

**Aircraft and Helicopter Leasing and Sales, Inc. and  
Stephen H. Crowe. Case 31-CA-3587**

December 30, 1976

**SUPPLEMENTAL DECISION AND  
ORDER**

BY MEMBERS FANNING, PENELLO, AND  
WALTHER

On August 30, 1976, Administrative Law Judge Jerrold H. Shapiro issued the attached Supplemental Decision in this proceeding.<sup>1</sup> Thereafter, Respondent 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 Supplemental 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 his recommended Supplemental Order.

**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 Supplemental Order of the Administrative Law Judge and hereby orders that the Respondent, Aircraft and Helicopter Leasing and Sales, Inc., Sun Valley, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Supplemental Order.

**SUPPLEMENTAL DECISION**

JERROLD H. SHAPIRO, Administrative Law Judge: On February 28, 1974, the National Labor Relations Board issued a Decision and Order in the above-captioned case (209 NLRB 275), finding that Respondent Aircraft and Helicopter Leasing and Sales, Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Stephen H. Crowe, Dan Crowse, and J. C. Fournier for engaging in protected concerted activities. The Board's Order was enforced by the United States Court of Appeals for the Ninth Circuit in an unpublished order and on October 6, 1975, the United States Supreme Court issued an order denying Respondent's petition for writ of certiorari.

The Board's Order requires Respondent, among other things, to make the three discriminatees whole for any loss of earnings they may have suffered by reason of their discharges. A dispute having arisen over the amount of

backpay due under the Board's Order, the Regional Director for Region 31 of the Board, on May 19, 1976, issued and duly served on Respondent an Amended Backpay Specification, which was further amended at the hearing, alleging the amount of backpay due under the Board's Order. Respondent filed timely answers and on June 10, 1976, a hearing was held on the issues raised by the pleadings.

The questions presented for decision are: (1) Whether Respondent's backpay liability toward Crowse and Fournier was tolled or otherwise diminished because of their discharges by interim employers; (2) whether Crowse's failure to seek interim employment as an aircraft mechanic instead of limiting his employment to construction carpentry constitutes a willful loss of earnings or a lack of reasonable diligence in seeking interim employment; (3) whether the conduct of Crowe and Fournier in connection with the Quinn job constitutes a willful loss of earnings or a lack of reasonable diligence in seeking interim employment; (4) whether the record establishes a willful loss of earnings or a lack of reasonable diligence on Crowe's part in seeking interim employment and, in this connection, was he obligated to seek employment outside the aviation industry; (5) whether the discriminatees were obligated to maintain written records of their transportation and phone expenses rather than relying on estimates; (6) whether the transportation and living expenses incurred by Fournier while commuting between his interim employment and his residence can be deducted from his interim earnings; (7) whether the rental of a garage and the cost of various tools and equipment can be deducted from Fournier's interim earnings; and (8) whether the money received by Crowe during the backpay period for model airplanes he built prior to the backpay period constitutes interim earnings.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following:

**FINDINGS AND CONCLUSIONS**

1. The failure of the discriminatees to maintain records of their transportation and phone expenses

The law is settled that transportation expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination, and the consequent necessity of seeking employment elsewhere, are deductible from interim earnings. *Crossett Lumber Company*, 8 NLRB 440, 479-480 (1938); *Hoosier Veneer Co. a Corporation*, 21 NLRB 907, 938, fn. 26 (1940). It is undisputed that the three discriminatees in seeking interim employment traveled substantially and that Fournier and Crowe also incurred other transportation costs connected with their interim employment and Crowe incurred phone expenses. Respondent, except for Fournier's commuting expenses described *infra*, does not contest the reasonableness of these expenses as computed in the backpay specification nor the fact that the discriminatees are entitled to a deduction therefrom in computing their net interim earnings. Respondent's disagreement with

<sup>1</sup> The Board's original Decision and Order is reported at 209 NLRB 275 (1974)

the inclusion of these transportation and phone expenses in the specification is based on the ground that the discriminatees kept no written contemporaneous records, hence the computations in the specification are only approximations or estimates and there is a possibility of error one way or the other. However, the fact that expense computations are based on estimates does not preclude their acceptance (*W. C. Nabors, d/b/a W. C. Nabors Company*, 134 NLRB 1078, 1092, 1095 (1961)),<sup>1</sup> especially where, as here, it was Respondent's unlawful conduct which caused the discriminatees to seek interim employment which resulted in expenses they would not have ordinarily incurred,<sup>2</sup> and there is no evidence that any one of the discriminatees padded these expenses or that the expenses are unreasonably large. Under these circumstances, the fact that the discriminatees only estimated their transportation and phone expenses is not sufficient to preclude their deduction from net interim earnings. In reaching this conclusion, in Crowse's case, I have taken into account his failure to notify the Board's compliance officer that he had incurred transportation expenses. This failure is relevant only insofar as it impugns the reliability of his testimony that he incurred these expenses. On this point Crowse impressed me as an honest witness. Moreover, his testimony concerning these expenses is corroborated by the undisputed fact that he traveled substantially in search of interim employment which indicates that the transportation expenses included in the specification are not unusually large.<sup>3</sup>

## 2. Dan Crowse

Dan Crowse was employed by Respondent as a helicopter mechanic. Upon his discharge on February 9, 1973, he diligently sought employment with several other employers, one of whom, Nordskog Company, hired him as a helicopter mechanic. Crowse was discharged 12 weeks later on June 6, 1973, for excessive absenteeism. Respondent contends that Crowse's backpay should be reduced by the earnings he would have received had he remained in Nordskog's employ. In order for this defense to succeed, Respondent must prove that Crowse incurred a "willful loss of earnings" by his failure to keep his job with Nordskog, *Mastro Plastics Corporation et al.*, 136 NLRB 1342, 1346 (1962). Respondent has not sustained this burden. Crowse at no time removed himself from the labor market but, to the contrary, throughout the backpay period diligently sought employment and, as Respondent in its posthearing brief recognizes, earned "excellent wages" during the backpay period. Moreover, there is not a scintilla of evidence that Crowse willfully or without excuse absented himself from work at Nordskog or that his absenteeism record with Nordskog was any different from what it had been while he was employed by Respondent. Under these circumstances, the fact that Nordskog found Crowse to be an unsuitable employee does not constitute a willful loss of

earnings. E.g., *Harvest Queen Mill & Elevator Company*, 90 NLRB 320, 338 (1950) (discriminatee Cook discharged for refusing to work on Sundays); *Mastro Plastics Corporation*, 145 NLRB 1710, 1716 (1964) (discriminatee Vargas discharged from several interim jobs, one for being in jail for 10 days); *Barberton Plastics Products Inc.*, 146 NLRB 393, 396 (1964) (discriminatee discharged for unsatisfactory performance); *Webb Manufacturing Inc.*, 174 NLRB 37, 38 (1969) (discriminatee Cline fired for unsatisfactory work); *Artim Transportation System, Inc.*, 193 NLRB 179, 183 (1971) (discriminatee discharged after argument with supervisor over working conditions).

Respondent makes the further contention that Crowse is not entitled to backpay for the period after his discharge by Nordskog during which time he was employed as a carpenter in the construction industry. Crowse, an aircraft mechanic, after his June 6, 1973, discharge by Nordskog, unsuccessfully looked for work as an aircraft mechanic for about 7 weeks,<sup>4</sup> at which point late in July 1973 he entered the construction industry's carpenter apprenticeship program. He started work as an apprentice carpenter on July 30, 1973, for Daum Construction, which laid him off for lack of work in December 1973. Then Crowse almost immediately secured a similar job with General Construction Services for whom he worked until late December 1974 when he was laid off for lack of work. He was without work until May 12, 1975, when he was hired as a carpenter by Darby Construction for whom he was still employed at the conclusion of the backpay period, November 13, 1975. During the interim between his employment with General Construction and Darby Construction, the record establishes that Crowse made a reasonably diligent search for carpenter's work in the construction industry. Respondent does not contend otherwise. It is Respondent's position that when Crowse, a skilled aircraft mechanic, late in July 1973 abandoned his trade for that of a construction carpenter, it constituted a willful loss of earnings, tolling Respondent's backpay liability for the remainder of the backpay period.

The law is settled that "if the discriminatee accepts significantly lower paying work too soon after the discrimination in question, he may be subject to a reduction in backpay on the ground that he willfully incurred a loss by accepting an 'unsuitably' low-paying position" *N.L.R.B. v. Madison Courier Inc.*, 472 F.2d 1307, 1321 (C.A.D.C., 1972). In the instant case, after about 2 months of unsuccessfully searching for work as an aircraft mechanic, Crowse, only then, decided to seek employment as a construction carpenter. Like an aircraft mechanic, the job of a construction carpenter is highly skilled and, in comparison to Crowse's work with Respondent, cannot be classified as "significantly lower paying work" or "an unsuitably low-paying position." The record establishes that in 5 of the 10 backpay quarters in which Crowse was employed as a carpenter, his earnings exceeded what he would have earned as a mechanic employed by Respondent and that

<sup>1</sup> See also *Arduin Manufacturing Corp.*, 162 NLRB 972, 975 (1967), holding that poor recordkeeping does not in itself prevent recovery by a wronged party.

<sup>2</sup> See *United Aircraft Corporation*, 204 NLRB 1068 (1973). ("the backpay claimant should receive the benefit of any doubt rather than Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved.")

<sup>3</sup> In addition to Crowse's transportation expenses, the specification includes his union initiation fee and union dues paid in connection with his interim employment. These expenses are not in dispute.

<sup>4</sup> Respondent makes no contention that Crowse during this period was not reasonably diligent in seeking work as a mechanic and the record establishes that he did conduct a reasonably diligent search.

during the remainder of the backpay period he earned substantial sums of money. Indeed, in its posthearing brief Respondent recognizes that "construction workers earn excellent wages when they are working as is attested to by the many quarters in which Crowse's interim earnings exceeded backpay," but contends that the temporary "down periods" which are common to the construction industry made it unsuitable interim employment for a man with Crowse's background and experience. However, there is no contention that during the temporary "down periods" Crowse failed to make a reasonably diligent search for carpentry work, and the record reveals that he in fact did make such a search. Moreover, there is not a iota of evidence that Crowse's opportunity for employment was better as a mechanic in the aircraft industry than as a carpenter in the construction industry, or that there was even a demand for aircraft mechanics. Under all of these circumstances, I am of the opinion that Crowse's failure to seek work as an aircraft mechanic does not constitute willfully incurring a loss of earnings.

### 3. Stephen Crowe

Respondent takes the position that Stephen Crowe forfeited his right to backpay for that part of the backpay period which ended December 31, 1974, because he did not make a bona fide effort to seek employment and forfeited his right to backpay for the remainder of the backpay period because his conduct in connection with the Quinn job constitutes a willful loss of earnings.

An employer may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment" (*Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 199-200 (1941)), but this is an affirmative defense and the burden is upon the employer to prove the necessary facts. *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (C.A. 5, 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings; rather the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575-576 (C.A. 5, 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable exertions in this regard, not the highest standard of diligence." *N.L.R.B. v. Arduini Manufacturing Co.*, 394 F.2d 420, 422-423 (C.A. 1, 1968). Success is not the measure of the sufficiency of the discriminatee's search for interim employment; the law "only requires an honest good faith effort" *N.L.R.B. v. Cashman Auto Company and Red Cab Company*, 223 F.2d 832, 836 (C.A. 1). And in determining the reasonableness of this effort, the employee's skill and qualifications, his age, and the labor conditions in the area are factors to be considered. *Mastro Plastics Corp.*, 136 NLRB 1342, 1359. Finally, inasmuch as Crowe, as described *infra*, was self-employed throughout the backpay period, it is well to remember "that self-employment is an adequate and proper way for the injured employee to attempt to mitigate his loss of wages [and] should be treated like any other interim employment in measuring backpay

liability." *Henrich Motors Inc. v. N.L.R.B.*, 403 F.2d 145, 148 (1968), and the fact that a self-employed discriminatee is not successful in his business does not demonstrate that he was not engaged in full-time self-employment because "the principle of mitigation of damages does not require success; it only requires an honest good faith effort . . ." *Henrich Motors, Inc.*, 166 NLRB 783, 784 (1967).

The backpay period in the instant case commenced February 9, 1973, the date Crowe was discharged, and ended November 13, 1975, the date Crowe was offered and accepted Respondent's offer to return to work. Crowe, whose trade is that of an aircraft mechanic, is 56 years old and for the entire 35 years of his adult life has been employed as a mechanic in the aircraft industry. In addition to being a skilled mechanic, he is authorized by the Federal government to license aircraft, that is, to certify they are airworthy, and is licensed to pilot several types of commercial planes.

Immediately following his discharge and for the entire backpay period, Crowe did business as a self-employed person inspecting aircraft pursuant to his Government license, in some cases performing the maintenance work connected with these inspections, and overhauling aircraft. His earnings from his self-employment during the backpay period are as follows: 1973 — first quarter, \$1,025; second quarter, \$365; third quarter, \$700; fourth quarter, \$100; 1974 — first quarter, \$0; second quarter, \$125; third quarter, \$200; fourth quarter, \$300; 1975 — first quarter, \$1,123.14; second quarter, \$998.14; third quarter, \$998.14; fourth quarter, \$150. Crowe's self-employment was obviously not a financial success. This does not demonstrate however that Crowe failed to diligently pursue his business or that he failed to devote his full time to it, for, "the principle of mitigation of damages does not require success; it only requires an honest good faith effort . . ." *Henrich Motors, supra*. Respondent failed to adduce sufficient evidence to prove that Crowe did not exert an honest good-faith effort to secure business or that Crowe did not devote his full time to self-employment. Respondent did not question Crowe about the effort he made to secure business or about the manner in which he conducted his business or, specifically, whether he devoted his full time to the business. The sole evidence — other than Crowe's lack of success which as indicated earlier is not relevant to this question — which suggests that Crowe did not devote his full time to his business is his testimony that for 3 months he spent 12 hours a week helping someone set up a hobby shop for which he received no remuneration. In my opinion, for the reasons set forth *infra*, this evidence is insufficient to demonstrate that Crowe during these 3 months failed to devote his full time to his business or otherwise engaged in conduct which constitutes a willful loss of earnings. Under the circumstances, I am satisfied that Respondent has not met its burden of demonstrating that there are special circumstances existing in this case which warrant a finding that Crowe incurred a willful loss of earnings by engaging in a business of his own.

In addition to the above-described self-employment, Crowe made an unsuccessful quest for other suitable employment during the backpay period. During 1973 Crowe visited 11 different employers in the aircraft industry

and without success sought employment as an aircraft mechanic. During the remainder of the backpay period he revisited these same employers from time to time without success to determine whether there were job openings.<sup>5</sup>

Under the circumstances, Crowe's self-employment and his diligent quest for other suitable employment throughout the backpay period, I am unable to conclude that Respondent has demonstrated that Crowe did not make a reasonable search for work during the entire backpay period or any part thereof or that he incurred a willful loss of earnings.<sup>6</sup>

Respondent argues that even if it has failed to prove Crowe did not exercise a reasonable effort to secure interim employment, the record does demonstrate that by failing to seek employment outside the aircraft industry Crowe incurred a willful loss of earnings.<sup>7</sup> I disagree. Crowe, who is 56 years old, is a skilled aircraft mechanic who for 35 years — his entire adult life — has worked at this trade in the aircraft industry. It is no light matter to tell a man of Crowe's age with his years of service as a skilled aircraft mechanic that he must forfeit the relief due him, when he was discharged in violation of the law, because he did not scrap his skill in a specialized trade when he put himself out for hire. This is especially true where, as here, there is not a scintilla of evidence that work was available which was comparable to Crowe's chosen trade and suitable to his background and experience. For all of these reasons I find that Crowe did not incur a willful loss of earnings by failing to seek interim employment outside of the aircraft industry.<sup>8</sup> See *The Madison Courier, Inc.*, 202 NLRB 808 (1973), enforcement denied in pertinent part 505 F.2d 391 (C.A.D.C., 1974).

Respondent's final contention is that, even assuming the evidence does not demonstrate Crowe incurred a willful loss of earnings for the entire backpay period, his conduct from January 1, 1975, through August 23, 1975, when he rebuilt the Quinn helicopter, establishes a willful loss for that period.

Crowe entered into an agreement with Pat and Tim Quinn to rebuild a helicopter owned by the Quinns. Crowe agreed to furnish the labor, the tools, and the equipment, whereas the Quinns agreed to furnish the parts. The agreement provided that the Quinns and Crowe would share in any profit (the proceeds of the sale of the rebuilt helicopter minus the cost of the helicopter) derived from the

<sup>5</sup> Respondent did not question Crowe about his failure to seek work as a mechanic with employers other than these 11. At one point in his testimony, when Crowe started to volunteer an explanation for his failure to seek employment as a mechanic with other employers, Respondent moved to have his testimony stricken and did not question him about this subject.

<sup>6</sup> I have considered Crowe's failure to register for employment with the state employment agency and recognize this is an appropriate factor in assessing his efforts to locate interim employment. But, in the circumstances of this case, I am of the opinion his failure to register with the State for aircraft mechanic work does not establish that he failed to exercise reasonable diligence in securing employment.

<sup>7</sup> Respondent's further contention that Crowe was obliged to seek employment outside of Southern California is palpably without merit because a discriminatee is not obligated to seek interim employment which is located an unreasonable distance from his home. E.g., *American Bottling Company*, 116 NLRB 1303, 1306 (1956), and *Nickey Chevrolet Sales, Inc.*, 160 NLRB 1279, 1280 (1966).

<sup>8</sup> This conclusion is not inconsistent with the court's decision in *Madison Courier*, for here, unlike there, Respondent failed to carry its burden of demonstrating that suitable alternative work opportunities for Crowe were

sale of the rebuilt helicopter. Crowe, in turn, entered into a joint venture with Fournier to rebuild the helicopter and agreed to split his share of any profit with him.<sup>9</sup> On January 1, 1975, they started work on the helicopter and completed it on August 23, 1975.

Respondent urges that Crowe did not devote his full time to this job. Pat Quinn testified for Respondent that Crowe told him it would take from 3 to 4 months to do the job and, even if everything went wrong, it would be finished by June 1, 1975.<sup>10</sup> Quinn also testified that during the middle of March 1975 work on the helicopter started to slow down, so he questioned Fournier about the slowdown. Fournier told him, he testified, that Crowe had lost interest in the job and was not doing his share of the work but instead was busy with a new hobby shop. Quinn testified that the rebuilding of the helicopter should not have taken more than 4 months, explaining that the job was similar to the 1200-hour overhaul normally given a helicopter which does not take more than 3 to 4 months<sup>11</sup> and that Al Broussard, a friend of his who rebuilds wrecked helicopters for resale, rebuilds three ships a year.<sup>12</sup>

Pat Quinn did not impress me as being a reliable witness. Moreover, he is not a completely disinterested or unbiased witness for at the time of the hearing he was involved in litigation with Crowe over the rebuilding of a second helicopter which is related to the rebuilt helicopter involved herein. In addition, Pat Quinn's testimony on a highly significant matter, when taken in its entirety, does not ring true. Quinn initially testified that the reason Crowe and Fournier were not given the job of rebuilding a second helicopter owned by the Quinns was their work on the first one had been so slow that it would have been unprofitable to employ them to rebuild the second one. This does not jibe with Quinn's earlier testimony that about June 1, 1975 — long after it was obvious to him that Crowe and Fournier were taking too long to rebuild the first helicopter — the Quinns entered into an agreement with Crowe that Crowe would rebuild the second one for which he would receive 50 percent of the profits from its resale. This obviously does not square with Pat Quinn's testimony that his failure to award the contract to rebuild the second helicopter to Crowe was based on Crowe's slow progress on the first one.<sup>13</sup> In an effort to explain why, despite Crowe's slow work performance in rebuilding the first helicopter, Crowe was awarded the contract to rebuild the second one, Pat

available outside the aircraft industry. This case is more analogous to *Florence Printing Co. v. N.L.R.B.*, 376 F.2d 216 (C.A. 4, 1967), cited by the court with approval (*N.L.R.B. v. The Madison Courier, Inc.*, *supra* at 397).

<sup>9</sup> The eventual sale of the rebuilt aircraft by the Quinns netted Crowe about \$6,000 which he split 50-50 with Fournier.

<sup>10</sup> Crowe credibly denied he told Pat Quinn it would take 3 or 4 months at the most to rebuild the helicopter.

<sup>11</sup> I reject Quinn's testimony that the work being performed by Crowe and Fournier was identical to a 1200-hour helicopter overhaul. Fournier credibly testified, in detail, why the rebuilding for resale of a wrecked helicopter was not the same as overhauling a helicopter for one's own use. Fournier is an experienced aircraft mechanic, whereas Quinn admittedly is not qualified to rebuild a helicopter and has never performed this type of work.

<sup>12</sup> The fact that Broussard, who is in the business of rebuilding helicopters for resale using a proper workshop, could rebuild one in less time than the discriminatees, who were without a proper workshop and beset with other difficulties described *infra*, does not prove that the discriminatees were willfully wasting their time or not devoting their full time to the job.

<sup>13</sup> Quinn later significantly changed this testimony, admitting that

(Continued)

Quinn testified in substance that the June 1975 agreement was made between Crowe and Tim Quinn and that Pat went along with it because he thought it was *a fait accompli*. I do not believe him, for it is clear from his entire testimony that the June 1975 agreement between Crowe and the Quinns for Crowe to rebuild the second helicopter was entered into with the full knowledge of Pat Quinn, who was a participant in the discussions which resulted in the agreement. The aforesaid circumstances, in my opinion, indicate that the testimony of Pat Quinn that Crowe and Fournier took too long to rebuild the helicopter is not credible.

Not only is Pat Quinn's testimony that the discriminatees took too long to rebuild the helicopter unreliable, but the record as a whole fails to demonstrate this. When questioned about Crowe's work on the hobby shop by Respondent, Crowe testified that, during January 1975 through March 1975, he spent 12 hours a week helping someone set up a hobby shop. Respondent did not ask whether Crowe did this work during those times when he should have been rebuilding the helicopter or whether it was work which he performed after hours or on weekends. Respondent also failed to question Crowe about the number of hours he devoted to his work on the helicopter. There is simply insufficient evidence that Crowe's hobby shop work interfered with his work on the helicopter or that Crowe willfully delayed this work. Indeed, Quinn's testimony that progress on the helicopter did not start to slow down until the middle of March 1975 indicates that Crowe's hobby shop work was not connected with the slowdown, for Crowe had been working on the hobby shop since January 1, 1975, and finished this project by the end of March 1975. I recognize that Fournier admittedly told Quinn that the job was not progressing as fast as it could and placed the blame on Crowe. However, Fournier credibly testified that he voiced these remarks in a fit of temper because he felt that he (Fournier) was devoting more of his time on that job than Crowe,<sup>14</sup> but that in fact the length of time it took to rebuild the helicopter was not Crowe's fault. In this regard, Fournier credibly testified that under ordinary conditions it should have taken about 5 months to rebuild the helicopter for resale but that there were delays due to a combination of unfortunate factors: They were without a proper facility to do this type of work;<sup>15</sup> there were delays in securing tools, equipment, and parts; there were adverse weather conditions.

another factor that entered into the decision not to use Crowe to rebuild the second helicopter was that Crowe was not satisfied with a 50-percent split of the profits but wanted 60 percent. Crowe credibly testified that the reason given him by the Quinns for not awarding him the contract to rebuild the second helicopter was that he was asking for too much money and they could get someone else for less money. Under the circumstances, including my impression that Pat Quinn was not a trustworthy witness, I find the evidence insufficient to establish that the Quinns decided not to use Crowe to rebuild the second helicopter because it took him too long to complete the first one.

<sup>14</sup> The fact that Fournier was devoting more of his time to the job than Crowe does not, absent evidence of the number of hours being worked by Crowe on this job, establish that Crowe was not devoting his full time to the job.

<sup>15</sup> The discriminatees lacked a permanent facility equipped to rebuild a helicopter so they used a hangar owned by the Quinns, a garage rented by Fournier, and Crowe's home as workplaces. In the middle of April 1975, Pat Quinn, recognizing that perhaps the discriminatees needed a better working

For all of the foregoing reasons I am convinced that Respondent has not met its burden and demonstrated that Crowe's conduct in connection with the Quinn job constitutes a willful loss of employment or that Crowe devoted less than his full time to this job.

Finally, I reject Respondent's contention that the \$200 earned by Crowe during the backpay period from the sale of his model airplanes should be included as a part of his interim earnings. The record establishes that these model planes were built by Crowe several years prior to the backpay period and that the only thing Crowe did during the backpay period was place them for sale on consignment. He performed no labor on the planes and I think it is a fair inference that these planes were not built to sell, but that Crowe's lack of success in securing interim employment forced him to sell the planes. In my view the moneys which Crowe received from the sale of these model planes, under the circumstances, did not constitute "interim earnings" derived from "interim employment," but is more analagous to supplemental earnings which are not deductible from a discriminatee's gross backpay.

#### 4. J. C. Fournier

Fournier was employed by Respondent as a helicopter mechanic. Upon being discharged on February 9, 1975, he obtained identical employment with Heli-Parts, Inc., where he worked from March 13, 1973, through April 1, 1974, when he was discharged. Fournier was not given an explanation by the employer for his discharge, but Heli-Parts challenged his subsequent claim for unemployment compensation, stating that he had been discharged for excessive absenteeism. The record does not indicate either the number or the nature of Fournier's absences.

Respondent contends Fournier's backpay should be reduced by the earnings he would have received if he had not been discharged by Heli-Parts. In order for this defense to succeed, Respondent must prove that Fournier incurred a "willful loss of earnings" by his failure to keep his job with Heli-Parts. *Mastro Plastics Corp.*, 136 NLRB 1342, 1346. Respondent has not sustained this burden. Fournier did not remove himself from the labor market but, to the contrary, throughout the backpay period diligently sought work.<sup>16</sup> Moreover, there is not a scintilla of evidence that Fournier

facility, spoke to Crowe about the possibility of renting one of two places, a helicopter repair shop which "was going out of business" and an industrial shop. Crowe credibly testified that he considered the matter and found that the industrial shop was too small for the type of work involved and that the helicopter repair shop was not available for rental at that time.

<sup>16</sup> On April 15, 1974, 2 weeks after Heli-Parts fired him, Fournier secured employment with another employer, Helicopter Rebuild & Weld. This job lasted until October 11, 1974. His next job, rebuilding the Quinn helicopter with Crowe, *supra*, lasted from January 1, 1975, to August 23, 1975. Fournier credibly testified that between his employment with Helicopter Rebuild & Weld and the Quinn job he unsuccessfully sought work with at least four employers and was in the process of identifying other employers whom he had sought work with during this period when Respondent changed the subject. During the period of time after the completion of the Quinn job on August 23, 1975, until his reinstatement by Respondent on November 13, 1975, Fournier sought employment with seven different employers.

willfully<sup>17</sup> or without excuse<sup>18</sup> absented himself from work at Heli-Parts or that his absenteeism there was any different from what it had been while he was employed by Respondent. Under these circumstances, the fact that Heli-Parts found Fournier to be an unsuitable employee does not constitute a willful loss of earnings. (See cases cited, *supra*, in connection with Crowse's discharge by Nordskog.)

Respondent, as a separate ground for denying Fournier backpay, urges that he incurred a willful loss of earnings because of his conduct in connection with the rebuilding of the Quinn helicopter. Respondent contends that Fournier was obligated to take affirmative action to rectify Crowe's alleged willful misconduct which resulted in this job being delayed for about 4 months. As found, *supra*, however, it was not demonstrated that Crowe, who had entered into the contract to rebuild the Quinn helicopter, willfully delayed or otherwise devoted less than his full time to this job. In any event assuming *arguendo* Crowe's conduct was sufficient to affect Crowe's right to backpay, Respondent failed to adduce evidence which casts even a colorable suspicion that Fournier devoted less than his full time to the Quinn job and there is not an iota of evidence that Fournier was a party to or ratified Crowe's alleged misconduct. For these reasons Respondent has not demonstrated that Fournier incurred a willful loss of earnings while employed to rebuild the Quinn helicopter.

Respondent challenges certain expenses claimed by Fournier as an offset to his interim earnings. I shall deal with each of these challenges separately.

During his employment with Respondent, Fournier lived in greater Los Angeles, about 8 miles from Respondent's place of business. The result of his discharge was that he could not afford the rent of this residence, so immediately after his discharge he moved into another house located within greater Los Angeles, where he resided for the entire backpay period. On March 13, 1973, he was hired by Heli-Parts as a temporary employee. He attained permanent status in about June 1973 and remained with Heli-Parts until April 1, 1974, when, as described *supra*, he was discharged. Heli-Parts is located in Porterville, California, which is approximately 150 miles from Fournier's residence. During his entire employment with Heli-Parts, Fournier during the workweek rented a motel room in the vicinity of the employer and on weekends returned home. The backpay specification credits Fournier with the trans-

portation, room, and board expenses connected with this interim employment. Respondent does not contest their reasonableness but takes the position that, for the period of time after Fournier became a permanent employee of Heli-Parts, they should be disallowed because Fournier at that time was obligated to move his residence from Los Angeles to Porterville where he was working. I disagree. The law is settled that Fournier's expenses, such as for transportation, room and board, incurred in connection with working elsewhere than for Respondent, which would not have been incurred but for the discrimination against him, and the consequent necessity of his securing interim employment, are properly deducted from interim earnings, e.g., *Hoosier Veneer Co.*, 21 NLRB 907, 938, fn. 26. In the instant case, in view of the uncertainties normally attached to the duration of a new job, and the pending prospects of Fournier returning to work for Respondent,<sup>19</sup> it was not unreasonable, in my opinion, for Fournier to continue to maintain his residence in Los Angeles while working for Heli-Parts. And, while residing in Los Angeles, Fournier, under the circumstances, did not live such an unreasonable distance from his work at Heli-Parts to deny him the transportation expenses in addition to the room and board expenses claimed by the General Counsel.

Respondent also urges that an expense of \$70 was improperly included in the specification for the first quarter of 1974. I agree. This expense was incurred in connection with Fournier's part-time employment performed after his normal working hours at Heli-Parts to supplement his income. Since a discriminatee's earnings from this type of moonlighting do not constitute interim earnings, it follows that the \$70 expense was improperly included in the specification, and I shall correct the specification in this connection.

Following his employment with Heli-Parts, Fournier next secured work with Helicopter Rebuild & Weld located in Santa Paula, California, where he worked from April 17, 1974, until October 11, 1974. Helicopter Rebuild & Weld is located between 45 and 50 miles from Fournier's residence whereas, as described, *supra*, while employed by Respondent he resided only about 8 miles from work. During his employment with Helicopter Rebuild & Weld, rather than commute to work each day, Fournier rented a motel room near the plant where he stayed during the workweek and

<sup>17</sup> Not only is there a lack of evidence that Fournier willfully absented himself from his work at Heli-Parts but a referee for the State Unemployment Insurance Appeals Board concluded that Fournier was eligible under state law to collect unemployment compensation without being penalized because his absenteeism was not a "willful or intentional" disregard of the employer's interests

<sup>18</sup> During a part of his employment with Heli-Parts, Fournier moonlight-

ed, that is, he performed mechanic's work on helicopters for persons other than Heli-Parts on his own time after working hours. Respondent's contention that this moonlighting was the reason for Fournier's alleged excessive absenteeism is speculation without support in the record

<sup>19</sup> The decision in this case recommended, among other things, that Respondent offer to reinstate Fournier

returned home for the weekends. The specification credits him with his transportation, room, and board expenses connected with this interim employment. Respondent does not contest the reasonableness of these expenses but takes the position that Fournier's room and board should be disallowed because many employees who live in Southern California commute between 90 and 100 miles a day to work. However, these employees, unlike Fournier, are not commuting because prior employers had unlawfully discharged them, thus causing them to secure interim employment located at a greater distance from their homes. Here, it was Respondent's unfair labor practices which forced Fournier to secure interim employment and placed him in the position of having to commute 90 to 100 miles daily rather than the 16 miles he had been traveling while employed by Respondent. Under the circumstances, it was not unreasonable for Fournier to rent a motel room near his interim employment during the workweek, rather than commute daily to his residence, and the transportation, room, and board allowances claimed by the General Counsel therewith are reasonable except for one thing. The specification credits Fournier \$25 a week for motel expenses. However, Fournier on an average of two times weekly drove to Los Angeles during the workweek to purchase parts and equipment for his employer and on those days remained overnight at his residence. Accordingly, I have only credited him with motel expenses for three nights a week during his employment with Helicopter Rebuild & Weld, which totals \$15 weekly instead of \$25 and have corrected the specification in this respect.

In connection with the job of rebuilding the Quinn helicopter, Crowe and Fournier purchased tools and equipment at a cost of \$1,950.<sup>20</sup> The backpay specification claims that this expense in its entirety should be deducted from the money Fournier received in rebuilding this helicopter. However, in his posthearing brief the General Counsel concedes that Respondent is entitled to an offset in the amount of the fair market value of the tools and equipment. Respondent takes the position that since the tools and equipment can be used by Fournier in his trade and since they have a resale value that this expense should be disallowed in its entirety. The question is a troublesome one but, on balance, I agree with Respondent.

The record reveals that the tools and equipment in question have a resale value and can be used to perform helicopter maintenance work and to rebuild helicopters as well as in some cases to perform other maintenance work.<sup>21</sup> Indeed, when Crowe and Fournier met to split the profits and expenses connected with the Quinn job, Fournier assumed the expense for all of the tools and equipment in

question because, as Fournier testified, he intended to start his own helicopter repair shop where he could put these tools and equipment to use. Finally, I note that the discriminatees made no effort either to rent the tools and equipment for the duration of the job or to purchase used tools since, as Fournier testified, it was more "convenient" to buy them new. Under these circumstances, although these tools and equipment literally speaking were necessary to rebuild the Quinn helicopter, I do not believe that their cost is properly allocable as an item of reimbursable expense. See *Harvest Queen Mill & Elevator Co.*, 90 NLRB 320, 340-341 (1950), where a self-employed farm laborer purchased a team of horses for plowing gardens and the Board while concluding that the expenses for horse feed and shoeing were deductible from interim earnings failed to treat the cost of the horses in the same manner.<sup>22</sup> Accordingly, I shall correct the specification so that the cost of the aforesaid tools and equipment is not included in Fournier's expenses.

I reject Respondent's contention that the \$250 rental paid by Fournier for the use of a garage to do certain spray painting and other work connected with the rebuilding of the Quinn helicopter was an unreasonable expense. Fournier credibly testified that he used this garage for the work because it was not possible to work in the aircraft hangar owned by the Quinns, inasmuch as the hangar was filthy and dusty, which condition was compounded by the wind which blew through the hangar. As found, *supra*, Pat Quinn recognized that the hangar left something to be desired as a workshop, but the alternative locations which Quinn suggested that the discriminatees use were either unavailable at the time or unsuitable for use without substantial renovation. Under the circumstances, I find that the \$250 rental was a reasonable expense.

#### CONCLUSIONS

Based on the foregoing and the whole record, I conclude that the total net backpay due the discriminatees is as follows:

Stephen Crowe	\$16,708.57
Dan Crowe	\$ 5,324.31
J. C. Fournier	\$11,075.66

This backpay is based upon the computations set forth in Appendix A [omitted from publication].

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

<sup>22</sup> *Rice Lake Creamery Co.*, 151 NLRB 1113, 1115, fn 8, 1156 (1965), (discriminatee Shervey) is distinguishable, as there was no evidence that the employee in that case purchased the tools with a view toward using them in the future in connection with his trade. I also note that no exceptions were taken to that portion of the Trial Examiner's recommended Decision and the Board felt constrained to note it was adopting that portion *pro forma*.

<sup>20</sup> The tools and equipment consisted of a compressor, a hydraulic press, Bell helicopter tools, and miscellaneous tools and equipment.

<sup>21</sup> I recognize that the Bell helicopter tools can only be used to rebuild and perform mechanical work on the Bell 47 series helicopters which went out of production in about 1975. However, they had been in production previously for almost 30 years and because of this there are presumably a substantial number of these aircraft in need of repairs and rebuilding which is a condition which will continue for the next several years

SUPPLEMENTAL ORDER <sup>23</sup>

Respondent Aircraft and Helicopter Leasing and Sales, Inc., Sun Valley, California, its officers, agents, successors, and assigns, shall make whole each of the employees involved in this proceeding as net backpay the amounts set forth opposite their names, plus interest accrued at the rate of 6 percent per annum to be computed in the manner

specified in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), until payment of all backpay due, less tax withholding required by Federal and state laws.

Stephen Crowe	\$16,708.57
J. C. Fournier	\$11,075.66
Dan Crowse	\$ 5,324.31

<sup>23</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.