rate which would have been paid to each is the wage rate each was earning at the time of the discharges plus an increase in the hourly rate which was given to all employees in June 1975.

(c) Quarterly gross backpay was computed by multiplying average weekly hours by the number of weeks in the quarter by the hourly wage rate.

(d) The gross backpay for each of the discriminatees is set forth as follows:

APPENDIX A

Lynn Sawyer

(a) Calculation of Average Hours
 274.50 Hours ÷ 5 = 54.90

(Total hrs. worked during 5 full wks. of employment prior to termination) (No. of Wks.) (Avg. Hrs.)

(b) Application of Average

Calendar Year and Quarter	Average Weekly Hours	No. of Weeks
1974 -2	54.90	10
1974 -3	54.90	13
1974 -4	54.90	13
1975 -1	54.90	13
1975 -2	54.90	13
1975 -3	54.90	13
1975 -4	54.90	13
1976 -1	54.90	13
1976 -2	54.90	13

(c) Total Hours	Wage Rate	Gross Backpay
549.00	\$2.30	
713.70	2.30	\$1,262.70
713.70	2.30	1,641.51
713.70	2.30	1,641.51
713.70	2.30	1,652.49
713.70	2.30/2.50	1,784.25
713.70	2.50	1,784.25
713.70	2.50	1,784.25
713.70	2.50	1,784.25

APPENDIX B

INTERIM EMPLOYMENT

Lynn Sawyer

Calendar Year and Quarter	Interim Employer	Interim Earnings
1974 -2	None	- 0 -
1974 -3	None	- 0 -
1974 -4	None	- 0 -
1975 -1	Medicos Recovery Care Center 22355 West Eight Mile Road Detroit, MI 48219	\$44.50
1975 -2	None	- 0 -
1975 -3	None	- 0 -
1975 -4	None	- 0 -
1976 -1	None	- 0 -
1976 -2	None	- 0 -

APPENDIX C

Lynn Sawyer

No additional expenses claimed.

APPENDIX D

Lynn Sawyer

Calendar Year and Quarter	Gross Backpay	Net Interim Earnings	Net Backpay
1974 -2	\$1,262.70	- 0 -	\$1,262.70
1974 -3	1,641.51	- 0 -	1,641.51
1974 -4	1,641.51	- 0 -	1,641.51
1975 -1	1,652.49	\$44.50	1,597.01
1975 -2	1,784.25	- 0 -	1,652.49
1975 -3	1,784.25	- 0 -	1,784.25
1975 -4	1,784.25	- 0 -	1,784.25
1976 -1	1,784.25	- 0 -	1,784.25
1976 -2	1,784.25	- 0 -	1,784.25
		Total	\$14,932.22

The General Counsel alleges that the Board's Order and the court's decree will be satisfied by Respondent's payment of \$14,932.22 to Lynn Sawyer.

During this proceeding the parties entered into a non-Board settlement agreement with respect to the backpay owing to R. Paul Pfeiffer, which agreement they agreed would be reduced to writing and signed subsequent to the adjournment of this proceeding.¹

¹ The facts set forth above are not in conflict in the record.

A. Respondent's Denials and Affirmative Defenses to Allegations in the Amended Backpay Specifications

Although in paragraph 3(b) of its answer Respondent admits that the backpay period for discriminatee Sawyer commenced on April 18, 1974, when Respondent discharged her, it categorically denies that such period continues to date; and it affirmatively avers that a valid and proper offer of reinstatement was made to discriminatee Sawyer on or about July 9, 1974, which discriminatee Sawyer constructively refused.

In paragraph 2(b) of its answer, Respondent denies that hourly wage rates were given all employees in June 1975 and affirmatively avers that clerical employees and dispatchers did not receive uniform wage increases at that time or at any other time.

The General Counsel alleges in paragraph 3(b) of the backpay specifications that "An appropriate measure of the hourly wage rate which would have been paid to each is the wage rate each was earning at the time of the discharges plus an increase in the hourly rate which was given to all employees in June 1975."

In its answer to the above allegation, Respondent admits that the computations as set forth in the Appendix are correctly calculated and based on the appropriate data, except as provided in its qualified answer to paragraph 3(b) above.

With respect to Respondent's above-described defense in paragraph 3(b) of its answer that Sawyer's period of unemployment did not continue to the date of this proceeding because Respondent made a valid and proper offer for her reinstatement on or about July 9, 1974, the record is barren of any evidence that Respondent ever offered Lynn Sawyer reinstatement to her job. At most, the record shows that on cross-examination counsel for Respondent propounded several questions to Sawyer regarding her home address at the time she applied for employment and her address at the time she left the employ of Respondent and thereafter.

In support of its contention that such an offer had been made, counsel for Respondent cites *Adams Book Company, Inc.*, 203 NLRB 761 (1973). However, a review of that case very readily reveals that the employer therein established that it sent letters offering reinstatements to the last known address of four dischargees. Two of the letters were returned to the employer marked undelivered. Here, Respondent has failed to demonstrate that it sent Sawyer a letter or made any effort to communicate with Sawyer in any form, with respect to offering her reinstatement. I discredit its contention that it did so.

Based on the absence of any evidence of record that Respondent offered Sawyer reinstatement, I hereupon conclude and find that a valid and proper offer for reinstatement to her job was not made by Respondent either on or about July 9, 1974, or at any other time.

In view of Respondent's affirmative defenses set forth in paragraph 3(b) of its answer, relating to hourly wages and a wage increase to drivers as distinguished from dispatchers,

² In spite of such extensive cross-examination, I nevertheless credit the testimony of Compliance Officer Basso because I was persuaded by the straightforward, professional, and nonexaggerating manner in which he testified that he was testifying truthfully. Moreover, I credit Mr. Basso's

and in view of counsel for Respondent having earlier in this proceeding represented to the court that he had reason to believe there was error and apparent misrepresentation in the backpay specifications as his prior questions had suggested, the Administrative Law Judge allowed counsel for Respondent, over the objection of counsel for the General Counsel, to interrogate Compliance Officer Basso with respect to the driver versus dispatcher-trainee capacity of Lynn Sawyer and the accuracy of Mr. Basso's computations. At this time the Administrative Law Judge viewed Respondent's 3(b) answer as being sufficiently specific to satisfy Section 102.54(b) of the Board's Rules, cited by counsel for the General Counsel.

Also at this stage in the proceeding it had not been established whether Sawyer had been found to be a driver or a dispatcher-trainee, with reference to Respondent's 3(b) answer. There were some questions propounded to Mr. Basso about what was in the transcript of the original proceeding about Sawyer's job capacity. However, those questions did not establish that the issue had been litigated so that administrative notice could be taken thereof.

Counsel for Respondent thereupon embarked on extensive and persistent interrogation of Mr. Basso, dealing with what job Sawyer initially applied for, whether or not her job was probationary, whether he investigated Sawyer's past work experience, in what capacity she was employed, and whether he examined the union contract with respect to Sawyer's job.²

However, upon the conclusion of counsel for Respondent's cross-examination of Compliance Officer Basso on the accuracy of his computations, counsel for the General Counsel moved to amend the backpay specifications by adding 3(e), which provides that Lynn Sawyer was unavailable for work during September 1975 and for the period from June 15, 1976, to the date of this proceeding (September 24, 1976). The motion was granted without objection from Respondent.

In an effort to prove that Sawyer was not a dispatcher-trainee, counsel for Respondent proceeded to cross-examine dischargee R. Paul Pfeiffer on his observations of the capacity in which Sawyer was working in the office. Pfeiffer described occasional instances during which he saw Sawyer take reservations for limousines, dispatch drivers when they called in, and answer the telephone, the same duties dispatcher Elmer Reeves performed.

In this regard, *Lynn Sawyer* testified that she was interviewed for employment at Respondent by Mr. Linteau in early March. At that time she said he told her he would start her as a trainee-dispatcher by answering the phones, and learning how to schedule the limousines to all of the given points. She said later on the same day she talked to Mr. Linteau and their conversation was as follows:

Louie and I sat down, and he said, "I want to talk as frankly as I possibly can." He said, "We need somebody to help dispatch." He said, "We need somebody to help on the phones, and we would like to break somebody in, new at the job." And I said, "Well,

testimony because Respondent's extensive cross-examination of him did not produce one item of probative evidence that he was not testifying truthfully. Nor were any patent errors in the specifications uncovered.

that sounds good." I said, "Is there any way I could possibly be a driver." He said, "Well, we will try you at one thing first, and if it doesn't work then maybe you can be a driver."

Q. Did he indicate to you at any time that the job that he was hiring you for was a temporary job?

A. No, he did not.

Cindy Belle Green, president and general manager of Respondent, testified that she has been employed by Respondent for 13 years and has served as president and general manager for approximately 8 years. She further testified that Lynn Sawyer was employed by Respondent in the capacity of a telephone operator. She then identified Sawyer's application for employment, dated March 11, 1974, which indicated Sawyer applied for the position of telephone operator. She denied that Sawyer was ever employed as a dispatcher. Green described Sawyer's duties as follows:

She took in keys from the drivers, or handed them their envelopes from the dispatcher to them; or punched their timecards. She answered the telephones putting them on hold for the dispatcher or on hold for whomever else they might be calling for, for myself or for Mr. Linteau, and then referring the calls to us. She did take some reservations, and then turned them over to the dispatcher. She also had to turn the gas pump off and on which was right near her desk. And in general help the dispatcher or transfer calls to whoever else was in the office.

She also punched the timecards and envelopes of the limousine drivers.

President Green further testified that the duties of a dispatcher are as follows:

The dispatcher has approximately five reservation books in front of him. And, of course, there are telephones with several lines coming in, and he has to dispatch limousines for pickups to 68 different cities. We have approximately 50 limousines running 24 hours a day, but we have 50 of them on the road usually four or five hours out of each day. He has to know where all of their stops and the pickups are. He has to know all the schedules. We have a schedule running from Ann Arbor every 30 minutes. We have a schedule running from the Parkcrest Motel on the East Side every 30 minutes. We also have hundreds of reservations tied into these scheduled runs. A dispatcher has to route these buses, know their running time, know where they all are at once, and be able to direct them to each individual point when they call on the phone.

³ If I were to make a finding upon the above testimony of discharges Pfeiffer and Sawyer, and Respondent's President Green, I would credit the versions of Pfeiffer and Sawyer over that of President Green. I would credit Pfeiffer and Sawyer because I was persuaded by their straightforward, self-assured, and earnest demeanor throughout this proceeding that they were telling the truth. While I would credit President Green's description of the duties of a dispatcher, I would discredit her testimony that Sawyer was hired and remained a telephone operator. As she testified I was persuaded by her ill-at-ease (blinking her eyes on crucial questions about Sawyer's job

He also takes all reservations and puts them in these books where they belong.

Q. Does he have complete charge of the drivers and tell them when to go off route and when not to keep up their schedules, etcetera?

A. He has complete charge of all the drivers.

Q. And you said you have some 50 units daily, 50 units operating with drivers?

A. Approximately. It varies with the conditions and the business.³

B. Respondent's Nonpleaded Defense That Sawyer was Probationary and her JoJ Experimental

Counsel for Respondent indicated he intended to show that Sawyer's job was an experimental probationary job and he thereupon moved to so amend his answer to that effect. General Counsel objected to the amendment and the Administrative Law Judge overruled the objection, the question being related to Sawyer's job capacity already an issue.

Mr. Basso continued to testify that Respondent (Mr. Jerome) was given an estimated figure of backpay liability on October 23, 1975. During the year thereafter, Respondent had complained about the length of the backpay period and that it believed there had been a valid offer for reinstatement to Sawyer. Mr. Basso said he did not know of any other complaints of Respondent until Respondent filed its answer complaining about the wage rate for Sawyer. All of his discussions about backpay were held with Respondent's cocounsel, Mr. David Jerome.

Counsel for Respondent then proceeded to interrogate President Green about the removal of a large number of telephone lines from the service of its business which resulted in Respondent not needing the job position previously performed by Lynn Sawyer; and that thereafter Respondent's business started feeling the effects of the economic recession which necessitated a reduction in the number of its drivers, the sale of five of its cars, and the removal of some of its cars from insurance coverage. Thereupon, counsel for respective parties undertook an after-the-fact interrogation of President Green with respect to whether Sawyer's job was originally permanent or temporary. The witness (Green) stated that when Sawyer performed the job she had no supervisory authority and she earned \$2.10 an hour as a trainee; and that the position was a 60-day probationary job. Louis Clark Linteau, chairman of the board and principal owner of Respondent, essentially corroborated the testimony of President Cynthia Green.

On rebuttal, Lynn Sawyer testified that the chairman of the board of Respondent, Mr. Linteau, did not tell her the job was temporary or probationary.⁴

capacity) demeanor that she was not testifying truthfully. Even though Respondent produced Sawyer's application for employment indicating position applied for was "Telephone operator," I nevertheless would credit Sawyer's explanation of record and I would place more weight on the testimony about the dispatcher-trainee duties she actually performed.

⁴ If I were to make a finding based on the above testimony as to whether Lynn Sawyer was hired by Respondent as a temporary or probationary job employee, I would credit Sawyer's version as corroborated by the credited testimony of R. Paul Pfeiffer, *supra*. I would credit Sawyer's testimony

(Continued)

At the conclusion of President Green's description of the duties of a dispatcher, counsel for the General Counsel brought to the attention of the Administrative Law Judge the decision of the Administrative Law Judge in the original proceeding, reported at 218 NLRB 1160 (1975). In that decision the Administrative Law Judge therein found that Lynn Sawyer was hired as a dispatcher-trainee.⁵

C. Respondent's Affirmative Defense of Failure of Sawyer To Seek Other Employment

In denying any knowledge of Lynn Sawyer's interim earnings and expenses as alleged in paragraph 4 of the backpay specifications, Respondent affirmatively avers in paragraph 4 of its answer that discriminatee Sawyer made no effort to obtain other employment to mitigate the liability involved.

In an effort to substantiate his theory, counsel for Respondent had his cocounsel of record, David E. Jerome assume the witness stand and testify on his investigative findings of various Sunday newspaper "want advertisements" for such jobs as beauty salon worker and cab and limousine drivers listed during the months of May 5, 1974, through September 5, 1976, in the Detroit metropolitan area. As Mr. Jerome proceeded to summarize his findings on the availability of such jobs, counsel for the General Counsel objected to the admissibility of the newspaper job advertisements (Resp. Exh. 2(b)), on the grounds that such evidence was hearsay and according to the Code of Professional Responsibility was inconsistent in positions which destroyed the credibility of Mr. Jerome. The Administrative Law Judge received Respondent's Exhibit 2(b) under advisement.

General Counsel thereupon objected to Respondent relitigating the job capacity of Sawyer and the objection was sustained.

Mr. Jerome further testified that until he met Ms. Dobie and Mr. Basso their principal dispute was over the amount of backpay money due Lynn Sawyer. However, when he met Ms. Dobie and Mr. Basso, he said he did raise the defense of Lynn Sawyer's not having looked for work for 2 years since her termination with Respondent. Mr. Jerome continued to testify as follows:

Q. And what kind of a study did you undertake, and what newspapers did you examine?

A. Well, Airport Service Lines is located in Pontiac. So, the first thing I did, I went to the newspaper offices in the Pontiac area. The primary paper there is the Oakland Press, and asked them if I could review

because I was persuaded by her heretofore described demeanor throughout this proceeding that she was testifying truthfully. Moreover, I note that even though Sawyer's application for employment indicates that the position applied for was telephone operator, which she satisfactorily explained, the position therein was not labeled *temporary* or *probationary* telephone operator. I discredit the testimony of President Green and Chairman Linteau because I was persuaded by the rather anxious and glib manner in which they testified that they were exaggerating, and appeared to have a conscious interest in making the evidence appear favorable to Respondent.

⁵ *Airports Service Lines, Inc.*, 218 NLRB 1160, 1167 (1975):

C. The Discharge of Lynn Sawyer

Sawyer began her employment on March 14 and was discharged at

their want ads since May of 1974. They advised me that they had papers back for only approximately one year. Prior to that time I would have to go to the Oakland Community College and look at microfilm. So, I then looked at the various Oakland Press's that they had at their facilities. And I brought representative copies of those trying to pick at least one for every month. In many months I picked two or three. And the first paper that I brought with me is April 10, 1975. Then I went to OCC and looked at the microfile to see if the want ads previous to that time under the microfilm would be similar.

Upon completion of that I went to the Detroit Public Library to look at the old Free Press and the News. Both the Free Press and the Detroit News keep papers only back to about six weeks. So, I then went to the — The Detroit Public Library has a microfilm system, and I looked there at the Sunday News and the Sunday Free Press for each Sunday from — the first Sunday of each month from 1974 through September 5, 1976.

With respect to his role as advocate and witness in this proceeding in violation of the canons of ethics, Mr. Jerome said he has been involved in this case since the beginning, that he assisted in drafting the pleadings herein, that he has talked to Mr. Basso repeatedly about the case, and he did not deem his actions unethical because he did not try the case.

Thereafter, Lynn Sawyer testified that she registered with the unemployment bureau a few days after she was discharged by Respondent, and that she would call or visit the bureau periodically. She read the list of names of places where she looked for work unsuccessfully during the months of October, November, and December 1974. The list of places (G. C. Exh. 2) was received in evidence. On cross-examination Sawyer identified some of the places of employment where she filed a written application for employment.⁶

D. Procedural Rulings of the Administrative Law Judge

After a review of Section 102.54(b) (quoted at the hearing by counsel for the General Counsel) along with Section 102.54(c) and 102.57 (not quoted or cited at the hearing by counsel for the General Counsel) of the Board's Rules and Regulations governing backpay proceedings, the Administrative Law Judge has reconsidered his rulings made in this proceeding in light of the evidence admitted as follows:

the end of the workday on April 18. She was hired as a dispatcher-trainee. She answered the telephones and took calls from customers wanting rides to the airport. She operated the timeclock to record when the time drivers reported on and off duty. She also maintained a list of employees and their telephone numbers and, when required, called employees to report for runs.

⁶ I credit the testimony of Sawyer over that of Cocounsel Jerome. Not only did Sawyer appear self-assured in testifying but she supported her testimony by identifying numerous places where she had sought employment. I would discredit Cocounsel Jerome's testimony also because it did not establish that Sawyer had not made a reasonable search for work, and because he, as investigator, cocounsel, and witness for Respondent could not have stated the facts impartially and objectively.

Having examined paragraphs 3(b) and (d), and to the extent to which paragraph 3(d) incorporates paragraph 3(b) by reference in Respondent's answer, I conclude that all affirmative defenses asserted therein are not sufficiently specified and particularized, so as to satisfy the language of the above-cited Board rules. The Administrative Law Judge therefore erred in overruling counsel for the General Counsel's objection to the admission of evidence on these affirmative defenses (a pay raise and the job capacity of Lynn Sawyer), and said ruling is hereby reversed and all such evidence admitted thereunder is excluded and disregarded in considering the merits in this proceeding.

More specifically, Respondent disputes the accuracy of the computations in the specifications as well as the premise on which they were made, but it neglected to specifically set forth the basis of its dispute and the details of its position as to applicable premises, accompanied by supporting data. Accordingly, I find the allegations in paragraphs 3(b) and (d) of the amended backpay specifications to be true.

However, even if I were to make a finding upon the excluded evidence, as herein conditionally credited or discredited, I would nevertheless conclude and find that the amended backpay specifications are correct as set forth in the amended backpay specifications, except to the extent that they might have been modified or corrected by the General Counsel's amendment during this proceeding (that Lynn Sawyer was not available for work during September 1975 and for the period from June 15, 1976, to the date of this proceeding (September 24, 1976).

E. Respondent's Motion To Amend its Answer

The Administrative Law Judge erred in granting Respondent leave to amend its answer, over the objection of counsel for the General Counsel, to allege for the first time and submit evidence that Lynn Sawyer was a probationary employee hired in an experimental job that was to be eliminated. Such leave to amend is hereby reversed and all evidence admitted pursuant thereto is excluded and disregarded in the consideration of this case.

However, suffice it to say that if the Administrative Law Judge were to make a finding upon such improperly admitted evidence, as conditionally credited or discredited herein, he would find that Respondent has failed to establish that Lynn Sawyer was hired as a probationary employee in a job that was experimental or temporary. He would further find that Respondent is now advancing this after-the-fact (discriminatory discharge) probationary-experimental contention as a pretext in an attempt to avoid liability for accrued backpay.

F. Cocounsel for Respondent Becomes a Witness and Testifies on Behalf of Respondent

Respondent affirmatively averred in paragraph 4 of its answer that Lynn Sawyer has failed to search for other employment. In support of this averment counsel for Respondent called as a witness cocounsel of record, David E. Jerome, who testified about his investigative findings on the availability of jobs in the Detroit metropolitan area. As Mr. Jerome proceeded to testify, counsel for the General

Counsel objected on the grounds that Mr. Jerome was assuming the roles of an advocate and witness, which are inconsistent, according to EC 5 of the Code of Professional Responsibility and Canons of Judicial Ethics. Counsel for the General Counsel thereupon moved to strike Mr. Jerome's testimony. The Administrative Law Judge reserved ruling on the motions.

Legal authority on the question as to whether an attorney is permitted to testify on behalf of his client, or, if he is permitted to testify, should his testimony be excluded, is by no means precise.

In *Christensen v. United States*, 90 F.2d 152 (1937), the court held that an attorney is permitted to testify on behalf of his client. The court went on to point out that there is no strict rule applicable to all cases of this nature; that the court in its discretion may either deny or allow the attorney to testify; that if the attorney is allowed to testify such fact may be conditioned upon his removal from the case as counsel; that whether or not the attorney was the attorney of record is not determinative of the admissibility of his testimony; that the testimony of the attorney is tolerated at all only because occasionally it is proper in the interest of justice — on disputed and material issues of fact; and that this being the case the testimony of the attorney should be given the same weight as any other witness.

In *United States v. D. Clancy, et al.* 276 F.2d 617 (1960), the court held the attorney's testimony may be excluded if the attorney does not exclude himself from further participation in the trial. In any event, however, the Board has held in *Local Union No. 9 of the International Union of Operating Engineers (The Fountain Sand & Gravel Company)*, 210 NLRB 129 (1974), fn. 1, "it is not our function or responsibility to pass on the ethical propriety of a decision by counsel to testify in one of our proceedings. When, as here, the testimony is otherwise proper and competent, it should be accepted in evidence."

Accordingly, General Counsel's motions to preclude Cocounsel Jerome from testifying and to strike or expunge his testimony (which I did not deem incompetent at the time he testified) from the record are hereby denied.

Since the substance of Cocounsel Jerome's testimony about his investigative findings was to be supported by newspaper "Help wanted" advertisements published in local newspapers in Metropolitan Detroit, counsel for the General Counsel objected to their admission in evidence on the grounds that such newspaper advertisements are hearsay under the Federal Rules of Evidence. The Administrative Law Judge received the newspaper "Help wanted" advertisements and reserved ruling on the motions.

A review of Section 801(c) of the Federal Rules of Evidence does not reveal any language which intimates or infers the conclusion that newspaper "Help wanted" advertisements are *per se* hearsay. Instead, Section 902(6) of the Federal Rules of Evidence specifically provides under the self-authentication doctrine that "newspapers and periodicals—printed material purported to be newspapers or periodicals"—are not only admissible, but extrinsic evidence of authenticity as a condition precedent to admissibility is not required. Moreover, the note of the advisory committee to the Congress on Section 902(6)

points out that, "The likelihood of forgery of newspapers or periodicals is slight indeed. Hence, no danger is apparent in receiving them."

Of course Cocounsel Jerome in the instant proceeding did not claim authorization for the publication of the "Help wanted" advertisements. In fact, he quoted the identity (name and city) and dates of all newspapers in which the advertisements appeared during periods when Sawyer was unemployed. Such newspaper advertisements speak for themselves, are presumably authentic, and do affect their admissibility. Accordingly, the Administrative Law Judge overrules counsel for the General Counsel's objection thereto and the motion to exclude the newspaper advertisements is denied.

However, based on the foregoing newspaper "Help wanted" advertisements of record, I nevertheless conclude and find that Respondent has failed to substantiate its affirmative allegation that Lynn Sawyer failed to make a reasonable and diligent search for other employment. The fact that jobs were advertised in local newspapers does not establish that such jobs would have been available if and when Lynn Sawyer had arrived to apply for them, or that if she had arrived in time to apply for them, she would have been selected for a position. Nor has Respondent established that such advertised jobs were the only jobs in existence for which Lynn Sawyer could have applied, or that Sawyer did not in fact apply for one or some of these advertised positions. Hence, while it may be accepted that some, if not all, of the jobs advertised did in fact exist, such fact alone is a far cry from establishing Sawyer's failure to make a reasonable search for other employment, as Board law requires of Respondent. Thus, the Administrative Law Judge is more than satisfied, without Lynn Sawyer's gratuitous evidence of her efforts to obtain other employ-

⁷ In the event the Board's Order is enforced by a Judgment of the 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

ment, that Respondent has failed to submit any probative evidence that Lynn Sawyer failed to make a reasonable and diligent search for alternative employment.

Respondent has availed itself of a hearing before a duly designated Administrative Law Judge in the original proceeding, wherein it was represented by the same legal counsel who appeared and represented Respondent in the instant proceeding. The Board's Decision and Order, including the backpay provisions in the original proceeding, reported at 218 NLRB 1160, was enforced on February 2, 1976, by a decree of the United States Court of Appeals for the Sixth Circuit. Disputing the amount of backpay due under the terms of the Board's Order in this proceeding, Respondent has failed, as it alleged, to establish any errors in the computations of the specifications, or any misrepresentation in the premises on which they are based. Consequently, Respondent is liable for the amount of backpay set forth in the amended backpay specifications, as further amended during this backpay proceeding.

ORDER ⁷

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Respondent, Airports Service Lines, Inc., Pontiac, Michigan, their officers, agents, successors, and assigns, shall pay to dischargee Lynn Sawyer, as net backpay, \$14,932.22 together with interest on the amount due on each quarter at the rate of 6 percent per annum, less said accrued amounts computed in the same manner for the periods when Lynn Sawyer was unavailable for work, as found above pursuant to the amendment to the backpay specifications during this proceeding, until the indebtedness has been discharged.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."