Allied Lettercraft Company, Incorporated *and* Local 1, Amalgamated Lithographers of America, affiliated with International Typographical Union, AFL-CIO. Case 2-CA-7724

24 June 1986

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND BABSON

On 30 August 1985 Administrative Law Judge Raymond P. Green issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision and a brief in answer to the Respondent's exceptions.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Allied Lettercraft Company Incorporated, New York, New York, its officers, agents, successors, and assigns, shall pay Victor Ramos $10,472, plus interest, less required Federal and state tax withholdings and less any unpaid loans made to him by the Respondent.

[1] The Board's original Decision and Order is reported at 272 NLRB 612 Member Babson notes that he was not on the Board when the underlying unfair labor practice case issued

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

[3] Under the analysis set forth in his dissent in *Ad Art, Inc.*, 280 NLRB No 114, issued today, Chairman Dotson would deny backpay in this proceeding on the basis of the claimant's attempted concealment of interim earnings

Leonard Grumbach, Esq., for the General Counsel
Samuel Rosen, Esq., and *Andrew Hoffman, Esq. (Milgrim, Thomajan, Jacobs & Lee)*, of New York, New York, for the Respondent.
George Cambria, of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This backpay proceeding was heard by me in New York, New York, in March and April 1985. The case arises out of a Board decision at 272 NLRB 612 (1984) in which the Board, inter alia, ordered the Respondent to make whole Victor Ramos and Paul Giamo for any loss of earnings they may have suffered by reason of the discrimination against them. Thereafter, Respondent executed a stipulation whereby it waived its rights under Section 10(e) and (f) of the Act insofar as court review was concerned. Respondent did, however, reserve the right to contest, in a hearing before an administrative law judge, the amount, if any, of backpay due to the discriminatees. A dispute having arisen concerning the amount of backpay owing, the Acting Regional Director issued a backpay specification and notice of hearing which was subsequently amended at the hearing.

At the outset, it is noted that at the opening of the hearing the General Counsel amended the specification to delete any backpay claimed for Paul Giamo inasmuch as that individual failed to cooperate in the backpay investigation. As that amendment was unopposed and as Giamo did not appear at the hearing, I granted the General Counsel's motion.

I also note that certain stipulations were made concerning the gross backpay figures relating to Ramos. First, it was stipulated that Ramos, if he had remained employed by the Respondent, would have received a 15-percent raise on 1 July 1981, and an 8-percent raise in each of the two succeeding years. Second, it was stipulated that during the period 1981 through 1983, Ramos would have averaged 1.6 hours per week overtime in 1981; .90 hours per week overtime in 1982; and .88 hours per week overtime in 1983. In view of these stipulations, the General Counsel, as part of his brief, modified the gross backpay figures which are not contested by the Respondent.

I also note, before turning to the major issues in this proceeding that the General Counsel, as part of the backpay specification, set forth certain interim earnings of Ramos. In some instances the interim earnings in a given quarter exceed the gross backpay claimed. Accordingly, the General Counsel's position regarding the backpay claim in light of the stipulations described above and the conceded interim earnings can be set forth in the following table:[1]

Period	*Gross Backpay*	*Interim Earnings*	*Net Earnings*
1980(4)	$676	$0	$676
1981(1)	3601	300	3301
1981(2)	3601	300	3301
1981(3)	4134	3914	220
1981(4)		1	
1982(1)		1	
1982(2)		1	
1982(3)		1	
1982(4)	4030	2821	1534
1983(1)	4342	4077	265

Period	Gross Backpay	Interim Earnings	Net Earnings
1983(2).....	4342	2947	1395
Total Net			$10,692

[1] Exceed gross.

The Respondent makes the following contentions.

(1) That Ramos made an agreement directly with the Respondent to accept the sum of $6500 in settlement of his backpay claim.

(2) That the General Counsel should be estopped from seeking backpay after 1981 because the Regional Office's representative allegedly asserted to Respondent's counsel that the Region was not seeking backpay after 8 or 9 months following Ramos' layoff.

(3) That Ramos failed to mitigate backpay.

(4) That Ramos incurred a willful loss of earning because of his resignations from certain interim employers and because he was terminated for cause by certain interim employees.[1]

(5) That Ramos willfully concealed certain interim earnings and therefore should be precluded from receiving any backpay.

Although the Respondent asserted in its answer that Ramos should be denied backpay "under the principles of release and accord and satisfaction," this argument was not pursued in its posttrial brief. Therefore, it is my impression that the Respondent is not pursuing this contention which, in any event, I would conclude to be without merit.

The record shows that after the Board's decision, but prior to the issuance of the backpay specification, Daniel Cantalmo, the Company's president, met with Ramos in late November 1984 and offered Ramos a sum of money to settle the potential backpay liability. At the meeting, Ramos and Cantalmo arrived at a figure of $6500, payment of which was conditioned on the Regional Director approving Ramos' requests to withdraw that portion of the charge as related to his discharge. Subsequently, Ramos sent a letter to the Regional Director requesting permission to withdraw the charge insofar as it related to him. The Regional Director, however, refused to approve the withdrawal request because, in his view, the settlement was for less than 50 percent of the probable backpay due and owing. As a consequence, no money was ever paid by the Respondent to Ramos[2] and the "settlement," being conditioned on the Regional Director's approval of the withdrawal request, never came to fruition.

In view of the facts outlined above, it seems to me that no settlement was ever consummated between the Respondent and Ramos inasmuch as a condition of the settlement was never met (i.e., approval by the Board's Regional Director of a request to partially withdraw the charge). In the first place, it is doubtful if Ramos had the power to request the withdrawal of any part of the charge because he was not the charging party. Secondly, the Regional Director is accorded a great deal of discretion whether to approve a withdrawal request and may refuse to do so if he legitimately believes that the withdrawal of a charge would be contrary to the public interest. In either event, as the purported settlement was conditioned on the approval of such a withdrawal request, and as approval was not given, the settlement, by its terms, never came into being.

The Respondent next asserts that Ramos should be denied backpay subsequent to the third quarter of 1981 because of certain representations made by Regional Office personnel. More specifically, Rosen, Respondent's counsel, contends that in a phone call with the compliance officer's secretary, in late October 1984, she confirmed "that the period of backpay sought by the Region was limited to the nine or ten months following Ramos' layoff." He asserts that, in reliance on this confirmation, he advised his client and his client agreed to sign a stipulation wherein the Respondent waived its rights of appeal pursuant to Sections 10(e) or (f) of the Act.

Rosen testified that during the trial of the underlying case (in October 1981), the General Counsel represented that the limit of backpay for settlement purposes would be 9 or 10 months because Ramos had been out of work for that period of time.[3]

As noted, the Board's decision issued on 28 September 1984. Soon thereafter, the Regional Office sent a letter asking if Respondent was willing to comply with the Board's Order. On 8 October Rosen sent a letter to the Regional Director which stated, inter alia;

> In this regard, your office had advised us over a year ago that the gross back pay claimed for Ramos was approximately $10,000; that he had been unemployed for nine months after his layoff but that thereafter, he obtained employment and continued to enjoy same. Please submit to us, a back pay specification for Ramos showing the gross back pay claimed for each quarter, together with deductions therefrom for interim earnings and/or failure to mitigate. Assuming the facts given us by your office in the past continue to be operative, we will proceed to comply with the Order and will either accept your back pay specification or request a hearing. Incidentally, if there is any information by way of financial records that you need, please advise in writing as quickly as possible and we will comply.

On 26 October Rosen caused another letter to be sent to the Region in response to the Region's proposed stipu-

[1] The General Counsel concedes that the backpay period would, under any circumstance, be cut off on 13 November 1984 when Ramos was offered reinstatement. She also concedes that, as a practical matter, backpay does not go beyond the second quarter of 1983 because, after that time, Ramos' interim earnings exceeded gross backpay.

[2] It appears that at the meeting between Ramos and Cantalmo, the latter lent Ramos $75, which had not yet been repaid as of the time of this hearing

[3] As Ramos at the time of the underlying trial had been out of work for only 9 or 10 months and had gotten a job shortly before the trial, it is not surprising that the General Counsel at that time was willing to settle the case on the basis of backpay for 9 or 10 months.

lation waiving Respondent's right to court review. The letter stated:

> As you may recall, we attempted to settle this matter about two years back. At that time, we were told that Ramos had been unemployed for about nine or ten months after his discharge but that he then obtained employment and had and was continuing to work. Obviously, this is an important factor because in waiving Circuit Court's review, we would like a handle on our potential back pay liability. I am not asking you for any back pay specification or estimate at this time. Rather, I am only asking that you confirm that Ramos continues to be employed and that the period for which back pay is due is basically, 1981.

According to Rosen, soon after sending the above-noted letter, he had a telephone conversation with a Vespole who he claims described herself as the compliance officer's assistant. (In actuality she is the compliance officer's secretary).[4] According to Rosen, Vespole verbally confirmed his 26 October letter that the only period of backpay is 9 or 10 months following the layoff. He states that based on her verbal confirmation, he advised his client to waive court review because the money for this period of backpay did not warrant incurring further legal expenses.

In relation to the above, Vespole testified that in response to the compliance officer's request, she called Rosen's office, spoke to someone, and left the message that Ramos continued to be employed. She denies speaking directly to Rosen and denies that she told anyone at his office that the backpay period was only for 1981.

On 2 November Rosen forwarded another letter to the Compliance Officer stating:

> Based on the information supplied to us by Vespole of your office—that Ramos continues to be employed and that the only period of complete unemployment we are dealing with in backpay is the nine or ten month period following his original lay-off—our client has determined to waive enforcement proceedings. Accordingly, I enclose herein an executed copy of the Stipulation you forwarded to us earlier this month.[5]

According to Vespole when she opened this letter and read it, she wrote a memo to the file because Rosen's representation of his conversation with her was not accurate. In any event, the Region did not, after receiving Rosen's 2 November letter, make any response which confirmed Rosen's claim that he had been assured regarding the backpay period for Ramos. Indeed the next written communication by the compliance officer to Rosen dated 4 December 1984 made it quite clear that the Region was seeking backpay for Ramos through and including the fourth quarter of 1983. In response, Rosen wrote a letter dated 10 December 1984. Regarding Ramos, the only issue raised by Rosen in this letter is an inaccuracy regarding the date on which Ramos was offered reinstatement. No mention is made in this letter concerning the alleged "promise" by the Region to limit Ramos' backpay to 1981.

In my opinion, there is absolutely no basis either in fact or law for Respondent's argument that, based on Vespole's alleged representation, the Board should be estopped from granting backpay to Ramos beyond 1981. For one thing I credit, based on demeanor and the entire record herein, Vespole's testimony to the effect that she did not state that the Region was seeking backpay on Ramos' behalf for only a 9- or 10-month period. At most, she merely told Rosen or his office that as of October 1984, Ramos continued to be employed. Indeed Rosen's claim that Vespole told him that the only period of backpay was for only 9 or 10 months is negated by his letter which says something quite different and consistent with Vespole's testimony; to wit, that "Ramos continues to be employed and that the only period of *complete unemployment* we are dealing with in backpay is the nine or ten month period following his original layoff." (Emphasis added.)[6]

Further, even if I were to credit Rosen's testimony concerning his conversation with Vespole, I would still not cut off Ramos' backpay as the facts Rosen assert would not make out a legally viable defense. Thus, for example, in *Neeley's Car Clinic*, 255 NLRB 1420 fn. 1 (1981), the Board rejected a Respondent's contention that backpay should be tolled because it relied on certain representations made by the Region's compliance officer concerning the validity of the Company's reinstatement offer. In this regard, the general rule is that the Board is not bound by "informal or impersonal advice received by parties respondent from Board agents, especially when employee rights are violated pursuant to that advice." *Capitol Temptrol Corp.*, 243 NLRB 575, 589 (1979). See also *United Hydraulic Services*, 271 NLRB 107 fn. 2 (1984); *Galesburg Construction Co.*, 259 NLRB 722 (1981); *Clean & Shine*, 255 NLRB 1144 (1981).

Respondent's assertion that Ramos failed to mitigate backpay is also rejected. In this respect the record shows that after his discharge by Respondent, Ramos took a number of actions in an effort to find work. He registered with the New York State Unemployment Office which operates a referral service for out-of-work employees. That agency, however, was unable to offer or find employment for Ramos. He also registered with the hiring hall of the Charging Party. Unfortunately, at the time that Ramos was seeking referrals from the Union's hiring hall, there was a general decline in employment for pressmen and the Union gave first preference to persons who already were its members. The result, through

[4] Vespole has no legal training and no training about the legal issues in backpay cases

[5] It is noted that this stipulation executed by the Respondent states, inter alia, that there is no agreement between it and the Board concerning the amount of backpay and that Respondent therefore reserves the right to a backpay hearing before an administrative law judge It *does not* state that there is any agreement or understanding that Ramos' backpay would be limited to 9 or 10 months or any other period of time

[6] I note that Rosen, who has been practicing labor law in the New York area for about 16 years, holds himself out as an expert in this field of practice I also note that he has fairly regular dealings with the personnel at Region 2 of the Board

no fault of Ramos, was that he received his first job referral from the Union's hiring hall in August 1981, when he was referred to a company named Phillips Offset Co. Inc., some 8 months after his discharge in December 1980. As a result of his job at Phillips, Ramos then became a member of the Union and was more successful thereafter in receiving job referrals.

In addition to relying on the state unemployment agency and the Union's hiring hall, Ramos credibly testified that he responded to want ads in various newspapers either by calling or visiting prospective employers.[7] Indeed, during the backpay period, Ramos did obtain a number of jobs which were not referred to him by the Union. These included jobs at the Press Room (in 1981), A Touch of Class (in 1981), and RBL Printing (in 1982).

In backpay cases a discriminatee need only make reasonable efforts to find interim employment and is not held to the highest standard of diligence. *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420, 423 (1st Cir. 1968). Once the General Counsel establishes the gross backpay figure, the burden is then shifted to the Respondent to prove any dimunition of the gross backpay either by way of interim earnings, unavailability for work, or willful loss of earnings. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Thus, in *Oil Workers v. NLRB*, 547 F.2d 598, 602–603 (D.C. Cir. 1976), the court stated:

> The boundaries of the willful loss of earnings doctrine have been defined in subsequent opinions. Backpay may be reduced to the extent that the employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." The burden of proving such willful loss of earnings is always upon the employer.
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> The discriminatee is merely required to make "reasonable efforts" to mitigate his loss of income, and only unjustified refusals to find or accept other employment are penalized under this rule. An employee need not "seek employment which is not consonant with his particular skills, background, and experience," or "which involves conditions that are substantially more onerous than his previous position." He is not required to accept employment which is located an unreasonable distance from his home.
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> Efforts at mitigation need not be successful; all that is required is an "honest good faith effort." [Citations omitted.]

Respondent seems to imply that during the period that Ramos was receiving unemployment benefits, he sat back and enjoyed a vacation until those benefits ran out, whereupon he first began to look for work. I do not view this record as proving such a contention. For one thing, during the initial period after his discharge from Respondent, Ramos and his family were forced to move from their own apartment into an apartment with relatives. He also had to file for bankruptcy on 30 March 1980 leaving him without credit of any kind. During this period, Ramos, as an unemployed pressman in a depressed industry and with limited skills, was forced to work on the streets as a "street mechanic" from which he earned only about $100 per month. To my mind, this is hardly the portrait of someone who is enjoying a rest on the Government's unemployment insurance rolls. I therefore do not believe that Respondent has demonstrated that Ramos failed to look for work following his discharge by Respondent in December 1980.[8]

The Respondent contends that Ramos had a willful loss of earnings either when he quit various jobs or was discharged from certain jobs. I find no merit in these contentions.

Ramos' first job in the printing industry after his discharge by Respondent was at A Touch of Class. He worked at this company on a trial basis for 2 weeks, after which he was let go. The reason Ramos was not retained was because he was not viewed as having sufficient experience for the type of work done by this company. As there was no evidence that his discharge was caused by any misconduct on his part, but rather due to his relative inexperience, it cannot be said that Ramos was at fault and thereby caused a willful loss of earnings. *Fort Lock Corp.*, 233 NLRB 78, 80 (1977).

Ramos next obtained employment from the Press Room where he worked for a short while. (According to his social security records, he earned $382 at the Press

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[7] Respondent sought to offer into evidence a report from a private investigative company to the effect that it had Ramos under surveillance for a week and had not seen him leave his apartment to look for work This report was not offered through the persons who engaged in the surveillance, but rather through the president of the investigation agency who wrote the report, based on the observations of his employees. I rejected the report as hearsay despite the contention that it constituted a business record under Rule 803(b) of the Federal Rules of Evidence

As it is clear that this report was made for the purposes of litigation, it therefore lacks the necessary trustworthiness required by the rule to enable its introduction by the party responsible for the report's preparation. *Palmer v. Hoffman*, 318 U S. 109 (1943); *U.S v. Smith*, 521 F.2d 957, 966 (D C. Cir 1975).

[8] The Respondent subpoenaed certain search for work records which Ramos submitted to the New York State Department of Labor in connection with his unemployment benefits Although not making a formal motion to quash, the State Department of Labor advised Respondent's counsel in writing that disclosure of such records was barred by Section 537 of the State Labor Law When Respondent asked the General Counsel to enforce the subpoena, this was refused. Respondent now argues before me that Ramos should have been required to obtain these records from the State and his failure to seek their release should lead to an adverse inference in this case regarding his alleged search for work.

In my opinion, Respondent's arguments are without merit As a rule, the Board quashes subpoenas served on other governmental agencies when the disclosure is prohibited under applicable state law. *Herman Bros*, 156 NLRB 1419 (1965), enfd 360 F 2d 176 (6th Cir 1966); *Cushman Auto*, 109 NLRB 720 (1954), enfd 223 F 2d 832 (1st Cir 1955)

In this case the contention that Ramos should suffer an adverse inference on a material issue because a state agency did not respond to a subpoena which, in any event, would have been quashed on a timely motion, strikes me as being absurd Moreover, Respondent has not even shown that Ramos failed or refused to request the state agency to release the records in question In fact, the record shows that Ramos signed a form authorizing the State Department of Labor to release records to the Board's compliance officer and that the Region turned over to Respondent all such records as it had in its possession

Room during 1981.) He left this job voluntarily when the Union referred him to a job at a union shop called Phillips Offset Co. Inc. In quitting his job at the Press Room to take the job at Phillips, Ramos can hardly be said to have incurred a willful loss of earnings inasmuch as his wages at the latter were higher than at the former. *Laborers Local 1440*, 243 NLRB 1169, 1172 (1979). Of perhaps equal importance is the fact that once obtaining a job at an employer having a contract with the Union, Ramos could then become a union member and enjoy the full use of its hiring hall. This, in effect, enhanced rather than diminished Ramos' opportunities for future employment and therefore tended to increase his interim earnings.

Respondent asserts that Ramos was thereafter discharged for cause by Phillips. Although it is true that Ramos' employment at that company was terminated, the record herein does not show that it was due to misconduct on his part. Rather, the evidence shows that Phillips came to the conclusion that Ramos' experience and skill were not quite up to their standards. As such, I do not view his termination by Phillips as constituting a willful loss of earnings. *Sylvan Manor Health Care Center*, 270 NLRB 72 at 75 (1984); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1162, (1980), enfd. 683 F.2d 1296 (10th Cir. 1982).

The Respondent also asserts that Ramos quit jobs at RBL and Bravo Printing. However, as these events occurred in the third and/or fourth quarters of 1983, they are irrelevant because the General Counsel is not claiming backpay beyond the second quarter of 1983.

Respondent's final contention is that Ramos concealed certain of his interim earnings and therefore should be cut off from all backpay. In this respect, the Board in *American Navigation Co.*, 268 NLRB 426, 428 (1983), set forth certain criteria regarding this type of problem. In so doing the Board stated:

> We think that in fashioning a remedy in cases where a discriminatee has intentionally concealed employment from the Board, two matters must be considered: (1) the Respondent's liability for the consequences of its unlawful conduct, and (2) the Board's administration of its compliance proceedings consistent with the public interest. Each of these matters is equally important. As the Ninth Circuit reasoned in *Flite Chief*, supra at 993, to award full backpay to a claimant who attempts to pervert an order issued in the public interest into a scheme for unjustified personal gain is to reward perfidy. This hardly enhances the public interest or effectuates the Act. Yet, the Board holdings in *Big Three and Flite Chief* unintentionally achieve just such an inequitable result, and it is for this reason that these holdings must be overruled. We note that an award of full backpay in these circumstances not only rewards the specific individual's perfidy, but may also encourage deceit by others in the future, because claimants will know that they have nothing to lose by concealing employment. If the concealment is undetected, the claimant enjoys a windfall; if detected, he suffers no loss but forgoes only the amount of concealed earnings, an amount to which he was not entitled in any event.
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> On the other hand, to deny backpay in an amount that exceeds that which is necessary to deter deception is to provide a respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct for no useful purpose. We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices. This remedy will be applied of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings.

It is noted that a mere mistake in reporting earnings by a discriminatee will not serve to toll backpay as it is clear from the above that the Board will only cut off backpay for deliberate and perfidious misrepresentations. Also, the Board made it plain that it would cut off backpay only for any specific quarter in which the concealed interim earnings occurred. Thus, at footnote 6, the Board concluded that it would only "deny all backpay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception." It is further concluded that such a contention is in the nature of an affirmative defense which, like such defenses in all backpay cases, must be proven by the Respondent.

In Respondent's brief, counsel refers in his statement of facts to alleged misrepresentations by Ramos concerning interim employment as a street mechanic, at A Touch of Class, at the Press Room, at RBL, and at Bravo Printing. Yet in counsel's argument, he seems to rely only on the alleged failure to report earnings as a street mechanic and at A Touch of Class. In this respect, I note that even if Ramos failed to properly report interim earnings at RBL and Bravo, that would not affect the backpay award as those jobs were held in the third quarter of 1983, a period beyond which the General Counsel is seeking backpay. Regarding the Printing Press, as this job was held in the same quarter as his job at A Touch of Class, Ramos' failure to report the former would not affect the outcome of the case if he is disqualified during this quarter because of an improper failure to report the latter job.

The record shows that in late October 1984 (almost 4 years after Ramos had been discharged), the compliance officer of Region 2 sent Ramos a group of forms to be filled out in connection with his backpay claim. They were accompanied by a set of rather elaborate and complicated instructions. (See R. Exh. 4.) According to Ramos, when he received these forms he sought the aid of Union Representative George Cambria, who assisted him in completing the forms. Among other things, Ramos was advised to put in the jobs that he had obtained through the use of the Union's hiring hall which he did. (These numbered about 15 over a 3-year period). He left out, however, on these initial forms, the names of

companies at which he worked where the jobs had been obtained by means other than the Union's hiring hall. Thus, in his initial submission of forms, Ramos did not disclose his earnings as a street mechanic, at A Touch of Class, at the Press Room, at RBL, or at Bravo. (It should be noted that each of those jobs was of a relatively short duration and his work as a street mechanic barely fits the definition of employment.)

Prior to the issuance of the backpay specification on 26 December 1984, Ramos obviously disclosed his earnings as a street mechanic to the Regional Office as there is listed in the specification an item for miscellaneous interim earnings of $300 per quarter for the first, second, and third quarters of 1981. As Ramos testified that he earned about $100 a month by working with his cousin what amounts to a "fly by night" auto mechanic, these earnings are reflected in the miscellaneous earnings of $300 per quarter set forth in the specification. As such, it is clear to me that Ramos did not conceal these earnings as alleged by the Respondent.

A more difficult question relates to Ramos' 2-week employment at A Touch of Class in the third quarter of 1981. This job was not listed by Ramos on the form he filled out initially. Also, he adamantly denied ever working at this company when he was questioned at the hearing by Respondent's counsel. When Respondent then called a witness from A Touch of Class who testified to Ramos' employment there, Ramos was recalled by the General Counsel and suddenly recalled this employment. Although I can understand how it would be possible to forget a temporary job worked almost 4 years before and for which Ramos had no records (having worked off the books), it is noted that even when he was denying that he ever worked there, Ramos knew where the company was located and was familiar with the name of its owner. In effect, Ramos' explanation for not reporting this job was ultimately not that he forgot it, but that he was only employed on a trial basis. In this respect, I view with skepticism, Ramos' explanation for not reporting his job at A Touch of Class and conclude that Respondent has met its burden of establishing that he improperly concealed such earnings. As all these earnings occurred in the third quarter of 1981, I shall exclude that quarter from Ramos' backpay.

In view of all the foregoing it is my conclusion that the total net backpay for Victor Ramos, exclusive of interest, is $10,472. In the event that Ramos has not repaid the $75 loan made to him by Respondent in 1984, that amount shall be deducted from the net backpay figure.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Allied Lettercraft Company Incorporated, New York, New York, its officers, agents, successors, and assigns, shall

Make payment to Victor Ramos the sum of $10,472 plus interest less tax withholdings required by Federal and state laws and less any unpaid loans made to him by Respondent.

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[9] If no exceptions are filed as provided by Sec 102 46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes