

taurants of of Renaissance, and that we shall refrain from picketing for any purpose between 8 a.m. and 12 p.m. and 2:30 to 5 p.m., when deliveries are normally made.

FOR THE FOLLOWING AFFILIATES OF HOTEL & RESTAURANT
EMPLOYEES AND BARTENDERS INTERNATIONAL UNION,
AFL-CIO,

(1) LOCAL 89, CHEFS AND COOKS UNION OF N.Y.,
Labor Organization.

Dated----- By-----
(Representative) (Title)

(2) LOCAL 15, BARTENDERS UNION OF N. Y. C.,
Labor Organization.

Dated----- By-----
(Representative) (Title)

(3) LOCAL 1, DINING ROOM EMPLOYEES UNION,
Labor Organization.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Fifth Floor, Squibb Building, 745 Fifth Avenue, New York, New York, Telephone No 751-5500, if they have any questions concerning this notice or compliance with its provisions.

I. Posner, Inc., Posner Distributing Corp., and Posner Beauty and Barber Supply Corp.¹ and District 65, Retail, Wholesale and Department Store Union, AFL-CIO. *Case No. 29-CA-14 (formerly 2-CA-7270). August 3, 1965*

SECOND SUPPLEMENTAL DECISION AND ORDER

On October 30, 1961, the National Labor Relations Board issued a Decision and Order in the above-entitled case, finding that the Respondent had discriminated against certain named employees in violation of Section 8(a) (1) and (3) of the National Labor Relations Act, as amended.² Thereafter, the Board's Order was enforced by the United States Court of Appeals for the Second Circuit, and a decree was entered on July 3, 1962, against the Respondent.³ The decree provided, *inter alia*, that Respondent make whole the employees named therein for any loss of pay suffered by reason of Respondent's discrimination against them.

On December 21, 1962, the Regional Director for the National Labor Relations Board for Region 2 issued a backpay specification and the Respondent filed an answer and amended answers thereto. Upon

¹ Hereinafter referred to collectively as Posner or the Respondent.

² 133 NLRB 1567.

³ *N.L.R.B. v I Posner, Inc., et al.*, 304 F 2d 773 (C A 2).

appropriate notice issued by the Regional Director, a hearing was held before Trial Examiner James F. Foley for the purpose of determining the amounts of backpay due the claimants.

On August 15, 1963, the Trial Examiner issued the attached Supplemental Intermediate Report in which he found that the claimants were entitled to specific amounts of backpay. Thereafter, Respondent and General Counsel filed exceptions to the Supplemental Intermediate Report, and supporting briefs.

On February 17, 1964, the Board issued its Order reopening record and remanding proceeding to Regional Director for further hearing, in order that the Trial Examiner might issue certain *subpoenas duces tecum* applied for by the Respondent and for such further proceedings dealing with related matters as might become necessary.

Said subpoenas were issued and a hearing pursuant thereto was conducted by the above-named Trial Examiner on May 11, 12, 14, and 15, 1964. A further hearing was held on February 10, 1965, on Trial Examiner Foley's own motion.

On March 30, 1965, the Trial Examiner issued his attached Supplemental Decision and Recommended Order. Thereafter, Respondent and General Counsel filed exceptions thereto, and briefs in support of said exceptions.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Jenkins].

The Board has reviewed the rulings made by the Trial Examiner at the hearings, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Supplemental Intermediate Report, the Supplemental Decision and Recommended Order, the exceptions, and the briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified below.

1. For the reasons fully set forth in the Supplemental Intermediate Report and Supplemental Decision and Recommended Order, we adopt the Trial Examiner's recommendations concerning the backpay due discriminatees Ronald Bell, Robert Bell, Freddie Allen, and Gerald Mussenden.

2. The Trial Examiner recommended certain diminutions of backpay in the case of discriminatee James Johnson. Thus, in his Supplemental Intermediate Report, the Trial Examiner recommended a reduction of Johnson's backpay in the amount earned by another individual on a job secured through the Union hiring hall, which job Johnson presumably would have obtained had he been in attendance at the hiring hall on certain specified days early in April 1961. In his Supple-

mental Decision and Order, the Trial Examiner recommended a further reduction in Johnson's backpay for the period he was out of work, concluding that Johnson should have gone to the hiring hall three times weekly, rather than once and hence that 2 days' pay a week (or 40 percent) should be deducted from his net backpay for each week he was out of work with the exception of the period covered by the above-mentioned diminutions. We do not agree.

The record reveals that on February 23, 1960, almost immediately after the inception of the backpay period, Johnson secured a job through the aid of Union Organizer Doswell at the Pur-All Paint Products Co., Inc., where he worked until November 24, 1960, when he was laid off for lack of work. He was out of work for approximately 9 months until September 5, 1961, when through the Union, he was recalled by Pur-All, where he remained through the end of the backpay period.

During his period of unemployment, Johnson went to the New York State Unemployment Office each Thursday morning, and to the aforementioned Union hiring hall once or twice each week. Three times he was sent by the State to its employment office but was not dispatched to, or assigned, a job. He sought work at Roulette Records, Seaboro Trucking, and Ansonia Shoe Stores, and made inquiries about jobs through friends and a cousin. He visited, and on several occasions called, Pur-All to ask for work but was told that no work was available and that they would notify him through the Union when he might return to work.

All the circumstances bearing upon the adequacy of Johnson's search for employment must be evaluated against the Board's longstanding rule in these cases that "while the general burden of proof is upon the General Counsel to establish the damage which has resulted from Respondent's *established* discriminatory discharge, i.e., the gross backpay over the backpay period, the burden of proof is upon the Respondent as to diminution of damages, whether from the willful loss of earnings by the failure to either look for or keep a substantially equivalent job or from the unavailability of a job at Respondent's plant for some reason unconnected with the discrimination."⁴ Upon careful examination of this record, we do find that Respondent has shown that Johnson acted unreasonably or that he willfully incurred loss of earnings during the backpay period in question.⁵ Accordingly, we find that Johnson made the necessary effort in his search for work and that he is

⁴ *Mastro Plastics Corporation, et al.*, 136 NLRB 1342, 1346.

⁵ We do not believe that such laxity appears from the fact that Johnson was not at the hiring hall on any specific day or that he did not utilize the hiring hall more frequently. See *Brown and Root, Inc., et al., doing business as joint venturers under the name of Ozark Dam Constructors*, 132 NLRB 486, 501, 540-543; *Bonnar-Vawter, Inc.*, 135 NLRB 1270, 1274.

entitled to backpay on account of the discrimination against him in the amounts set forth in the General Counsel's specifications, as amended, to wit:

GROSS BACKPAY			
1st quarter	2d quarter	3d quarter	4th quarter
1960			
\$248. 19	\$600 11	\$628 80	\$667 85
1961			
709 82	713 75	771. 36	373 27
LESS INTERIM EARNINGS			
1st quarter	2d quarter	3d quarter	4th quarter
1960			
217. 21	734 19	761 38	487. 77
1961			
000 00	20 30	230 72	421 28

Accordingly, on the basis of the foregoing facts, the Supplemental Intermediate Report, the Supplemental Decision, and the entire record in this case, the National Labor Relations Board hereby orders that the Respondent I. Posner, Inc., Posner Distributing Corp., and Posner Beauty and Barber Supply Corp., their officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding as net backpay the following amount: ⁶

Ronald Bell-----	\$1, 766. 80
Robert Bell-----	356. 78
Freddie Allen-----	807. 49
Gerald Mussenden-----	45. 55
James Johnson-----	<u>2, 154. 97</u>
	5, 131. 59

⁶ We further direct that the addition of interest at the rate of 6 percent per annum shall accrue from the date of this Order on the respective amounts that have herein been determined to be payable to each discriminatee. *Nassau and Suffolk Contractors' Association, Inc.*, 151 NLRB 972; *Isis Plumbing and Heating Co.*, 138 NLRB 716.

SUPPLEMENTAL INTERMEDIATE REPORT

STATEMENT OF THE CASE

On December 21, 1962, the Regional Director of the National Labor Relations Board's Region 2 issued a backpay specification in the above case alleging that I. Posner, Inc., Posner Distributing Corp., and Posner Beauty and Barber Supply Corp., herein collectively called Respondent, owed backpay to five employees adjudged discriminatees under Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), herein called the Act, by the Board on

October 30, 1961,¹ and the United States Court of Appeals for the Second Circuit on July 3, 1962.² Respondent filed an answer on January 14, 1963, and amended answer on February 6, 1963, and a later date.

A 9-day hearing on the backpay specification and last amended answer was held before Trial Examiner James F. Foley during the period between February 20, 1963, and April 5, 1963. General Counsel and his Regional Director and Respondent were represented by counsel. They and the Charging Party were afforded an opportunity to be heard, make oral argument, and file briefs. General Counsel and Respondent, by counsel, offered oral testimony and documentary evidence, examined and cross-examined witnesses, and made objections, motions, and oral argument. Counsel for General Counsel filed a brief after the close of the hearing.

FINDINGS AND CONCLUSIONS

I. PRELIMINARY FINDINGS

The five discriminatees for whom the General Counsel seeks backpay are Ronald Bell, Robert Bell, Freddie Allen, Gerald Mussenden, and James Johnson. The General Counsel seeks backpay for the period from February 23, 1960, to November 21, 1961. Respondent offered them reinstatement on November 21, 1961.³ The Board ruled in its decision (*supra*, at 1567, footnote 1) that the defense of replacement to the remedies of reinstatement and backpay was not available to Respondent at the compliance stage since it had not asserted it during the unfair labor practice proceeding. I read the decision of the Second Circuit (*supra*, at 774) as affirming this ruling.⁴ The Board did not decide whether the strike engaged in by these discriminatees from September 1, 1959, to February 23, 1960,⁵ was an economic strike or an unfair labor practice strike. However, in view of the Board's ruling that the Respondent is estopped from asserting the defense of replacement it is not material for the purposes of this proceeding whether the strike was an economic strike or an unfair labor practice strike.

Respondent is a manufacturer of cosmetics, a distributor of its own products and those of other manufacturers, an installer of beauty and barber equipment, and a supplier of beauty and barber materials. It manufactures cosmetics, those with a petrolatum base, such as hair greases and straighteners, and creams and liquids. On November 11, 1962, a fire destroyed the building in which Respondent manufactured. Since that time it has had its products made by other companies under contract.

II. THE BACKPAY SPECIFICATION

A. *The backpay formula*

General Counsel's specification alleges backpay due premised on a formula consisting of gross backpay by quarterly periods that the five discriminatees would have earned from February 23, 1960, the date when they would have returned to work,

¹ 133 NLRB 1567.

² *N L R. B. v I. Posner, Inc., et al.*, 304 F. 2d 773 (C.A. 2).

³ The Board found that these five employees were discriminated against in violation of Section 8(a)(3) and (1) of the Act by the refusal of Respondent to reinstate them upon their unconditional offer on February 19, 1960, to return to work on February 23, 1960. These employees had participated in a strike from September 1, 1959, to the date they offered to return to work. The strike was in connection with the efforts of District 65, Retail, Wholesale, and Department Store Union, AFL-CIO, herein called the Union, to organize Respondent's employees.

⁴ See also *I Posner, Inc., et al.*, 140 NLRB 1313.

⁵ The Board found discrimination against four employees in addition to those named in the backpay specification. The four others were Vernon Butler, whose interim earnings exceeded his backpay claim, and employees Morales, Moore, and Simpson. Respondent's reinstatement offer of November 21, 1961, included Morales but not Moore and Simpson. The Second Circuit did not enforce the Board's Order insofar as it related to Morales, Moore, and Simpson because of the Board's finding in a separate proceeding (133 NLRB 1555, 1562, 1564) that they engaged in misconduct during the strike. It remanded the case to the Board insofar as it affected these three employees to permit Respondent to assert the strike misconduct as a defense. The Board on the remand (140 NLRB 1313), found the misconduct a defense to the charge of discrimination for refusal to reinstate Moore and Simpson. Respondent did not claim Morales' misconduct as a defense to reinstatement.

to November 20, 1961, the date on which Respondent offered to reinstate them, less interim earnings in the respective quarterly periods of which General Counsel has knowledge adjusted by any expenses occurring in connection with the interim employment responsible for the earnings. General Counsel's position is that he had met his burden of proof upon proving the gross backpay due, and that it is the burden of Respondent to show diminution of damages, whether from interim earnings, willful loss of earnings by the failure to either look for or keep a substantially equivalent job, or the unavailability of a job at Respondent's plant for some reason unconnected with the discrimination. The interim earnings admitted by General Counsel are for the convenience of Respondent but not part of General Counsel's burden of proof.

Respondent attacks the formula with the contention that in addition to a showing of gross backpay due it should provide for the General Counsel assuming the burden of showing that the discriminatees were available for employment, that jobs were available for them at Respondent's plant, their interim earnings, and earnings that discriminatees would have received had they diligently sought employment and had been available for employment, and ready and willing to perform the same. Respondent relies on the Administrative Procedure Act⁶ to support its position.

This issue between General Counsel and Respondent can be disposed of at the threshold. It is clear from Board and Court decisions that the General Counsel has met his burden upon showing the gross backpay due. It is the Respondent's burden to furnish the evidence showing diminution of gross backpay whether by way of interim earnings, loss of earnings by willful idleness, unavailability of the discriminatees for interim employment, or unavailability of jobs in Respondent's plant for some reason unconnected with the discrimination.⁷ Moreover backpay may be computed on a quarterly basis.⁸

B. *The gross backpay*

General Counsel's specification alleges that the appropriate measure of the gross backpay of each discriminatee during the backpay period is the average of the earnings during the backpay period of general factory employees whose rate of pay at the beginning of the backpay period was the same as that of the discriminatee immediately prior to the strike, and who remained in Respondent's employment throughout the backpay period, and where there were no such employees, an appropriate measure is the average earnings of those general factory employees who were most nearly comparable to the discriminatee with suitable adjustments.

The gross earnings averaged by quarterly periods as gross backpay of Ronald Bell, a \$65-a-week employee, are the average gross earnings for the period February 23, 1960, to December 31, 1960, of employees Yberra and Kemp, who worked in Respondent's manufacturing department through 1960, and received \$65 a week at the beginning of the backpay period, and the gross earnings for 1961 up to November 20 of Gordon and Willis, general factory employees who worked throughout the backpay period and who received \$60 a week at its beginning, adjusted upward (by a factor of 104 percent) to reflect the higher weekly rate Ronald Bell was receiving when discharged. Yberra and Kemp were employed by Respondent for only a part of 1961.

The gross earnings for the backpay period averaged by quarterly periods as comparable gross backpay of Robert Bell, a \$60-a-week employee, are the average gross earnings of employees Gordon and Willis for the complete backpay period. As stated above, they received \$60 a week at the beginning of the backpay period and worked throughout this period. The gross earnings for the backpay period by quarterly periods alleged as the gross backpay of Freddie Allen are the gross earnings of employee Miranda, the only general factory employee receiving \$55 a week at the beginning of the backpay period who worked throughout this period. The averaged earnings of Yberra, Kemp, Gordon, Willis, and Miranda include increases and overtime, sick leave, and vacation payments.

The gross backpay showed by quarterly periods for discriminatees Johnson and Mussenden is based on earnings of \$50 a week employees averaging at least 13 weeks. They are employee T. Bell who worked only during the third and fourth quarters of 1960, employees Garcia and Montijo who worked during the third and fourth quarters of 1960 and the four quarters of 1961, employee Sanchez who worked during the fourth quarter in 1960, and the four quarters in 1961, employees Martin and Cuellar who worked during the four quarters of 1961, employees Pinero, Otero, and Gonzalez

⁶ 5 U.S.C. section 1006(e).

⁷ *Mastro Plastics Corporation, et al*, 136 NLRB 1342, 1346-1347, 1357-1358; *N.L.R.B. v. Brown & Root, Inc., et al*, 311 F. 2d 447, 454 (C.A. 8), and cases cited therein

⁸ *N.L.R.B. v. Seven-Up Bottling Company of Miami Inc*, 344 U.S. 344, 350-351

who worked during the third and fourth quarters of 1961, and employee Birch who worked only during the fourth quarter of 1961. These are the employees who worked during the backpay period at \$50 a week, and who worked an average of at least 13 weeks. Since Respondent had no \$50-a-week employees during the first and second quarters of 1960, the earnings of these employees for the first and second quarters of 1961 were used. They were the applicable portion of the 1961 first quarter earnings of Garcia, Montijo, Sanchez, Martin, and Cuellar,⁹ and the full 1961 second quarter earnings of these employees.

The average number of hours worked per employee per quarter was determined by computing the average number of hours worked in a week by the employees working in the particular quarter and multiplying this figure by the number of weeks in the quarter. These quarterly hours were multiplied by the hourly rate paid these employees in the particular quarter adjusted to reflect an increase of \$2.50 per week Johnson and Mussenden would have received both on July 1, 1960, and January 1, 1961, in view of length of service.

For the third quarter of 1960, Respondent paid employees Garcia, Montijo, Sanchez, and Martin, four senior \$50-a-week employees, who worked in that quarter, total sick leave payments amounting to \$89.01. General Counsel computed the average sick leave payment, which is \$22.25, and added it to the gross earnings for that quarter. Also included in the earnings of these comparables are payments for overtime worked in the third and fourth quarters of 1961. No vacation payments or increases are included as they did not receive any. As stated above, Johnson's and Mussenden's hourly rate premised on a \$50 weekly wage for 40 hours was adjusted to reflect the increases General Counsel contends they would have received in view of length of service.

By use of the formula outlined above, General Counsel arrived at the gross backpay figures alleged in the backpay specification as amended. They are as follows:

Name	1960			
	1st quarter	2d quarter	3d quarter	4th quarter
Ronald Bell.....	\$333 15	¹⁰ \$873 97	¹⁰ \$927 50	¹⁰ \$857 88
Robert Bell.....	302 63	784 13	841 00	811 25
Freddie Allen.....	275 14	785 18	773 00	780 00
Gerald Mussenden.....	248 19	648 86	676 77	673 88
James Johnson.....	248 19	648 86	676 77	673 88
	1961			
Ronald Bell.....	¹¹ 861 90	1,015 30	1,016 51	534 24
Robert Bell.....	828 75	976 25	977 42	513 66
Freddie Allen.....	777 00	874 88	765 35	477 76
Gerald Mussenden.....	305 77	0 00	414 33	396 65
James Johnson.....	709 82	713 75	769 43	¹² 396 65

C. The issues dealing with gross backpay

Respondent does not attack either the method of computing gross backpay for Ronald Bell, Robert Bell, and Freddie Allen or the method of computing it for John

⁹ The backpay period did not begin until February 23.

¹⁰ Ronald Bell's gross backpay figures for the second, third, and fourth quarters of 1960 were amended to correct a mechanical error. They show an addition of \$9.76 for the second quarter, and a reduction of \$9.76 for the third quarter and \$9.51 for the fourth quarter.

¹¹ This figure was reduced by amendment during the hearing (*infra*) to \$287.30 as Ronald Bell was unavailable for employment during January and February 1961.

¹² General Counsel was permitted to amend these figures for Johnson for the second, third, and fourth quarters of 1960, and the third and fourth quarters of 1961, to \$600.11, \$628.80, \$667 85, \$771.36, and \$373.27, to delete compensation for leave without pay during his interim employment over compensation for such leave for his comparables.

and Mussenden¹³ However, it contends that neither the discriminatees nor the comparables were general factory employees, and the latter were selected as comparables on the basis of their earnings only instead of on the basis of the same or most equivalent duties, that the employees selected as comparables are not comparables as their jobs during the strike and thereafter were in no way the same or equivalent to the jobs of the discriminatees immediately prior to the strike, and that increases, overtime work, and vacations were within the discretion of Respondent, and earnings premised on such factors should not have been included. Respondent admits that it compensated employees during reasonable periods of sick leave

D. Findings on gross backpay factors in issue

In August 1962, Compliance Examiner Altman, a Regional Office employee, visited President Hamilton Posner of Respondent in his office at Respondent's plant. Altman stated to Posner that the purpose of his visit was to secure evidence to enable him to make the backpay computations for employees whom the Board and the Second Circuit had held were discriminated against by Respondent. He explained to Posner that he computed backpay by using the earnings of employees comparable to the discriminatees in terms of skill or pay during the backpay period. Posner suggested to Altman employees as comparables to the discriminatees. He suggested Miranda for Robert Bell, Gordon for Ronald Bell, Martin nad Melendez for Mussenden and Johnson, and Presnow for Butler.¹⁴ He also offered Yberra and Kemp as comparables. The testimony does not show the discriminatee for whom the latter two were suggested by Posner. Posner suggested other comparables but neither the testimony of Altman nor Posner disclose who they are

Altman rejected Miranda as a comparable for Robert Bell as Miranda's weekly wage was \$55 while Bell's was \$60, and rejected Gordon as a comparable to Ronald Bell as Gordon's weekly wage was \$60 while Ronald Bell's was \$65. The rejection was proper. Obviously, if the public rights under the Act are to be vindicated the discriminatees have to be restored financially as near as possible to where they would have been had they not received discriminatory treatment at the hands of Respondent¹⁵ The use of Mirando and Gordon as suggested by Respondent would have been for the benefit of Respondent, the wrongdoer, rather than in behalf of the public's rights under the Act.

The General Counsel used Martin's earnings for computing gross backpay for Mussenden and Johnson under the Board's adjusted average hours formula, long established by Board and Court precedent¹⁶ to the extent that Martin worked during the backpay period. I credit Altman's testimony that in the adjusted average hours formula the earnings of all of Respondent's factory employees earning \$50 per week during the backpay period were included. The record does not show what weekly wage Melendez was earning during the backpay period.

In the course of Altman's conversation with President Posner, he asked for and received Respondent's payroll records. From these records he selected the comparables and their earnings as stated above. About 2 weeks later, Altman had another conversation with President Posner. He furnished him with the list of the employees he had selected and asked him to let him know if there was any reason why they should not be used as comparables. Posner did not respond to this request at that time or at a later date except to comment that no one did all the work that Butler, a bookkeeper, did. As previously stated, no claim is made for Butler. He asked Posner at this time for the classifications of the employees he had selected, and Posner replied that they did not have any, as the employees in the manufacturing department were general factory or all around employees.¹⁷

¹³ These methods have the approval of the Board and the courts. *Mastro Plastics Corporation, et al.*, 136 NLRB 1342, 1355; *Brown & Root, Inc., et al.*, 132 NLRB 486; enfd. 311 F. 2d 447, 542-543 (C.A. 8), and cases cited therein. See *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198-200

¹⁴ As previously stated, Butler's interim earnings exceeded his gross backpay. No backpay is claimed for him.

¹⁵ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177; *N.L.R.B. v. Brown & Root, Inc.*, 311 F. 2d 447, 452.

¹⁶ *N.L.R.B. v. Brown & Root*, at 453, and cases cited therein.

¹⁷ I have premised these findings on Altman's testimony. Any conflicts between it and President Posner's testimony have been resolved in favor of it. I consider and find Altman to be a more credible witness than Posner.

On October 23, 1962, the Regional Office sent to Respondent by regular mail over the signature of Sidney H. Levy, acting compliance officer, a letter and attachments giving in detail the formula for the computation of the backpay as stated subsequently in the backpay specification issued on December 21, 1962. No reply to this letter was received by the Regional Office. President Posner denied he ever received the letter, but admitted it may have been received by Respondent or the attorney then representing it. A copy of the letter was sent to Murry Frank, Esq., attorney for Respondent at that time. I find that the letter was received by Respondent and is binding on it.

Altman, in view of President Posner's statement to him that Respondent's factory employees were not classified, but were general factory employees, computed the gross backpay on the basis of earnings. However, he knew from the reporting forms submitted to the Regional Office by the discriminateses what they considered the classifications of their jobs to be. Ronald Bell reported his job prior to the strike as mechanic's helper and machine operator. Robert Bell, Allen, Johnson, and Mussenden reported their jobs as mixer, filling machine operator, general helper, and general worker, respectively.

Discriminatees Ronald and Robert Bell, Allen, and Johnson testified at the hearing, as did President Posner, regarding their duties.¹⁸ Ronald Bell first mixed cosmetics with a petrolatum base for about a year and a half, and for the last year of his employment he adjusted labeling, capping and filling machines to take the different size glass containers that were being filled, capped, or labeled. President Posner testified that Respondent had one conveyor and cooling line prior to the strike and the automatic and semiautomatic machines that had to be used with that line. According to Posner, another line was added during the strike and one after the strike. It is clear from the evidence that the machines Ronald Bell adjusted were, in part, the automatic and semiautomatic machines operated in connection with this assembly line. He assisted William Robertson, the mechanic who repaired and maintained the machines and other equipment in additions to making the adjustments.

The first year and a half, Ronald Bell, as a compounder or mixer, dipped some of the petrolatum, a grease with the trade name or trademark of Vaseline, out of the drum in which it was brought to the third floor from the basement by a stockboy, and mixed certain ingredients with the remainder in the drum to form a hair grease. He heated the petrolatum, a solid jelly substance while cold, in the drum to convert it to a liquid. He mixed the ingredients with the petrolatum under the supervision of Grant the "floorlady." The ingredients were other greases, oils, and lanolin. Grant poured in the coloring and the perfume. Bell had knowledge of the amount of each ingredient, except the latter two. Bell pumped the mixture to an overhead container. It then flowed down through a tube controlled by a faucet to be drained off by hand by other employees and placed in jars.

When Ronald Bell was given the assignment of adjusting the filling, capping, and labeling machines to take the different size jars, his brother Robert Bell was given the compounding or mixing job he had performed for a year and a half. Robert was doing this work at the beginning of the strike. Both Ronald Bell and Robert Bell were high school graduates. As witnesses, they were articulate and forthright. Their demeanor testimony and other testimony showed them to be intelligent persons and possessing the capacity to adjust themselves to changes in work methods. From an evaluation of their testimony and the testimony of President Posner discussed *infra*, I find that both Ronald Bell and Robert Bell were qualified to do any job that was available in Respondent's manufacturing department during the strike and thereafter which Respondent entrusted to \$65-a-week hourly wage employees.

Yberra, who along with Kemp are the comparables for Ronald Bell for the 1960 part of the backpay period, was a compounder. An elderly gentleman, who died in July 1961, he manufactured two of Respondent's products entirely except for supervision of Grant. He knew the quantity of all the ingredients that went into products he manufactured. Kemp manufactured greases that were hair straighteners. He did nothing else. He, like the Bells, knew the quantity of most of the ingredients, and worked under the supervision of Grant, the chemist, and President Posner. No testimony was offered as to the extent of the education of Yberra or Kemp.

Gordon compounded petrolatum products during the backpay period. He and Willis are the comparables for Robert Bell, and for Ronald Bell for the 1961 portion of the backpay period. He did the work that Robert Bell did and that Ronald Bell did when he was a compounder. Prior to being placed in this job, he was a general

¹⁸ Respondent did not contest the backpay claim for Mussenden. The amount of the claim is \$45.55.

helper in one of the other departments. Willis, like Kemp, made a grease hair straightener during the strike. Like Gordon, he was a general helper prior to the strike. The record is silent as to the extent of Gordon's or Willis' education.

Allen compounded liquids prior to the strike. It was a three-man operation. Allen was in charge and had two assistants. His comparable is Miranda. Miranda prior to the backpay period was used in the making of creams. During the backpay period and thereafter, he was also used in the manufacture of new cream products, and the liquids which Allen had made prior to the strike. He was Allen's replacement. The record is silent as to the extent of Allen's and Miranda's education.

Johnson and Mussenden were \$50-a-week factory helpers prior to the strike. Johnson filled jars with grease and capped them by hand. He took jars and bottles off the machines where they were capped and placed them in cartons. He also stacked cartons of bottles or jars on skids, and did other manual labor.¹⁹

Respondent does not contest the mechanics of the adjusted hourly wage formula used in computing Johnson's gross backpay. However, it does contend that after the end of the strike on February 23, 1960, jobs that were the same or equivalent to the job Johnson held prior to the beginning of the strike in September 1960 were no longer available in Respondent's plant. Respondent claims that the jobs were eliminated by the mechanization of certain of its manufacturing operations during the strike period, which ran from September 1, 1959, of February 23, 1960. It makes the same contention with respect to work for discriminatees Ronald and Robert Bell, and Allen.

Respondent makes this defense on the testimony of President Posner. He testified that prior to the strike the manufacturing part of his business was a pot and pan affair. In the case of cosmetics with a petrolatum base, drums of solid petrolatum were brought to the manufacturing department on the third floor by manual labor from the basement where they were stored. The drums were heated, and when the petrolatum became a liquid, a certain amount was dipped from the drum and certain ingredients (other greases, oils, lanolin, perfume, and coloring) were added. Then the mixture was pumped overhead into an overhead batch or container, and allowed to flow into containers through a tube, controlled by a faucet, which ran from the overhead container. The jars were filled by hand.

Posner testified that during the backpay period two 2,000 gallon tanks containing heating coils were installed in the basement for storage of the petrolatum. It was kept in a liquid form through heating by the coils. Pipes were run from the tanks up to the third floor into vats with heating facilities through which the petrolatum was forced by an electric pump and electric cutoffs. Jacketed kettles for mixing liquids and creams were also installed, eliminating the pot-and-pan method for making these products. He also testified that a conveyor line with automatic and semiautomatic filling, capping, and labeling machines was installed during the strike. One was in operation before the strike and another was installed after the strike. According to Posner, a total of two employees could do the work required on each conveyor line with its fillers, cappers, and labelers in contrast to a much larger number who were required when the operations were performed by hand. He also stated that less employees were needed to mix the petrolatum and liquid and creams than formerly.

Posner admitted that with an increased productive capacity, Respondent increased considerably the number of products in the cosmetics line which it manufactured. He conceded that the reduction in the manual labor requirements for bringing drums of petrolatum to the third floor from the basement, or of moving drums on the third floor to be heated, and removing part of their contents, was offset at least to some extent by the need for additional manual labor in connection with Respond-

¹⁹ Johnson had very little schooling. Both counsel for General Counsel and Respondent as well as President Posner of Respondent assumed he could not read or write. Johnson testified he could not write well or read well. Organizer Doswell of the Union who was close to Johnson during the 20-odd weeks the employees were on strike testified he did not read or write well. As a witness, Johnson appeared to the examiner to be a person who had some reading and writing ability. His testimony showed he had no difficulty in understanding and responding to the letter from the Union which he received on September 1, 1961, informing him that a job was available to him at the plant of Pur-All Manufacturing Co., Inc., herein called Pur-All, a former employer. General Counsel makes much of the fact that Doswell accompanied him to the Pur-All plant in March 1960 when he was first employed there, and assisted him in making out some employment forms. However, difficulty in making out employment forms is not conclusive evidence of inability to read and write. One adept at reading and writing could well encounter such a difficulty. I find from the evidence that Johnson had a limited knowledge of reading, writing, and counting.

ent's increased production. Additional cartons with containers had to be stacked in preparation for use, and a greater number of cartons of filled containers had to be loaded on skids to be brought to the shipping room, and more compounders or mixers were required to make the new lines of cosmetic products. Posner also testified that he was able to train employees working in the plant whether in manufacturing or elsewhere to perform the new work resulting from the mechanization of manufacturing operations.

Posner testified that at the time of the strike Respondent had about 80 employees—15 to 17 to 20 were in the manufacturing department. At the time of the fire on November 11, 1962, Respondent had 150 employees—30 were in the manufacturing department. According to Posner, the number of employees in the manufacturing department remained the same during the backpay period. He stated that the manufacturing of the additional products with the same number of employees was possible because of the mechanization of many of the manufacturing operations. Posner also stated that the installation of tanks in the basement began in September or October 1959, and were ready for operation about the latter part of January 1960. He said that the other installations took place during the backpay period and subsequently.

Posner could not recall the company or person from whom he purchased the tanks. He had no records because they were destroyed in the fire. He was of the opinion they were purchased at auction. General Counsel's witnesses Salgado and Santiago who worked in the manufacturing department during the strike, the backpay period and subsequently until the fire on November 11, 1962, testified that the tanks were not installed in the basement until November 1960, and may have been brought in later. Witness Delgado testified that at the time the tanks were brought into the building there were 23 employees in the manufacturing department. Posner testified he had no knowledge with respect to employees hired for the manufacturing department during the backpay period.

I reject Respondent's position that mechanization or automation eliminated work for Ronald and Robert Bell. The evidence of record discloses them to have had more education than any of the other factory employees, receiving \$65 per week or less, and to have the capacity to learn new duties attendant on the mechanization. Ronald Bell had already worked with the new machinery installed by Respondent. For 1 year he worked with the conveyor and cooling line with its automatic filling, capping, and labeling machines that had been installed at least by September 1958. Certainly Allen who supervised two others while making liquids by the pot-and-pan method could readily adapt himself to the use of the automatic machinery that made his work easier to perform and increased his productive capacity. There is no evidence in the record of educational or other background to show that Miranda, who made the liquids Allen had been making, was any more adaptable to the mechanization than Allen would have been.

I also reject Respondent's position that no job was available for Johnson because of the mechanization. Jobs of moving cartons of containers for storage on the third floor, to the assembly line for the filling, capping, and labeling of the containers, and of taking the cartons of filled containers from the conveyor and cooling line to be packed on skids for movement to the shipping room, were available. The evidence does not support Respondent's contention that Johnson was unable to count the number of cartons that were placed on skids. I have found that Johnson had a limited capacity to count. Absent evidence, to the contrary, it is presumed he could count to 25, a condition precedent, according to Posner, to holding this type of job.

General Counsel properly included increases, and overtime, sick leave, and vacation payments in the gross backpay. They are part of employee's earnings²⁰. I credit Altman's testimony that all factory employees receiving \$65 a week or less received an increase after a year of employment. And that 60 percent of these employees worked overtime in the third and fourth quarter of 1961. President Posner testified that Respondent compensated its employees for all reasonable periods of sick leave. Yberra, Kemp, Gordon, Willis, and Miranda and other employees received 2-week vacations in 1960 and 1961. There is nothing in this record that discloses that the Bells and Allen would not receive vacations in 1960 and 1961 had they been working for Respondent during those years.

I find General Counsel's gross backpay figures, as amended, to be proper except to the extent I recommend they be modified.

E. *Interim earnings and other diminutions of gross backpay*

In the specification, General Counsel admitted earnings earned by the discriminatees during the backpay period. It alleged the difference between gross backpay

²⁰ *Mastro Plastics Corporation, et al.*, 136 NLRB 1342, 1360.

and the interim earnings as the amount of backpay owed the discriminatees. During the hearing, General Counsel was given leave to amend the backpay specification to reduce the gross backpay and net backpay of Ronald Bell by \$574.60, increase the interim earnings of Freddie Allen by \$36, and to reflect in the gross backpay and net backpay of Johnson uncompensated leave he took during his interim employment.

Testimony by Ronald Bell disclosed that he was unavailable to the labor market in a 2-month period in the first quarter of 1961 when he was learning to be a presser. The testimony of Freddie Allen disclosed that \$18 deducted for carfare expense from his earnings in the fourth quarter of 1960 and the same amount from his earnings in the first quarter of 1961 should have been allocated to other quarterly periods. Testimony by Arnold Chaleff, office and general manager of Pur-All Paint Products, Inc., herein called Pur-All, showed that Johnson had uncompensated leave during his employment with that company beyond that reflected in the earnings of the comparables. The evidence showed that this additional uncompensated leave was 39 hours, 36.4 hours, and 4.6 hours in the second, third, and fourth quarters of 1960, respectively, and 17 hours in the fourth quarter of 1961. He had 14 less hours of uncompensated leave than his comparables in the third quarter of 1961. There was no adjustment in the backpay of the second and third quarters of 1960 as his earnings exceeded his gross backpay for those quarters. His gross backpay and net backpay were reduced \$6.03 for the fourth period of 1960, and increased \$1.93 for the third quarter of 1961. There was no change for the fourth quarter of 1961 as his earnings exceeded his gross backpay for that quarter.

In his brief of May 31, 1963, General Counsel moved to further reduce the backpay claim of Ronald Bell by \$61. Bell earned this amount at miscellaneous jobs in March and April of 1961 as a presser. The motion of the General Counsel is hereby granted. The granting of it is to the benefit of Respondent and not to its prejudice.

1. The interim earnings of Ronald Bell

Ronald Bell had interim earnings in every quarter except January and February 1961, when he was learning to be a presser. As stated above, General Counsel amended the specification to exclude any gross backpay for him for these 2 months as he was unavailable to the labor market. As a consequence, no backpay is claimed for these 2 months. And General Counsel has amended the specifications to add \$61 to his interim earnings, and thereby reduce the backpay claim by that amount, to reflect earnings in this amount Bell made in March and April 1961, when he was starting out as a presser, following the learning period of the prior 2 months.

Following the unconditional offer to Respondent to return to work on February 23, 1960, Ronald Bell registered at the hiring hall of the Union. He was dispatched by the hiring hall to a job at Atlantic Container Corporation, which he obtained on February 26. He worked for 1½ days when he was laid off for lack of work. At the beginning of March, he was dispatched by the Union to a job at Miles Shoe Store where he worked 5 weeks. During this 5-week period, he failed to earn seniority status by his work performance.

Following the layoff by Miles Shoe Store, Bell registered at the New York State Unemployment Office. He went there on Mondays to receive a weekly compensation check. That office sent him to its placement or dispatching office once or twice a month. He went to the hiring hall of the Union 4 days a week. He applied for any job called out over the loud speaker system he thought he could fill. He was either not qualified or other applicants had seniority. He also applied for work at the Halsey Drug Company, a drug manufacturer. He did not find work until July 19, 1960, when the Union hiring hall dispatched him to a job at Glass Laboratories. He obtained the job.

Robert Bell worked at Glass Laboratories until November 24, 1960. Shortly thereafter he was dispatched by the Union hiring hall to a general helper's job at Schrantz & Bieber. This job was a temporary one.²¹

After 2½ to 3 weeks, about the middle of December, Bell left Schrantz & Bieber to take a higher paying temporary job for 10 days at the U.S. Post Office. He was

²¹ When a dispatcher at the Union hiring hall dispatched Bell to this job he told him that it was a temporary job. A salesman at Schrantz & Bieber also told him the job was temporary. This is Bell's testimony. I credit it. His failure to report to the Regional Office his miscellaneous earnings of \$61 in March and April 1961, when he was starting out as a presser does not affect appreciably his credibility disclosed by his demeanor and other testimony. He readily disclosed the earnings in his testimony. They were obtained from temporary small jobs in March and April 1961, in which he tried his newly acquired skill as a presser. I credit his testimony that it did not occur to him to report them.

laid off December 24, 1960. Ronald Bell, as stated above, was unavailable to the labor market in January and February 1961, when he was learning to operate a clothes pressing machine. In March and April 1961, he secured through the New York State Unemployment Office the miscellaneous pressing jobs. In May 1961, he obtained a job as a presser at Sair One Hour Cleaners where he worked the remainder of the backpay period ending on November 20, 1961.

I do not accept Respondent's position that Ronald Bell should not have left employment at Schrantz & Bieber to accept the higher paying temporary job with the U.S. Post Office. He had good reason to believe that the job with Schrantz & Bieber was temporary like the job with the post office. I credit Ronald Bell's testimony that while looking for work as a presser he also went to the Union hiring hall looking for work.

I find that the interim earnings stated in the specification, as amended, for Ronald Bell are proper, and recommend that they be adopted. I also find that he made a reasonable effort to obtain work during the backpay period.

2. Interim earnings of Robert Bell

Robert Bell had employment in each quarter of the backpay period. Over half of his total claim of \$356.78 is for the first quarter of the backpay period. After he unconditionally offered to return to work for Respondent on February 23, 1960, he began looking for employment. He registered with the New York State Unemployment Service. Its dispatching office sent him to two companies. He did not obtain work at either of these two places.

The hiring hall of the Union dispatched him to Old Dutch Mustard Co. in the first or second week of March 1960²² He obtained a job there and worked for about 1 week and was laid off. He thereupon registered at the hiring hall²³ and was dispatched the same day to National Shoes. He obtained a job there loading and unloading trucks, and as a warehouse clerk and a warehouse helper. His employment continued throughout the remainder of the backpay period.

I find that Robert Bell made a reasonable effort to obtain employment, and that the statement of his interim earnings included in the backpay specification, as amended, is proper. I recommend that they be adopted.

3. Interim earnings of Freddie Allen

After offering Respondent to return on February 23, 1960, Freddie Allen began looking for employment elsewhere. He registered at the State Unemployment Office. He received a check from that office weekly. He scanned the help wanted ads in newspapers. He informed the State Unemployment Office of these jobs. The State Unemployment Office dispatched him to a job at the Harlem Hospital on or about April 1, 1960. He began employment at the hospital on April 2, 1960. Prior to February 23, 1960, Organizer Doswell of the Union told Allen that the hiring hall could dispatch him to a job. However, he did not go to the hiring hall. Allen had interim earnings in every quarter of the backpay period except the first quarter of 1960. His rate of pay at the hospital was slightly less than what he received when working for Respondent. He had three leaves of absence during the backpay period for which he was not compensated. One was on April 30, 1960, because of illness in the family, one was on Independence Day, July 4, 1960, because of a death in the family, and one was on July 30, 1960, because of personal illness. All other leaves of absence during the backpay period were compensated. The evidence shows that Allen would have received compensated leaves of absence on April 30, July 4, and July 30, 1960, if he had been working for Posner. It was not necessary, therefore, for General Counsel to adjust the gross backpay to delete an allowance for these 3 days.

Allen testified that while employed at the Harlem Hospital he would have lunch at its cafeteria 3 days out of every 7-day week at a savings of 50 cents a lunch over

²² The hiring hall of the Union dispatched Ronald Bell, Robert Bell, and Johnson to jobs following the unconditional offer the Union made to Respondent on their behalf to return to work on February 23, 1960. Morris L. Doswell, who was organizer for the Union and handled the Union's strike activity from September 1959 to February 19, 1960, in testifying as a witness for the Respondent, stated that the Union felt obligated to assist the discriminatees in obtaining at least their first jobs after the strike ended.

²³ Bell did not register with the hiring hall until after this layoff. I do not consider his failure to register immediately as material as the Union was seeking to dispatch him and the other discriminatees to jobs as soon as possible. He was aware of this effort by the Union.

its cost when he was employed by Respondent. He also had dinner at the hospital cafeteria 15 times out of a 30-day month at a savings of \$1.10 a dinner over its cost when he was employed by Respondent. Counsel for Respondent contends that these savings are interim earnings and should be included therein. I find that the cafeteria at the hospital is operated for the benefit of the hospital and not employees. The cafeteria operation permits the hospital to have the employees available when they would be elsewhere if the cafeteria was not operated. The savings, therefore, between what he paid for lunches and dinners while employed by Respondent and by the hospital are not earnings. In any event, no consideration is given to the quality of the meals he ate when he was employed by Respondent and the quality of those he ate at the cafeteria.²⁴

I find that the interim earnings stated in General Counsel's specification, as amended, are proper, and recommend that they be adopted. I further find that Allen made a reasonable effort to find employment in the period between February 23 and April 1, 1960, and at all other times during the backpay period when he was not working. While he did not report to the union hiring hall between February 23 and April 1, 1960, he made other reasonable efforts to obtain employment. In any event, Doswell would have communicated with him if the union hiring hall had been able to locate a job for him.

4. Interim earnings of James Johnson

After Johnson had offered through the Union to return to work at Respondent's plant on February 23, 1960, he went to work for Pur-All on March 1, 1960. The Union obtained this job for him. As stated, *supra*, Morris L. Doswell, organizer for the Union who conducted the strike operation, against Respondent, testified that the Union felt obligated to provide jobs for the employees who ceased work at Respondent's plant to assist the Union in its strike activity.²⁵

²⁴ See Internal Revenue Code of 1954, 26 U.S.C.A. sec. 119 (1955); 1 Fed Tax Regulations, sec. 1.119 (1963)

²⁵ The Union has collective-bargaining contracts with some 1,500 employers or shops in the New York City metropolitan area. It operates a hiring hall in connection with its activities pursuant to its collective-bargaining contracts. The hall accommodates approximately 300 persons seeking employment. Jobs are called out over a public address system from 9 a.m. to 12 noon daily. Special jobs are called out and assigned in the afternoon. An applicant is required to register or reregister every 2 weeks. When the job is called out he feels he can fill, he applies to a dispatcher for it. There are four dispatchers under Director Pete Evanhoff, who heads the hiring hall operation. There are also a number of clerical employees who do the clerical work that the dispatching operations require. The hiring hall provisions in the collective-bargaining contracts provide preferences for applicants having seniority because of prior employment with the company seeking employees, or seniority by reason of prior experience in the particular industry the employer is in who is seeking employees. To have seniority, the applicant must have 4 weeks of satisfactory work performance.

The union hiring hall, on requests made to it by companies having collective-bargaining contracts with it, dispatches applicants to these employers from Monday to Friday each week. A job may be filled directly by the employer by rehiring a former employee with seniority. Or it may be filled by an applicant who is a friend of an employee of the applying employer. The hiring hall records jobs filled in this manner as well as jobs filled by dispatching applicants.

If a person is registered with the hiring hall and has seniority as stated above, he will be called by telephone or communicated with by letter or telegram, and informed that a job is available. The job will not be called out over the public address system until he is contacted. However, preferences are given to the persons in the hiring hall when the jobs are called out. The particular employer has the right to accept or reject the applicant who is dispatched.

Doswell testified for the Respondent regarding the union hiring hall and its dispatching of applicants to jobs. He is an organizer for the Union and in charge of the administration of a number of collective-bargaining contracts for the Union. He does not have duties involving the operation of the hiring hall, and clearly disclosed by his testimony that he lacked the knowledge of these operations from which he could give testimony that could be considered as probative evidence. He brought summaries of hiring hall records to the hearing and testified regarding them to the extent his limited knowledge permitted. He was a cooperative witness. These records were received in evidence.

Pete Evanhoff, hiring hall director, and the four dispatchers were the persons who could have furnished the type of testimony Respondent had to furnish in connection with its position that Johnson or any other of the discriminatees for which backpay is sought

Johnson's job at Pur-All has been filling cans with paint. His starting wages were \$59 per week. He and employees Alamo, Lester, and Pugues were laid off on November 24, 1960, for lack of work. The Union sent him a letter which he received on Friday, September 1, 1961. The letter either dispatched him to Pur-All or let him know a job was available to him there. He reported for work on September 5, 1961, was rehired, and was working there at the time of the hearing.

Johnson registered at the hiring hall on November 28, 1960, following his layoff on November 24, and went there about 8:30 a.m. and left at 11:30 a.m. once a week and sometimes twice a week. He testified he was told he had to go there only once a week, but did not say who told him. Johnson's testimony does not indicate whether he reregistered every 2 weeks. Doswell, Respondent's witness, was not asked whether he reregistered. Nor do the records in evidence through Doswell disclose this information. Johnson testified the first time he was on the witness stand that he visited the hiring hall on Monday. He later testified that he made the visit on Monday, Wednesday, or Friday.

Johnson went each Thursday to the New York State Unemployment office at 8 a.m. to receive his unemployment compensation check. He left there about 9:30 a.m. On three occasions, that office sent him to their dispatching office at which applicants for employment were assigned jobs. He was not dispatched or assigned to a job. In March 1961, he sought work at Roulette Records and at Seaboro Trucking, and in April 1961, at Ansonia Shoe Store on a lead from his uncle. Johnson also testified that he inquired about jobs of his friends, including Asbury Thomas and his cousin "Artie." In March 1961, he visited the Pur-All plant and asked Arnold Chaleff, the general manager, about returning to work, but the latter told him that a job was not available. He telephoned Pur-All about a month later, probably in April, and talked to Arnold Chaleff who told him that work was still slow. He called again in June and talked to Chaleff's father, known to him as Pop. Pop told him that work was still slow but that he would let the union hiring hall know when he needed him.

Johnson had less seniority in employment at Pur-All than Alamo who was laid off with him on November 24, 1960.²⁶ However, he had more seniority than Lester and Pugues who were also laid off with him. Alamo was rehired on December 24, 1960. Sometime in March 1961, Pur-All asked the union hiring hall to send it some new employees. This request was made to the hiring hall through the shop steward at the Pur-All plant. The hiring hall dispatched applicants to Pur-All. Pugues was rehired on March 24, 1961, to work in the shipping department as well as in the manufacturing department. He worked from March 24 to about January 1, 1963. Discriminatee Johnson was not qualified for a job in the shipping department in view of his limited knowledge of reading and writing. Simpson, who worked 2 weeks, was employed on March 31 to work in the shipping department. Roosevelt Grosvenor was also hired on March 31, 1961, to work in the shipping department. Richard Johnson and Pedro Rosado were hired on April 4 and April 6, respectively, to work in the manufacturing department. Richard Johnson worked about 9 weeks and Rosado about 8½ or 9 weeks. Pur-All hired two truckdrivers, one in April and one in May, and a worker for the shipping department on August 11. Two other employees were hired on August 18 and August 26, respectively. Arnold Chaleff who testified regarding the employment of these workers by Pur-All, had no record of the type of work for which they were hired or worked. In any event, the first employee worked 2 weeks, and the second one worked 1 day. The next employee to be taken on was discriminatee Johnson. He was rehired on September 5. He reported to Pur-All on that date after receiving the letter on September 1 from the Union.

Johnson testified that he never heard jobs for Pur-All called over the public address system while he was present at the hiring hall. He also testified that he never heard a number of jobs called out for the cosmetic manufacturing firms of Miradel (Theon), Nestle Le Mur, Paris Cosmetics, and Helen Neuschaefer, which Doswell testified

did not make a reasonable effort to obtain employment by reason of failure to utilize the facilities of the hiring hall. The hearing was adjourned from February 27, 1963, to March 13, 1963, to afford Respondent an opportunity to obtain probative evidence dealing with the availability of jobs to the five discriminatees through the union hiring hall. Then the hearing was further adjourned until March 27, 1963, to permit Mr. McCreery of counsel for General Counsel, to respond to a call to 2 weeks' active military service. During this period, Respondent did not make any timely requests to the Regional Office, counsel for the General Counsel or me for assistance in obtaining probative evidence regarding the union hiring hall.

²⁶ The findings relating to employment at Pur-All are based on the testimony of Arnold Chaleff, Pur-All's general manager. He was a witness for the Respondent.

were on the records of the hiring hall as jobs for which dispatch slips were issued during the year 1961. Doswell also testified that dispatch slips for an equal number of jobs for these companies were issued during the year 1960. He also stated that the Union had contracts with four additional cosmetics manufacturers.

Doswell further testified that in his opinion there were only three jobs of all the jobs listed that Johnson could fill in view of his limited capacity to read and write. Those were two porters' jobs at Miradel (Theon) at \$48 per month to which applicants were dispatched on May 17, 1961, and October 11, 1961, and a porter's job at Nestle Le Mur at \$48 per month, to which an applicant was dispatched on September 7, 1961. Moreover, he did not know whether Johnson would have been hired had he applied for the jobs. Johnson was working for Pur-All from September 5, 1961, so would have been unavailable in any event for the Nestle Le Mur job of September 7, 1961, and the Miradel (Theon) job of October 11, 1961. Doswell also testified that an applicant may wait days, weeks, or months before obtaining employment through the hiring hall of the Union. In some instances they have not been assigned at all.

From an analysis of the above-evidentiary findings, it appears to me that Johnson could have made a greater effort to find employment during the period from November 28, 1960, to September 1, 1961, when he was on layoff from Pur-All than the effort he made, by going to the union hiring hall more frequently than he did. I credit his earlier testimony that he was at the hiring hall 1 day a week and sometimes twice. If he had been in attendance at the hiring hall on April 3 or 4, 1961, or April 5 or 6, 1961, he would have been dispatched to a job in the manufacturing department at Pur-All and rehired because he had seniority over Richard Johnson and Pedro Rosado who were dispatched to those jobs. I do not find from the testimony of Doswell or the documents received in evidence through him any of the jobs in the cosmetics industry to which Doswell testified applicants were dispatched by the union hiring hall during the backpay period. Doswell, Respondent's witness, testified that he would have the qualifications for only the three referred to above. As stated above there is no evidence that he would have been given any one of these three jobs even if he were dispatched to them.

I recommend that Johnson be charged with the earnings of Richard Johnson who was hired on April 4, 1961, by Pur-All and worked 9 weeks. Richard Johnson's first week was only 4 days. He received \$1.45 per hour and \$2.21 per week cost of living. So he received \$48.16 for the first week and \$60.21 for each of the other 8 weeks, or a total of \$529.84. In accordance with this recommendation, the gross backpay alleged in the specification for discriminatee Johnson for the second quarter of 1961 (\$713.75) should be reduced by \$529.84 to become \$183.91, to deduct what he would have earned had he been at the union hiring hall in April when the jobs at Pur-All that were given to Johnson and Rosado were dispatched. I make this recommendation to give effect to the objective of the remedy, namely, to vindicate the public rights under the Act, but at the same time to promote production and employment.²⁷

Counsel for Respondent argues that the union hiring hall is the agent for the discriminatees, and, therefore, any failure on its part to assign the discriminatees to available jobs during times of unemployment in the backpay period, when under its rules they were eligible for such jobs, is chargeable to the discriminatees under the principle of respondeat superior.

While the Union was the agent of the discriminatees on February 19, 1960, when it notified Respondent that they offered to unconditionally return to work on February 23, 1960, this agency relationship did not grow into one whereunder the union hiring hall became the agent for the discriminatees with respect to Respondent for all purposes. Moreover, there is no probative evidence that the union hall failed to assign any of the discriminatees to available jobs when they were eligible under the hiring hall rules.

The union hiring hall in terms of dispatching applicants to employers in accordance with applicable provisions of a collective-bargaining contract enjoys the status of an employment agency which brings together employers and employees. With respect to referrals and requests therefor, the employer and the Union may be liable to each other for breach of performance. It may even be argued that the employer may have a right of action against a referred applicant as a third party beneficiary under the agreement between the hiring hall and the applicant who seeks employment through it, and that the applicant may have a right of action against the

²⁷ See *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 411-412 (concurring opinion); *Waterman Steamship Corporation v. N.L.R.B.*, 119 F.2d 760, 762, 763 (C.A. 5); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197-200; *Mastro Plastics Corporation, et al.*, 136 NLRB 1342, 1347.

employer as a beneficiary of the latter's contract with the hiring hall. However, the hiring hall provisions of a collective-bargaining contract do not extend to an employer not a party to the contract to give him rights against former employees he discriminated against because of failures by the parties to the contract to whom he is a total stranger.

5. Summary of interim earnings

The interim backpay earnings which I find proper are as follows:

Name	1960			
	1st quarter	2d quarter	3d quarter	4th quarter
Ronald Bell.....	\$266 81	\$130 64	\$633 52	\$899. 42
Robert Bell.....	118 40	1, 019 40	997 48	1, 023 52
Freddie Allen.....	0 00	623 63	762 62	656 65
Gerald Mussenden.....	202 64	708 63	805 40	834 20
James Johnson.....	217 21	734 19	761 38	487 77
	1961			
Ronald Bell.....	45 00	672 90	975 50	496 80
Robert Bell.....	789 12	1, 173 84	876 00	482 16
Freddie Allen.....	789 72	678 84	854 84	436 73
Gerald Mussenden.....	364 91	0 00	451 80	521 70
James Johnson.....	0 00	20 30	230 72	421 28

CONCLUSIONS AND RECOMMENDATION

Upon all of the foregoing findings, I find and conclude that discriminatees Ronald Bell, Robert Bell, Freddie Allen, James Johnson, and Gerald Mussenden are entitled to backpay payments in the amounts listed below:

Ronald Bell.....	\$1, 766. 80
Robert Bell.....	356. 78
Freddie Allen.....	807. 49
James Johnson.....	1, 625. 13
Gerald Mussenden.....	45. 55
	<u>4, 601. 75</u>

I recommend that the Board adopt the foregoing findings and conclusions, and order Respondent to pay to the discriminatees the amounts recommended.

SUPPLEMENTAL TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER

STATEMENT OF THE CASE

On February 17, 1964, the Board reopened and remanded this backpay proceeding for the issuance by the Trial Examiner of *subpoenas duces tecum* requiring the production of evidence by Revlon Corporation, Miradel Theon Company, Nestle Le Mur, Paris Cosmetics, Inc., and Helen Neuschaefer, showing the employees they hired through the Union's hiring hall during the backpay period, and their weekly wage rates, and for further hearing limited to the taking of this evidence, and other evidence that became material and relevant by its inclusion in the record.

Subpoenas duces tecum were issued to officials of the above-named companies, and they appeared and testified at a hearing in New York City on May 11, 12, 14, and 15, 1964.¹ Also taken was evidence dealing with the operation of the union hiring hall during the backpay period in connection with the dispatching of workers of Nestle Le Mur, Helen Neuschaefer, Paris Cosmetics, and the Theon Company which was absorbed by the Miradel Company. It consisted of documentary evi-

¹ These witnesses were William Gregory, office manager and personnel manager, of Nestle LeMur; Albert A. Flaster, consultant to The Miradel Company, and president of the Theon Company before its assets were acquired by Miradel; John R. Englert, comptroller of Helen Neuschaefer; M. Roy Spitalney, vice president of Paris-Cosmetics, Inc., and William E. Brothers, personnel director of Revlon, Inc.

dence, and the oral testimony of Peter Evanoff, the director of the hiring hall during that period. On February 10, 1965, further hearing was held in New York City in regard to the capacity of discriminatee Johnson to read and write, and distinguish shades and colors, and discriminatee Ronald Bell's efforts during the part of the backpay period from April 7, 1960, to April 19, 1960, to obtain employment through the Union's hiring hall.

FINDINGS AND CONCLUSIONS

1. Nestle Le Mur

It is undisputed that Nestle Le Mur hired male general factory workers through the hiring hall during the period March 29, 1960, through December 31, 1960, and during the period January 1, 1961, to November 21, 1961. During the 1960 period, 77 were hired and 142 were hired during 1961. The Company has had collective-bargaining contracts with the Union since March 29, 1960. None of the employees hired had any "seniority" status.² Of the 77 jobs and of the 142 jobs 74 and 137 jobs, respectively, paid \$48 or \$48.50 per week. Four jobs (beginning March 29 and July 25, 1960, and July 12 and July 20, 1961) paid \$52 per week; one (beginning April 26, 1961) paid \$58 per week; two (beginning May 15 and June 5, 1961)

² Under the hiring hall rules, there are plant seniority, industry seniority, and overall seniority. Plant seniority is acquired by 4 weeks of satisfactory employment with an employer serviced by the hiring hall. Industry seniority is acquired by service exceeding 3 years since January 1934, in an industry serviced by the hiring hall. Time less than 2 years spent in an industry immediately prior to the date of registration is deducted from length of service. Wartime service in the Armed Forces is credited in the industry in which the worker was employed 1 year or more immediately prior to entrance into the service. Overall seniority is the cumulation of the years of seniority in each of the industries serviced by the hiring hall. Names of workers with seniority are listed on a board maintained for each specific industry serviced, and on a board kept for overall seniority. Any worker of "good character and competence" is eligible to register at the hiring hall, regardless of membership or nonmembership in the Union. He is registered on the industry board of each of the industries serviced by the hiring hall in which he has seniority, in accordance with his length of service in the respective industry. He is registered on the "Central Seniority Board" in accordance with his overall length of service in all industries serviced by the hiring hall. Where he does not have any seniority, he is registered on a board identified as the Extra Board in the order in which he registers.

Workers laid off or unemployed must register between 8.30 a.m. and 1 p.m., Monday through Friday of each week. Workers with seniority still seeking employment after 2 weeks following registration must check in after each 2 weeks to show they are still seeking employment, and to keep their names on the seniority lists. Workers who put in 5 days or less on a job maintain their original registration dates. Every worker dispatched to a job by the hiring hall or recalled to a job by an employer must secure a dispatch slip before reporting for work to guarantee observance of shop seniority and hiring hall rules. Workers may not solicit or accept jobs in any firm under a contract with the Union to which they have not been duly dispatched. This is to insure fair and equitable dispatching of jobs according to seniority in the industry.

Each registrant with industry or overall seniority, or both, is given a pamphlet entitled "Employment Office Guide". It has thereon the hiring hall's address of 13 Astor Place, New York 3, New York, and contains the rules of the hiring hall, the name of the registrant, his address, his book number if he is a member of the Union, and the date of his registration, as well as a record of his seniority in the industry and his overall seniority. A space is provided for the recording of his "Check-in Record" in compliance with the rules. The rules are silent, and so is the record, as to what, if anything, is given to a worker without industry or overall seniority who is registered on the Extra Board. Jobs are called out over a public address system, three times at 2 hour intervals from 9 a.m. until 1 p.m. (Footnote 25 p 13, of Supplemental Intermediate Report issued August 15, 1963, is corrected accordingly.) Workers must apply for the job at the time of dispatching in order to be eligible for it. The exception is where a worker has plant seniority. He is notified before the job is called out or posted. When a job is called out, it is posted on a bulletin board in the hall outside the hiring hall. The board can be seen by the registrants in the hiring hall.

A job is first dispatched to the worker with the greatest length of service of 5 years or more in the specific industry, second, to the worker with the greatest length of service of 5 years or more on the Central Seniority Board; third, to the worker with the greatest length of service of 3 to 5 years in the specific industry; fourth to the worker with the greatest length of service of 5 years or less on the Central Seniority Board; and finally, to the worker registered longest on the Extra Board.

paid \$62 per week, and one (beginning March 29, 1960) paid \$64 per week. Of the 77 jobs 19 were packers' jobs. The remainder consisted of 52 floor boy, 2 factory worker, and 3 porter jobs. The classifications of the \$64 per week job is not disclosed by the record. Of the 142 jobs 26 were packers' jobs. The remainder were 41 floorboy and 75 factory worker jobs.

The packers work at the end of the assembly line packing the assembled products in cartons, and placing the cartons on pallets. A packer is expected to be able to count to at least the number 88, and to distinguish at least 25 to 30 shades. Floor-boys, factory workers, and porters move goods and supplies to and from the assembly lines, and throughout the factory.

A worker referred to Nestle Le Mur by the hiring hall is asked to fill out an application. He is required to indicate on the application his name, address, sex, social security number, date of birth, citizenship, marital status, schooling, physical defects, prior job experience, and criminal background, if any. Some of this information is furnished by placing a "Yes," or "No," a check ("√") or an "X" in applicable boxes following the words identifying the question. An example is Male [], Female []. Certain information, however, has to be written in by the applicant. This would include name, address, social security number, and date of birth, and possibly physical defects and prior job experience. If the applicant is not able to fill out the form because he is unable to read or write, he is not hired. The meaning of a question will be explained to an applicant who does not understand it. The need for the explanation does not handicap the applicant. The referred applicant is hired if he is able to complete the application form except where the interview he has with a representative of the personnel office reveals characteristics or limitations which would make it difficult for him to become a member of the employee group. If the applicant can fill out the application, Nestle Le Mur assumes he can read, write, and distinguish colors sufficiently to hold a job even as a packer.³

None of the 219 workers hired through the hiring hall referral procedure during the backpay period were employed by Nestle Le Mur at the time the hearing was resumed on May 11, 1964. Most of them were laid off after a short period of employment, well below the 30-day probationary period. The layoff was due in some instances to lack of ability to do the required work, but largely because the workers requested were needed only for a limited number of days to get out specific production orders. When the need for additional workers again arose, they were secured through the hiring hall referral procedure.

Records of the hiring hall disclose that 24 of 27 requests for referrals to fill packers' jobs in 1961 included the requirement that they be able to read and write. Only three requests for factory workers in 1961 included the requirements of reading and writing.⁴

2. Miradel (Theon) Company

It is undisputed that Theon Company, a manufacturer of cosmetics, hired employees during the backpay period through the hiring hall of the Union. Theon had a collective-bargaining contract with the Union, which provided for the hiring of employees through the hiring hall. The Miradel Company subsequently purchased the assets of Theon, and retained Albert A. Flaster, who had been its president, as a consultant. Flaster testified for Respondent on May 11, 1964, in response to a *subpoena duces tecum*.

Flaster did not have with him the personnel records showing employees Theon hired during the backpay period although he appeared on behalf of the Miradel Company in response to the subpoena. He testified that Theon's records had been

³ I do not give weight to General Counsel's questions and answer on cross-examination intended to give the inference that an extended interview at the employer's plant is given each general factory referral. This flies in the face of the reality that the hiring hall is part of the hiring procedure, and any extensive screening at the employer's plant would duplicate work of the hiring hall and with attendant unnecessary overhead cost. Nor do I draw any inference that a number of workers are referred for one job. There is only one referral absent unsuitableness of the worker referred and notice of the unsuitableness given to the hiring hall. While an interviewer at the plant has his eye open for a referral with potential for promotion, he accepts the referrals for the general factory worker jobs when they fill out the applications satisfactorily, absent disclosure of the unsuitableness previously mentioned.

⁴ Evranoff, the hiring hall director, testified that unless the request from the employer included the reading and writing requirement, it would not be attached to the description of the job called out or posted. He testified, however, that where the dispatchers were familiar with the requirements of employers for the classifications of workers, they would aim to meet them in the course of selecting and dispatching.

put aside in storage for tax purposes, that Theon had furnished to Miradel any records pertaining to labor it required, and that he was not familiar with any Theon records Miradel may have taken from the place where they were stored. He responded to the subpoena since he was the only one in Miradel's office when it was served, and he had been Theon's president. Mr. Flaster was then questioned with respect to Theon's relationship with the Union hiring hall during the backpay period.

It was Flaster's recollection that 75 to 100 maintenance and production workers were hired by Theon through the hiring hall during the backpay period. There were times when the hiring hall did not have workers registered who could be dispatched in response to Theon's requests. Theon would request five workers when they needed only two. It would try out the first two dispatched to find if they could do the particular jobs well. If they could, there was no need for the other three. On the other hand, if one or both of the first two arrivals could not qualify, a replacement or replacements from the remaining three were given work until Theon had two satisfactory workers.

Flaster recalled that between 75 and 80 factory workers were employed during the backpay period. Of those employed 10 to 15 were male and the remainder were female.⁵ One male employee was a porter and another was an assistant to the mixer. Four worked in the shipping department, and approximately six worked as general factory employees. These six moved supplies and other materials about the plant as needed, and did routine assembly work.

Those working in the shipping department had to be able to read and write and count to avoid making mistakes when filling out orders. General assembly work consisted of the assembling of component parts for a complete unit to be packaged, and the packaging of the unit. In the case of liquids and powders, there would be the bottle, a cap, and other matter to go in the package. There were other components that made up clips and cards and other products produced and sold. Routine assembly work consisted of routine assignments such as gold stamping, cementing washers together to make heads for mechanical pencils, and putting together plastic and metal parts of other Theon products. The work of operating the filling machines was done by female workers. Servicing the assembly line for all operations was part of the duties of the male general factory worker charged with moving supplies and materials.

Flaster recalled that Theon endeavored to obtain a good type of employee, preferably one who understood English and could read and write and count, a little. Theon had difficulty in meeting its preference as most of its employees were Spanish. There were many jobs open to workers who could not read or write. On many occasions, Theon hired a worker who could not read or write. If he showed ability and a desire to work he was given an opportunity to show he could do the work. A worker almost "moronic" but "nice and clean" who was good at a particular job, would be kept on it.

Flaster also recalled that a general assembly worker who placed a pencil on a card would ordinarily be able to do this work "blind" as the boxes came through in the color of the pencil. However, on occasions cards for one color were in the boxes of another color. The worker had to be able to read the description of the color both on the card and on the pencil to be sure they matched. He had to know, for example, that he was placing a pencil marked black on a card marked black.

Records of the hiring hall disclose that male general factory workers dispatched by it and hired by Theon in 1961 were one in February, eight in May, two in June, and one in July. They were paid \$48 per week. In May, June, October, and November, porters were dispatched and hired. They were one each in May, June, and October at \$48 per week, four at \$50 per week in October, and one at \$50 per week in November. A packer was dispatched and hired at \$50 in June. The general factory workers dispatched in May were in response to a request for workers who could read and write.

3. Helen Neuschaefer

Helen Neuschaefer normally employs 70 to 100 factory workers, most of whom are women. The women are employed on the assembly lines and in the shipping department. This Company had a collective-bargaining contract with the Union during the backpay period, which ran from February 23, 1960, to November 21, 1961, and hired all its factory workers through the union hiring hall in accordance with the contract.

⁵ It appears that of the 75 to 100 workers hired through the hiring hall, 15 to 20 male workers, and 60 to 80 female workers, were dispatched and hired at least temporarily.

In the period from February 23 to December 31, 1960, the Company hired 44 male factory workers, and during the period from January 1 to November 21, 1961, it hired 17 male factory workers. The first hire in 1960 was in May. In 1961 there were three in March, one in April, two in June, four in July, five in August, and two in September. The evidence does not show the number of workers by classification. Helen Neuschaefter classifies factory workers as general factory, assembly, shipping, and maintenance workers. However, the evidence does show that there are normally 23 male factory workers employed—12 are general factory workers, 4 are assembly workers, 3 are in the shipping department, and 4 are maintenance workers. During the peak season, which normally runs from May to October, the general factory workers are doubled, and the assembly and shipping workers are each increased by three. There is no increase in the number of maintenance workers.

It can be estimated on the above figures that the 44 hires in 1960 approximated 30 general factory, 7 assembly, and 7 shipping room workers, and the 17 hires in 1961 approximated 11 general factory, 3 assembly, and 3 shipping room workers. The wages of those hired approximated \$55 per week except in the case of two jobs in 1960 (one in October and one in November) which paid \$64 and \$70, respectively, and four jobs in 1961 (one each in March, June, July, and September) which paid \$62. General factory workers did all manual labor work such as bringing materials into the assembly rooms (like bottles, caps, and labels), and after the assembly line work was completed, bringing the finished products away from the lines to the next operation. They loaded and unloaded trucks. As part of work of servicing the assembly lines, they would fetch boxes of labels.

Helen Neuschaefter had no reading or writing requirements for male workers with the exception of the few who worked on the assembly line. In the shipping department, the women filled the orders and put the labels on the packages or cartons. The male workers only packed the packages. The Company had products with 50 to 70 shades. The workers who obtained supplies for the assembly line were expected to be able to comply with requests for materials of a certain shade of color by recognizing its identification on the carton. If he was requested to bring a carton of brown labels to an assembly line, he had to go to the storage area and find the carton of labels with the word "brown" printed or written on it. They would also have to be able to count to 60 or 70, in order to be able to fetch to the line the quantity of supplies requested.

Hiring hall records disclose that of 16 requests for factory workers by Helen Neuschaefter in 1961, 6 had the reading and writing requirement attached. They were for two general factory and one porter in January, a packer in June, and two general factory in August. The 10 requests which were silent in regard to reading and writing were for 2 general factory in January, a porter in February, 3 general factory in March, 2 general factory in July, and 2 in September.

4. Paris Cosmetics

Paris Cosmetics, Inc.,⁶ a manufacturer of cosmetics, had collective-bargaining contracts with the Union from May 1960 to November 21, 1961, and hired workers through the Union's hiring hall during that period. Paris hired 6 workers in this manner during the 1960 period, and 17 in the 1961 period. The weekly wage was \$50 for the 1960 hires and \$54 except in a few instances for those hired in 1961. Five of the hires in 1961 were engaged at \$50 per week, and one was paid \$42 for a week's work. None of these employees had any seniority at the times they were dispatched and hired.

The workers hired through the hiring hall operated the feeder machines, assembly line conveyers, packed merchandise at the end of the conveyer, stacked finished goods on a pallet or skid, loaded and unloaded trucks, cleaned up, and did any other work of a related nature necessary to the normal transaction of business. The worker dispatched from the hiring hall was required to complete an application form. He was required to furnish his name, address, social security number, education, experience, marital status, dependents, previous employment, and reason for leaving

⁶ Spitalney, Respondent's witness, admitted in response to Respondent's counsel's questioning that he refused to talk to an attorney for the Respondent prior to the hearing, saying he would see him at the hearing, but did permit an attorney for the General Counsel to interview him prior to the hearing, and signed a statement for him. Spitalney was a credible witness. His testimony stands un rebutted. I have credited both his demeanor and other testimony. If his credibility were in issue, I would weigh the difference in treatment accorded counsel for Respondent and counsel for General Counsel. In this context, however, it is not material, and I gave it no weight.

his previous employment. Generally, to be hired the worker had to be able to fill out the application. However, exceptions were made when a dispatched worker appeared to have the potential of a good worker by his experience, appearance or some other factor that appealed to the interviewer, in spite of his difficulty in completing the application form. There were no specific requirements for reading and writing. He was hired or not hired on the basis of his ability to fill out the form, with the exception stated above.

A worker who stacked finished goods on a skid or pallet at the end of the conveyor line had to be able to make a mark on a sheet of paper for each unit he stacked (whether it was pieces, cartons, or skids or pallets), and to count the number of marks he made on the paper. This means he had to be able to count sufficiently to be able to do this work. These totals were used by the Company to determine the number of pieces produced in a particular production line in connection with its cost analysis. A worker who stacked cartons had to be able to count in order to keep track of them. There were jobs that called for moving and lifting only. Reading, writing, and counting were not necessary for those jobs.

The Company is a contract manufacturer, and in its contract work colors and shades of colors may or may not be involved. Where there were colors and shades of colors involved, the worker who went to the stockroom for labels had to be able to read to obtain the boxes of labels he was sent to obtain. On occasion he may have had to read "the name of the product, the name of the manufacturer, fragrance, color or shade, size occasionally." If he had to place a label on a carton he was shown by the foreman or forelady what label to apply. Any repetition of this same unit of work was done independently by the worker. Assembly line workers worked on one product at a time and on one shade at a time

5. Revlon

There were a considerable number of production and maintenance workers hired by Revlon during the backpay period. Revlon has plants in Edison and Passaic, New Jersey, which manufactures cosmetics, and a plant in Irvington, New Jersey, that makes cutlery products which, like cosmetics, contribute to a woman's appearance. They are scissors, nail clippers, and files. It has another plant at North Bergen, New Jersey, which manufactures clothing; a subsidiary, Komack Manufacturing Company, Brooklyn, New York, which manufactures Esquire shoe polish, a research laboratory in New York City; a distribution center in Los Angeles, and general offices at 666 Fifth Avenue, New York City.

Revlon has contracts with the Union for some of its operations. It is clear from the evidence of record that it does not employ through the Union hiring hall workers for its cosmetic plants at Edison and Passaic, New Jersey, and the record is silent as to whether it hires through the hiring hall workers for any other of its operations

In these circumstances, I rejected an exhibit showing the number of porters that were hired by the Edison plant during the backpay period, and the dates of hire. This and evidence that may be in the record regarding workers hired for its other operations is not material or relevant to the remand hearing, since it was limited to employment through the facilities of the Union's hiring hall. I have, therefore, given this evidence no weight in reaching my Supplemental Decision and Recommended Order.

6. James Johnson

Discriminatee Johnson was born in New York City but spent his boyhood in Abbeville, South Carolina, where his father was a tenant farmer.⁷ He attended four grades of Gillmore grammar school in Abbeville between the ages of 5 and 16. He was absent from school on many occasions when it was in session. He helped his father with the farm when he was absent. Johnson learned to read, write, and count during the 11 years, or parts thereof, that he spent in grammar school.

When 16, approaching 17, he volunteered twice for duty in the U.S. Army, he was turned down the first time, but was accepted the second time. He served 2

⁷ Witnesses who gave testimony for Respondent in the backpay proceedings regarding Johnson's capacity to read and write were Hamilton Posner owner and official of Respondent; Morris L. Doswell, organizer for the Union, the Charging Party, who represented the Union in the organizational activity, including the picketing from September 1959 to February 24, 1960; Johnson himself, and Evanoff, the hiring hall director during the backpay period. Posner testified Johnson was illiterate; Doswell, who had been closely associated with Johnson in the picketing activity, and said he knew him well, testified he was deficient in reading and writing; Johnson testified he did not read or write well, and Evanoff testified that Doswell told him that Johnson was illiterate

years. He testified he was discharged after 2 years because he had a low IQ. When he first volunteered, which was at the recruiting office in Abbeville, he filled out a form for the recruiting sergeant. He wrote in his name and address. The remainder of the form was a questionnaire with a box to be filled in after each statement. He placed an X in the box following the applicable statement. One stated "male," another stated "female." He marked male.⁸ One other was "married" or "single." He marked single. In the space allotted for a statement of what he was doing at the time, he wrote he was going to school. He checked or placed a circle around the number "4" to show he attended four grades of grammar school. Johnson took a literacy test the first time at Fort Jackson, Columbia, South Carolina. He went there in an Army bus from Abbeville with about 40 others. Johnson was handed a paper which included problems in arithmetic such as dividing and subtracting. He failed this test. Johnson recalled that the second time he volunteered at Abbeville, he answered questions asked by the recruiting sergeant. He did not recall writing anything down. The sergeant took him and three others in a passenger automobile to the Army location at Atlanta. He passed the literacy test he took there.

Johnson testified that when he was employed by Posner he knew at least 10 colors. He said further he had knowledge of the colors he was required to know in connection with taking jars off the assembly line after they were automatically filled and capped, placing them in cartons, sealing the cartons, and placing the cartons on skids or pallets. Johnson answered "Yes" to Respondent's counsel's question whether he knew a Posner color by the name of "bergamot." It is the color of an orange which is shaped like a pear. Johnson also testified that during the first period he worked for Pur-All, which was from March 1, 1960, until he was laid off on November 24, 1960, for lack of work, he had knowledge of 30 to 40 colors and shades in connection with his job of filling cans with paint. He knew the commonly known colors when he was in grammar school.⁹ He testified that while working at Pur-All he tried to help himself and learn something.¹⁰ Johnson disclosed he

⁸ Johnson took occasion at the hearing on February 10, 1965, to indicate he was offended at the remarks and questioning of counsel for both General Counsel and Respondent, at the hearing in the spring of 1963 and the remand in the spring of 1964, that suggested he did not understand an inquiry as to whether he was male or female. He did not have this problem. The evidence shows he understood such an inquiry whenever made, and answered readily and correctly by checking the box after "male." At the outset of the backpay hearing, counsel for Respondent strove to show that Johnson was of low mental capacity, such as being unable to understand the inquiry as to whether he was male or female, and thinking the inquiry was whether he did work in connection with the "mail." The purpose was to show that Respondent did not have a job in which to reinstate him. General Counsel, at that time, strove to rebut such a position. He defended Johnson by the objection that the question asked was misleading. And it was. Later when the evidence was related to the issue whether Johnson made a reasonable effort to find employment, or engaged in willful idleness, Respondent's counsel strove to show mental capacity by Johnson to fill jobs dispatched through the Union's hiring hall, in seeming contradiction of his prior contention that Johnson was of low mental capacity. General Counsel, on the other hand, at this stage of the proceeding, was seemingly engaged in an effort to show Johnson of low mental capacity, such as being unable to understand an inquiry to whether he was male or female, in contradiction of his prior position, to support General Counsel's position that Johnson should not be held accountable for failure to appear at the hiring hall more than 1 day a week to apply for general factory jobs which were available, because of mental incapacity to hold the general factory jobs called out or posted. The strategy of counsel left the record with only limited evidence of Johnson's capacity to hold the jobs that were available through the hiring hall. For this reason, the record was reopened on February 10, 1965.

⁹ The primary colors are the colors in the spectrum. Newton's seven were red, orange, yellow, green, blue, indigo, and violet. Then there is white which is usually the color of the light thrown upon an object which reflects equally all rays thrown upon it. It is usually, viewed by white light. Black is the color of an object which has very little capability for reflecting rays. Webster's New International Dictionary (1933 Ed), P. 400.

¹⁰ I find from Johnson's demeanor testimony that his comprehension was good, and that generally, he understood readily questions counsel and I asked him. The questioning of Johnson with respect to his knowledge regarding the meaning of an oath and the obligation to tell the truth while under oath arose not from Johnson's testimony, but rather from the efforts of counsel to make him appear a person of low mental capacity. Johnson readily indicated by his answers to my questions that he was aware of his obligation to tell the truth under oath.

could read the figures "100," and "1000," and could count slowly. He could add 500 and 500, 50 and 50, 54 and 54. He stated, however, that 13 and 13 were 24.¹¹ Johnson also testified that he read the sport pages of a newspaper, that he could recognize the name of players, having seen them many times. He also testified that when he was laid off by Pur-All on November 24, 1960, he registered at the hiring hall. According to him, he did not receive a copy of the rules of the hiring hall when he registered, or any other document showing industry or overall seniority. He testified, however, that he received a paper saying that he had to register every 2 weeks and appear at the hiring hall once a week.

Counsel for General Counsel gave Johnson three word-reading tests. One was identified as General Counsel's Exhibits No. 2A and 2B, each page being identified; another was identified as General Counsel's Exhibit No. 3, and the third was identified as General Counsel's Exhibit No. 4. In the first and third tests, Johnson selected a word from four words associated with a picture as the word describing the picture, by placing an X in the circle after the word he selected. He quickly marked the two tests.

In the first test, he correctly selected the words basket, paint, fish, paper, saw, road, meat, foot, radio, women, city, camp, river, dollar, teacher, stairs, desk, chief, speaker, wall, carry, sea, machine, half, dad and card, and incorrectly selected the word early instead of world, turtle instead of cave, danger instead of dance, towel instead of village, trying instead of hit, swing instead of save, and did not select a word for the picture of a lake, a bucket "filled" with sand, and a boy running "behind" other boys. His exact score in this quick test was 26 out of 35. I find that in each of the instances where there was an incorrect selection or no selection, the error could have been due to Johnson's misunderstanding or lack of understanding of the picture rather than inability to read the words associated with the pictures, or lack of knowledge of the meaning of the words.

In test three, Johnson correctly selected the words chief, sharp, cut, engine, burn, net, soft, soap, meet, follow, and fingers. He incorrectly selected the word five instead of hide for the picture of a little girl of five hiding behind a chair; into instead of find for the picture of a little girl about to find two companions who had gone into a closet to hide; the word try instead of the word lady for a lady walking; the word tent instead of the word last for a picture of six youngsters and another in the distance. He made no selection from the words against, lie, blanket, and lake for a picture of a "lake," or from the words agree, path, pleasant, and coffee for a picture of a "path." I find, however, that Johnson's incorrect selections, or failure to make a selection, could have been due to a misunderstanding or lack of understanding of the pictures, rather than inability to read the words associated with each of these pictures. In any event, his exact score was 11 out of 17.

In the second test, Johnson readily recognized and read the words, am, big, run, dog, up, to, me, it, good, look, all, cake, how, from, into, that, wanted, milk, another, cry, gate, snow, next, bunny, running, clang, fruit, music, cannot, addition, compound, and grateful. He did not recognize or read the words, story, playing, hopped, thought, well, quick, sound, teach, often, straight, dark, cheek, reason, plain, inch, freeze, moment, knife, president, shovel, whale, blizzard, embrace, groove, introduce, magic, nonsense, permanent, scratch, accomplish, commotion, decorate, essential, marvelous, grateful, population, remarkable, suggestion, and territory.

7. Ronald Bell

As previously found, Ronald Bell was laid off by Miles Shoe Store about April 7, 1960, and was unemployed from that date until July 19, 1960, when he was employed by Glass Laboratories through the hiring hall.¹² Bell repeated the testimony he previously gave regarding his efforts to obtain employment through the hiring hall after his layoff by Miles Shoe Store and before his employment by Glass Laboratories.

¹¹ Johnson, whose comprehension was good, knew from the colloquy of counsel that he had to appear somewhat slow in thinking in order to collect the maximum amount of backpay. The thought occurred to me that Johnson in the course of responding to this type of question may well have deliberately answered incorrectly to keep the backpay figure at the highest possible level.

¹² Bell had 2 years seniority in the cosmetics industry by reason of his 5 years employment by Posner. Since he worked 1½ days for Atlantic Container Corporation he did not have plant seniority with that company. He lacked the minimum of 4 weeks or 30 days employment. He failed to obtain plant seniority at Miles Shoe Store by 5 weeks employment there from March 1, 1960, because of poor work performance.

My findings on this testimony are set out on page 11 of the Supplemental Intermediate Report issued August 15, 1963. I particularly noticed Bell's demeanor testimony at the reopening on February 10, 1965. I again credit his demeanor testimony as well as his testimony of his efforts to obtain employment. I also credit his testimony that he did not hear any general factory or general helper jobs at or about \$65 per week called out, or see any such jobs posted. The jobs offered in evidence through hiring hall records and the testimony of officials of Miradel, Nestle Le Mur, Helen Neuschaefer, and Paris Cosmetics corroborate Bell's testimony. I also credit Bell's testimony that he applied for any jobs he thought he would be able to fill, regardless of the employer, and lost out to other applicants either because of insufficient seniority or lack of experience.

8. Analysis and concluding findings

Preliminary to my stating my conclusions of fact and law and recommendations that are premised on the foregoing, I feel it appropriate to state some material principals of law that are binding on me by statute or Board and Court decisions.

Backpay proceedings are not newly instituted primary actions, but rather supplementary proceedings to compute the amounts which constitute reimbursements as ordered and decreed. They are the fulfillment "of the Board's duty to complete or make final what it properly left undecided in its first order."¹³ The Board's backpay orders are entered and enforced not "to vindicate the private rights of the men" but "to discourage discharges of employees contrary to the Act."¹⁴ They are reparation order[s] designed to vindicate the public policy of the statute."¹⁵

A backpay order, therefore, is part of the remedy to vindicate the public right to have labor free from the discouragement of membership in a labor organization by the discharge of employees for engaging in union activity. The formula is roughly the sum of the earnings the discharged employee would have earned had he not been discriminated against, less his earnings during the backpay period, and less amounts he would have earned had he made a reasonable effort to find employment.¹⁶ While the policy of allowing deductions from gross pay that reflect failure to make reasonable efforts to find employment resembles the mitigation of damages in private law suits, it is not primarily intended to save harmless the violating employer, but to discourage idleness, and encourage production and employment, although, as in the mitigation of damages, the employer benefits. A draconian application of the policy of deductions that reflect lack of effort to find employment could wipe out the earnings the discriminatee would have earned had he not been discriminated against, with the result that the remedy to vindicate the public right would be an empty one, and there would be no deterrent to a recurrence of the employer's illegal conduct. On the other hand, the public right would not be vindicated if willful idleness of the discriminatee were ignored, and, as a result, production and employment were discouraged instead of encouraged. So while the discriminatee must make a reasonable effort to minimize his losses, he is not required to make the maximum effort, in order to be eligible to receive backpay.¹⁷ This is in accord with the general rule for breach of employment contracts.¹⁸

The evidence clearly shows that the hiring hall of the Union is not only the medium for the vital communication between employers in the New York City area seeking workers of the type of Johnson and these unemployed workers, but is also the first stage of the hiring process by which employers hire workers who use the facilities of the hiring hall. The evidence also shows that approximately 1,500 employers have bargaining contracts with the Union, and that many of them by contract and otherwise obtain workers through the Union's hiring hall facilities.

¹³ *N.L.R.B. v. C C C Associates, Inc.*, 306 F. 2d 534, 540 (C.A. 2)

¹⁴ *Waterman Steamship Corporation v. N.L.R.B.*, 119 F. 2d 760, 762, 763 (C.A. 5).

¹⁵ *MacKenzie Coach Lines, Trustee in Bankruptcy of Nathansen v. N.L.R.B.*, 344 U.S. 25, 27; *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 412, footnote 3. (Frankfurter, J., concurring opinion).

¹⁶ *Mastro Plastics Corporation, et al.*, 136 NLRB 1342; *Brown & Root, Inc., et al.* 132 NLRB 486, enfd 311 F. 2d 447; *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 411-412 (Frankfurter, J., concurring opinion), *Waterman Steamship Corporation v. N.L.R.B.*, 119 F. 2d 760, 762, 763 (C.A. 5); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197-200.

¹⁷ See *W. C. Nabors d/b/a W. C. Nabors Company*, 134 NLRB 1078, enfd, as modified 323 F. 2d 686 (C.A. 5) cert denied 376 U.S. 911

¹⁸ See *Emery v. Steckel*, 126 Pa. 171, 17 Atl. 601, 602 (Pa. Sup. Ct.); *McCormick Damages* § 159 (Hornbook ed., 1935); 1 *Sedgwick, Damages* § 206 (9th ed., 1912).

The evidence further shows that during the backpay period Theon, Nestle Le Mur, Helen Neuschaefer, and Paris Cosmetics hired many general factory workers and porters through the hiring hall. I believe the evidence of the use of the hiring hall by these manufacturers, and Pur-All and Atlantic Container, justifies an inference, which I hereby make, that similar use of the hall was made by other manufacturers, including additional cosmetic manufacturers, as well as employers at wholesale and retail levels having collective-bargaining contracts with the Union.

I further find on consideration of the evidence of the use of the hiring hall by Theon, Nestle Le Mur, Helen Neuschaefer, and Paris Cosmetics, and Johnson's testimony, including his demeanor testimony, that Johnson was qualified to hold many of the jobs for which workers were hired through the hiring hall by these companies, including the jobs having simple reading and writing requirements, and the requirement of capacity to recognize colors and shades of colors that have been under scrutiny here. Johnson attended school for 11 years, even if only in four grades. He can read and write. His comprehension is good. He has the ability to improve himself to meet the challenge and requirements of a job. After Johnson's employment with Pur-All, he could recognize 30 to 40 colors and shades of colors. These are more colors and shades than average persons of higher education than Johnson can recognize and identify. As he stated on the witness stand, he increased his knowledge of colors on the job. If the opportunity were afforded Johnson to acquaint himself with 88 colors or shades required by a job, he would acquire that knowledge without difficulty. As it is, with his knowledge of 30 to 40 colors or shades of colors, he very likely has more knowledge of colors and shades than the average worker hired through the hiring hall. From my observation of Johnson, he could adapt himself to many general factory jobs including those with simple reading and writing requirements with the minimum of prejob or on-the-job training.

While the jobs of the type that Johnson could fill were available through the hiring hall from Monday through Friday of each week, a reasonable effort would be made by a person like Johnson to find employment, in the context of this case, if he went to the hiring hall, and made an effort to be dispatched to a job, at least 3 days a week. This finding is made with recognition of Johnson's weekly visit on Thursday to the State unemployment office. It was to pick up his weekly relief check, and, by request, occasionally to check with the dispatching branch of that office. He could complete this visit by 9.30 a.m. I consider this finding to be in accordance with the evidence of the remedy to vindicate a public right by providing a deterrent to future employer violation, but at the same time encouraging production and employment rather than willful idleness.¹⁹ It is recognized by the Board and the courts that a remedy to effectuate the purposes of the Act cannot be fashioned with preciseness or by adherence to strict formula.²⁰ The Board, however, has broad discretion to fashion a remedy to effectuate the purposes of the Act.²¹

On the foregoing findings, I conclude that there should be a reduction in the amount of net backpay I recommended for Johnson in my Supplemental Report issued August 15, 1963. This reduction should represent estimated earnings he would have made had he gone to the hiring hall and applied for work an additional 2 days a week during the last 5 weeks of the fourth quarter in 1960, starting with November 28, 1960, following his layoff on November 24, 1960, by Pur-All, 2 days of each of the 13 weeks in the first quarter of 1961, 2 days of each of the weeks of June 1961, in the second quarter of 1961; and 2 days of each of the weeks of July and August in the third quarter of 1961. He was rehired by Pur-All on September 5, 1961. No deduction is made for the period from April 3, 1961, to June 3, 1961, as I had made a deduction for this period in my Supplemental Report of August 15, 1963. See page 17 of my August 15 report.

The amounts deducted were determined by multiplying the number of hours of the 2 days of each week of each quarter for which a deduction was made by the hourly rate for the particular quarter, as found on page 16 of Appendix D-1 of the specification. The additional deductions by quarters are as follows:

1960—4th Quarter.....	\$103.65
1961—1st Quarter.....	283.93
2d Quarter.....	87.85
3d Quarter.....	206.91
	680.34

¹⁹ See cases cited footnote 16.

²⁰ *N.L.R.B. v. Brown & Root, Inc., et al.*, 311 F. 2d 447 (C.A. 8).

²¹ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194; *Regal Knitwear Company v. N.L.R.B.*, 324 U.S. 9, 13; and *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 346-347.

The revised recommendation of backpay by quarters and by total for Johnson is:

1960—1st Quarter	-----	\$30. 98
2d Quarter	-----	0. 00
3d Quarter	-----	0. 00
4th Quarter	-----	76. 43
1961—1st Quarter	-----	425. 89
2d Quarter	-----	75. 76
3d Quarter	-----	333. 73
4th Quarter	-----	0. 00
		942. 79

I have reviewed the evidence of Ronald Bell's efforts to obtain employment during the backpay period, including the testimony he gave on February 10, 1965, as well as the evidence dealing with jobs available in the plants of Theon, Miradel, Nestle LeMur, and Helen Neuschaefer, and I am satisfied that he is entitled to the backpay recommended on page 218 of my Supplemental Report of August 15, 1963. I am also satisfied from a review of all the evidence that discriminatees Robert Bell, Freddie Allen, and Gerald Mussenden are also entitled to the backpay I recommended for them on page 218 of my August 15, 1963, Supplemental Report.

RECOMMENDED ORDER

Upon all of the foregoing findings, I find and conclude that discriminatees Ronald Bell, Robert Bell, Freddie Allen, James Johnson, and Gerald Mussenden are entitled to backpay payments in the amounts listed below:

Ronald Bell	-----	\$1,766. 80
Robert Bell	-----	356. 78
Freddie Allen	-----	807. 49
James Johnson	-----	942. 79
Gerald Mussenden	-----	45. 55
		22 3,919. 41

I recommend that the Board adopt the foregoing findings and conclusions, and order Respondent to pay to the discriminatees the amounts recommended.

²² Since it is Respondent's wrongdoing, which, under the circumstances, has made it "impossible to do more than approximate the conditions which would have prevailed" (*F. W. Woolworth Company v. N.L.R.B.*, 121 F. 2d 658, 663 (C.A. 2)), Respondent cannot complain because the amount of backpay cannot be measured with precision. It is its wrongdoing that has given rise to the involved state of facts in this proceeding. See *Storv Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563; *N.L.R.B. v. Kartarik, Inc.*, 227 F. 2d 190, 129-193 (C.A. 8), and *Eagle-Picher Mining and Smelting Company v. N.L.R.B.*, 119 F. 2d 903, 914 (C.A. 8).

The Rose Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO. Cases Nos. 30-CA-19 (formerly 13-CA-5728) and 30-CA-41 (formerly 13-CA-6234). August 4, 1965

DECISION AND ORDER

On April 28, 1965, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Deci-