

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

**FIRST TRANSIT, INC.,
Successor with Liability to
RYDER/ATE, INC.**

and

Cases 21-CA-32146
21-CA-32285

**WHOLESALE DELIVERY DRIVERS,
SALESPERSONS, INDUSTRIAL AND ALLIED
WORKERS, LOCAL 848, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO**

Lisa A. McNeill, Los Angeles, Calif., for the
General Counsel.

Douglas N. Silverstein, of *Kesluk & Silverstein*,
Los Angeles, Calif., and *Daniel R. Beerck*, Cincinnati, Ohio,
for Respondent.

SUPPLEMENTAL DECISION
Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This compliance hearing was tried in Los Angeles, California on eight hearing days beginning November 1, 2004. The underlying Board Order (331 NLRB 889, Member Hurtgen concurring) was issued on July 31, 2000. That order required Ryder/ATE, its successors and assigns, to offer to reinstate and to make whole any employee who lost his or her job as a result of the Employer unilaterally changing its attendance policy on April 24, 1997. Additionally, the United States Court of Appeals for the District of Columbia Circuit issued its judgment on October 17, 2001 enforcing the Board's order. (No opinion per court rule. Docket No. 00-1407). During the litigation, First Transit, Inc. succeeded to the Foothill Transit Authority bus system contract previously held by Ryder/ATE. On September 8, 2000, First Transit, Inc. entered into a stipulation approved by the Regional Director in which it admitted that it was a successor with liability to Ryder/ATE. Subsequently, the Regional Director for Region 21 identified 37 employees whose employment was lost as a result of the changed attendance policy. Thereafter, a dispute arose over the amount of backpay allegedly owed these employees. As a result, the Regional Director for Region 21 issued a compliance specification on May 27, 2004. First Transit (Respondent) properly filed an answer to the compliance specification on July 21, 2004.¹ After the hearing concluded, the

¹ The Regional Director granted two extensions of time for filing the answer.

General Counsel and Respondent filed briefs which have been carefully considered.

5 The issues, as presented, are relatively straightforward. For the most part, the gross
backpay has been calculated as being reasonably accurate and a stipulation governs the
backpay formulas which have been followed. The principal concerns raised by the answer and
the applicable stipulation are a variety of offsets. Most frequently, Respondent argues that the
claimant ² voluntarily removed himself/herself from the job market, thereby failing to meet the
required duty of mitigating his or her damages. The alleged removals took various forms:
quitting acceptable interim employment without good cause, returning to school full-time, failing
10 to make an adequate search for interim employment and, in one case, deliberately choosing
underemployment. Respondent also argues that some of the employees were ineligible for
backpay in the first place because they were either probationers or they would have been
discharged under the previous attendance policy.

15 A second stipulation modifies the backpay specification for former drivers Lola Joyner,
Lonnell Horn, Juanita Madden, Natasha McQueen (Warren), Cindy O'Neal and Deborah Slets.

20 In addition, there is a stipulation regarding missing and deceased claimants. It covers
seven former employees and requires Respondent to establish a set-aside of approximately
\$643,000 while the parties jointly determine, on an administrative basis, whether the gross
backpay of the missing and deceased claimants may be subject to an offset. Those individuals
are José Avalos (deceased), Denny Benavides, Shawn Howell,³ Ike Johnson, Marcus Nelons,
Valerie Pedraza and Tyrice Turner. These individuals' claims are deliberately omitted from this
decision.

25 Generally speaking, the rules of law to be applied are as follows: A finding by the Board
that an unfair labor practice was committed is presumptive proof that some backpay is owed,
NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972
(1966) and it is the General Counsel's burden to establish the reasonableness of the method
30 used to calculate gross backpay. Those are not issues here. In the next stage, the burden
shifts to the respondent to demonstrate that there are offsets to the gross figures, i.e.,
mitigation. The case usually cited for that proposition is *NLRB v. Brown & Root, Inc.*, 311 F.2d
447, 454 (8th Cir. 1963). Therefore, this Respondent has the burden of establishing such
matters as availability of jobs, willful loss of earnings and interim earnings to be deducted from
35 the backpay award. *NLRB v. Mooney Aircraft, Inc.* 366 F.2d 809, 812-813 (5th Cir. 1966);
Neeley's Car Clinic, 255 NLRB 1420 (1981). When there are uncertainties or ambiguities, doubt
should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft
Corp.*, 204 NLRB 1068 (1973) and cases cited therein. In evaluating the reasonableness of a
40 claimant's efforts to mitigate, the law does not require the highest standard of diligence, but only
that he or she make an "honest good faith effort to find suitable employment." *NLRB v. Arduini
Mfg. Co.*, 395 F.2d 420, 422-423 (1st Cir. 1968). Furthermore, the backpay claimant's efforts
during the entire backpay period, rather than in any particular quarter, must be considered to

45 ² I use the word 'claimant' here, rather than the traditional word 'discriminatee', because
none of the individuals were victims of purposeful discrimination as prohibited by the Act. All
are said to have lost their jobs due to absenteeism, but their transgressions were measured by
the unlawfully imposed attendance policy. 'Claimant' seems to be a more accurate description
of their status.

³ Howell was inadvertently omitted from the stipulation as signed on November 15, 2004. I
hereby add him to the stipulation based upon the General Counsel's concession on
February 28, 2005 in response to a show cause order.

determine whether the claimant was reasonable in his efforts. *Black Magic Resources*, 317 NLRB 721 (1995); *Rainbow Coaches*, 280 NLRB 166, 179-180 (1986). In addition, normally an employee is not obligated to seek *any* employment that is offered, but employment in the field in which he or she had been performing at the time of the discharge—that is, substantially
 5 equivalent employment. Accordingly, a claimant is not required to accept a lower-paying job or more onerous work absent compelling factors, such as an undue amount of time spent searching unsuccessfully for a comparable position. *Arlington Hotel Co.*, 287 NLRB 851, 854 (1987). Furthermore, a claimant does not fail to mitigate if he or she declines to move from one location to another to try to find a job. Cf. *Hacienda Hotel & Casino*, 279 NLRB 601, 605-606
 10 (1986); *Iron Workers Local 15*, 298 NLRB 445, 469 (1990).

The Background

In late 1996 Ryder/ATE took over the bus contract covering a portion of the Foothill
 15 Transit Authority's service area routes originating from Foothill's Pomona yard. At the same time it accepted the pre-existing collective bargaining contract between the predecessor, Laidlaw Transit and Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO (the Union) covering the coach drivers it employed. The contract's term ended on March 31, 1997. In an attempt to remedy
 20 some perceived severe absenteeism, Respondent, without bargaining with the Union on the point, instituted a new attendance policy on April 24, 1997. The Board adopted Judge Mary Miller Cracraft's decision finding that the unilateral implementation of the new policy violated §8(a)(5). It also found that application of the policy had resulted in the discharge of named
 25 coach drivers Michelle Woods, Edwin Lear and Maria Velasquez as well as the discharge of others then unknown. The 'others' have now been identified and are included in the compliance specification. As part of their job, each coach driver was required to maintain a Class B drivers license with a passenger endorsement. As would be expected, the backpay periods vary for
 30 each driver since the unlawfully imposed attendance policy impacted each at different times. Each driver was required to maintain a Class B drivers license with a passenger endorsement. Some held Class A licenses with additional endorsements, such as air brakes, which permitted the holder to drive even bigger vehicles than the motor coaches they operated for Foothill
 Transit, such as tractor-trailers. Each employee will be discussed alphabetically.

Clide Aaron

35 Clide Aaron was hired in late October 1999 and was discharged under the absentee policy on July 25, 2000. The specification asserts her backpay period runs from the date of her discharge to January 23, 2002. Adjustments have already been made in the specification covering periods where she was unable to work due to family circumstances (caring for her
 40 daughter injured in auto accident and then caring for her husband after a heart attack). In addition, the General Counsel's brief concedes that Aaron's testimony that she did not search for work during the 4th quarter of 2001 and the 1st quarter of 2002 warrants elimination of the claims for those two quarters. It has therefore reduced the claim as shown in Appendix C-1 from
 45 \$21,855.96 to \$16,860.76. However, my calculation shows the accurate figure to be \$16,210.13.⁴

⁴ The initial specification claimed \$21,855.96 as net backpay. The 4th quarter of 2001 and the 1st quarter of 2002, when combined, totals \$5645.83. When that figure is subtracted from the total claim of \$21,855.96, the correct remainder is \$16,210.13, not the \$16,860.76 set forth in the brief.

Respondent agrees with the General Counsel that Aaron made an adequate search for work immediately after her discharge during the 3rd quarter of 2000. The gross backpay for that period is \$3,218.87. Where Respondent and General Counsel diverge is the 4th quarter and thereafter. Respondent asserts that Aaron did not accept a job which was offered her in
5 December.

In July 2000, after receiving truck driving training, Aaron sought positions with over-the-road haulers. In December she returned to the driving school and learned of an open offer by Swift Transportation. That company offered her a job for a minimum of 6 months, with a
10 possibility of it lasting 3 years. Had Aaron successfully accepted the position, her expected annual income was advertised to be in the \$35,000 range. She arranged with Swift to take an over-the-road haul beginning on January 5, 2001 for her first 6-week run.

Unfortunately, Aaron's 16-year-old daughter was severely injured in an auto accident on
15 December 17, 2000. As of the date of the hearing in 2004, the daughter still had not fully recovered. The accident was followed by a second family emergency on January 9, 2001 when Aaron's husband suffered a heart attack. In August 2001, he suffered a second heart attack. As a result of the daughter's auto accident and her husband's cardiac condition, Aaron never took the Swift Transportation job. Indeed, she has not found any work since that offer. While
20 the General Counsel has adjusted the gross backpay for those periods, acknowledging that Aaron was not seeking employment during those times, Respondent counters that, terrible as the personal tragedies befalling Aaron and her family may have been, the reality for backpay purposes is that she never actually took the only interim employment offered to her during the slightly more than a year and a half of her backpay period.

A partial explanation for the dearth of employment offers stems from the fact that the family moved from where they lived in Upland, first to Victorville where professional driving jobs were scarce, and then to Barstow, where the situation was worse. Even so, Aaron went through a state unemployment program known as GAIN which provided nominal income conditioned on
25 her taking some job acquisition training. In addition, Aaron testified that in 2001 she submitted job applications at several bus and charter lines, including Victor Valley Transit, Wal-Mart and Stater Brothers supermarkets.

For this proposition, Respondent has essentially combined two arguments, one of which
35 has been partially accepted by the General Counsel. The combination is the familiar duty to mitigate as set forth above and the second is the so-called 'hazards of living' rule set forth in *American Manufacturing Co. of Texas*, 167 NLRB 520, 522 (1967). Indeed, the specification as drafted took those circumstances into account.

However, I am unable to accept Respondent's argument that the backpay for Aaron
40 should end when she turned down the over-the-road Swift Transportation job. Although it did involve driving, and she was qualified for it by virtue of the appropriate licensing, I do not deem it to have been equivalent employment. Her first run with Swift would have required her to be away from her home in Upland for 6 weeks. This was not a day job as her motor coach driving
45 for Ryder/ATE had been. It not only required long-haul driving, it no doubt would have included loading and unloading the freight, a normal responsibility for such a driver. As a coach driver, she had had no freight to unload. Furthermore, the pay was quite different. Swift was to pay her by the mile; as a coach driver, she had been hourly and could count on a regular, periodic paycheck. Swift never even told her how the pay would be calculated. There was nothing regular or periodic about it. Therefore, I conclude that Aaron's choosing (albeit due to family circumstances) to decline the Swift job was entirely reasonable, as it was not equivalent work. She could have turned it down even absent the emergencies which befell her and her family.

Respondent has not challenged Aaron's efforts to obtain interim employment during the remainder of the backpay period. In any event, taken as a whole, her efforts were reasonable. For those time frames where she was unable to participate in the job market, appropriate adjustments have already been made.

Clide Aaron is entitled to the net backpay of \$16,210.13.

Patrice Benemie

Patrice Benemie's backpay specification has been modified. The corrected specification is G.C.Exh. 10, a modified Appendix C-4. Benemie was a coach driver hired in December 1996 and discharged July 15, 1997. Her backpay period is July 16, 1997 to January 23, 2002. Her interim earnings from the date of her discharge until the 1st quarter of 1999 are quite small and therefore her net backpay for those periods is not significantly offset. She continued to maintain her Class B drivers license with passenger endorsement.

Nevertheless, it appears that within 3 weeks of her discharge she applied for bus driving jobs at Omni Transit (in Riverside), Laidlaw School Bus and even tried to get her job back at Ryder/ATE. Although her testimony is somewhat disjointed, it also appears that she applied for a school bus job with the Chaffey [Joint Union High] School District in Ontario/Chino. That job eventually came to fruition in October 1999, though it appears she had to apply again in August of that year. In the meantime, sometime in 1998 she obtained a job with Del Taco (a fast food chain), eventually leaving in September of that year to get married. It was about a year later that she began her employment with the Chaffey School District.

Respondent argues that it is entitled to an offset during those periods of unemployment that are not clearly described by Benemie—particularly the year between the end of the Del Taco job and the beginning of the Chaffey job. It specifically asserts that it was unable to obtain any useful information because of Benemie's "dizzying" testimony. And, to be sure, Benemie was unclear on her job-seeking efforts. This is not particularly surprising, given the passage of time. She recalled job applications, but was unable to place them in any particular time frame. A number of more important things were no doubt her daily focus: marriage, death of a premature infant, subsequent pregnancy and the like.

However, Respondent has the burden of proof to demonstrate that Benemie had willfully avoided job opportunities. Here, I think it has failed to meet that burden and doubts on the issue are to be resolved in favor of the claimant. *United Aircraft Corp.*, 204 NLRB 1068 (1974). Accordingly, Benemie is entitled to the full amount set forth in the modified Appendix C-4, the sum of \$33,300.77.

Frances Carmona (Lemos)

Ryder/ATE hired Frances Carmona in September 1997; she was discharged under the unlawfully imposed attendance system on April 15, 1998. Her backpay period runs from April 16, 1998 until January 23, 2002. Although unrelated to any remedial issue under scrutiny here, Respondent actually reinstated her on April 3, 2004.

Respondent's argument concerning Carmona entails two incidents, each of which it asserts requires termination or reduction of her backpay. However, Respondent's brief does not take issue with the net backpay until the 1st quarter of 2001, which correlates with the second incident.

The first incident involves Carmona's discharge by her first interim employer, Laidlaw Transit. Laidlaw also held a contract with the Foothill Transit authority, but over routes originating from a yard in Montebello (as opposed to Ryder/ATE-First Transit which operated out of Pomona). The second concerns her refusal to take a pay cut at Budget Rent-A-Car. Carmona says she quit, but it appears that had she not done so, she would have been fired.

Insofar as both of these incidents are concerned, Respondent's position is without merit. Carmona's testimony is replete with efforts to find and remain employed. Even the Laidlaw employment demonstrates that. She was hired as a coach driver for Laidlaw, taking a pay cut of more than a dollar, only 3 weeks after Ryder/ATE let her go. She worked for 4 months and was forced to take 2 days off due to a medical emergency befalling her baby. Laidlaw was unsympathetic and fired her claiming she had 'abandoned her job' even though she asked for an assignment on the third day. The Board has held in *Ryder Systems*, 302 NLRB 608, 610 (1991) that an involuntary separation from an interim employer not constituting gross misconduct is not a willful loss of employment. Carmona lost her job to take her infant to the hospital—hardly gross misconduct—and immediately sought to resume her job. See also *P*I*E Nationwide*, 297 NLRB 454 (1989), *enfd. in pert. part*, 923 F.2d 506 (1991). The same can be said for her departure from Budget Rent-A-Car. She had been hired as a fleet truck and car driver, but when the company determined under its policies that she was not driving a truck, it decided to reduce her pay to \$8.00 per hour. She decided that rate was significantly less than she needed, so she quit to seek another job. I find that her decision here was perfectly reasonable under the circumstances. Certainly Respondent has not shown that her decision amounted to a willful loss of employment.⁵

I conclude that Respondent has not met its burden of demonstrating that Carmona willfully refused employment during the period in question. Accordingly, her backpay has been computed correctly at \$49,747.27.

Raymond Coletti

In its brief, Respondent has advised that it does not dispute the backpay calculated on behalf of Raymond Coletti as set forth in Appendix C-6. Accordingly, no discussion of his circumstances is required. The net backpay due Coletti is \$25,611.89.

Robin Corral (Delgado)

Robin Corral's backpay period begins on July 5, 1997 and ends on January 23, 2002. Respondent's principal contention regarding this claim arises from Corral's testimony that she was fired from an interim employer, the San Gabriel Valley Tribune, in 1999 and later quit a subsequent job at Lawrence Equipment. Respondent has constructed a backpay alternative based on the pay rate earned at Lawrence Equipment. It should be observed here that the Appendix C-7 for Corral has been modified and the modification is in evidence as G.C.Exh. 9. Respondent does not quarrel with the adjustments made as set forth in that exhibit, but believes it should be further modified based on Corral's discharge for misconduct and/or the subsequent

⁵ Although Carmona lost her drivers license during part of this time over missing a court date concerning a fix-it ticket, Respondent has not made an issue of it. The argument would appear to lack merit, for she regained her license and her Class B passenger endorsement. She got her Class C license back as soon as she paid her fine. It did not affect her ability to obtain gainful employment during the backpay period.

quit.

While employed by Ryder/ATE, and before her unlawful discharge, Corral had been attending night school to acquire office skills, specifically bookkeeping. As a result, she did not limit her interim job search to bus driving and when she had completed the class, she obtained work with a temporary office staffing company which assigned her to a temp job with the San Gabriel Valley Tribune. After a period, that employer hired her directly as a customer service representative and she remained employed there until her discharge.

Corral explains that she was fired after being called in for a 5-hour Saturday shift, a situation which created a child care problem for her. She had seen other employees bring children to work and believed it would be okay to bring her baby in that day. An acting supervisor objected and a verbal disagreement ensued. As a result, that employer discharged her, citing 'misconduct' as the reason. Although a discharge for insubordinate conduct, which Corral appears to acknowledge here, cannot be approved as a general policy, nevertheless it did not amount to a forfeiture of backpay. It simply was not gross misconduct, nor was it a deliberate or willful attempt to get fired.

As discussed above, a backpay claimant who is fired by an interim employer is to be judged under the standards established by the Board in *Ryder Systems* and *P*I*E Nationwide*, both supra. In *Ryder*, the Board said at 610:

The Board has consistently held that discharge from interim employment, without more, is not enough to constitute willful loss of employment. *P*I*E Nationwide*, 297 NLRB 454 (1989), enfd. in pertinent part, 923 F.2d 506 (7th Cir. 1991), and cases cited therein. A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. Here we find that the Respondents failed to show that Larry Elmore's conduct fell within that standard. Elmore may have missed several scheduled deliveries, *but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge.*⁸ Without such proof, Elmore's discharge from ATS will not serve as a basis for tolling his backpay.

⁸ See *Lundy Packing Co.*, 286 NLRB 141, 146 (1987), enfd. 856 F.2d 627 (4th Cir. 1988), and *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981). The same reasoning applies with regard to David Elmore's discharge from Music City. [Emphasis supplied].⁶

What the Board observed in *Ryder Systems* can also be seen here. Corral's conduct does not suggest that she deliberately courted discharge, nor did she commit an act of moral turpitude or something equally extreme. Accordingly, I do not find that her discharge from the San Gabriel Valley Tribune to be evidence that she forfeited her right to backpay.

Analysis of her departure from Lawrence Equipment produces a similar result. That interim employer was a kitchen equipment manufacturer (tortilla machines) which hired Corral as a receptionist at \$8.00 per hour. It was a family-owned business with little opportunity for advancement. After 6 months, Corral resigned to take a bus driver job with Laidlaw Transit. Clearly the receptionist job was not employment in any way equivalent to the trade from which she had been unlawfully dismissed. On the other hand, the Laidlaw job was. She had every right to seek a job in the field where she had been most successful. She had continued to meet

⁶ See also [Met Food](#), 337 NLRB 109 at 114 (2001).

the state licensing requirements and the transition was relatively smooth. That it paid less than the receptionist job is of no legal consequence. Its potential was greater, it provided overtime opportunities and would become substantially equivalent to the Ryder/ATE job.

5 In August 2001, Corral, for family reasons, decided she needed more money to take care of her children and she was becoming tired of bus driving. She seamlessly found another job at a company known as Metro One. That employer's business is not clear from the record, nor is the nature of the job she took. She worked from August 2001 through November 2001. She testified that she was discharged from that job as a consequence of a medical issue.
10 Apparently, off the job she suffered a broken nose, resulting in bruising and some dizziness. The company was unsympathetic to her plight and, despite a doctor's note, dismissed her for excessive absenteeism.

15 Respondent makes no argument regarding Corral's departure from Metro One, only contending that the Lawrence receptionist rate should be used for the remainder of the backpay period. If that were done, it would have me assume that she would have remained continuously employed for the remainder of the period (thereby crediting all periods of unemployment with that quarterly rate and earnings). This would offset the gross backpay claim to zero. As noted, I cannot do so, for there is insufficient evidence that Corral deliberately avoided work or took
20 herself off the job market. Accordingly, I find the General Counsel's backpay specification, as modified in G.C.Exh. 9, to be a reasonable estimate of her net backpay, \$29,399.59.

Donald Duplessis

25 Donald Duplessis's backpay period is from August 7, 1998 through May 27, 2003. He is one of the few whose specification shows virtually no interim earnings over this 5-year period and his net backpay is nearly \$98,000. Respondent's principal argument is that his testimony about job searching is not credible. Even so, it acknowledges that Duplessis's first 3 years of searching are not really challengeable. In its brief it asks that the backpay cease beginning with
30 the 3rd quarter of 2001, thereby excluding the last 2 years from the calculus.

35 It is accurate to say that Duplessis's responses to Respondent's inquiries create some questions which are not fully answered. Part of it is because while Duplessis could testify about the places he sought work, he had difficulty in saying when those applications were filed. Many applications were completed from the State's Employment Development Department (EDD) which would fax applications and resumes to employers who had listed jobs. The EDD apparently did not routinely provide copies to Duplessis of the material it sent out on his behalf. Even if it was available, Duplessis had no real incentive to maintain whatever he did receive. Duplessis, like most of these claimants, did not know until the compliance stage began,
40 sometime after the court judgment of October 17, 2001, that he was a victim of an unfair labor practice. Thus, he and the others remained unidentified for years while the case was processed. As a result no one, not the Union, not the Board's Regional Director and not the employing entities, was able to advise them to keep job search records or to mitigate by finding employment. Moreover, many of them could not be readily found, having dispersed to a wide
45 variety of locations within Southern California, a large, heavily populated area. Most of these individuals were poorly paid, held short-term jobs and were constantly on the move, looking for better situations. They could not usually be found in the telephone directory and some had even left the state.

However, none of these facts advance Respondent's argument that the last 2 years of backpay should be denied. Duplessis, in 1998 during the earlier part of his backpay period, had begun to attend a nearby community college ⁷ on a part-time basis. He was seeking to expand his job marketability, trying to "restructure" his life. He said he was weak in computer skills, English literature and math. He also sought exposure to the standard general education requirements of the California college systems. He even tried to improve his typing skills (no doubt for computer keyboarding).

Duplessis did testify that during the 2000-2002 period, at least half of which is in the time frame Respondent wishes to strike, he sought many types of jobs hoping to utilize his college learning. He took civil service tests for city, county and state agencies, applied as a tree trimmer, and sought work as an airport driver and delivery driver. He had only middling success with the civil service tests, which he took up through 2002. He had also applied for work at the Pomona Unified School District, the UCLA Medical Center and Childrens Hospital.

He survived during this period by living with his younger brother, his wife and their family. Early on, he had been able to keep from falling into debt because he had had the foresight to purchase some debt/unemployment insurance through his credit card company. During the entire backpay period he made himself useful around his brother's house, living rent and board free. This enabled him to attend the community college and to search for jobs. Certainly no employment relationship was established, although he felt an obligation to justify his presence in the house. ⁸

In order for Respondent to prevail in persuading me to strike the last 2 years of his backpay from the specification, it must provide some evidence that Duplessis failed to seek work. Respondent argues that he should have succeeded in finding some employment in the job market, even if he had to lower his sights from the driving jobs he was qualified to perform. It is here where Respondent's argument fails. Lack of success is not proof of a failure to mitigate. Respondent's conclusions are mostly circumstantial assumptions, not evidence. In rejecting its contention, I am mindful of the fact that as of the date of his testimony, November 2004, Duplessis's 2002 job-seeking efforts were 2 years past and his 2003 efforts (through the 2nd quarter per the specification) were nearly 18 months past. Memory is a far from perfect means to test fleeting, and therefore immemorable, events from that distance, and no one had asked him to keep records. Accordingly, I find that Respondent has not proven that Duplessis failed to mitigate the backpay as alleged in the specification. He is entitled to the full amount set forth in Appendix C-8, \$97,877.32.

Pamela English (Potts)

Ryder/ATE hired Pamela English in August 1997; she was discharged on May 14, 1998. Her backpay period begins the following day, May 15, 1998 and ends on January 23, 2002 when Respondent rehired her. The specification seeks backpay totaling \$11,902.56.

Respondent's contentions are two-fold: first, it asserts that in the three quarters following her discharge (2nd, 3rd and 4th of 1998), she failed to adequately search for work and therefore did not seek to mitigate the backpay due her; second, additional interim earnings were uncovered during the hearing that the specification had not taken into account.

⁷ Mount San Antonio College in Walnut.

⁸ He did earn some extra money scavenging for bottles and cans. These negligible earnings helped him with tuition and have been accounted for in the specification.

Before discussing Respondent's first argument, it should be observed that although the backpay period covers fourteen full quarters and parts of two others, it reflects no gross backpay calculation for nine of those quarters. Therefore, only six quarters can even be in issue.

A review of English's testimony regarding her search for work during the first three quarters does not support Respondent's contention. It argues that two of the applications relied upon to prove English's job search during those quarters were actually completed before she became a victim of the unlawfully imposed attendance program. As English testified, when she became aware that she was in danger of losing her job, she applied to two other transit agencies, Omni Transit in San Bernardino and Orange County Transit (apparently in Orange). She said these applications were to remain active for 6 months after being filed. Therefore, it is clear that she had active applications for employment in her field on file immediately after her discharge. Those applications, standing by themselves, warrant the conclusion that she was actively seeking work during the initial months of her backpay period. Her testimony shows that she renewed at least one of them fairly quickly after her discharge. (ENGLISH: "Well, I mean you put on a application you terminated and you applying for another bus job, they're kind of like it's kind of hard to get fired from a bus job, really, but I had put in a application at Orange County Transit and I had received a letter that they could not hire me at this time. I had put that in after I got terminated from Foothill.") She would not have told Orange County Transit that Foothill (Ryder/ATE) had terminated her on her original application because the event had not yet occurred.

In any event, the Orange County Transit rejection letter, received some 3 months after the Ryder/ATE discharge, spurred her to further action. She registered with the unemployment office (EDD) for the purpose of trying to find work. Unconventionally, she did not simultaneously seek unemployment benefits. Instead, she used their resources to look for a job and sought work near her Pomona home.

ENGLISH: A lot of people was going to Orange County Transit because, you know, I don't know. They was paying a little more, you know . . . But I was waiting around for that. And then, when I got the card in the mail saying that, you know, they couldn't hire me at this time, then that's when I went to the unemployment office. So three months was gone and, you know, waiting for that. I was looking forward to that because some people had got hired. You know, you're like sitting around waiting. That took some of my time . . . And then, when I found out I didn't get that job, then that's when I went to the unemployment office and I would look in the computer and I'm kind of computer illiterate, so I don't really catch on and they had this computer thing going on.

So I went down there and I was trying to find -- you know, you try to find a job similar to what you were used to and a lot of the jobs that I wanted were in L. A. and I didn't really know too much about L. A. I was always a close to home type of person. So it either had to be Pomona or somewhere in San Bernardino, which is where I was seeking and I couldn't find anything, you know, like that, and I put in applications at Omni, at Omni Transit. I didn't pass the test on there.

English also applied for work with the Pomona Unified School District, apparently seeking work as a driver. They offered her security guard work which she did not want. As it was not equivalent employment, she was free to turn it down. Having been trained years before as a registered nurse, she also applied for nursing work with the nearby Pomona Valley

Hospital. She testified that she observed the personnel clerk throw her application in the trash. That happenstance did not really offend her because she had long since decided to give up that profession as it did not suit her.

5 Her efforts with EDD, however, eventually paid off. She found a part-time truck driving
job with Sky Chefs at the Ontario International Airport. She transported hot meals from the Sky
Chefs kitchen in Ontario to the Palm Springs airport, a round trip of about 140 miles. She
worked a 5-hour shift, from 6 a.m. to 11 a.m. At the Ontario airport she found a second part-
time job, driving a shuttle bus for Ampco Parking Systems. These jobs came to her in the 1st
10 quarter of 1999.

While it could be said that English's job search in the preceding 2-½ quarters could have
been more constant, it seems to me that her efforts exceeded the minimum to qualify as
reasonable. She was distracted to some degree by family issues—being the single mother of
15 three teenage girls, having the house in which they lived sold out from under her by a
resentful/abusive ex-husband, and keeping that ex-husband at bay. Despite those concerns
she sought and, when she found it, embraced work.⁹ I have no doubts that she was an active
job seeker during that 2-½ quarter period.

20 The second issue is one of proof of proper allocation. English answered Respondent's
subpoena by producing two Internal Revenue Service printouts containing information from W-2
forms for tax years 1999 and 2001. Respondent has allocated these newly-learned interim
earnings in a fashion which reduces or eliminates the net backpay in those quarters of 1999 and
2001 where gross backpay has been shown. I am not convinced that such an allocation is
25 acceptable.

Compliance officials often spread annual earnings equally across all four quarters of a
year. They do so for gross earnings (sometimes modified by known wage changes) and for
year-long employment. And, they are sometimes forced to make a four-quarter allocation when
30 they are unable to assign the earnings to their proper quarters due to a lack of information or
when they are unable to make a reasonable determination of when the employee was actually
working. The better practice is, of course, to assign interim earnings to those quarters during
which the employment occurred.

35 Respondent has chosen to allocate these interim earnings in a way most advantageous
to it without regard to the quarters in which they were earned. The 1999 claim under the
specification is for quarters one and two. The specification seeks no backpay for quarters three
and four. The IRS printout (English Exh. 1) does not name the employer, but does provide
wage and withholding information. Respondent did not really inquire about those earnings and
40 when they might have occurred. English herself was a bit uncertain saying “. . . it's just
confusing me because it don't have a year and I was sick and working and sick and working and
I kind of get confused. . . .” She could not picture 1999 very well in her mind.

45 What we do know is that English was working during the first two quarters of 1999 and
earned \$5388 in wages. We also know from the IRS form that she earned, from that unnamed
employer, wages of \$6264. We can be fairly certain that the two figures do not come from the
same employer and therefore do not duplicate each other. It seems likely to me that the

⁹ Eventually English determined that two simultaneous jobs were too much to handle and she gave up the Sky Chefs job. A month later she suffered an illness which forced her from the Ampco job as well.

earnings do not overlap (at least for quarterly *Woolworth*¹⁰ purposes). Thus, it is more probable that the earnings shown in English Exh. 1 properly belong to quarters other than one and two. While Respondent's counsel may have been able to draw the witness out on the point, he really made no effort to do so. Since the burden to prove interim earnings rests with Respondent, it appears to me that he failed in such endeavor.

The same can be said for the earnings shown on the IRS printout for tax year 2001 (English Exh. 2). The specification seeks backpay only for the first quarter, where interim earnings have already been admitted. Even there the gross was reduced, so the net is only \$249. Respondent asserts that the earnings from the two employers shown on English Exh. 2, a total of \$1492, should be allocated to that first quarter and thereby fully offset the gross backpay. Again, it is fairly clear that those earnings did not come from the first quarter of 2001 and should be more properly assigned to other quarters. Once again, Respondent did not inquire about when those earnings occurred.

Counsel for the General Counsel did offer to modify the specification with respect to both years, if appropriate. That offer does not seem to have been accepted; certainly no adjustment has been proposed. I suspect that Respondent's proposal in its brief, if proposed to the Regional Director, was rejected for the same reasons I have given above.

I make one other observation. If indeed those interim earnings actually occurred in, or can properly be assigned to, a quarter where no gross backpay has been claimed, then each quarter would have to be fully reexamined. If there had been interim earnings in such a quarter, it would logically follow that English had sought, and had obtained, work for that quarter. That fact would call for a gross backpay claim for the quarter that might well exceed the interim earnings and thus result in a net figure available to the claimant in that quarter. Absent a motion to amend the specification, I regard the matter as closed. Respondent did not demonstrate that the discovery warrants adjusting the specification as written. Moreover, it can be understood that the compliance officials did not deliberately overlook any interim earnings. The fault, if any, lies with the passage of time and the uncertain memories which accompany it. English is entitled to the sum set forth in Appendix C-9, \$11,902.56.

Robert Giles

Ryder/ATE hired Robert Giles in January 1997. He was a victim of the unlawfully established attendance point system and was discharged on December 3, 1997. The specification shows his backpay period to be from December 4, 1997 to May 3, 2002. At that time Respondent offered him reinstatement and he accepted.

Giles was one of the very fortunate members of the group who suffered this type of discharge. Within hours he went to Foothill Transit's El Monte yard, located about 16 miles to the west and operated by Laidlaw. He had earlier been trained by Laidlaw, was a known quantity, and he knew individuals holding hiring authority there. He was hired on the spot, albeit at a lower pay rate, and worked for Laidlaw for about 4 years.

Respondent's principal argument concerning Giles is its belief that in March 1998, Ryder/ATE's Pomona General Manager Wayne Fritz offered him reinstatement and he turned it down. The General Counsel observes that the circumstances of the offer are somewhat unclear and that whatever Fritz may have said, the 'offer' would not have crystallized until after the

¹⁰ *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

unfair labor practice hearing. That hearing took place on June 24, 1998.¹¹ In March, when the conversation took place, Fritz was aware of the issues the complaint presented and knew Giles was one of the employees whose circumstances were in issue even though he was not named in the complaint.

5

Giles's route, while working for Laidlaw, took him to Respondent's Pomona yard, giving him the opportunity to converse with his former employer. On that occasion in March 1998 he spoke to Fritz in the office doorway.

10

When Fritz testified, he framed the so-called reinstatement offer as having been made in writing:

Q [By Mr. SILVERSTEIN] Now, Mr. Giles states in his declaration, "Fritz offered to reinstate me to my old position." Do you remember that conversation?

15

A [Witness FRITZ] Yeah, somewhat. I remember we sent the letters out to everybody, and Robert, I think, in fact, after the letters went out, was the first time Robert came to see me.

* * *

Q [By Ms. McNEILL] What did you say to [Giles], to ask him to come back? What do you recall?

20

A I don't recall asking him verbally to come back. I recall our discussions, and part of one of those discussions was his wanting to know if he could come back to Ryder. I told him I wasn't sure. I didn't know, and then, subsequent to that, it was decided that if we had people that wanted to come back, and we knew or saw them, or whatever, that we could offer, and that is what generated the letter.

25

Q Oh, I see. I see. It is then your testimony that you made no verbal offer to Giles for him to come back?

A If I did, I don't remember necessarily. I remember sending the letter, because I remember thinking about who do we know, who do we know where they are, and so forth, and Robert came up, and we did a letter.

30

As seen, Fritz could not describe his conversation with Giles. Moreover, no letters were offered in evidence. Fritz, who no longer works for Ryder/ATE, was of the opinion that the letters remained on file there; despite that, Respondent did not offer in evidence any 1998 letter addressed to Giles. However, it is true, as framed in counsel's question, that Giles gave an affidavit to the Regional Office in which he agreed that Fritz had made an oral reinstatement offer of some sort. Still, there is more to it than a bare offer.

35

Q [By Mr. SILVERSTEIN]: Now, Mr. Giles, now that you have read that paragraph, does that help refresh your recollection that Mr. Fritz did, in fact, offer to reinstate you, to your old position?

40

A [Witness GILES] Yes.

Q And, in fact, Mr. Fritz did offer to reinstate you, to your old position.

A Yes.

Q Okay and what did you tell him, in response to his offer, of reinstatement?

45

A I just told him that I was working over at Laidlaw and that is what he told me, that it would -- I mean, it would not matter now. I mean, like, he told me the Trial would be sometime, in the future.

So, I mean, he offered to reinstate me and I told him that I was working at Laidlaw and, you know, I would not have been reinstated, at that moment, right at that moment. So, I mean, it

¹¹ The underlying unfair labor practice charges had been pending since July 14, 1997.

was okay that I was working at Laidlaw because I was not being reinstated, at that moment.

Q Okay.

A Right, at that moment, just to not worry.

Q All right. Well, I am not sure I understand that. I think what your declaration says -- let us
5 see, if we can refresh your recollection, in this regard; that you decided not to accept the offer because you were working, at Laidlaw. Is that what happened?

A Well, at that -- I mean, at that time, that was the time that he told me that I could -- or, I
10 mean, it would be -- the reinstatement or anything -- reinstatement -- because he did -- he mentioned the money. I mean, a money reward, for the time that I would -- if I would had -- you know, like he said, I may be entitled to back salary or something like that. He mentioned that, also, and he said it would be, after the Trial, after it had gone to Trial.

Based on the foregoing testimony, I find that whatever Fritz said to Giles that day in front
15 of the Pomona office, it did not qualify as an offer sufficient to remedy an unfair labor practice. Giles, elsewhere, did say that the offer would have been to his old job. However, other conditions were not discussed. Fritz never offered him any backpay, saying only that whether it would be owed depended on the outcome of the unfair labor practice proceeding. Furthermore, according to Giles, the date of reinstatement was up in the air. He was happy at Laidlaw but
20 might have been willing to return. Even so, he says Fritz told him he didn't need to worry about when he would come back. Apparently there was no hurry because no decision needed to be made until after the unfair labor practice proceeding decided matters. Respondent's argument on this issue is rejected. A valid reinstatement offer must be specific, unequivocal, and unconditional. *Cassis Management Corp.*, 336 NLRB 961, 969 (2001).

25 Respondent's second argument is that Giles quit his Laidlaw job in October 2000 because he was about to reach Laidlaw's limit under its attendance policy and his job was therefore at risk. Giles does acknowledge, at least in part, that that was his reason for resigning. He said it was better to quit than be fired. But he had other reasons as well. He wanted a job with more security: in his words, a 'regular job.' Nevertheless, he sought and
30 quickly obtained driving work. Still, the first job, with Diversified Para-Transit, was for minimum wage. That amount was insufficient so he quit. He found a shuttle job with Ampco Parking which paid \$6.25 per hour with a promise of tips. He worked there for a month and a half, and when the tips did not turn out to be sufficient, he quit to return to Laidlaw, taking a pay cut from his previous rate to \$8.50. In addition, Giles sought work with Greyhound Lines and the MTA
35 (Los Angeles Municipal Transit Authority).

The General Counsel argues that Giles's quitting the Laidlaw job was reasonable, citing
40 *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982). I am not entirely convinced. See, for example, the Board's treatment of employees who quit their interim employment for a variety of marginal reasons in *Knickerbocker Plastics*, 132 NLRB 1209 (1961). I recognize that the case is a relatively early one and can today be distinguished on other grounds, not the least of which would be that their interim employment was not substantially equivalent. Still, the case provides a series of job-quitting examples which the Board would not accept. I might well be tempted to follow that case here. After all, Giles certainly did have a substantially equivalent job with
45 Laidlaw. He was driving a passenger coach in the same general geographical area and under similar working conditions. Unless there was a legitimate reason to quit, he shouldn't have done so. Nonetheless, I accept his analysis of his situation. He had allowed his attendance points to build up to such a degree that he was in imminent danger of being fired. Had he stayed on and been fired for that reason, it would not have been to anyone's advantage. He would have taken a discharge for cause, but Respondent could not argue that the discharge itself was gross misconduct and a willful departure from the workforce. It would have rendered Giles less desirable to subsequent employers and would have risked his interim earnings being reduced or

even zeroed out if he couldn't find work. As Respondent has recognized, such quits do not extinguish the backpay in its entirety; they only toll it. Both Giles and the General Counsel are correct when they observe that it is better to have a resignation on one's record than a discharge. In that circumstance, I find that Giles's quitting the Laidlaw job in October 2000 was reasonable. Therefore, I uphold the specification as set forth in Appendix C-11. The total net backpay due Giles is \$21,786.41.

Cheryl Harris

10 In its brief, Respondent no longer disputes the backpay claim for Cheryl Harris as set forth in Appendix C-12. Her backpay period runs from July 13, 2000 to January 28, 2002. Under the specification, Harris's net backpay is \$29,228.08.

Danielle Hasberry

15 Danielle Hasberry began bus driving for Ryder/ATE in December 1996. She was discharged on August 7, 1997 for running afoul of the wrongly imposed attendance policy. Her discharge grew out of a weeklong absence to attend an out-of-state funeral for her niece; she had permission to be absent for that purpose, but was fired anyway. Her backpay period runs from August 8, 1997 to January 23, 2002. Backpay, as recalculated in G.C.Exh. 8 (a new Appendix C-13), is shown as \$27,513.66. She obtained equivalent work with Laidlaw at Foothill's El Monte yard in late September. The parties agree that the recalculation found in G.C.Exh. 8 requires some fine-tuning because her Laidlaw employment was calculated on a \$7.50 hourly rate. Hasberry testified, however, that her hourly pay rate at Laidlaw was actually \$8.50. By brief, the General Counsel has provided the additional correction. The figure now sought is \$26,953.66.

25 Despite the correction due to the Laidlaw pay rate, Respondent argues that Hasberry's interim employment history requires further reduction for two reasons. Both are connected to her resignation at Laidlaw in February 1998. The primary argument derives from the congenital illness of Hasberry's son and its connected complications. Under this scenario, Respondent argues, she would have been forced to quit her job with Ryder/ATE just as she was forced to quit Laidlaw. Thus, Respondent contends that Hasberry's resignation due to the child's circumstances terminates her backpay in its entirety

30
35 Respondent's secondary argument is that since Hasberry quit Laidlaw, an equivalent job, her Laidlaw earnings rate should be carried forward as if it had been interim earnings in all subsequent quarters. Here, it agrees that her quit would not have ended its backpay liability, but Respondent would be entitled to the Laidlaw rate credited as interim earnings for the remainder of the backpay period. This would result in fully off-setting gross backpay for several quarters.

40
45 The facts are relatively straightforward. At the end of September 1997, when she took the Laidlaw job, Hasberry lived in Rialto, roughly 27 miles from her Ryder/ATE job in Pomona. The Laidlaw job was about 40 miles from her home. In February 1998 she was displaced from her Rialto residence and moved to San Bernardino. Her new location was about 48 miles from Laidlaw's El Monte yard. Neither Rialto nor San Bernardino was an easy freeway commute,

though both are served by Interstate 10. That section of I-10 is notorious for its glacial pace. (Today's alternate route, State Highway 210 would not open in that area until November 24, 2002.)¹²

5 Hasberry testified that the additional commuting time and distance were causing her to occasionally fall asleep at the wheel as she returned home. In addition, at about the same time, her son's condition deteriorated and she decided it was best if she stayed home to care for him. Accordingly, she resigned from Laidlaw toward the end of February and did not seek work for about 1-½ to 2 months. The Regional Director has made an adjustment in Appendix C-13 to
10 account for that circumstance. Counsel for the General Counsel argues that Hasberry did not permanently remove herself from the job market and backpay resumed as soon as she reentered the job market.

15 Hasberry resumed searching for work in April, placing bus driving applications with Charter Bus Company and Laidlaw's School Bus System. She applied to be a receptionist at a hair salon and two restaurants, Millie's and Coco's. She sought retail sales work at several stores in one of the San Bernardino shopping malls and submitted an application to a limousine service. She also applied to the California Highway Patrol, which was interested, but Hasberry
20 backed out when she learned the 6-month training period to become an officer would require her to be away from home for that length of time.

In October, she found work with Jamboree Property Management as a property manager and worked there until being laid off in November 1999. Shortly thereafter, she took another property management job with LanTrek Property Management. In the month between
25 those jobs, having now acquired experience in the field, she applied to two other property management firms as well as the Riverside Transit Agency. Hasberry stayed with LanTrek until April 2000. At that point, LanTrek sold out to an individual named Bruce Kao. Kao reduced her monthly salary from \$1650 to \$200, forcing her to look for other work. She reapplied to Riverside Transit and filed applications with Target Stores and Sears Credit. She left Kao in
30 June when Sears Credit hired her as a telephone dun and she stayed there until late summer 2001. Hasberry then worked through a temp agency, Innovative Staffing, where she had continuous employment through the end of her backpay period. Her interim earnings exceeded gross backpay for the last three quarters of the backpay period and no net backpay is said to be due between July 2001 and March 31, 2002.

35 Insofar as the first issue is concerned, whether her quit at Laidlaw constituted a permanent removal from the job market, the test is whether her quit was reasonable. Reasonableness, of course, must be measured against what her original job had been. In this case, her commute to Laidlaw was some 13 miles further from Rialto than the Ryder/ATE job
40 had been. Clearly, Hasberry had been able to tolerate, given her ill child, a moderate commute to Pomona. That commute was extended when she took interim employment with Laidlaw, though perhaps at the limits of her family's tolerance. When she lost her home in Rialto and felt forced to move to San Bernardino, she viewed that extension as exceeding her tolerance limits, though she gave it a fair chance. Falling asleep at the wheel was certainly a risk no one should
45 have to bear. When her child's health took a turn for the worse during the same time period, the two issues conflated and led her to quit.

With respect to the primary argument, that the child's illness would have forced her to quit any job she held, it does not follow that her backpay claim ended at that point. In my view,

¹² <http://www.cahighways.org> (last visited July 26, 2005).

this is nothing more than an issue of reasonableness. First, had the child's illness occurred during her employment with Ryder/ATE she would have been eligible for unpaid leave under the Family Medical Leave Act (FMLA). She had been hired by Ryder/ATE in December 1996, but the child's illness did not become acute until February 1998. Absent the improper discharge, she would have remained employed by Ryder/ATE for the requisite 1-year FMLA eligibility period, and she could have simply taken FMLA unpaid leave without penalty when the child's illness worsened. See 29 CFR Part 825 for the pertinent regulations. Quitting would not have been necessary and she could have returned to duty after the same 2-½ month period of caring for the child. Therefore, I find that her quit due to the child's illness did not terminate her backpay claim.

A similar analysis regarding Hasberry's commute length also fails. Had she remained at the Pomona yard, her commute would have remained only 27 miles and had she maintained the pay rate, it is quite possible that she would not have lost her Rialto residence. It cannot clearly be said in that circumstance that the viability of her backpay claim should be made to rest upon a family decision she would not have had to make had she remained employed with Ryder/ATE. It was Ryder/ATE's decision to discharge her that put her at risk. Respondent cannot be heard to say that it should benefit from what befell her after the discharge. Her decision to move to San Bernardino was certainly reasonable, given her choices. Thus, while the Laidlaw job may have been a barely equivalent job from the outset, it was no longer equivalent when she lost her residence and was forced to undertake a much longer commute, one which put her at a risk the shorter commute did not.

Under these circumstances, I find that Hasberry's net backpay, as adjusted, has been properly calculated as \$26,953.66.

Lonnell Horn

Lonnell Horn was hired on May 12, 1997 as a coach driver and was discharged a little more than 2 months later on July 28, 1997. He was a probationary employee at the time he was fired for breaching the unlawfully imposed attendance policy. Although the parties have agreed that his backpay begins on July 29, 1997 and ends on June 14, 2004, Horn is one of the subjects of the stipulation in G.C.Exh. 2 in which Respondent reserved certain arguments relating to probationary employees and employees who were discharged for cause. He chose not to accept his 2004 reinstatement offer.

As Horn is the first probationary employee to be encountered in the decision, it is appropriate to note the general rule regarding that status. The Board observed in *West Point Mfg. Co.*, 141 NLRB 819, 838¹³ that probationary employees are fully protected by the Act and entitled to the same protection enjoyed by any statutory employee. Respondent's argument that probationary status relieves it of liability to Horn and the other probationary employees is rejected as inconsistent with the goals of the Act. The issue will not be discussed further.

Horn was one of the last claimants to testify, appearing on the last day of the hearing. Much of his testimony related to his circumstances in finding work during the backpay period. About two-thirds of the way through his testimony, he made an admission that caught everyone by surprise.

¹³ enfd. in part, 330 F.2d 579 (4th Cir. 1964), cert. denied 379 U.S. 882 (1964).

Q (By Mr. SILVERSTEIN) When did you apply at Omni Transit?

A (Witness HORN) I can't remember, I don't know the date.

Q Was that right after -

A It was right after.

5 Q Right after Ryder/ATE -

A Yes.

Q Do you know, have you ever had any issues with your license, suspensions or anything like that?

A Yes.

10 Q What were the issues -

A In '90 I got a DUI [Driving under the influence of alcohol].

Q When was that?

A I can't remember, it was in '90.

Q I am sorry -

15 A It was in the '90s. I don't know what date.

Q Was it after your employment at -

A After my employment.

Q Did that pretty much disqualify you from working in the transit industry?

A Right.

20 Q Have you had any other tickets or license problems?

A No. Driving?

Q Driving.

A No.

25 Q And so just to clarify, if your last day at work at Ryder/ATE was July 28th, 1997, when in relation to that do you think you got your DUI?

A Two years after that, I think.

Q So May of 1999?

A Somewhere in there.

30

Horn, as can be seen from this snippet, and confirmed by a review of his remaining testimony, did not have good recall for dates and sometimes not for sequence either. His lack of clarity regarding the date of his DUI conviction created some practical difficulties. In his initial testimony, he sounded as if the conviction had preceded his hire in 1997. He clarified it quickly to estimate it as occurring 2 years after his hire, which would put it, as counsel suggested, in

35

May 1999. Still, the ramifications for this case were unclear. Horn knew he had been disqualified from transit driving, but no one else did. Without advance notice of the issue,

neither counsel nor I was prepared to fully explore it with the care a backpay specification would require.

40

Respondent's second witness had been Salvador Garcia, currently Respondent's assistant general manager, but in 1997 a Ryder/ATE manager¹⁴ of significant responsibility, experience and knowledge. Counsel asked him a series of background questions concerning company policies, mostly to provide a general understanding of the setting. In that somewhat limited context, he asked the following:

45

¹⁴ Garcia has worked at this yard for 13-½ years in various capacities. He started as a driver but has served as dispatcher, supervisor, projects manager, safety manager, training manager, safety quality control manager and operations manager. His testimony came so early in the hearing, no one thought to ask him what his job was in 1997 during Horn's short tenure. Clearly Garcia is knowledgeable about the practices of the Foothill Transit District's concessionaire, whether Ryder/ATE or Respondent.

[By Mr. SILVERSTEIN] . . . Mr. Garcia, does (sic) First Transit and its predecessor entities have a drug and alcohol policy?

A [Witness GARCIA] Yes, we do.

5 Q What is that policy?

A Our drug and alcohol policy is zero tolerance. We have pre-employment and if a person comes out dirty, on a pre-employment, that employee -- that person will not be hired, by the Company.

10 We have a random poll, which is Federal guidelines; we follow that. We, also, have reasonable suspicion and, unfortunately, we have had people, sometimes, fail the random and a few people, we have identified, as reasonable suspicion and they were terminated; zero tolerance.

Q Okay. If you have a drug or alcohol issue, you are terminated.

15 A Yes. We are dealing with the public safety and that is very important to us and, also, the reputation of our Company is very important.

In addition, even before Garcia provided his testimony, the General Counsel had put on a short, independent case. It involved driver Tom Montoya whom the General Counsel needed to support its contention that Montoya had been fired under the unlawfully imposed rule.

20 Montoya's own circumstances are discussed infra. In the course of that factual development, Montoya gave the following testimony on cross-examination which is pertinent to Ryder/ATE's policies as they likely would have been applied to Horn:

A [Witness MONTOYA] It is always safety. Safety first.

25 Q [By Mr. SILVERSTEIN] Okay, and so, is it well known in the industry that you could be fired if you were in excessive accidents?

A Yes, it is.

Q Okay, what about driver alcohol issues? Is that --

A Oh, you are out the door.

30 Q Okay.

A I just had a random the other day. They pulled me off of the route, "Let's go." Random; the bus companies don't play like that.

* * *

Q So, and once again, this goes back to because you are in a safety sensitive position?

35 A Yes.

Q Okay.

A You don't want guys stoned driving your bus.

40 After the close of the hearing Respondent moved on January 24, 2005 (filed January 26, 2005) to reopen the record in order to present a court-certified copy of Horn's DUI conviction. I later permitted the parties to file supplemental briefs on the issue and what effect the conviction would have had on Horn's continued capability of driving commercially, as well as whether Ryder/ATE's zero tolerance policy would have been applied to him. The parties' responses have been helpful.

45 Based on their responses, I have determined to receive the certified conviction record, which is a self-authenticating document under Fed.R.Evid. 902(4). If I were to deny the motion, I am certain that it would be regarded as an abuse of my discretion, particularly given the unexpected nature of Horn's admission on the last day of the hearing. Accordingly, the motion is granted and Exhibit A attached to it is received in evidence.

5 The certified conviction shows that Horn, on September 8, 1999, in Pomona Municipal Court, pleaded guilty to count 2, driving a vehicle in violation of California Vehicle Code §23152(b), driving with a blood alcohol reading in excess of .08%. A conviction was entered and he was placed on 3 years formal probation and fined \$500. He was also assessed \$850 to be paid to a state penalty fund.

10 In addition, a United States Department of Transportation regulation disqualifies from commercial driving holders of commercial drivers licenses, as Horn assuredly was, upon their conviction of "being under the influence of alcohol as prescribed by State law" or if convicted of "having an alcohol concentration of 0.04 or greater while operating a [commercial motor vehicle]." See 49 CFR §383.51 ff. and the chart which accompanies it. The disqualification is for 1 year for the first offense.

15 I shall assume here that this was Horn's first offense, though in truth he was never asked. Second, I shall assume that his conviction on September 8, 1999 occurred as a result of him driving a noncommercial vehicle, and that the second part of the DOT regulation cited here does not apply, though again, he was not asked. Therefore, it is clear that upon the conviction, Horn was barred by the first portion of the rule from working as a commercial driver for 1 year beginning from the conviction date.

20 This raises the question of whether Respondent's zero tolerance policy would have been applied to him if Respondent had known about it. Both Respondent and Ryder/ATE no doubt have a relationship with the Department of Motor Vehicles whereby the DMV notifies it of license suspensions of its drivers. The system is certainly not foolproof in the best of times. Here, of course, he was not on Respondent's payroll at the time of the conviction and Respondent would not have been notified. In fact, Respondent might never have learned of it. Even so, had Horn been employed as a driver for Respondent at the time of his conviction, I think it is clear that the policy would have been applied to him and he would have lost his job at that point. Indeed, he knew, as demonstrated in his quoted testimony, that the conviction disqualified him from driving in the transit industry. Horn's colleague, Tom Montoya, explained it even better than manager Garcia: a transit company cannot allow its drivers to be "stoned" on the job.

35 I agree. No transit company, concerned for the safety of its passengers, can employ a driver who has demonstrated that he is willing to drive while intoxicated. I find, therefore, that Horn would have been fired from his job as a coach driver immediately upon his conviction. In fact, given his knowledge of the disqualification rules, and the fact that Horn does not appear to be given to deceit, if Respondent had still employed him it is entirely likely that he would have informed management of the conviction and/or left of his own accord.

40 Accordingly, I find that he either would have been fired or would have resigned on September 8, 1999. Therefore, Horn's backpay period ends on that date.

45 The General Counsel has provided, attached to its supplemental brief, an alternate Appendix C-14 which I have used to recalculate Horn's backpay for the shortened period. It consists of net backpay for the 3rd and 4th quarters of 1997, all quarters of 1998, and the 1st, 2nd and 3rd quarters of 1999. Adding the net backpay figures from those quarters, Horn's total net backpay becomes \$31,624.83 without regard to the question of whether he had made a proper effort to mitigate his backpay upon his discharge.

Even so, there is some question regarding Horn's effort to mitigate. Horn, a probationary employee, was discharged at the end of July 1997. Shortly thereafter, he

embarked upon an effort to find traditional employment. He sought work with one bus company, Omni Transit in San Bernardino, and a number of retail stores, including Home Depot, Miller's Outpost, Pavilions, Food 4 Less and Trader Joe's. About 3 months after losing the Ryder/ATE job, his brother, pastor of a church, in exchange for room and board, put him to work as the church handyman. He lived with his brother who also provided him with a variety of necessities, including clothing, toiletries and occasional spending money. Except for that, Horn did not get paid for his duties. Eventually, in 2000, past the 1998 cut-off date set forth above, Horn became a minister but he has not been employed in that capacity. He later worked in other fields, but since that work also occurred after the cut-off, it is unnecessary to consider it.

This suggests that Horn either made an inadequate search for work or underemployed himself, by accepting room and board in exchange for his church handyman duties. The Regional Director, however, seems to have accounted for this situation by assigning a quarterly value to it of \$1050.00. Respondent has not challenged this interim earnings credit as unreasonable. Accordingly, I shall let the matter stand. Therefore, I accept the calculations beginning with the backpay period through the date he would have been discharged for the DUI. Net backpay for that period is, as stated above, \$31,624.83.

Mary Hyemingway

Three weeks before her discharge on April 26, 2000, Mary Hyemingway suffered an industrial injury to her back and was put on Workers Compensation. It appears from the record that she accrued attendance points under the wrongly instituted attendance policy for at least part of the time she was under the company doctor's care. After her discharge, and for the next 5 months, she continued to seek medical care for the condition, but from her own physician. Although her doctor limited her to light duty, Hyemingway testified that she was still able to seek work during those first two quarters which Respondent challenges. The work she sought, she says, was work which met the light duty limitations.

Hyemingway's backpay period, according to Appendix C-16, runs from April 26, 2000 to March 3, 2002. The specification alleges that she is due net backpay of \$32,164.79. Respondent, according to its brief, has no issues with quarters beginning with the 4th quarter of 2000 and running to the end of the backpay period. It takes issue only with the 2nd and 3rd quarters of 2000. Here, Respondent asserts that Hyemingway failed to seek work or was unable to seek work, and either failed to mitigate or was unable to be in the job market due to physical disability.

Hyemingway's testimony concerning her search for work during 2nd and 3rd quarters of 2000 was fairly limited; she was undergoing therapy at the same time. Her testimony suggests her search was not very successful:

Q [By Mr. SILVERSTEIN] Okay. All right. Well, I am looking at some of the documentation you filled out with the National Labor Relations Board and this indicates that you were still treating with your back all the way, through the end of 2000.

A [Witness HYEMINGWAY] They had me going -- well, then, that is when you go through the Workers' Comp Hearing, to try to get rehabilitated -- or, I mean, retrained and when they were going through the re-training Hearing, they still had me going to therapy since I still had back problems but I could work and stuff but I did know how you can do something and then go to therapy. You can to work and go to therapy.

So, they had me where I could work, able to work, but needed to go to therapy. So, I went to therapy and they were trying to get me re-trained, which the Company denied -- they --

Q Okay. So, were you given any re-training, at all?

A I did not get re-trained.

Q Okay.

A We fought for that but I did not get it.

5 Q So, it is your testimony that approximately over, more or less, 2000, that is when you were capable of either --

A That is when I --

Q Going back to work --

A And that is when I starting going out looking for jobs.

Q Okay. In October of 2000, where did you apply, for a job?

10 A Oh, different places; Accounting, at San Bernardino. I applied to the City of Pomona. I applied different places.

Q Okay.

A I even applied, at my present job.

Q What is that?

15 A I even applied back, at First Transit, for an office job.

As one can see from the testimony, she did not pursue any job that she could recall until October of 2000, by then into the 4th quarter which Respondent does not challenge. Instead, during the previous two quarters she had focused both on rehabilitation from the injury and a
20 futile attempt to obtain retraining.

The record on those two quarters is somewhat sparse and Hyemingway's testimony was rather disorganized as she tried to recall the impact the injury had upon her. Her testimony for that time frame—principally over matters connected to her Workers Comp claim—is fairly
25 convoluted. Moreover, during the compliance investigation she filled out a questionnaire in which she said she was unable to work through December 31, 2000. It is also true that she had repudiated that statement to some degree. Yet that repudiation would more likely have been aimed at the 4th quarter of 2000 and would not have affected the 2nd and 3rd quarters which are in issue here.

30 Since she was unable to state with any certainty that she had actually searched for work during those two quarters, I am compelled to deny that portion of the claim. Therefore, I shall strike the gross amount sought for the 2nd and 3rd quarters of 2000. That subtraction results in a net backpay of \$23,971.51.

35

Lola Joyner

Lola Joyner's specification was modified by stipulation through the issuance of a new Appendix C-18, included in the G.C.Exh. 3 stipulation. Her backpay period runs from June 27,
40 2000 to January 28, 2002. She eventually returned to work on March 11, 2002. Net backpay under Appendix C-18 has been claimed in the amount of \$32,449.90.

Prior to her discharge, Joyner had been seeing a physician concerning some breathing difficulties which ultimately proved to be double pneumonia. She received absence points even
45 though she was seeing the doctor. The doctor told her she would need 30 days of rest before recovering. She was actually discharged on June 26, 2000, which was a Monday. Although she could no longer recall the days involved with clarity due to the passage of time, she said that several days before her discharge, she submitted a slip requesting a 30-day medical leave supported by the doctor's recommendation. Despite her request, she was discharged.

She acknowledges, and the parties now agree, that she could not have worked during that 30-day period due to the illness and its attendant recovery period. The modified Appendix

C-18 did not take that into account and the General Counsel has in Appendix A to its brief, reduced the claim to \$30,825.28 in order to account for that circumstance. The correction will be accepted.

5 Respondent nonetheless argues that Joyner should be denied all backpay for the 3rd quarter of 2000, for the 3rd and 4th quarters of 2001 and the 1st quarter of 2002, all based on its contention that Joyner did not make an adequate search for work during those time periods.

10 Joyner acknowledges that she did not begin searching for alternative work until 2 months after the doctor cleared her to go back to work, seeming to concede Respondent's point. However, she also testified that she had filed a grievance with the Union in an effort to get her job back. Filing such a grievance was an entirely appropriate step to take—if successful, it would have obviated any need to seek employment from a new employer. Accordingly, I find as a matter of law that filing the grievance was the same as if she had sought work from another company. Moreoever, aside from any collective bargaining contract language,¹⁵ it would appear that she had rights under the Family and Medical Leave Act, having worked for Ryder/ATE and its predecessors for over 5 years. See generally 29 U.S.C. §2654, which permits such an employee to take medical leave without penalty¹⁶ where he or she is unable to work due to a 'serious health condition' lasting more than 3 days. Double pneumonia would appear to qualify.¹⁷ In any event, an effort to try to maintain one's job in such circumstances falls far from a failure to mitigate.

25 Respondent also argues that even after the doctor's release, Joyner's acknowledgement that she still suffered some lingering effects could have affected her ability to work. It makes a similar argument related to Joyner's February 2001 diagnosis of a chronic muscle pain condition known as fibromyalgia.¹⁸ Its argument is speculative in both instances. Joyner never worked a straight 8 hour day; bus driving involves two split shifts of 4 hours each, allowing her a significant respite during the middle of the day. The argument is rejected.

30 Subsequently, Joyner began to seek work at employers near her San Bernardino home, including the transit system in that city, Omni Transit. Over a period of time, maintaining her Class B license with passenger and air brake endorsements, she applied to other transit and charter bus lines. These included Coach U.S.A., Roesch Transit, Turner Buses, Concept Buses and Charter Bus Lines. She also checked job availability at Amtrak and S&L Charter Lines, as well as others she could not recall. She did not seek work at Foothill Transit's El Monte yard because it was too far from her home.

40 Respondent does not dispute the General Counsel's calculations for the 4th quarter of 2000 and the 1st and 2nd quarter of 2002, apparently conceding that Joyner sufficiently mitigated the backpay during those quarters.

45 In subsequent quarters, the 3rd and 4th quarter of 2002 and the 1st quarter of 2003, Respondent would deny Joyner all backpay based on its assessment of her testimony. During these quarters Joyner was drawing unemployment and participating in two welfare programs designed to train the unemployed and enable them to change careers. The plans, known as

¹⁵ The pertinent collective bargaining contract is not in evidence.

¹⁶ See 29 CFR §825.220 (1998).

¹⁷ See 29 CFR §825.114 (1998).

¹⁸ The cause of fibromyalgia is unknown and there is no treatment, although remaining active appears to help.

GAIN and JET, both required the participants to regularly apply for work as they are known as welfare-to-work programs. JET itself provided job leads to Joyner and she followed up on them without success. Accordingly, I find she did seek work as required during those quarters. JET also sent her to San Bernardino Adult School to learn computers and typing.

5

Respondent argues that these programs and the school required Joyner's presence during the work day and therefore she was unavailable to work. Joyner testified, however, that had she obtained employment while pursuing those programs, the program would regard her as having become employed and she would no longer need to continue since the program would have achieved its purpose. Respondent's argument is rejected.

10

Accordingly, I find Joyner to be entitled to the adjusted backpay figure of \$30,825.28, the figure provided by the General Counsel in its brief.

15 Elbert Kellem

Elbert Kellem's backpay period runs from June 24, 1999 to January 23, 2002. He retired from the U.S. Army in 1994, worked for the Postal Service until 1996 and was hired by Ryder/ATE in 1997. As a veteran of the first Gulf War, Kellem has acquired a keen interest in becoming a drug and alcohol counselor. To that end, while working for Ryder/ATE, he began taking classes and interning in that field with the Los Angeles Veterans Administration Hospital. After his discharge he continued that training. He usually took classes 5 days a week from 8 a.m. to noon. In the afternoons he performed clinical type training, serving variously as a urinalysis intake monitor, conducting classes and engaging in face-to-face counseling with patients. He also helped VA patients in their own searches for employment. All this work was part of his goal of becoming a qualified drug and alcohol counselor, and the schooling and clinical work was unpaid.

20

25

Even so, he never stopped looking for paid work, often with public entities or civil service jobs. Although he scored well on the examinations, someone always seemed to be ahead of him. Kellem testified:

30

I put in a lot of applications. I put in for a different variety of jobs. I even put in for a -- I put in for EDD¹⁹ and I put in for DMV,²⁰ Border Patrol, Immigration, and, with Border Patrol, Immigration I found out that I was too old after they [...] it took them so long to call me because the age cap was 37²¹ and I put in [at] Orange County [Transit]. I put in -- and, when I did some work for EDD, also, to help them find jobs, that helped me, also, to learn the system and I put in -- and I

35

40

¹⁹ The California Employment Development Department. The EDD is the state unemployment agency. As noted in his quoted testimony, though not clearly, his counseling of VA patients led him to both possible employment with the EDD and to job offerings available from the EDD.

45

²⁰ Testimony shows he applied to the Department of Motor Vehicles after the backpay period ended.

²¹ Kellem applied for work with the Border Patrol shortly after retiring from the Army in 1994; his efforts were relatively continuous. Eventually, sometime during the backpay period, he says the Border Patrol hiring authorities made a tentative offer which they withdrew when they discovered he was older than the maximum of 37. He had become too old in 1997 or 1998, before his unlawful discharge, but never knew it until they withdrew the tentative offer.

was putting in job, job, job, job, and I got my score back up where I'm in the top three [of] one hundred and I'm saying what's the problem? I can find everybody else a job, but I can't get [one] myself -- you know, I'm in the top three.

5 He also applied for paid counseling openings with the VA and sought driving work with Omni Transit in San Bernardino. None of his efforts resulted in a job.

Respondent argues that by going through the VA training as a drug and alcohol counselor, both because it was volunteer work and because it took up virtually all of the
10 workday, that Kellem had removed himself from the job market between the 2nd quarter of 1999 and the 4th quarter of 2000. It acknowledges that the remainder of the claim, to the 1st quarter of 2002, is accurate.

15 First, with respect to the training, it must be observed that Kellem had begun the training while employed at Ryder/ATE. In essence, it was a moonlighting endeavor. He was certainly entitled to pursue that goal to the extent it would not have interfered with his search for paid employment—whether in the counseling field, bus driving or any other job. Moreover, as he said, it would have been easy to give up the volunteer work if an offer had been made:

20 Q By Mr. SILVERSTEIN: You were working this internship. You testified it was a full-time Monday through Friday job, correct?

A [Witness KELLEEM]: Yes. I worked [volunteered] full-time.

Q Okay. Didn't that in some ways hinder you or prohibit you from obtaining a 9:00 to 5:00 job?

25 A No. Because it's something that I agreed to do to help people. No, it did not hinder me. It was something that I see it was positive.

Q And I'm not saying that it was negative. I acknowledge that it was very, very positive, but what I'm saying is, since you were spending your hours from 9:00 to 5:00 helping people and working in this internship and doing your drug counseling, doesn't that mean that you couldn't spend 9:00 to 5:00 working in some other job that would have actually paid you?

30 A No. Not -- I didn't see it that way.

Q Okay. You may not have seen it that way, but isn't that the way it was?

A Yeah, that's the way it was.

* * *

35 JUDGE KENNEDY: Let me see if I understand. You're saying that, if a job had come along, you would have taken that job?

THE WITNESS: Yes. Yes. I score 100 when I take these tests, like in the top three, and they haven't hired me. I don't know if that's just to get the numbers.

JUDGE KENNEDY: Well, I'm just saying that there you are working [during the] day in the counseling, doing counseling, and, if you got a phone call that said somebody was going to
40 hire you, you'd go. Is that --

THE WITNESS: I'm gone. I'm gone.

JUDGE KENNEDY: All right.

THE WITNESS: I'll see you later. I'm gone. Sorry.

45 Accordingly, I find that Respondent has not demonstrated that Kellem ever took himself out of the job market after Ryder/ATE discharged him in June 1999. He is entitled to the sum set forth in Appendix C-19, \$43,479.83.

Edwin Lear

Edwin Lear had worked for Ryder/ATE less than 6 months when he fell victim to the unlawfully imposed attendance policy. He is a claimant named in the original complaint. His

backpay period begins on June 7, 1997. Although the specification, Appendix C-20, shows his backpay period to have ended on January 28, 2002, an earlier reinstatement offer was discovered at the hearing and, as a result, the parties have stipulated that the backpay period ended coincident with the end of the 3rd quarter of 2001, i.e., September 30, 2001. This modification results in only a slight adjustment downward, from \$33,278.44 to \$33,076.57.

Nonetheless, Respondent asserts that Lear failed to meet the required duty of mitigation. It contends that after Lear was fired in June 1997, he consistently took lesser-paying jobs when he could have been working at Laidlaw's Foothill Transit operation in El Monte.

The facts, however, demonstrate that he had only two full quarters where he had no interim employment. It does appear to be true that in the beginning, he eschewed employment with Laidlaw in El Monte in favor of other lower-paying choices. His first job, about a month after his discharge, was as a bus driver with Western Transit. It turned out to be a temporary job and he was laid off after 5 weeks. Due to the lower pay rate, he had already begun seeking work elsewhere. He looked in the paper and also visited his local EDD office weekly in Pomona where he lived. He applied for some of the warehouse jobs on the EDD list. Eventually, he secured a job with an airport shuttle company, Hudson General, at Los Angeles International Airport. That pay rate, too, was less than Ryder/ATE's. He then found work closer to his home in Pomona with a Laidlaw paratransit operation known as GetAbout. The pay rate there was even lower and the hours turned out to be fewer. After a short time, he was laid off in March 1998.

Subsequently, he did apply to Laidlaw's Foothill operation in El Monte, apparently late in the 4th quarter of 1998. He worked there more or less continually until the end of the backpay period. He did quit to try his hand at a drivers education school, thinking the wage/commission pay system would be advantageous. When that did not work out because there were too few students, he returned to Laidlaw through the end of the backpay period. He currently works as a coach driver for the Los Angeles Metro system.

Respondent's principal argument is that Lear should have gone straight to Laidlaw's Foothill operation and, since he did not, Respondent should be credited with the Laidlaw pay rate as interim earnings for the entire backpay period. This would result in a total offset, and its liability would be zero.

Respondent's argument is rejected. It is simply a "shoulda, coulda" argument. The Board will not second-guess a claimant's good faith effort to find interim employment. In any event, it is quite clear that Lear sought and found employment throughout the relevant time frames. He did not remove himself from the job market.

Lear is entitled to the modified amount shown above, \$33,076.57.

Juanita Madden

Ryder/ATE hired Juanita Madden on June 2, 1997. Her last day of work was September 19, 1997. At the time she separated from employment, she was still a probationary employee, having been employed for only 3-½ months. Respondent contends, nevertheless, that Madden chose to quit and was not a victim of the unilaterally imposed attendance system.

According to the modified specification found in G.C.Exh. 3, Madden's backpay period begins on September 20, 1997 and ends on June 14, 2004. She had the good fortune of being employed throughout the 7-year timeframe. As a result, her net backpay totals only \$4,882.42,

arising from 1998-1999 quarters where her interim earnings did not exceed the gross backpay figure. In the initial stipulation, GC.Exh. 2, the parties stipulated that the 37 employees, including Madden, listed in paragraph 1(a), were “discharged, suspended, or otherwise denied work opportunities as a result of Ryder/ATE’s unlawful institution” of the attendance policy.

5 Paragraph 1(b) of the stipulation states that by entering into the stipulation, Respondent was not waiving its right to argue that certain probationary employees, including Madden, were not governed by the just cause clause of the collective bargaining contract and would have been discharged under the previous attendance policy “and/or that certain employees resigned. . . .” Under that clause, insofar as Madden is concerned, Respondent has reserved the right to argue
10 that she resigned before she would have been fired.

The facts are relatively simple, even if the analysis is not. At the hearing, Madden acknowledged that she resigned.

15 Q [By Mr. SILVERSTEIN] Okay. And your last day of employment was September 19th, 1997, correct?

A [Witness MADDEN] Yes.

Q Okay. And now you resigned from Ryder/ATE, right?

A Yes.

20 Q All right. And you were still a probationary employee at the time you resigned, correct?

A Probably so. I don't remember.

* * *

Q By Mr. SILVERSTEIN: Ms. Madden, since you resigned, no one from the company ever told you that you were being terminated for receiving too many points under the point system, did they?
25

A No.

She also testified that she was barely aware of how the attendance point system worked, having heard about it second-hand from other employees.

30

Three documents were offered concerning Madden’s departure. The first is an employee attendance form dated September 18, 1997, the day before her separation. It shows that she had been charged with four attendance points that day for a “miss-out” (not defined) and at that point had accumulated a total of eight points. Ten points would result in her discharge.
35

Q [By Ms. McNEILL] Ms. Madden, that document, [Madden Exh. 1], reflects that you accumulated, at least, 8 attendance points. Do you know whether or not you ever accumulated 10 attendance points?

40 A Not that I know of, because I didn't count and, you know, I'm not for sure about the way they did things, because I don't remember signing anything [concerning receiving 10 points].

* * *

Q BY MS. McNEILL: Do you recall signing that document [Madden Exh. 1]?

A Yes.

45 Q Okay. Now do you recall on the day that you signed that document was that your last day of work?

A No. Because I had already quit before I even went back to work.

Q Okay. Before you had gone --

A Yes.

Q Before you signed that document?

A Yes.

Madden's testimony here suggests that she had given her notice of quitting before, or upon receiving and signing Madden Exh. 1. She did testify that she thought the attendance system worked a hardship upon her and that it seemed unfair, as it did not allow for freeway problems encountered during her commute from her Los Angeles home.²² Of course, her choice of dwelling location is not really pertinent because once she took the job she committed herself to Ryder/ATE's daily work schedule. Reporting on time was essential because bus schedules need to be met. A late driver meant a late bus, which in turn meant problems with timely and reliable passenger service. Madden was probably not a good fit simply in terms of geography.

Still, there are two versions of the employee change form, one with supervisory notes and signatures, and one without. The one with the handwritten notes shows that on September 29, 1997, Operations Manager Laurie Dobson approved Madden's discharge for having accumulated too many attendance points, noting that she was a probationer. Other managers have added their signatures. The other employee change form, with updated computer data entries, carries her as a code 'TN'. The code chart, G.C.Exh. 4, does not reflect what that code signifies, but TN appears to be an entry meaning 'termination.' The first also has a box checked 'termination,' a code of 'TO' (also not on the chart) and both contain the remark that she would not be rehired.

Under these circumstances, despite her testimony that she quit, I find Ryder/ATE considered her a discharge. She was certainly recognized on Ryder's records as a fired employee who was ineligible for rehire.

I suspect that Madden simply tried to quit before she was fired in order to avoid having a firing on her employment record. It may even be that someone in the first line of supervision considered her a quit, but the company never got that message.

Therefore, I reject Respondent's contention that Madden resigned. The records are conclusive on the point. Finally, as noted earlier, her status as a probationary employee is irrelevant under the Act.

As Respondent does not challenge the calculation of backpay claimed for Madden, I shall find the specification, as modified, to be accurate. Net backpay due Madden is \$4,882.42.

Natasha McQueen née Warren

Natasha McQueen's backpay period runs from August 13, 1997 until July 9, 2004. Her specification (Appendix C-22) was amended at the hearing and the amended version has been designated as G.C.Exh. 6. A comparison of that exhibit to the proposed backpay adjustments offered by Respondent demonstrates that they are in full agreement from the 3rd quarter of 1997 to the 3rd quarter of 2001. This disagreement begins with the 4th quarter of 2001 and continues through the end of the backpay period in 2004. In effect, the disagreement is over only \$3220.58. The remaining \$36,552.64 is not in contest.

Respondent observes that it actually rehired McQueen in July 2001 and she returned to work at that time, but shortly thereafter she quit during her retraining period in order to attend

²² At the time of her hire and discharge in 1997, Madden lived on West Imperial Highway in southern Los Angeles. Her freeway commute to the Pomona yard would have been about 40 miles, through the heart of downtown Los Angeles.

child custody hearings. Those hearings arose from a divorce and her ex-husband's attempt to seek custody. In response to her quit, the Regional Director has credited her interim earnings account from that point on as if she had remained employed with First Transit through the second offer of reinstatement in 2004.

5

I am of the view that Respondent has the better argument here. When McQueen sought work from Respondent in July 2001 and Respondent put her on the track to her old job, its duty of offering reinstatement was satisfied. The net backpay for those quarters is the difference between what she was credited with versus what she would have been earning had she never been fired.

10

However, it is clear that she would have quit during the child custody dispute and ended her employment at that point, just as she actually did. This is simply an application of the hazards of living rule noted earlier. *American Manufacturing Co. of Texas*, supra. Accordingly, I find that the quit terminated Respondent's backpay obligation with respect to McQueen. Therefore, McQueen is entitled to the amount of net backpay not in dispute, i.e., \$36,552.64.

15

Leo Mitchell

20

The specification for Leo Mitchell alleges that his backpay period begins on August 23, 1997 and ends on January 23, 2002. However, due to his employment history, it seeks only a total of \$951.01 net backpay for the first two quarters of the period, the 3rd and 4th quarters of 1997, where his interim earnings did not exceed his gross backpay. Respondent asserts that Mitchell is not entitled even to that amount because he was not a victim of the unlawfully imposed attendance policy.

25

Mitchell testified that he really couldn't remember why he was discharged, but recalled that shortly before his discharge he had declined to accept an additional route. He said:

30

Q By Mr. SILVERSTEIN: Now shortly before you left Ryder/ATE you refused to take an additional route?

A [Witness MITCHELL] Yes.

Q You just didn't want to do that; right?

A No.

35

Q And it is your belief that that was related to the reason you left Ryder/ATE?

A That may have been one reason.

Q Was there any other reason?

A I don't know, there just seemed to be a lot of stuff around there at that time and maybe they were just angry and taking it out on the drivers.

40

* * *

Q By Ms. McNEILL: Mr. Mitchell, were you terminated from Ryder/ATE after receiving [attendance] points?

A Maybe on their behalf, but I was there every day that they wanted me to be there.

Q Do you recall why you were terminated?

45

A I really don't.

Two employee change forms from Mitchell's personnel file are in evidence. Mitchell Exh. 1 appears to be a photocopy of an older version, written upon by supervision to show the termination and the reason for it. It is actually signed by a manager on September 4, 1997. The second is the same document after being updated in the computer. Mitchell Exh. 2.

The first contains the handwritten entries showing that Mitchell had been ‘terminat[ed]’, on August 22, 1997 for ‘D2’ reasons and that he was not eligible for rehire. The codes key, found in G.C.Exh. 4, shows that ‘D2’ is an invocation of the ‘attendance/tardiness’ rule. Accordingly, based on Ryder/ATE’s own records, I find that it did discharge Mitchell under the wrongly imposed policy, that Mitchell has properly been deemed a victim of the policy and that he is entitled to the backpay set forth in Appendix C-23, \$951.01.

Tom Montoya

The dispute concerning Tom Montoya principally arises from Respondent’s contention that he was not fired because of the attendance point system, but that he had abandoned his job. Alternatively, assuming that he was fired under the attendance policy, Respondent argues that he was fired for misconduct by an interim employer and that its backpay obligation to Montoya ended at that point.

The backpay specification, Appendix C-24, alleges that Montoya’s backpay period begins on December 3, 1997 and ends on February 1, 2002 when Respondent reinstated him. The total net backpay claim is only \$9,296.07 for the entire 4-½ year period. He had substantial interim earnings throughout that time frame. Indeed, he was able to find work almost immediately after his discharge.

Montoya, contrary to Respondent’s contention, testified that he had been discharged because of the attendance policy point system. The Ryder/ATE employee change slip (Montoya Exh. 2) has no code explaining the reason for the action. It does have boxes checked indicating that he was not eligible for rehire and that no exit interview was conducted. It was printed on December 20, 1997 and shows that Montoya’s last day of work was December 2. That date is actually the day Ryder/ATE’s Operations Manager Laurie Dobson wrote a letter (Montoya Exh. 1) advising him of the discharge. The letter explains that it has been written because they could not reach him at the phone number Dobson said was on file, listing a phone number (partially redacted here for security purposes), the last four digits of which are 3079. One wonders whether Dobson had a correct number because the employee change slip, while it shows the same mailing address as the letter, contains a phone number with the same area code, but with a different prefix and the last four digits 4530. Montoya stated that the address was that of his mother and that he had never seen the letter before it was shown to him at the hearing. Assuming it was his mother’s address, it is, nonetheless, the address which he gave the Company as his home.²³

The letter does reference Respondent’s contention that Montoya had abandoned his job, sometime after having driven a bus on November 15, 1997, a Saturday. It also asserts that Montoya had requested to be changed to part-time employment, but he had not checked in with the dispatcher for assignments as requested. Because of that failure, Dobson advised Montoya that he was being discharged because of ‘job abandonment.’

Regarding the part-time issue, Montoya said he had been asked to switch to part-time and had willingly agreed to work weekends. He gave the following testimony:

²³ The letter’s authenticity is not in question; furthermore, the cc: listings show a copy was sent to the Union. It is fair to presume that it was sent through the regular mail and received, despite Montoya’s denial, even though the writer, Dobson, was not called as a witness. It was received in evidence without objection.

Q By Mr. SILVERSTEIN: Mr. Montoya, shortly before you left the employment of First Transit in December of 1997, did you request to go on part-time status with First Transit?

A [Witness MONTOYA] I don't recall that at all.

Q You don't recall that?

5 A No, sir. I don't recall it.

Q You don't recall asking if you could work just weekends, and no longer have weekday shifts?

A I was asked if I -- if I would consider working weekends, because they had a surplus of drivers and I was new there, basically.

Q And what was your response to that?

10 A I go, "Oh, okay." I mean, if it is for the good of the Company, sure.

Q So, your testimony is that you actually agreed to be reduced to a part-time schedule?

A Yes, because they had asked me, because they had surplus of drivers, and I was new, if I would consider working weekends only.

* * *

15 Q So, what you are saying is that it is possible you might not have showed up for some of your work shifts, right?

A I am sure I called in, because I am very conscientious about that. I called in; they told me, "No, you don't got nothing," and then I come in on Monday and they ask, "Where were you at this weekend," or they ask me next weekend, "Where are you at?" I go, "I called in."

20 Q Well, looking at this letter, and go ahead and take a moment to look at it --

A I read it.

Q -- but from reading this letter it looks like you didn't show up the weekend of November 15th or any time thereafter.

A I must have [acquired] all of the points. They probably -- . . . terminated me.

25 * * *

Q By Mr. SILVERSTEIN: You don't know if you acquired any points for this, do you?

A I am sure I did, because they were pretty strict about giving you points.

Q Do you know the difference between receiving points for attendance violations and abandoning your job?

30 A What do you mean "abandoning your job?" Not showing up, right?

Q Correct.

A That is not in my nature, not to show up. I always show up.

Q And I appreciate that, Mr. Montoya, and I am not suggesting that it is...

A Right.

35 Q But, the question is, I am asking you if you can appreciate the difference in earning points under the attendance policy, and abandoning your job, and job abandonment as a basis for termination?

A No, I would never abandon my job. I like this job too much. I love this job. I would never abandon my job like that.

40 * * *

Q Do you have any recall whatsoever, that you came to work at First Transit after November 15th, 1997?

A No, sir, I got no recall. That was seven years ago. I got no idea.

Q So you don't know one way or the other.

45 A It was just so long ago; that is what it is. I can't recall these dates and stuff.

Q Mr. Montoya, since you can't recall, isn't it possible then, that you didn't come to work during that time period, and that the Company terminated you for job abandonment?

A No, it is not possible, sir.

Q It is not possible?

A No, it is not possible. It is not in my nature to do that. I would not do that. I would not do that.

* * *

Q When did you first -- if your last day of employment at First Transit was December 2nd, and your first day of employment at Waste Management was December 6th, when did you first contact Waste Management?

5 A I got hired actually the same day that I applied, so December 6th, I -- I went over there and I got hired the same day. It didn't take me long to find a job.

Q Well, I am a little confused...If you never received this letter, how did you know that you had been terminated from First Transit and that you needed to find a new job?

A I don't know if I was terminated or not. I have no idea, sir.

10 Q Isn't it true that no one ever told you that you were terminated, because you had pointed out on the system --

A No, I was told that I got pointed out.

Q Who told you that?

A Laurie -- I believe her name was Laurie back then.

Q Laurie?

15 A Yes.

Q Do you have a last name?

A She is right here. [Pointing to Montoya Exh. 1] Laurie Dobson, Operations Manager.

20 Based on Montoya's testimony, I am obligated to make several findings favoring Respondent's view. First, he did agree to work weekends on a part-time basis, whether he volunteered for his own reasons or whether he was asked to do so. That necessarily meant a reduction in his income. Not only did he testify to it, the letter says his last day of work was on a weekend day, Saturday, November 15, 1997.

25 He also concedes that he was obligated to call the dispatcher to learn when he was needed, simultaneously conceding that his schedule was irregular and that he needed to be in touch. He asserts that he did communicate with the dispatcher, but also says he was not given a run, only to be asked the following Monday where had he been, why hadn't he come in. He says he responded that he had called in.

30 From that, he assumed that he had been given attendance points, since he apparently was aware of the strict manner in which points were assessed. However, as a part-time weekend worker, it is not clear to me that attendance points would be issued in the same fashion. His was an ad hoc sort of arrangement, so points shouldn't have been issued unless he had agreed to a run.

35

40 Then, although he claims he had never seen the discharge letter, he also testified that he was hired by Waste Management as a trash truck driver on the same day he applied, December 6, only 4 days after the letter was sent. That confluence of circumstances suggests to me that he did receive Montoya Exh. 1 shortly after it was sent and immediately set out to obtain a new job. It also means that his recollection is untrustworthy or selective.

45 In the circumstances, I am unwilling to credit Montoya's testimony that he never received the letter. Indeed, it is more plausible that he became resentful of the reduced hours offered to him and that he took a cavalier approach to calling the dispatcher. This recklessness resulted in his missing enough calls that the dispatcher gave up on him and reported that he was not able to rely on him in during the 2 weeks before his discharge.

Therefore, I find that Montoya was discharged for reasons unrelated to the unlawfully imposed attendance program. He is therefore not entitled to any backpay under the Board's order. The specification applicable to him, Appendix C-24, will be dismissed.

Cindy O'Neal

5 Cindy O'Neal's situation is different from most of the others. She was not fired as a result of acquiring too many points under the unlawfully imposed attendance program. She resigned when faced with the probability that she would shortly be fired. As a result, the General Counsel asserts she was constructively discharged.

10 O'Neal was hired as a bus driver in December 1998 and her last day of work was June 30, 1999, a period of slightly over 6 months. In May and June, in rapid succession, she acquired the attendance points which put her at risk under the attendance program. She was absent on May 18, 27 and 29, June 8 and, apparently, June 22. On June 25, O'Neal's supervisor Beth Randa counseled her about the situation, observing that O'Neal had accumulated eight of the ten points which would cause her discharge. See O'Neal Exh. 2. It may well be that the supervisor was then unaware of the June 22 absence, which put O'Neal at ten, not eight points. Shortly thereafter the situation came to its head.

O'Neal testified:

20 Q By Mr. SILVERSTEIN: Now Ms. O'Neal, [. . .] why did your employment at Ryder/ATE end?
 A [Witness O'NEAL] I got a ten-point suspension?
 Q Didn't you resign from the company, though?
 A I had already got the ten points and [Laurie Dobson] said I was going to be fired anyway.
 Q So you were given the option to resign and you took it?
 A Right, rather than get fired.* * * . . . but I intended on quitting if I hadn't got those ten
 25 points.

30 Rather clearly, O'Neal was between a rock and a hard place. Still, she was given the option to resign rather than suffer a discharge, an option she was going to exercise regardless of what happened. In the circumstances presented here, I am unable to conclude that O'Neal was constructively discharged and qualifies for backpay under the terms of the Board's order.

35 There are two issues presented here. The first is that the General Counsel's theory of backpay entitlement is based on an unfair labor practice which has never been alleged and which the General Counsel has never really sought to prove. Instead, the General Counsel simply lumped this employee in with the others who were actually discharged, and seeks to have her treated the same way. Second, the doctrine of constructive discharge, normally seen under §8(a)(3), requires two elements: first, that the burden being imposed on the employee must cause a change in working conditions so difficult or unpleasant as to force the employee to resign;²⁴ and second, that the burden was imposed because of the employee's union activities.
 40 See *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976).

45 This case arises not under §8(a)(3), but §8(a)(5) as a unilateral change in wages, hour and terms and conditions of employment. And clearly the Board found, and the court agreed, that Ryder/ATE had breached its bargaining obligation to the Union when it unilaterally, and without notice, modified its attendance rules. Yet these attendance rules, had they been adopted after meeting the required obligations of collective bargaining, are not in and of

²⁴ In some fact patterns this requirement can be characterized as forcing the employee to make a Hobson's choice, either quit or abandon one's §7 rights. See, e.g., *Goodless Electric Co.*, 321 NLRB 64, 67-68 (1996); *Control Services*, 303 NLRB 481, 485 (1991). That choice is not presented in this fact pattern.

5 themselves onerous. Their only aim was to get drivers to work on time so the schedules would run on time. And, it is a given that an employer can require employees to come to work on time, even if he has to bargain with the employees' representative to establish the rules governing the penalties for failing to comply. Therefore, requiring any of these employees to come to work on time is far from being regarded as burdensome. It was not onerous at all; in fact it was a normal duty of employment.

10 Under that analysis, O'Neal had the duty of coming to work on time; when she discovered she was unable to meet that duty, rather than allowing herself to be fired, she simply accepted responsibility for her own shortcomings and resigned. Cf. *Kentucky River Medical Center*, 340 NLRB No. 71 (2003), slip op. at 65-66 (Taulbee) (discriminatory warnings in violation of §8(a)(1) not sufficient provocation to warrant employee abandoning work, i.e., effectively resigning job). Indeed, O'Neal's resignation can easily be seen as her own act of unexpected supervention. What Respondent might have done had she not resigned was rendered not cognizable upon that event.²⁵ Therefore, the General Counsel has not offered sufficient evidence to meet the first element of a constructive discharge. Having failed to meet that initial burden, the backpay specification relating to O'Neal will be dismissed.

20 Marta Perez

Marta Perez was a bus driver for Ryder/ATE from late March 1997 until her discharge for breach of the unlawfully imposed attendance rules on June 11, 1998. Her backpay period runs from June 12, 1998 to January 23, 2002 when Respondent offered her reinstatement which she declined. Appendix C-28 seeks a net backpay sum of \$23,196.63. This includes a claim for \$13,151.36 for the four quarters of 2000. As will be seen, the 2000 figures require significant adjustment.

30 Almost immediately after Ryder/ATE discharged Perez, she obtained a bus driving job with Ampco System Parking at its operation at the Ontario International Airport, not far from her home. She remained employed there for about a year and a half. She lost that job in early 2000 when she failed to properly engage the parking brake while she attended to a minor medical issue. The bus rolled into a parked car. She was discharged because it was the second accident in which she had been involved and the company's policy was to discharge any driver with two accidents, even though the incident caused no damage. (Indeed, her first accident did not involve any negligence on her part.) This does not qualify as a deliberate effort to remove herself from the job market by engaging in an act of gross misconduct.

40 At that point she decided that she would become a stay-at-home mother to her children. The evidence shows that she stayed out of the job market for about 10 months.²⁶ The Social Security Administration report shows that during the year 2000, she earned \$4,075.50, one-fourth of which the compliance officer allocated to each quarter for that year. In November 2000 she began searching for work and on December 5 obtained a job with the Walgreen Company where she still works. Her Walgreen interim earnings for the last quarter of 2000 was \$475.00.

45 ²⁵ Cf., *Electrical Workers (IBEW), Local 1701 (Dynalectric Company)*, 252 NLRB 820, 829 (1980); *P.G. Berland Paint City*, 199 NLRB 927, 927-928 (1972); and *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

²⁶ The parties are in agreement that her testimony that she stayed out of the job market for a year and 10 months is mistaken. That conclusion is supported by the Social Security Administration records. Perez Exh. 1. See also the colloquy between counsel and myself at p. 1157 ff.

The backpay specification, Appendix C-28, requires some adjustments to account for the anomalies—her withdrawal from the job market, the misallocation of the 2000 Ampco earnings and the Walgreen earnings. The corrected allocations are shown in the chart below.

5

Year/Quarter	Gross Backpay	Interim Earnings	Net backpay	
2000 Q1 ²⁷	4425.48	3779.53	645.95	
2000 Q2 ²⁸	340.42	296.01	44.41	
2000 Q3	0	0	0	
2000 Q4 ²⁹	1021.26	475.00	546.26	
			1236.62	Net backpay/2000

10

When added to the net backpay for other quarters in the backpay period, \$9845.29, this \$1236.62 adjustment results in a total net backpay claim of \$11,081.91.

15

Respondent's argument, that when Perez withdrew from the job market to be a stay-at-home mother she had cut off liability altogether, is rejected. Tolling the gross backpay liability for the affected quarters, as I have here, is the appropriate course.

20

Cheryl Ramirez

Respondent, in its brief, has advised that it does not dispute the backpay calculation for Cheryl Ramirez. Accordingly, the net backpay set forth in Appendix C-29 is found to be appropriate: \$23,487.85.

25

Joyce Robinson

As alleged in the backpay specification, Appendix C-30, Robinson's backpay begins on May 19, 1997 and ends on January 23, 2002. At the time of her discharge, Robinson had just completed her 120-day probationary period, having worked for only about 4-½ months. The threshold issue presented here is Respondent's defense based upon her testimony at the hearing that she had some difficulty finding interim employment because "I was limited because of my record, too, [I] got a prior record." She went on to state that about 12 years before (approximately 1992), she was convicted of second degree robbery. This testimony was a surprise, as no one was aware of this conviction. When Respondent inquired, she said that on her job application form she had stated 'yes' when asked if she had any prior felonies. ³⁰ That

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²⁷ The interim earning figure is assumed to be the same as in the 4th quarter of 1999.

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²⁸ These figures represent the first week's work in the 2nd quarter

²⁹ The gross backpay figure covers 3 weeks—two in November and one in December searching for work.

³⁰ Q By Mr. SILVERSTEIN: So, when you fill out an application and it asks, if you have had any prior felonies, you have to answer, yes. Right?

45

A [Witness ROBINSON] Yeah.

Q Okay. Were you asked that question when you were hired, at Ryder/ATE?

A Yeah.

Ms. MCNEILL: Objection. She was hired.

JUDGE KENNEDY: She was hired and she answered it.

Mr. SILVERSTEIN: I understand.

JUDGE KENNEDY: Okay.

Continued

testimony was untrue. Her job application, in evidence as R.Exh. 8, asks: "Have you ever been convicted of a felony? (Note: A felony conviction is not an absolute bar to employment.)" She checked the 'no' box and left blank the 'If yes, please explain' box.

5 Near the end of the hearing, Salvador Garcia, now the assistant general manager for First Transit, but then a manager for Ryder/ATE, testified that he was not aware that Robinson had been convicted of second degree robbery. He testified that had her conviction been known at the time she applied for the job, in his opinion she would not have been hired, for Ryder/ATE had a policy of not hiring felons. Furthermore, he opined, she would not have been hired
10 because of, using counsel's words, "résumé fraud," i.e., that she had lied when filling out the job application form.

 On January 26, 2005, after the close of the hearing, Respondent filed a motion to reopen the record to receive a hiring investigation report performed by a pre-employment screening
15 company which had not uncovered the robbery conviction. The motion is denied for two reasons. First, the document cannot be authenticated without hearing a witness, and I am loath to take that step since, second, the document, even if authenticated, would not significantly enhance the record.

20 As matters now stand, it is clear that Robinson was convicted of a very serious felony and did not disclose it at the time of her hire. Furthermore, there is a substantial likelihood that she did not tell me the truth either. I recognize that a great deal of time has passed since she filled out the form in 1997, and that she was not shown the application at the time she testified, undoubtedly because her testimony on the subject was unexpected. She may simply have
25 forgotten what she did, but I tend to think that is not so. Persons who have convictions on their record take extra thought when confronted with a question about them. I find she knew it was untrue at the time she filled it out; I am reasonably certain she still knew it to be false when she gave her testimony.

30 This puts the matter into the category of cases exemplified by *ABF Freight System v. NLRB*, 510 U.S. 317 (1994); *John Cuneo, Inc.*, 298 NLRB 856 (1990); *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973). These are all cases involving falsehoods connected to the hiring/tenure process. There is also one feature which is identical to that set forth in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)—the fact that the pertinent evidence did not
35 surface until the compliance hearing. Also of general pertinence is *McKennon v. Nashville Banner*, 513 U.S. 352 (1995), a Title VII case, concerning after-acquired evidence.

 These cases all address the question of appropriate remedy: Is a discharged employee who falsified a critical fact in order to get (or stay) employed, but who has subsequently
40 acquired protection under §7, entitled to the standard remedy of reinstatement with backpay?

 In *Lenkurt*, Administrative Law Judge Jerrold Shapiro observed that employee Maldonado's name had been on a prounion employee list which had been supplied to management, and a prima facie §8(a)(3) case had been otherwise made out. Maldonado,
45 however, had falsified his employment application in order to conceal a conviction, suspended sentence and a sentence of 3-years probation for grand theft. When discharged, he had recently passed his 90-day employment probation period. The employer, actively looking for

Q By Mr. SILVERSTEIN: And what did you put down when you were asked that question, at Ryder/ATE?

A Yes.

reasons to fire union activists, had plotted against Maldonado to make him late for work so that he would have an excuse for discharging him. The employer then received a tip about Maldonado's conviction and retained a professional investigating company to look into the matter. When the firm reported the conviction to management, Maldonado was promptly fired and told it was for falsifying his application. The judge, affirmed by the Board, and citing *P.G. Berland Paint City* and *Klate Holt*, both *supra*, dismissed the complaint as it related to Maldonado, saying:

I am motivated by several factors, primarily that the misconduct of Maldonado was serious and substantial, that the Company's printed rules state that it is a dischargeable offense, that the Respondent in its employment application clearly states that falsification is sufficient grounds for immediate discharge, and that there is no showing of disparate treatment. The Company welcomed, and was looking for, an excuse to discharge Maldonado, and the manner in which it documented Maldonado's misconduct reveals its awareness that the legality of the discharge was open to question, but on balance I conclude that Maldonado's objectionable conduct caused his discharge, and would have done so in the absence of any union activity." 204 NLRB 921 at 982.

In *Cuneo*, a compliance case on remand from the D.C. Circuit Court of Appeals, the Board seemed to announce a more nuanced approach to false applications:

Although we agree with the judge's conclusion that the Respondent would not have hired Brite had it known of his misconduct in falsifying his employment application, we do not find that this misconduct automatically bars an award of backpay. Rather, we limit Brite's right to backpay to the date the Respondent acquired knowledge of Brite's misconduct, consistent with the remedy approved by the Board in *Axelsson, Inc.*, [285 NLRB 862, 866 (1977)], a strike misconduct case.

The record shows that the Respondent hired Brite as a permanent employee and that but for the Respondent's unlawful refusal to reinstate Brite, the Respondent would have continued to employ Brite at least until the Respondent became aware of Brite's false statement concerning his employment history on his job application. The record also shows that the Respondent had a policy of not hiring applicants who misstate their employment background on their applications. In view of this policy, the Respondent probably would not have retained Brite after it learned of his misstatement. Under these circumstances, we would be granting an undue windfall to Brite if we failed to take into account his misconduct and granted him reinstatement and full backpay. On the other hand, relieving the Respondent of all backpay liability, including that for the period when the Respondent had no knowledge of Brite's misstatement and had no lawful reason to fire him, would provide an undue windfall for the Respondent. Accordingly, as we have done in similar cases, we shall terminate Brite's backpay on the date that the Respondent first acquired knowledge of Brite's falsification. See *East Island Swiss Products*, 220 NLRB 175 (1975); *A. A. Superior Ambulance*, 292 NLRB 835 fn. 7 (1989). (Internal footnotes omitted.) 298 NLRB 856-57.

See also *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) which follows the *Cuneo* rule cutting backpay off on the date the employer learns of the misconduct.

Neither *Cuneo* nor *Marshall Durbin* involved the falsification and concealment of a criminal matter. In *Cuneo*, the employee had misrepresented his prior employment record and

there was no evidence that he had given false testimony; in *Marshall Durbin*, the individual's transgression concerned sexual harassment. In both cases the discovery occurred before the backpay period was to have ended.

5 In *ABF Freight System*, supra, the Supreme Court was faced with an employee who, although engaging in activity protected by the Act, had lied to his employer about being late to work, and lied about it again to the Administrative Law Judge. The Board (304 NLRB 585, Member Cracraft concurring) had nonetheless ordered the employee reinstated with backpay and the Court of Appeals concurred. Against the employer's passionate argument that perjurers
10 not be rewarded, the Supreme Court said:

15 False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truthseeking function of adversary proceedings. See *United States v. Mandujano*, 425 U.S. 564, 576 -577 (1976). See also *United States v. Knox*, 396 U.S. 77 (1969); *Bryson v. United States*, 396 U.S. 64 (1969); *Dennis v. United States*, 384 U.S. 855 (1966); *Kay v. United States*, 303 U.S. 1 (1938); *United States v. Kapp*, 302 U.S. 214 (1937); *Glickstein v. United States*, 222 U.S. 139, 141-142 (1911). If knowingly exploited by a
20 criminal prosecutor, such wrongdoing is so "inconsistent with the rudimentary demands of justice" that it can vitiate a judgment even after it has become final. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). In any proceeding, whether judicial or administrative, deliberate falsehoods "well may affect the dearest concerns of the parties before a tribunal," *United States v. Norris*, 300 U.S. 564, 574 (1937), and may put the factfinder and parties "to the disadvantage,
25 hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means." *Ibid.* Perjury should be severely sanctioned in appropriate cases.

* * *

30 When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Because this case involves that kind of express delegation, the Board's views merit the greatest deference. This has been our consistent appraisal of the Board's remedial authority throughout its long history of
35 administering the Act. [fn. omitted] As we explained over a half century ago:

40 "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion, and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

45 Notwithstanding our concern about the seriousness of Manso's ill-advised decision to repeat under oath his false excuse for tardiness, we cannot say that the Board's remedial order in this case was an abuse of its broad discretion, or that it was obligated to adopt a rigid rule that would foreclose relief in all comparable cases. Nor can we fault the Board's conclusions that Manso's reason for being late to work was ultimately irrelevant to whether antiunion animus actually motivated his discharge, and that ordering effective relief in a case of this character promotes a vital public interest.

Notably, the ALJ refused to credit the testimony of several ABF witnesses, see,

e.g., 304 NLRB, at 598, and the Board affirmed those credibility findings, id., at 585. The unfairness of sanctioning Manso while indirectly rewarding those witnesses' lack of candor is obvious. Moreover, the rule ABF advocates might force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility. Its decision to rely on "other civil and criminal remedies" for false testimony, cf. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 521 (1993), rather than a categorical exception to the familiar remedy of reinstatement, is well within its broad discretion.

510 U.S. 317 at 323-325.

None of these cases definitively deals with the problem presented here. In some cases, such as *East Island Swiss Products*, 220 NLRB 175, 179 (1975) and *A. A. Superior Ambulance Service*, 292 NLRB 835 fn. 7 (1989), and *Cuneo*, supra, the Board has chosen to cut off backpay at the time when the Employer first learned of the misconduct which would have barred the employee from being hired in the first place. That remedy would be hollow here, since Robinson's falsity was not discovered during her short employment and was not revealed until 5 years backpay had been accumulated, plus another 2 years which had passed as the compliance proceedings matured. Applying that analysis would simply reward Robinson for lying her way into the job 7-½ years ago.

In other cases, the Board has observed that where an employee has obtained his job through the use of a false statement in his application, it is not repugnant to the purposes and policies of the Act to order less than reinstatement with backpay. *Ohio Ferro Alloys*, 209 NLRB 577 (1974) (citing *Southern Airway Company*, 124 NLRB 749, 752 (1959) and *W. Kelly Gregory*, 207 NLRB 654 (1973)). In *Gregory*, the Board, after finding the driver in question had falsified his application regarding previous discharges and a 'drinking problem', concluded that he would not have been hired had he answered truthfully. It denied the driver reinstatement (and, apparently, backpay, though backpay is not specifically mentioned). *Gregory*, however, was overruled on that very point by *Cuneo*, supra.

As *Cuneo* observes, entirely denying backpay may be seen as an undeserved benefit for an employer who has an obligation to satisfy the public interest in remedying the unfair labor practice which has been found. At the same time, the Supreme Court's concern about rewarding false testimony, set forth in *ABF Freight*, supra, commands attention and cannot be ignored.³¹ Indeed, even though *ABF Freight* itself approved the Board's reinstatement and backpay order, the Board there at least had an opportunity to hear a fully litigated case of discrimination for it did not arise for the first time at the compliance stage. In *ABF Freight*, the Board found the employee's misbehavior to be merely an excuse for the discrimination visited upon his union organizing efforts. The Board's choice of remedy is therefore perfectly understandable, and the courts reviewing the remedy could see that the employee's prevarications were of secondary importance, and not based upon the employee's qualifications for initial hire. That circumstance may be easily contrasted to Robinson who actively misled Ryder/ATE into hiring her by concealing her disqualifying conviction and who later compounded the false statements before me.

³¹ The Board will not reward false testimony in backpay cases where the discriminatee has deliberately concealed interim earnings. *Ad Art*, 280 NLRB 985 (1986).

Therefore, I must construe *Cuneo* in light of *ABF Freight*, and strike a balance between the two extremes. *Cuneo* provided a limited backpay remedy which, due to timing factors, does not lend itself to Robinson's circumstances. In *Cuneo*, the Board cut off backpay as of the moment it found that the Employer learned of the employee's disqualifying background.

5 Application of the rule in the instant case, however, would fail to provide any balance because Robinson would then be entitled to the full backpay set forth in the specification since Respondent did not learn of her disqualifying background until the backpay hearing, well after the backpay period had ended. Such a remedy would reward not only her false application, but her false testimony as well and, in my opinion, offends *ABF Freight*.

10

It is clear to me that Robinson would not have been hired had she revealed her second degree robbery conviction to Ryder/ATE at the time of her hire. I reach that conclusion because even though not all convictions would bar an applicant from employment, Ryder/ATE, as a common carrier, has a heightened duty of care to protect its passengers. California Civil Code §2100.³² It would no doubt be subject to liability for negligently hiring an employee if it knowingly hired a violent felon who later committed an intentional tort or crime while on duty. And, while it may well be that Robinson does not constitute that risk, or that she may no longer offer that risk, by lying on her application Ryder/ATE never had the opportunity to assess or vet her regarding the question. I therefore conclude that Ryder/ATE would not have hired her if it had known the facts. She was a felon who had falsely concealed her background at the time of her hire.³³

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Therefore, I will issue a limited backpay remedy for Robinson. The remedy will provide backpay for a reasonable amount of time deemed to equal the time it would have taken for Ryder/ATE or Respondent to have learned of her criminal background and her deception about it. To be sure, such a determination is only an estimate, but the public interest to be satisfied is of more importance than her private loss.³⁴ Accordingly, I find it reasonable to conclude that her backpay period should be only 1 year in length. Therefore, I conclude that Robinson's backpay period begins on May 19, 1997 and ends on May 18, 1998. Her backpay is calculated according to the following chart:

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³² The statute states: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." See also *Allen v. Matson Navigation Co.*, 255 F.2d 273 (9th Cir. 1958), applying this statute.

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³³ In reaching this conclusion, I have followed the same methodology seen in *Cuneo* and *Gregory* which was not reversed on this point.

45

³⁴ In *Clayton Willard Sales*, 126 NLRB 1325, 13216-27 (1960), the Board said: "The remedy of reinstatement and backpay is not a private right, but a public right granted to vindicate the law against one who has broken it. Its object is to discourage discharges of employees contrary to the statute and thereby vindicate the policies of the National Labor Relations Act. The statute authorizes reparation orders, not in the interest of the employees, but in the interest of the public. They are not private rewards operating by way of penalty or of damages." [Internal footnotes omitted.]

Year/Quarter	Gross Backpay	Interim Earnings	Net backpay	
1997 Q2	2016.96	0	2016.96	
1997 Q3	4370.08	0	4370.08	
1997 Q4	4643.00	0	4643.00	
1998 Q1	4779.78	0	4779.78	
1998 Q2 ³⁵	2389.89	3037.20	0	
			15,809.82	Total Net backpay

10 For the backpay quarters provided here, Respondent makes no significant contention that Robinson failed in her duty to mitigate. Therefore, the revised calculation will stand. Robinson's net backpay is \$15,809.82.

15 Deborah Sleets

Deborah Sleets is the subject of a modified backpay specification submitted by the General Counsel. The modification is based on Sleets's testimony that she removed herself from the job market at the end of 1999. As modified, the backpay period begins on May 20, 1997 and terminates with the last quarter of 1999.

20 Respondent makes three principal arguments. First, it asserts that Sleets was a probationary employee having no reinstatement right. Second, she had failed to report a felony conviction on her job application. And, third, she unjustifiably quit an interim employer, Roesch Transit, and thereby forewent about \$17,000 in interim earnings.

25 As for Sleets being a probationary employee, I find the argument has no merit as previously discussed. As for the failure to report the felony, the evidence is somewhat thin on the point. Sleets was not directly asked about any unreported felony. She only knew that an interim employer, Laidlaw at El Monte, had let her go after a short time, saying there was a problem with her fingerprints.

30 In her Ryder/ATE application form, where she sought work as a dispatcher, not a driver,³⁶ she stated that she had been convicted of some kind of felony relating to a child custody matter after having been beaten by her husband. She did not say when that occurred, nor did she admit to exactly what crime she was convicted. On the record, counsel referred to it as domestic violence, but that does not adequately describe it. Even so, the conviction apparently did not bar her from becoming a Ryder/ATE dispatcher. Indeed, Assistant General Manager Salvador Garcia said that crimes of that nature were given consideration, and were not always a bar.

40 However, when Garcia began to testify about Sleets, Respondent's counsel made an offer of proof concerning a different conviction which counsel represented as having occurred in 1987. This, he said, was for carrying a concealed weapon, a loaded firearm 'filed at the Culver City, California Courthouse, Case No. CC-87M01019-01.' At the same time, he represented

³⁵ The figures in this row are derived from calculating the weekly pay rate from the quarterly figures set forth in Appendix C-30 and multiplying it by 6-½ weeks, the end of the revised backpay period.

³⁶ Sleets worked as a dispatcher only for a short time. She was a driver when she was discharged.

that he knew the domestic violence conviction occurred 2 years after that, in 1989. The General Counsel counters that Sleets may have possessed the weapon to defend herself from the abusive husband.

5 None of this, however, constitutes proper evidence. It was only an offer of proof and a rejoinder. Unlike the Robinson situation, no certified copy of the conviction was presented, but more importantly, Sleets was never given the opportunity to say anything about the matter. Furthermore, Garcia could only testify that in his opinion, had he known of the firearm conviction at the time Sleets sought employment, she would not have been hired. I must regard Garcia's
10 testimony here to be one of 20/20 hindsight.

 Among other things, we cannot be sure of what crime(s) Sleets was convicted or when. The record is too sparse to make that determination. Sleets's child custody matter may not even have been a felony. She seems to think it was, because she checked the 'yes' box, but even
15 so, these are often only misdemeanors. Neither do we know their official disposition. Convictions not resulting in physical injury are frequently abated in some fashion and later expunged. (In California the procedure is commonly called 'summary probation.')37 Or, if it is a juvenile offense, it may be sealed and the defendant may have no obligation to reveal it.³⁸ Even Respondent must concede that whatever the offenses, these incidents occurred 8-10 years
20 before her hire.

 Frankly, this matter, unlike Robinson's situation, does not appear to fall into the disqualification-from-employment category. Robinson's conviction was for robbery, a crime against persons. Sleets's crime, if the offer of proof were to be accepted, was a concealed
25 firearm. It does not appear to have been a crime against any person. Given the fact that Ryder/ATE's application form assured applicants that felonies were not automatic bars to employment, it seems that there is at least some likelihood that she would have been hired anyway. More importantly, Respondent's unwillingness to confront Sleets over this matter suggests it knew her explanation may well have undercut their argument. As things now stand,
30 Respondent has not provided sufficient proof that Sleets's application was fraudulent. Accordingly, Respondent's argument is unpersuasive.

 As for its last contention, that Sleets quit an interim employer without good reason, the facts are fairly straightforward. Within 2 or 3 months of her discharge by Ryder/ATE, Sleets,
35 who lived in Ontario, began seeking work. She was initially hired by Laidlaw at its El Monte yard, but was not retained due to the background check. Laidlaw did not give her any specific information concerning the dismissal which she thought was curious, because she had earlier worked for a Laidlaw operation in nearby Upland without any such issue arising. Thereafter, she sought and obtained work with limited success through a temp agency, Apple One. She
40 then sought work in San Bernardino with Roesch Lines, a bus company contracted to a transit district in that city. Roesch employed her without concern for her background (even though it is well-known to be yet another Laidlaw subsidiary). At this point, Sleets determined that it was best for her and her two small children to find less expensive lodgings and she moved to the Victorville area though she continued to drive for Roesch. This involved a daily commute of
45 about 40 miles and proved to be too much of a hardship, given her status as the single mother of two small children. She decided to seek work in the Victorville area instead, so she quit Roesch.

³⁷ See generally Cal. Penal Code §1203.4 (2004).

³⁸ See generally Cal. Welf. & Inst. Code §1772 (2004).

Contrary to Respondent, I find that her quit was reasonable in the circumstances. Indeed, she eventually sought comparable work from Forsythe Lines in the Victor Valley area. Forsythe was a contractor to the public transit agency there. She also sought work with the City of Victorville and a fast food restaurant. She was hired as a trainee by Forsythe but her training officer told her she would not pass the test, so she decided that further pursuit was fruitless. She participated in the GAIN program as a condition of public assistance; that program required her to seek work. She also sought to make a living as a hairdresser working from her home. She did have some income from social security due to the death of the father of one of her children and had assistance under the Aid to Families with Dependent Children program, but this does not seem to have deterred her from seeking to earn income from other sources.

Under these facts, I am unable to conclude that Sleets removed herself from the job market until the end of 1999 as recognized by the General Counsel. Accordingly, I find that the amended backpay specification, Appendix C-31, in the record as G.C.Exh. 12, is correct. Under that specification, Sleets is entitled to the full amount, \$41,495.64.

Daphne Thomas

Daphne Thomas's backpay period begins on June 27, 1997 and ends on May 3, 2002. During this period Thomas was unable to work during a pregnancy and the backpay specification has accounted for this time by making appropriate adjustments for the November 1998-July 1999 time frame. Respondent contends that Thomas unnecessarily quit working for an interim employer and therefore failed to properly mitigate the backpay claim.

The facts are straightforward. Shortly after Ryder/ATE fired Thomas for breaching the illegally imposed attendance policy, her husband's employer transferred him, on a temporary basis, to a project in Tulare, California, a medium-sized city in the Central Valley with about 44,000 residents. It is located over 200 miles from Thomas's home in Fontana. She testified that had she found employment near home, she probably would have remained at home; indeed, before leaving with her husband she had started to look for work near Fontana, signing up with two temp agencies, an employment agency and registering with the EDD. The remainder of her family continued to live in the Los Angeles area, but there was no reason for her not to join him since his Tulare job was not permanent.

While in Tulare, the couple lived in a motel. There she applied for bus driving work at Visalia Transit (located 15 miles from Tulare) and registered with the EDD in that area. Tulare had its own transit system and she eventually obtained on-call driving work with that agency, "Tulare Transit."³⁹ She continued to be in touch with her contacts in the Los Angeles area, and as her husband's job ended in Tulare, she utilized those contacts to arrange for immediate employment with Laidlaw in El Monte in December 1997.

Respondent makes a technical argument regarding these facts. It asserts that the General Counsel failed to adduce any evidence that Thomas's decision to quit the Tulare Transit job was reasonable and that therefore her backpay should be cut off as of the date of her resignation from Tulare Transit.

³⁹ There are two similarly named transit agencies in Tulare, the city-operated Tulare Transit Express and the county-operated Tulare County Transit. Thomas was not as specific as she might have been on the point.

However, I find that the circumstances carry self-evident proof of its reasonableness. Their home was in the Los Angeles area. When her husband's short term job in Tulare ended, they both expected to return to that home. Indeed, Respondent's argument would have the Board require Thomas to remain in Tulare while her husband returned to the family residence.
5 This argument borders on the silly.

10 She took the Laidlaw job with the idea that it would be permanent, but she was terminated from Laidlaw after having a disagreement with a supervisor concerning the wearing of earrings on the job. She had no attendance issues, but shortly after the disagreement, she called in to advise she would be late for work that day. The supervisor told her if she could not come on time, she couldn't come at all. She was fired that day, even though it was her only attendance transgression.

15 Respondent, as an addition to the Tulare quit argument, asserts here that Thomas did not do enough to maintain her job and that backpay should end at this point if not stopped when she quit the Tulare Transit job.

20 Again, I disagree. A backpay claimant is not barred from backpay unless she willfully removes herself from interim employment by gross misconduct. *Ryder Systems*, supra. Whether Laidlaw treated her fairly or not under its own employment system, it is clear that Thomas engaged in nothing approaching gross misconduct. She had committed no attendance violations until that day, and even then was not a 'no call, no show' absentee. Respondent's argument here is misplaced.

25 Thomas continued to seek and find employment throughout the remainder of her backpay period. Taken as a whole, it is clear that she actively sought interim employment and, for the most part, succeeded. Respondent has not demonstrated that the backpay calculation for Thomas is unreasonable. Accordingly, I find that Thomas is entitled to backpay as calculated in Appendix C-32. That figure is: \$51,971.66.

30 James P. Thornton

35 Respondent has advised in its brief that it does not dispute the backpay for James P. Thornton as set forth in Appendix C-33. Thornton's backpay period begins on June 30, 1999 and ends on January 23, 2002 when he was reinstated. The specification sets his net backpay at \$27,152.49.

Brent Turner

40 Respondent has advised in its brief that it does not dispute the backpay for Brent Turner as set forth in Appendix C-34. Turner's backpay period begins June 7, 1997 and ends on May 3, 2002. The specification sets his net backpay at \$34,571.76.

45 Maria Velasquez

Maria Velasquez was one of the named employees in the underlying unfair labor practice proceeding and was found to be a victim of the illegally imposed attendance program. Velasquez's backpay period runs from December 6, 1997 to January 23, 2002. Her backpay specification, Appendix C-36, has already accounted for some periods where she was not in the job market due to school attendance, a disability due to a difficult pregnancy, and a decision to withdraw from the job market to tend to her infant.

Respondent preliminarily asserts that because Velasquez quit a job on October 17, 1998 with Cames Security after her pregnancy-related disability period ended, it is entitled to an interim earnings offset at the Cames's rate from that date until she obtained a higher interim earnings rate. Clearly, however, her decision to quit was reasonable. The job, security monitor, certainly was not equivalent to bus driving; moreover, it was a graveyard shift where she was obligated to work alone. Still pregnant and feeling the residual effects of her previous difficulties, she realized that if she were to fall ill, there would be no one around to help. Her decision to quit that job was certainly reasonable. Even if Respondent's argument were to be accepted, it would only have applied to the remainder of the quarter since she chose not to work during 1999, and it appears that the Cames's rate would later be exceeded in quarters beginning in 2000.

Respondent's principal objection to the specification is its belief that beginning with the 1st quarter of 2000, Velasquez became a full-time student, attending classes at Mt. San Antonio College as she began to realize that a bachelor's degree was a realistic goal. She later transferred to Cal Poly Pomona and at the time of the hearing, was on track to graduate with her bachelor's degree in December 2005.

In any event, in January 2000, supported by the GAIN welfare-to-work program, Velasquez embarked upon her college career full-time. She had earlier demonstrated to the GAIN program, as a part-time student beginning August 1999, that she was a good candidate for support. As a result, she was enrolled in a work-study program which allowed her to be both a student and an employee. Under the program, GAIN paid 75% of her wages at two different jobs: Marcia's Family Day Care Center (from 3 p.m. to 4 or 5 p.m.) and the Community College Foundation which hired her as a tutor in the evenings. She went to school 20 hours per week and worked the two jobs for a total of 20 more hours per week. This arrangement continued until the semester ended in June. At that point the Community College Foundation hired her as a regular employee. Until the end of her backpay period she continued as a tutor for the Foundation, even becoming a master tutor as she completed her tenure at Mt. San Antonio College. During the entire time, however, she still looked for work which she intended to fit into her school schedule.⁴⁰ In February 2001, for example, she applied to the City of Pomona as a dispatcher. She also maintained her Class B drivers license with passenger endorsement and was on the lookout for driving jobs, usually to drive students on an overnight program. This did not pan out.

I am of the view that Respondent's argument concerning Velasquez is unpersuasive. It asserts that beginning in January 2002, when she became a full-time student, she removed herself from the job market and is entitled to a finding that her backpay period ended at that time. I disagree. Respondent has not demonstrated that she removed herself from the job market; indeed, she was able to find part-time work in the range of 20 hours per week (all of which serves here as interim employment). Furthermore, she did seek work as a full-time employee with the City of Pomona, but without success. Respondent's argument is therefore rejected. Cf. *Lord Jim's*, 277 NLRB 1514, 1515 (1986) (backpay granted to full-time student when she testified she could have continued to work hours comparable to those before the discharge); *Sargent Electric Company*, 255 NLRB 121, 123 (1981) (a part-time student going to school from 6-10 pm and working an 8-hour shift did not withdraw from the labor market).

⁴⁰ Her connection to the GAIN program and to the community college gave her access to child care support during this time frame.

Accordingly, I find the backpay specification set forth in Appendix C-36 to be an accurate assessment of Velasquez's net backpay: \$32,141.06.

Michelle Woods

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Respondent has advised in its brief that it cannot cite any specific instance where Michelle Woods breached her duty to mitigate her backpay as set forth in Appendix C-37. Accordingly, it concedes that the specification is correct. Woods's backpay period begins on June 3, 1997 and ends on January 23, 2002. The specification sets her net backpay at \$54,881.28.

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Jana Farrage

Jana Farrage was scheduled to testify at several points during the hearing. She never appeared and no explanation was really proffered; both counsel for the General Counsel and Respondent were aware that it was unlikely she would come to the hearing. Nevertheless, the parties have stipulated that her backpay was for a period of suspension, rather than a discharge and that her backpay totals \$372.58, as set forth in Appendix C-10.

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Conclusion

The liquidated net backpay for each of the employees discussed here is set forth in the chart.

Name of Backpay Claimant	Net Backpay
Clide Aaron	16,210.13
Patrice Benemie	33,300.77
Frances Carmona (Lemos)	49,747.27
Raymond Coletti	25,611.89
Robin Corral (Delgado)	29,399.59
Donald Duplessis	97,877.32
Pamela English (Potts)	11,902.56
Robert Giles	21,786.41
Cheryl Harris	29,228.08
Danielle Hasberry	26,953.66
Lonnell Horn	31,624.83
Mary Hyemingway	23,971.51
Lola Joyner	30,825.28
Elbert Kellem	43,479.83
Edwin Lear	33,076.57
Juanita Madden	4,882.42
Natasha McQueen née Warren	36,552.64
Leo Mitchell	951.01
Marta Perez	11,081.91
Cheryl Ramirez	23,487.85

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	Joyce Robinson	15,809.82
	Deborah Sleets	41,495.64
5	Daphne Thomas	51,971.66
	James P. Thornton	27,152.49
	Brent Turner	34,571.76
	Maria Velasquez	32,141.06
10	Michelle Woods	54,881.28
	Jana Farrage	372.58
	Total Net Backpay	\$840,347.82

15

Some loose ends remain. They must be left to further proceedings as necessary. These include the stipulated omission of the missing or deceased claimants José Avalos (deceased), Denny Benavides, Shawn Howell, Ike Johnson, Marcus Nelons, Valerie Pedraza and Tyrice Turner. Furthermore, it should be understood that the total backpay figure shown below does not include interest. The compliance office will calculate interest for each claimant separately using the formula set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and *Florida Steel Corp.*, 231 NLRB 651 (1977).

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Finally, the specification as it relates to Tom Montoya and Cindy O'Neal is DISMISSED.

The total backpay liquidated by this supplemental decision ⁴¹ is:

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\$840,347.82

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James M. Kennedy
Administrative Law Judge

Dated: July 29, 2005

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⁴¹ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusion and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA**

**FIRST TRANSIT, INC.,
Successor with Liability to
RYDER/ATE, INC.**

and

Cases 21-CA-32146
21-CA-32285

**WHOLESALE DELIVERY DRIVERS,
SALESPERSONS, INDUSTRIAL AND ALLIED
WORKERS, LOCAL 848, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO**

SUPPLEMENTAL DECISION

**James M. Kennedy
Administrative Law Judge**

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