

**Wecco Industries, Inc. and United Steelworkers of America, AFL–CIO.** Cases 17–CA–19047 and 17–CA–19120

August 28, 2003

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 28, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

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

In an earlier proceeding, the Board found that the Respondent committed numerous unfair labor practices, including discharging Charles Thornton in retaliation for his union activities.<sup>1</sup> The Board ordered the Respondent to offer to reinstate Thornton and to make him whole for any loss of earnings and benefits suffered as a result of the unlawful discrimination. The United States Court of Appeals for the Tenth Circuit enforced the Board's decision.<sup>2</sup> The Respondent reinstated Thornton on September 25, 2000. This proceeding concerns the amount of make-whole relief that Thornton should recover.

The Regional Director issued a compliance specification setting forth the length of the period for which backpay was claimed, the estimated amounts that Thornton would have received from the Respondent in wages, safety and attendance bonuses, profit sharing, and contributions to a 401(k) plan, and his interim earnings<sup>3</sup> and

expenses.<sup>4</sup> The specification also asserted that, if Thornton was pushed into a higher tax bracket as a result of receiving his backpay in a lump sum, the Respondent should be required to reimburse him for the added tax burden. The judge approved all of the claims in the specification, as modified to account for \$72 in interim earnings that were not included. We agree with the judge's findings,<sup>5</sup> with two exceptions.

---

Relying on the quarterly reports it did receive, the Respondent contends that the compliance specification understates Thornton's interim earnings for four quarters of the backpay period, particularly so for the second quarter of 1998, where the amount of interim earnings listed in Thornton's report to the Region was more than twice the amount listed in the specification for that period (\$5184.04). The judge rejected this argument, citing the compliance officer's testimony that backpay claimants often mistakenly report year-to-date rather than quarterly earnings when filling out earning reports. From our review of Thornton's reports for the first three quarters of 1998, it seems clear that is exactly what happened here. Thornton worked in the same job for the same interim employer in each quarter. The amount reported by him for the second quarter (\$11,285) is out of all proportion to the amounts reported for the other two quarters (\$6188.03 and \$7753.89). However, if the amount reported for the first quarter is subtracted from the amount reported for the second quarter, the remainder of \$5097 is much more in line with the reported earnings of the other quarters. With respect to other quarters where there are discrepancies between Thornton's reports and the compliance specification, it appears from the compliance officer's notes, which the Respondent introduced into the record as its own exhibit, that these slight discrepancies are explained by the fact that the interim earnings admitted in the specification are based on a review of actual check stubs instead of Thornton's summary reports.

<sup>4</sup> We agree with the judge that the General Counsel established Thornton's interim expenditures on work clothes and gloves through Thornton's credited testimony. Contrary to Member Schaumber's contention, we are not engaging in speculation here. We are adopting the judge's factual finding, which he based on Thornton's persuasive demeanor on the witness stand, that Thornton incurred the claimed expenses as he testified and that those expenses were reasonable. We reject our colleague's suggestion that such testimony should be found to be unworthy of belief, absent corroborating documentation—a view that is contrary to Board law. As our colleague concedes, Board precedent does not require the General Counsel to produce receipts for such expenditures or to explain why receipts are unavailable. *Coronet Foods, Inc.*, 322 NLRB 837 (1997), modified on other grounds 158 F.3d 782 (4th Cir. 1998).

<sup>5</sup> The judge found that the Respondent failed to prove that it would have lawfully laid Thornton off as part of a mass layoff in October 1998. In affirming that finding, we note that although Thornton had not taken as many classes to upgrade his job skills as most other employees, there were three other employees who had not completed all of the courses and were not laid off, and there is no showing that they were superior to Thornton. Moreover, the record establishes that many of the technological improvements at the Respondent's facility, which the Respondent contends necessitated skills upgrading by employees, were made in 1998, long after Thornton was fired. Had he not been unlawfully discharged, Thornton would have been eligible to enroll in additional classes to improve his skills.

In affirming the judge's finding that the Respondent failed to meet its burden of proving Thornton did not make a reasonable search for interim work, Member Schaumber finds no need to rely on *Black Magic Resources*, 317 NLRB 721 (1993), or *Alaska Pulp Corp.*, 326 NLRB 522 (1998), cited by the judge.

<sup>1</sup> *Wecco Industries*, 327 NLRB 172 (1998).

<sup>2</sup> 217 F.3d 1306 (2000).

<sup>3</sup> The Respondent complains it was not able to verify the amount of Thornton's interim earnings set out in the compliance specification because it did not receive the following documents from the Region: quarterly earnings reports from Thornton to the Region for the third quarter of 1999 and the first three quarters of 2000, Thornton's W-2 form for 2000, and Thornton's tax returns. The record indicates the Region did not have the quarterly reports or W-2 form. Nevertheless, we find the Respondent had sufficient information and opportunity to verify the interim earnings claimed. The Region provided the Respondent with all the quarterly earnings reports and, apparently, W-2 forms Thornton provided to the Region. The Respondent also received Thornton's tax returns as well as the compliance officer's notes detailing the information on which he relied in computing the amounts set forth in the compliance specification. Finally, both Thornton and the compliance officer testified and were available for examination by Respondent's counsel.

1. Attendance and Safety Bonuses. In August 1996, the Respondent implemented a program under which bonuses were paid in each quarter to employees with perfect attendance and safety records during the previous quarter. An employee with a perfect attendance record received a 10-cent hourly bonus, and an employee with a perfect safety record received a 15-cent bonus. An employee who earned both attendance and safety bonuses received an additional 5-cent hourly bonus.

The compliance specification claimed the attendance and safety bonuses on Thornton's behalf for each quarter of the backpay period. The judge agreed. He found that Thornton had a good attendance and safety record while working for the Respondent. He also reasoned that, as the wrongdoer, the Respondent should not be allowed to profit from any uncertainties resulting from its unlawful conduct.

In its exceptions, the Respondent repeats its argument to the judge that whether Thornton would have qualified for either bonus is entirely speculative. With respect to the attendance bonus in particular, the Respondent argues that Thornton did not qualify for it in each quarter before he was terminated, and therefore that, even if Thornton is entitled to the bonuses, he should not receive the attendance bonus for every quarter in the backpay period.<sup>6</sup>

We find merit in the exception, but only as it pertains to the attendance bonuses. As the judge stated, when uncertainty arises concerning the appropriate amount of make-whole relief, the uncertainty is normally, and appropriately, resolved in favor of the injured party and against the respondent, as the wrongdoer. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982). Qualifying for the attendance and safety bonuses, however, was a matter almost entirely within Thornton's control. Indeed, qualifying for the attendance bonus was entirely within his control (or, at least, entirely out of the Respondent's control). And, as the Respondent points out, the record establishes that Thornton did not qualify for the attendance bonus throughout the period leading up to his discharge.

In these circumstances, although we cannot be sure whether Thornton would have qualified for the bonuses had he continued in the Respondent's employ, we think it inappropriate to resolve our uncertainty by assuming that he would have qualified for both bonuses in all backpay quarters. We think the more appropriate approach is to

<sup>6</sup> The Respondent states that there were two quarters prior to his discharge for which Thornton could have qualified for the attendance bonus, and that he qualified in only one quarter. The record, however, reflects that there were three such quarters and that Thornton qualified in two of them.

base our assumptions on Thornton's actual past job performance.<sup>7</sup> Thus, because Thornton qualified for the attendance bonus in only two of three quarters before he was fired, we shall assume that he would have qualified for the attendance bonus in only two-thirds of the quarters in the backpay period. By contrast, the record establishes that Thornton qualified for the safety bonus in each quarter before he was fired. We therefore assume that he would have qualified for the safety bonus throughout the backpay period.

Our finding that Thornton should be reimbursed for attendance bonuses in only two-thirds of the quarters in the backpay period will require that his backpay be reduced commensurately. It will also require a reduction in both the amount of profit sharing payable to Thornton and in the contributions to Thornton's 401(k) plan, because those amounts were based on employees' gross wages, including attendance and safety bonuses.

Although we are assuming that Thornton would have qualified for the attendance bonus in two-thirds of the quarters in the backpay period (until the bonuses were eliminated in August 2000), there is no way of identifying the specific quarters in which he would have qualified. We could, of course, select quarters at random, but because the amounts of gross backpay claimed vary significantly by quarter, our selections could affect, somewhat, the amount of relief afforded. Moreover, although eligibility for the bonuses was determined on a quarterly basis, the quarters used by the Respondent (August–October, November–January, February–April, May–July) were not the same as the calendar quarters (Janu-

<sup>7</sup> See, e.g., *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995) (backpay formula should be representative of the discriminatee's employment history and take into account intermittency of employment); *Wayne Trophy Corp.*, 254 NLRB 881, 883 (1981) (purpose of traditional backpay formula, based on average hours of prediscrimination employment, is to account for absences, lost hours, or other factors that could reasonably be expected to recur during the backpay period).

Contrary to Member Schaumber, we find that the General Counsel was not required to introduce evidence concerning Thornton's attendance and safety records from his interim employment in order to qualify for attendance and safety bonus moneys. That argument was not raised by the Respondent. More to the point, we find no reason to believe that Member Schaumber's approach would more accurately predict whether Thornton would have qualified for the bonuses had he not been unlawfully discharged. Thus, for example, if Thornton's interim workplaces were more dangerous than the Respondent's facility, he might not have had an unblemished safety record at his interim employment. Similarly, if his interim employers did not offer attendance bonuses, Thornton may not have been as regular in attendance as he was while in the Respondent's employ. (Presumably, attendance bonuses are given to encourage good attendance.) In either case, then, given differences in working conditions, it would be improper to infer from Thomas' record during his interim employment that his attendance or safety record would have fallen off had he not been unlawfully terminated.

ary–March, April–June, July–September, October–December) used in the compliance specification. For these reasons, we find it impractical to attempt to recompute Thornton’s earnings on a quarter-by-quarter basis.

We shall, instead, simply reduce Thornton’s gross earnings by 5 cents per hour (7.5 cents for overtime hours), or 0.4 percent, from the beginning of the backpay period through July 31, 2000, when the bonuses were eliminated.<sup>8</sup> (Arithmetically, reducing earnings by 5 cents for the entire backpay period is equivalent to reducing them by 15 cents—the sum of the 10-cent attendance bonus and the 5-cent bonus for qualifying for both the attendance and safety bonus—for one-third of the backpay period.) Because profit sharing and 401(k) contributions were based on gross wages, we shall reduce them by 0.4 percent through July 31, 2000, as well. Our computations are set forth in the appendix.<sup>9</sup>

2. Tax Compensation. The judge found that if Thornton incurs higher income tax liability as a result of receiving his backpay in a lump sum, the Respondent should be required to reimburse him for the additional taxes that result. The Respondent has excepted, and we find merit in the exception.

The General Counsel did not seek this relief in the underlying case, and the Board’s Order in that case contained no provision such as the one the General Counsel now seeks. That Order has been enforced by the court of appeals. To provide the requested remedy at this stage would require the Board to amend its Order and possibly to return to court to seek enforcement of the amended Order. We think that this is not the time to raise this issue; the General Counsel should have made this argument to the Board in the earlier proceeding. Accordingly, we shall delete this provision from the judge’s recommended Order.<sup>10</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Webco Industries, Inc., Sand Springs, Oklahoma, its officers, agents, successors, and assigns, shall

<sup>8</sup> The compliance specification claims overtime at 1.5 times the \$12.50 hourly wage rate, which includes the bonuses: 1.5 times 5 cents equals 7.5 cents, which is 0.4 percent of the \$18.75 overtime rate.

The base wage rate increased by 25 cents in November 1998. Five cents per hour is 0.3921 percent of the higher rate, which we have rounded to 0.4 percent in the interest of simplifying our computations.

<sup>9</sup> We have used the compliance specification’s figures for interim earnings and expenses. We have also used the profit sharing factors and 401(k) contribution rates claimed in the specification. Like the judge, we are adding \$72 that Thornton received from the Union in 1997 to his interim earnings.

<sup>10</sup> Member Liebman agrees that this relief was not timely sought but nonetheless believes that this form of relief would be appropriate if timely sought.

pay Charles Thornton the amounts set forth below, as summarized in the compliance specification and as modified in the decision of the administrative law judge and in this decision. The Respondent shall pay the listed net amounts, less tax withholding required by Federal and State laws, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Backpay	\$18,030.13
Profit Sharing	3,128.03
401(k) Contributions	16,849.38

MEMBER SCHAUMBER, dissenting in part.

I join my colleagues in all but two aspects of their decision: one, before awarding Thornton any bonuses for attendance and safety, I would require the General Counsel to introduce evidence of Thornton’s attendance and safety record during his interim employment; and two, I would not award Thornton moneys for his claimed weekly purchases of work clothes without some evidence substantiating that claim, either in the form of receipts, a credible explanation why the receipts are unavailable, or some corroborative evidence of the need and the cost.

My colleagues disagree. In doing so they reach mightily to preserve unnecessary uncertainty in the measure of damages. I respectfully suggest that the Board is not at liberty to do so. The Act permits the Board to order make-whole remedies; it is prohibited from engaging in speculation when doing so. As the Supreme Court made clear to us in *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984):

[I]t remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practice.

Thus, in the remedy phase, it is incumbent on the Board to lessen the degree of uncertainty in the calculation of damages whenever it is possible to do so. That is, damages should be calculated with such certainty as the nature of the case allows. 22 Am. Jur. 2d, Damages, Section 488 (2003). The evidence I would require aims at accomplishing this result.

Thornton claimed that his interim work was such that he needed new work clothes—a shirt and new gloves—every week. He presented no evidence to substantiate that claim. A witness for the Respondent took issue with Thornton’s claim that he needed to purchase gloves each week. I believe under these circumstances, Thornton should be required to substantiate these interim expenditures with receipts, a credible explanation as to why the receipts are unavailable, or some other corroboration of this weekly clothing need. Indeed, I would require such evidence in every backpay case involving a claim for interim expenses

for which receipts are customarily given. My colleagues take issue with such a minimal requirement but do not say why except to rely on Board precedent that does not say why. See *Coronet Foods, Inc.*, 322 NLRB 837 (1997), modified on other grounds 158 F.3d 782 (4th Cir. 1998). I am of the view that unless the Board can provide some justification for not tailoring our evidentiary requirements to avoid unnecessary uncertainty in the computation of damages such precedent should not be relied on but overruled. I am prepared to do just that.

With regard to the attendance and safety bonuses, as mentioned above, I would require the General Counsel to introduce evidence of Thornton’s attendance and safety record during his interim employment. My colleagues do not require this evidence because it might not accurately predict whether Thornton would have qualified for the bonuses. They hypothesize that *if* Thornton’s interim work was more dangerous, and *if* his interim employer did not reward attendance, the evidence I would require might not be dispositive. It can hardly be contested, however, that Thornton’s safety and attendance records with his interim employer is *probative* of what his record would have been with the Respondent. If other evidence

exists that weakens the inference, fine—but that speculative possibility is not a reason not to require the introduction of concededly probative evidence. With all due respect to the majority, we do not fulfill our obligations under the Act by objecting to the introduction of readily available relevant evidence on the basis of hypothetical situations which could conceivably make the evidence less compelling where, as here, the evidence may lessen the degree of uncertainty in the measure of damages.

All of this is not to say that the wrongdoer can avoid “the risk of uncertainty which his own wrong has created.” See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 257 (1946) (citation omitted). It is to say, however, that the computation of damages must be “a just and reasonable estimate of the damage, based on relevant data.” *Id.* at 257.<sup>1</sup> It is the latter, I believe, we, the Board, must require.

<sup>1</sup> In this case, it cannot be said that the “wrongdoer’s misconduct has rendered [more accurate data] unavailable.” *Bigelow v. RKO Radio Pictures, Inc.*, supra, 327 U.S. at 257.

APPENDIX

Quarter/ year	Gross backpay	Net Interim Earnings	Net Backpay	Profit Sharing	401(k) Contri- butions Employee	Employer
I/97	\$640.62	\$0	\$640.62		\$76.87	\$9.61
II/97	\$9,043.81	\$2,167.00	\$6,876.81	\$83.92	\$1,085.26	\$135.66
III/97	\$8,727.76	\$5,094.26	\$3,633.50	\$373.37	\$1,047.33	\$130.91
IV/97	\$8,710.33	\$5,401.64	\$3,308.69	\$238.66	\$1,045.24	\$130.66
I/98	\$8,728.70	\$4,637.36	\$4,091.34	\$488.81	\$1,047.44	\$130.93
II/98	\$8,468.80	\$5,029.04	\$3,439.76	\$874.83	\$1,016.26	\$127.03
III/98	\$8,944.09	\$7,913.68	\$1,030.41	\$701.21	\$1,073.29	\$134.16
IV/98	\$9,370.37	\$7,295.01	\$2,075.36	\$367.23	\$1,124.44	\$140.56
I/99	\$8,310.63	\$6,230.84	\$2,079.79		\$997.27	\$124.66
II/99	\$8,534.45	\$8,340.66	\$193.79		\$1,024.14	\$128.02
III/99	\$9,972.67	\$7,423.52	\$2,549.15		\$1,196.72	\$149.59
IV/99	\$8,921.83	\$6,947.52	\$1,974.31		\$1,070.62	\$133.82
I/00	\$9,021.91	\$8,351.59	\$670.32		\$1,082.63	\$135.33
II/00	\$8,770.65	\$10,254.32	\$0		\$1,052.48	\$131.56
III(1)/00	\$2,590.84				\$310.90	\$38.86
III(2)/00	\$6,052.80	\$8,128.13	\$515.51		\$726.34	\$90.79
TOTAL			\$33,079.36			
			(\$72.00)	(received from Union in 1997)		
			\$33,007.36	\$3,128.03	\$14,977.23	\$1,872.15

*Frank Molenda, Esq.*, for the General Counsel.  
*David E. Strecker, Esq.*, for the Respondent.

#### SUPPLEMENTAL DECISION<sup>1</sup>

ALBERT A. METZ, Administrative Law Judge. The issue presented is the Respondent's liability for the backpay of employee Charles Thornton. On November 30, 1998, the National Labor Relations Board (Board) issued its Decision and Order in this case (327 NLRB 172) directing that the Respondent make Thornton whole for any loss of earnings and other benefits suffered as a result of its discrimination against him. On July 11, 2000, the Board's decision was enforced by the United States Court of Appeals for the Tenth Circuit (217 F.3d 1306).

A dispute arose between the Board and the Respondent as to the backpay due Thornton. On April 30, 2001, the Board's Regional Office issued a compliance specification setting forth the General Counsel's contention of the amount owed. The Respondent duly filed its answer to the specification disputing the accuracy of certain of the Board's calculations.

#### I. MAKE-WHOLE PERIOD

The principal dispute between the parties is the length of Thornton's make-whole period. The General Counsel claims that Thornton was out of work from March 15, 1997, the date the Respondent unlawfully suspended him, until September 25, 2000, the date the Respondent reinstated him to employment. The Respondent asserts the appropriate backpay period is limited to March 15, 1997, until October 7, 1998—a date it claims Thornton would have been laid off.

On October 7, 1998, the Respondent laid off several workers in various classifications. Subsequent to that layoff the Board issued its decision in *Wecco Industries*, 334 NLRB 608 (2001) (enforcement pending, *Wecco II*). In that decision the Board found that the Respondent violated the Act by unlawfully discriminating against some of the employees it selected for the October 1998 layoff. Three of those laid off were maintenance technicians, the same classification that Thornton had been working in at the time of his discharge. The Respondent argues that Thornton also would have been laid off in October 1998 because of his lack of skills.

A total of 53 employees were selected for the October 1998 layoff. These employees worked in various classifications including production, administrative, clerical, and management. The Respondent presented evidence that employees were considered for retention or layoff based on who possessed multiple talents and skills. Director of Maintenance John Bayliss was responsible for designating who would be laid off in the maintenance department. Bayliss was not directed to lay off any particular number of maintenance department employees but he was told to determine which employees possessed the best skills to keep production running.

Bayliss chose maintenance employees Charley Casey, Robert Warden, and Robert Shepard for layoff. Bayliss testified he selected these employees because they did not have the technical knowledge and skills required for retention. A consideration in their selection was the fact that they had not attended

vocational training classes to enhance their skills. The Respondent made classes in welding, mechanical, motor control and programmable logic available to employees at a local vocational institution. Bayliss testified that Casey was chosen for layoff because he could not read or write. The Respondent had tried to give him assistance in these skills but he had rejected the efforts. He did not possess the skills to pass the vocational school's qualification assessment. Bayliss picked Shepard because he refused to attend vocational school training and had let Bayliss down on several occasions with his inability to perform assigned tasks. Warden was laid off because he was physically tired all the time due to working on his farm during the day and working for the Respondent at night. Bayliss found that Shepard was "sleeping most of the time." Bayliss also noted that Warden was a "pretty illiterate type of guy."

Bayliss testified that he would have also chosen Thornton for the October 1998 layoff if he worked for the Respondent at that time. Bayliss based this retrospective appraisal on his view that Thornton did not have the required technical skills and knowledge to be retained. Bayliss testified that he took into consideration the fact at the time of the lay off Thornton had not completed all of the vocational school courses.

Respondent's Exhibit 5 shows that Casey, Shepard, and Warden had not attended any of the four maintenance department vocational classes. Thornton, in contrast, had successfully completed two of the four classes when he was unlawfully terminated in March 1997. That termination occurred over 1-1/2 years before the October 1998 layoff. Thus during that 19-month period Thornton was not eligible to attend the other vocational classes. This lack of opportunity is directly attributable to the Respondent's discriminatory discharge of Thornton.

Bayliss testified that he only retained those employees that could best serve the needs of the Respondent and thus he would have also laid off Thornton. The record does not sustain that conclusion. The record does not support a conclusion that Thornton was deficient of knowledge, skills, or abilities as compared to the three laid-off maintenance employees. Thornton is not illiterate. Thornton was not shown to have slept on the job. The Respondent did not demonstrate that Thornton failed to complete assigned work. Thornton attended vocational classes to improve his skills. Thornton was a senior employee possessed of recognized welding skills. Bayliss did not reduce the maintenance department beyond the three noted employees. After the layoff the Respondent hired two additional maintenance employees. Thornton was subsequently reinstated in accordance with the order of the court of appeals and has successfully worked for the Respondent since. The Respondent's brief concedes that following reinstatement, "Mr. Thornton was placed in the Fabrication Shop, a position where he could use his welding skills." It is clear that there was work for Thornton on his return that he could and did perform. See *EDP Medical Computer Systems*, 302 NLRB 54, 55 (1991). The Board and court of appeals have found that the Respondent discriminatorily discharged Thornton because of his protected union activities. Bayliss' retrospective assessment that Thornton would have been laid off, when measured against the factual background of this case, is speculation built on a defective foundation of unlawful discrimination. Finally, it cannot be ignored

<sup>1</sup> This case was heard at Tulsa, Oklahoma, on October 23, 2001.

that the Board held in *Webco II* that the Respondent continued its unlawful conduct when it selected certain employees for layoff in October 1998. In sum, I find that the Respondent has failed to prove that Thornton would have legitimately been laid off on October 7, 1998. I conclude that the compliance specification correctly sets forth Thornton's backpay period as being from March 15, 1997, to September 25, 2000.

## II. SEARCH FOR WORK

The Respondent argues that Thornton's search for work was deficient. On March 15, 1997, the Respondent told Thornton that he was suspended from work and by a letter dated April 11, 1997, notified him that he was discharged. Thornton's job search report (R. Exh. 1) shows he had started looking for work prior to being notified of his termination. The report shows he applied for employment at 13 employers between March 31 to May 9. He was hired by Interfab and started work on May 23. He testified that he probably looked for other work in the period May 9 to 23 but could not recall specifics. The Respondent asserts that Thornton should have more diligently looked for work even before being notified of his discharge and should be penalized for not having looked for work between May 9 and the May 23 start of his employment with Interfab.

"It is well settled that to be entitled to backpay a discriminatee must make reasonable efforts to secure interim employment which is substantially equivalent to the position from which he was discharged." *EDP Medical Computer Systems*, 302 NLRB 54 (1991). The burden is on the Respondent to show the facts necessary to establish that the discriminatee neglected to make reasonable efforts to find interim work. *Black Magic Resources*, 317 NLRB 721 (1995). The record shows that Thornton sought employment even to the extent of contacting potential employers prior to being informed by the Respondent that he was discharged. He exercised reasonable diligence by seeking work at numerous firms and found employment soon after his discharge. I find that the Respondent has failed to meet its burden of showing that Thornton did not make a reasonable search for work. *Alaska Pulp Corp.*, 326 NLRB 522, 534-535 (1998); *ABC Automotive Products Corp.*, 319 NLRB 874, 877 (1995); and *Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

## III. INTERIM EARNINGS

The Respondent raises several points concerning Thornton's interim earnings. The Respondent argues that the compliance specification is inaccurate because some of the quarterly earnings information that Thornton provided was conflicting. The Board's compliance officer, Robert Fetsch, testified that discriminatees sometimes mistakenly list year-to-date earnings rather than actual quarterly earnings when filling out quarterly report forms. Fetsch testified that he used W-2 forms, social security records, Thornton's submissions and all similar evidence available to him to calculate the compliance specification. The Respondent submitted no documentary evidence that showed Thornton had earned greater interim earnings than were stated in the compliance specification.

The Respondent argues that the record shows that Thornton worked for Red Hawk Industries in the interim. There are no

interim earnings shown for an employer of that name. The record, however, does reflect Thornton's earnings for Interfab. Thornton testified without contradiction that Interfab was bought out by Red Hawk Industries.<sup>2</sup>

The Respondent raises the point in its brief that the quarterly back pay reports indicate January 1997 as the "date of unlawful discrimination." (See box 2, R. Exh. 1.) Compliance Officer Fetsch testified the compliance specification used the correct date of March 15, 1997, to accurately reflect the commencement of the unlawful discrimination involving Thornton. The Respondent does not show how the reference to "January 1997" caused the compliance specification to be inaccurate. I find that the January reference in the backpay reports is of no legal significance and did not lead to any miscalculation of Thornton's backpay.

The General Counsel called Thornton as its witness at the hearing and he was cross-examined by the Respondent. The Respondent's brief, however, contends it was not given all of Thornton's records and he refused to submit to a voluntary interview with the Respondent. The Respondent argues "[The Respondent] has no way of confirming his gross interim earnings." This argument ignores the point that it is the Respondent who has the burden of proving facts that diminish a discriminatee's backpay. *Florida Tile*, 310 NLRB 609 (1993) (The employer who committed the unfair labor practice has the burden to establish facts that reduce the amount due for gross backpay.); *Arlington Hotel*, 287 NLRB 851, 855 (1987) (The burden of showing the amount of any interim earnings, or a willful loss of interim earnings, falls to the Respondent.). The Respondent could have subpoenaed witnesses and evidence and made a full inquiry into the matter. The Respondent decided not to take advantage of this due process right. The Respondent cannot now rely on that omission as an excuse for failing to meet its burden of proof.

Compliance Officer Fetsch conceded that in 1997 Thornton received the sum of \$72 from the Steelworkers Union and that amount was not considered in his interim earnings. I find that the calculations of Thornton's interim earnings must be modified to take account of this overlooked \$72 amount. With the single exception of the noted \$72 amount, the Respondent has failed to show that Thornton's interim earnings were not accurately calculated. I find that the percent's compliance specification, with the noted exception, does accurately list Thornton's interim earnings.

## IV. INTERIM EXPENSES

The Respondent questions the calculation of Thornton's interim expenses. The compliance specification states that Thornton had interim expenses of \$155 per quarter. This amount covers the purchase of work clothes and gloves for Thornton's interim employment. The Respondent concedes that it provided Thornton with work clothes during his employment but points out that there was an optional laundry service charge of \$4.50 per week that he elected to receive. The Respondent argues that

<sup>2</sup> I hereby order that the transcript be corrected to accurately reflect the following missing testimony. There are notations at p. 42, ll. 4 and 5, that words are "inaudible." I find that the inaudible testimony was in each instance the words "Red Hawk."

Thornton's interim expenses should be offset by the amount he would have paid each quarter (\$53.95) had he still been employed by the Respondent. Thornton testified that his wife laundered his work clothes during his interim employment. I find that Thornton's interim earnings shall not be offset for the cost of the laundry service charge.

Thornton did not have receipts for his interim work clothing purchases but estimated that the pants and shirts cost approximately \$20 a piece. He testified that he purchased approximately 52 pairs of gloves per year at \$5 per pair. The Respondent questions these expenses absent some documentary evidence to support the estimates.

Interim expenses serve as an offset to interim earnings, including expenses for clothing and uniforms. NLRB Compliance Manual, Section 10544. It is clearly desirable that a discriminatee have documentation to support his claims but he is not absolutely required to have receipts. *Master Slack*, 269 NLRB 106, 116 (1984). A discriminatee's claims for reimbursement may be based on credible estimates. *Aircraft & Helicopter Leasing*, 227 NLRB 644, 645 (1976). In the absence of documentation corroborating the interim expenses of clothing and gloves, I must make a finding based on my assessment of the credibility of the discriminatee. *Coronet Foods, Inc.*, 322 NLRB 837 (1997). I found Thornton to be forthcoming in his testimony and he was persuasive in his demeanor. I credit his testimony, conclude his interim expense claims are reasonable and find he is entitled to reimbursement for his interim expenses as set forth in the compliance specification.

#### V. SAFETY AND ATTENDANCE BONUSES

The compliance specification states that Thornton's pay rate for the make-whole period is comprised of the base rate and team pay earned by Respondent's similarly situated employees. Additionally, the specification asserts that Thornton is entitled to safety and attendance bonuses that Respondent awarded to employees who achieved perfect attendance and safety records. The Respondent does not contest Thornton's entitlement to base and team compensation. It does dispute his right to receive safety and attendance bonuses, as they are items "Thornton would have had to earn by meeting additional criteria above and beyond the general requirements of his employment."

The bonus program was implemented in August 1996 and it was discontinued in August 2000. In order to qualify for safety and attendance bonuses an employee had to have a perfect attendance and accident history during the previous fiscal quarter. The attendance bonus was 10 cents per hour and the safety bonus was 15 cents per hour. If an employee earned both the attendance and safety bonuses, he received an additional 5 cents per hour, making the total bonus 30 cents per hour. Compliance Officer Fetsch testified that his review of Respondent's records established that Thornton received the bonuses in two out of the three-quarters prior to his discharge. The Respondent points out that Thornton failed to qualify for the attendance bonus during the first quarter the program was implemented. He then qualified for the attendance bonus the next quarter. The Respondent argues that Thornton, at best, should only be entitled to an attendance bonus during one-half of the quarters during his backpay period.

Robin Robinett, the Respondent's corporate director of personnel services, testified that safety incidents could not be predicted. No evidence was produced to demonstrate that Thornton was an unsafe worker.

It is axiomatic that as the Respondent is the wrongdoer who caused the discriminatee's unemployment, any ambiguities, doubts, or uncertainties about backpay are resolved against it because a respondent is not allowed to profit from any uncertainty caused by its discrimination. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998); *Ryder System*, 302 NLRB 608 (1991), *enfd.* 983 F.2d 705 (6th Cir. 1993); *Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); and *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), *enfd.* 683 F.2d 1296 (10th Cir. 1982). Thornton has had a good attendance and safety record while working for the Respondent. It was not arbitrary or unreasonable to include the safety and attendance bonuses in his backpay. I find that Thornton is entitled to receive full reimbursement for both the safety and attendance bonuses as set forth in the compliance specification.

#### VI. PROFIT SHARING

The Respondent paid its employees a quarterly profit-sharing bonus during part of the backpay period. Employees' profit-sharing amounts were calculated by multiplying their quarterly wages by the profit-sharing factor established by the Respondent. The Respondent concedes that the compliance specification uses the correct factors to calculate the profit-sharing allegedly owed Thornton. The Respondent, however, disputes that Thornton was entitled to the full amount because his backpay was calculated including safety and attendance bonuses. I have found that Thornton was entitled to the safety and attendance bonuses. I therefore reject the Respondent's argument concerning a diminution of his profit-sharing entitlement. I find that Thornton is entitled to receive a full payment of the profit sharing as set forth in the compliance specification.

#### VII. CONTRIBUTIONS TO 401(K) PLAN

The Respondent argues that it is not possible to determine what if any contributions the Respondent should have to make to Thornton's 401(k) plan. This argument is based on Robinett's testimony that a new plan administrator and plan were selected in August 1998 and expanded options were offered to employees at that time. The Respondent thus says there is no certainty as to what option choices or amount of contributions, if any, Thornton would have made. Thornton testified that he contributed 12 percent of his earnings to the 401(k) plan prior to his discharge. On reinstatement he commenced contributing 15 percent to the plan. The compliance specification calculates the Respondent's liability for payments to his 401(k) plan based on his 12-percent contribution rate. The Respondent did not introduce any evidence showing that Thornton participated in any 401(k) plan during his backpay period.

The Board and courts have applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. Any formula that approximates what the discriminatee would have earned had he not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994),

enfd. mem. 48 F.3d 1232 (10th Cir. 1995). As noted above, the Respondent as the wrongdoer cannot profit from any uncertainty caused by its discrimination. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998). Thornton's record of contributions to his 401(k) is clear. The compliance specification sets a reasonable 12-percent contribution rate during the backpay period. I find that Thornton shall be paid on the basis of his 12-percent rate of contribution as set forth in the compliance specification.

#### VIII. TAXES

The General Counsel asserts that Thornton is entitled to reimbursement for any extra Federal and State income taxes that may result from his lump sum receipt of backpay:

Under current tax laws, discriminatees who receive lump-sum backpay awards covering a multi-year backpay period are likely to incur higher federal and state income taxes than they would have had they received their wages in due course. This is because the Internal Revenue Service (IRS) considers back pay awards to be taxable income earned in the year the award is paid, rather than over the previous years in which a dis-

criminatee would have earned the wages but for the unlawful discrimination. [G. C. Brief, p. 13.]

The Respondent denies it has an obligation to pay additional tax amounts that Thornton may incur because of the discrimination against him. The Respondent, however, does not dispute the General Counsel's interpretation of the tax implications of Thornton receiving backpay compensation. A purpose of the Court of Appeals' enforcement order is to make Thornton whole in light of the Respondent's unlawful discrimination against him. I find that it is consistent with that order that the Respondent compensates Thornton for any increased amounts of Federal and State income taxes he may incur because of his being made whole.<sup>3</sup>

[Recommended Order omitted from publication.]

---

<sup>3</sup> The Respondent filed an unopposed posthearing motion to correct the record concerning certain specified errors. I grant the Respondent's motion and receive it into evidence as R. Exh. 12