A.P.R.A. Fuel Oil Buyers Group, Inc., Prudential Transportation Inc., and Amer-National Heating Service Inc. *and* Local 553, International Brotherhood of Teamsters, AFL–CIO *and* Jesus Campos *and* Alberto Guzman *and* Damaris Gomez. Cases 29–CA–15446, 29–CA–15459, 29–CA–15467, 29–CA–15482, 29–CA–15517, 29–CA–15518, 29–CA–15571, and 29–CA–15589

September 30, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On May 19, 1997, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and supporting and answering briefs. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A.P.R.A. Fuel Oil Buyers Group, Inc., Brooklyn, New York, its officers, agents, successors, and assigns shall make whole Luz Muniz by paying her $105,380, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax witholding required by Federal and state law. Further, backpay will continue to run until the Respondent makes a valid offer of reinstatement to Muniz.

Saundra Ratner, Esq. and *Stephanie LaTour, Esq.*, for the General Counsel.
Lionel Alan Marks, Esq., for the Respondent.

SUPPLEMENTAL ORDER

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, based on a backpay specification and notice of hearing.

On the entire record, including ny observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

This is a compliance specification which was issued on July 31, 1996, based on a previous decision issued by the Board at 309 NLRB 480 (1992). There, the Board directed the Respondents to offer reinstatement to and make whole Luz Muniz, Damaris Gomez, Jesus Campos, Ismael Medina, Victor Benavides, and Alberto Guzman. This decision was thereafter modified by the Board on July 28, 1993, wherein it severed Benavides and Guzman from the remedy. The United States Court of Appeals for the Second Circuit issued a judgment enforcing the Board's Order as modified on May 20, 1994.

The hearing in these cases opened before me on February 25, 1997, at which time I was notified that the parties had entered into a settlement agreement regarding three of the four alleged discriminatees. This left for litigation only the backpay claim for Luz Muniz. In substance, the compliance specification, as it relates to Muniz, alleges as follows:

1. That the backpay period begins on January 3, 1991, which is the date that she was originally discharged by the Respondent.

2. That during the period immediately prior to her discharge, Luz Muniz earned $420 per week, which is the measure of her gross backpay.

3. That although she was rehired on December 7, 1992, she was not assigned to her former duties, that her job was substantially changed and that her hours and pay were reduced. The General Counsel therefore argues that this rehiring was not a valid reinstatement and although it is appropriate to set off backpay by her interim earnings at A.P.R.A. during this period of time, her backpay resumed when she was laid off in June 1993.

Based on the assumption that Muniz is owed gross backpay at the rate of $420 per week, the General Counsel contends that her gross backpay per calendar quarter would be $5460.

In the compliance specification, the General Counsel concedes that Muniz was employed during the first, second, third, and a portion of the fourth quarter of 1992 by a company called Antril Sportswear. It is conceded that Muniz had

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[1] We find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

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

We note that the judge inadvertently stated that Luz Muniz began her employment at the Respondent in 1998 rather than 1988.

[3] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

The Respondent has filed a motion to reopen the record and the General Counsel has filed an opposition. We deny the motion as the evidence the Respondent seeks to adduce has not been shown to be newly discovered and previously unavailable. The General Counsel has moved to strike the factual assertions made in the Respondent's motion to reopen the record. Inasmuch as we are denying the Respondent's motion to reopen, we find it unnecessary to pass on the General Counsel's motion.

We also find that the matters the Respondent has raised concerning Muniz' collection of unemployment benefits were not fully litigated and are best left to more appropriate forums.

interim earnings from that company in the amount of $650 for the first, second, and third quarters and $450 for the fourth quarter of 1992. The General Counsel also concedes that during the fourth quarter of 1992 Muniz had interim earnings from A.P.R.A in the amount of $960 and that she had interim earnings from A.P.R.A. in the amounts of $3120 and $2400 for the first and second quarters of 1993. The compliance specification concedes no other interim earnings and Muniz testified that she had none since being last employed by A.P.R.A.

The Respondent made a number of contentions among them that Muniz worked for another company during most of the time after her discharge and that she fraudulently concealed her employment. It also contended that her backpay should be cut off at various points in 1991 or 1992 based on its alleged offers of reinstatement. At the latest, the Respondent contends that her backpay should be terminated when it offered and she accepted reinstatement on December 7, 1992.

Muniz began her employment at the Respondent in September 1998 and was illegally discharged on January 3, 1991. She worked in an office located at 92 West 98th Street, Brooklyn, New York, where she took phone orders for oil and service, prepared tickets for the company's drivers, and occasionally assisted on a service call. According to her testimony, Muniz started at $200 per week and during the course of the 3 years that she worked for the company, received a number of raises. She testified that by October 1990 and until her discharge in January 1991, she was paid a weekly salary of $420 for working between 60 and 80 hours a week. In this regard, the employer's records tend to support Muniz's testimony inasmuch as they show that starting during the payroll period October 27, 1991, and until her discharge, she was normally paid $420 for each week. The payroll records omit any indication of how many hours she worked, and this too supports her claim that she was paid on a weekly rather than an hourly basis. Assuming that she normally worked 60 hours a week, this would translate to $6 per hour (40 hours x 6 = 240 plus 20 hours x 9 = 180 or a total of $420). The employer's contention that she normally worked over 100 hours a week is not credited.

The Respondent claimed that Muniz waived any right to reinstatement because when asked by the General Counsel in the underlying unfair labor practice trial if she was willing to return to work, she responded that she would return only in the Union was in place. While one may wonder why that question was asked, her testimonial response cannot be construed as a waiver of any right to reinstatement or backpay. *Big Three Industrial Gas*, 263 NLRB 1189, 1203 fn. 50 (1982). In this regard, I note that there is no evidence that there was any concomitant or contemporaneous unconditional offer of reinstatement made to her by the Respondent.

The Respondent also claims that at various times after the initial trial concluded, it made a number of oral offers of reinstatement to Muniz through the Board's agents. This assertion was clearly not supported by any evidence that the Respondent offered or offered to prove. Indeed, the evidence shows that the first attempt at some kind of reinstatement offer, was made to Muniz by a letter dated June 19, 1992. Unfortunately for the Respondent, this letter on its face, does not amount to an offer of immediate and unconditional reinstatement. It reads:

> Pursuant to an order of the United States District Court entered June 3, 1992, arising out of proceedings brought by the National Labor Relations Board in the above cases, we are required to offer you interim unconditional reinstatement to your former positions and the same terms and conditions of employment, or to substantially equivalent positions, as job openings for such seasonal work occurs.
>
> However, at this time, your former job is not available, nor is a substantially equivalent position available. Therefore, we are placing your name on a preferential seasonal recall list. We shall notify you when job openings for such seasonal work occur.[1]

By letter dated November 2, 1992, the Respondent sent an unconditional offer of reinstatement to Muniz and by letter dated November 30, 1992, she accepted.

Muniz testified that when she showed up for work on December 7, 1992, she was told that she was not going to work at her previous location but that she would henceforth work at a location at Lexington Avenue, in Brooklyn. While her description of the location may be somewhat exaggerated, the evidence shows that the other people who worked there were two of the owners, two supervisors, and the accountant. Thus, she was separated from the other unit employees, and the Respondent did not produce any credible evidence to show why she could not have been reinstated to her former location. Also, the evidence shows that her weekly earnings were reduced because the number of hours that she worked was sharply curtailed. In this regard, three of her ''statement of earning records,'' (introduced as G.C. Exhs. 7, 8, and 9), showed that during March and May 1993, she had gross earnings of $267, $267, and $198. (Upon her return, her hourly rate was $6.) Although Respondent's witnesses claimed that she refused to work overtime to the same degree that she had done in the past, Muniz, credibly contradicted that assertion.

On the basis of the above, I conclude that although Muniz was put back to work, she was not given a valid reinstatement to her former job as required by the underlying Board Order and Court decree. *Boland Marine & Mfg. Co*., 280 NLRB 454 (1980), *Hit'N Run Food Stores*, 231 NLRB 660 (1997).

Muniz was again terminated on June 9, 1993. Assuming that her original reinstatement had been valid and that her discharge in June was not discriminatorily motivated, her backpay would have ended on December 7, 1992. However, as I have concluded that her reinstatement was not in compliance with the Board's Order and Court decree, and therefore invalid for the purpose of tolling backpay, her discharge in June 1993, serves only to resume the backpay liability. Of course the moneys that she earned from the Respondent during the period from December 1992 through June 9, 1993, will be treated as interim earnings and will be deducted from

[1] At the time this letter was sent, the Respondent employed between 20 and 30 people at the office where Muniz had previously worked, most or all of whom had less seniority than she. The Respondent offered no evidence that her job was unavailable or that if unavailable, that there was no substantially equivalent job that she could do. At no time prior to her discharge on January 3, 1991, was Muniz a seasonal employee.

the gross backpay that she is owed for the respective calendar quarters.

The Respondent contends that Muniz failed to disclose her interim earnings and lied about her employment after her initial discharge on January 3, 1991.

At some point, Muniz filled out a questionnaire given to her by the Regional Office called ''Statement of Claimant for Backpay.'' On this questionnaire, which asked her to state the dates and names and addresses of companies where she looked for work and where she was hired, she listed various employers where she sought employment after her discharge from the Respondent. She did not indicate that she had obtained any employment.

At some point before June 1992, the Respondent's attorney advised the Regional Office that he had obtained information that Muniz had been employed by a company called Antril Sportswear. On June 23, 1992, Muniz was interviewed by Board attorney, Saundra Ratner, and gave an affidavit stating that she had worked part time at Antril Sportswear starting in November 1991 and that she had earned $50 per week off the books. In her affidavit, she asserted that she had actively searched for work and that apart from the job at Antril, she had been unable to obtain other employment. As a consequence of this information, the General Counsel, in the backpay specification, conceded that Muniz had interim earnings from Antril.[2] The fact that Muniz did not initially list her employment on the backpay questionnaire, does not prove to me that she willfully falsified her interim earnings. Her failure to do so may be attributable to her not fully understanding the questionnaire. When Muniz was asked about this job on June 23, 1992, she readily reported it to the Board's agent. See *Allied Lettercraft Co*., 280 NLRB 979, 983 (1986). In that case a majority of the Board, with member Dotson dissenting, agreed with the administrative law judge's conclusion that a ''mere mistake in reporting earnings by a discriminatee will not serve to toll backpay.'' See also *Manhattan Graphic Productions*, 282 NLRB 277, 278 (1986).

At the hearing, the Respondent called a witness, Mohammed Kwara, who testified that he operated a business out of his home wherein he and his brother repaired heating and air conditioning units. He claimed that he employed Muniz from about January 1991 to November 1996. Kwara testified that he paid her $5 per hour plus a 5-percent commission on customers that she obtained. In this regard, he asserted that her earnings were between $400 and $600 per week. He claims that Muniz asked him to pay her off the books and that he complied with this request. He could furnish no records or documents of any kind to show that he ever employed Muniz. For that matter, he could produce no records that he was ever engaged in this business. He produced no bills (either from suppliers or customers), invoices, receipts, accounting records, income tax or sales tax returns.

Assuming that his testimony was believable, this would eliminate most if not all of the backpay that is claimed on behalf of Luz Muniz.

When I asked Kwara when he first told any representative of the Respondent about his having employed Muniz, he testified that he first did so several days before he gave his testimony. He asserted that he met John Latora while on line at the Motor Vehicles Bureau and that he told him about employing Muniz during their conversation. (Kwara testified that he knew John Latora because he had previously been employed by A.P.R.A.)

This testimony, in my opinion is, from the Respondent's perspective, simply too good to be true. We have here a person who first appears out of the woodwork after 6 years and at the start of this backpay hearing to ''prove'' the Respondent's assertion that Muniz was employed during the backpay period. The Respondent, during the entire course of the underlying proceeding and its aftermath, had claimed that Muniz had been employed, but had only been successful in showing that she had worked for a limited time for a company called Antril Sportswear. The assertion that she had worked for Mohammed Kwara from January 1991 to November 1996, is denied by Muniz and his testimony is not credible to me.

Muniz testified that after her second discharge from the Respondent in June 1993, she again sought employment but was unsuccessful. And in this regard, the Respondent has not sustained its burden of proof to show the contrary.[3]

In view of the foregoing, I find that the General Counsel has sustained her burden regarding Muniz' backpay claim and that the Respondent has not sustained its burden to show that the claimed amount is not warranted. I therefore agree with the General Counsel's contentions and with the backpay claim set forth in the specification as amended at the hearing.

ORDER[4]

The Respondents shall make payment to Luz Muniz in the amount of $105,380 plus interest. Further, backpay will continue to run until the Respondent makes a valid offer of reinstatement to her.

[2] At the hearing, the General Counsel amended the specification to change the source of the interim earnings for the fourth quarter of 1992. Therefore, instead of listing earnings of $1410 from A.P.R.A., she lists $450 from Antril and $960 from A.P.R.A.

[3] The General Counsel having shown the gross backpay due, the employer has the burden of establishing affirmative defenses which would mitigate his liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc*., 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co*., 236 NLRB 543 (1978). Respondent does not meet its burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of so-called ''incredibly low earnings,'' but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work. *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 575–576 (5th Cir. 1966). Moreover, the Respondent cannot merely rely upon cross-examination of the claimant and allegedly impeaching testimony. *NLRB v. Inland Empire Meat Co*., 692 F.2d 764 (9th Cir. 1982). The evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore, and must show if, where, and when the discriminatee would have been hired had they applied. Id. at 1308; *McLoughlin Mfg. Corp*., 219 NLRB 920, 922 (1975); *Isaac & Vinson Security Services*, 208 NLRB 47, 52 (1973). *Champa Linen Service Co*., 222 NLRB 940, 942 (1976).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.