Gimrock Construction, Inc. *and* International Union of Operating Engineers, Local 487, AFL–CIO. Cases 12–CA–17385, 12–CA–20173, and 12–CA–20527

January 28, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On November 16, 2009, Administrative Law Judge Ira Sandron issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel also filed limited exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has reviewed the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Supplemental Order.

The judge's recommended Supplemental Order requires, among other things, that the Respondent bargain with the Union for 16 hours a week and submit a progress report to the Regional Director every 30 days. We agree with the judge that these requirements, which effectuate our prior order, are appropriate.

The Respondent's bargaining obligation arose from the Board's June 30, 2005 decision, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing—since October 27, 1999—to meet and bargain with the Union and provide it with requested relevant information.[2] The Board's Order was enforced by the 11th Circuit on December 27, 2006.[3] As explained in the judge's decision, the Respondent thereafter failed to respond to numerous requests to meet and bargain with the Union and to furnish it with the requested information.[4] Further, when the Respondent's continuing refusal to bargain and furnish information was established in this compliance proceeding, the Respondent defended its conduct by raising arguments that had been previously rejected by the 11th Circuit in the enforcement proceeding.[5]

In view of the Respondent's continuing refusal—over a period of years—to comply with the Board's bargaining order, the institution of a bargaining schedule and the submission of progress reports are necessary to ensure that (and gauge whether) the Respondent meaningfully complies with its bargaining obligations as set forth under the terms of the court-enforced Order. Because the General Counsel specifically sought these requirements in the compliance specification, we reject the Respondent's argument that it was denied due process.[6]

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

With regard to the Respondent's contention that the judge erred in denying its request to amend its answer on the second day of the hearing, Member Hayes notes that the Respondent failed to file a specific exception to this ruling and that, in any event, the exception is without merit.

[2] 344 NLRB 934 (2005). In the companion case issued the same day, the Board found, on remand from the 11th Circuit, that the Respondent violated Sec. 8(a)(3) of the Act by refusing to reinstate economic strikers upon their unconditional offer to return to work. 344 NLRB 1033 (2005). Both cases are the subject of this compliance proceeding.

[3] 213 Fed. Appx. 781 (11th Cir. 2006). In that decision, the Court enforced the Board's Orders in both 344 NLRB 934 and 344 NLRB 1033.

[4] Following the Court's enforcement of the Board's Orders in December 2006, the Board's Regional Office advised the Respondent of its remedial obligations, including the obligation to meet and bargain with the Union. Thereafter, and continuing through March 2008, the Union repeatedly requested bargaining with the Respondent pursuant to the terms of the court-enforced Order, sending five letters to the Respondent requesting that it provide dates to meet and bargain. The Union also requested the Respondent to furnish it with the requested information required under the terms of the Board's Order. The Respondent did not respond to any of these requests.

Further, as of September 2007, the Respondent had not posted the required notices to employees, and its failure to post was one of the subjects of a proceeding in the United States District Court for the Southern District of Florida, wherein the Board sought to enforce certain investigative subpoenas requiring the Respondent to (a) demonstrate that it had posted the required notices, and (b) furnish requested information necessary to calculate the amount of backpay due under the terms of the Order in 344 NLRB 1033 (2005). By Order dated September 13, 2007, the District Court directed the Respondent to comply with the investigative subpoenas, and thereafter the Respondent posted the notices and provided certain payroll records to the Board's Regional Office.

[5] Most notably, the Respondent continued to argue that bargaining was no longer required because there was no bargaining unit.

[6] Member Hayes dissents from the majority's adoption of provisions in the judge's recommended Order that impose substantial new special remedies on the Respondent for compliance with a bargaining Order that has been enforced by the 11th Circuit. In his view, the additional remedies—regardless of their merit—represent more than a mere "clarification" of the court's order, which must be understood as enforcing only the traditional requirements of a Board affirmative bargaining order. The General Counsel should petition the court for a modification of the order or, if appropriate, initiate contempt proceedings to secure these additional remedies.

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge and orders that the Respondent, Gimrock Construction, Inc., Hialeah Gardens, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order, including the payment to backpay claimants of the amounts set forth below, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings by Federal and State laws.

Murray R. Chinners	$ 74,583.12
Alfred K. Duey	$125,057.47
Joseph G. MacNeil	$ 10,367.77
Joseph T. Robinson	$ 580.83
Barney Sims	$ 92,243.40
James K. Wilkerson	$ 37,208.66
James L. Wolf	$ 14,311.31
TOTAL	$354,352.56

Dated, Washington, D.C. January 28, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Margaret J. Diaz and Rachel Harvey, Esqs., for the General Counsel.

Charles S. Caulkins and Philip R. Marchion, Esq. (Fisher & Phillips LLP), of Fort Lauderdale, Florida, for the Respondent.

Kathleen M. Phillips, Esq. (Phillips & Richard, PA), of Miami, Florida, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a compliance specification and notice of hearing issued on February 27, 2009,[1] as amended on May 22, against Gimrock Construction, Inc. (Gimrock or Respondent), stemming from the following Board decisions and cases of the Eleventh Circuit Court of Appeals (the Court).[2] For context, pursuant to a Stipulated Election Agreement, the International Union of Operating Engineers, Local 487, AFL—CIO (the Union) won an election on March 3, 1995, and was certified on March 20, 1995, as the bargaining representative of Respondent's equipment operators, oiler/drivers and equipment mechanics employed in Miami-Dade and Monroe counties, Florida (the two counties).

1. 326 NLRB 401 (1998)—The Board adopted, with modifications, Judge Raymond Green's May 31, 1996 decision, and found that the Union had conducted an economic strike commencing on May 31, 1995, that the strikers had made an unconditional offer to return to work on June 6, 1995, and that Respondent had refused to reinstate them in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Board further adopted his proposed order that Respondent offer immediate and full reinstatement to strikers who had not already returned, if necessary dismissing persons hired as striker replacements after June 6, 1995; and place on a preferential hiring list those striker applicants for whom positions were not immediately available. Judge Green concluded that he lacked authority to determine whether employees had engaged in a jurisdictional strike in violation of Section 8(b)(4)(D) of the Act, as Respondent had contended.

2. An unpublished Board Order of July 27, 1999—Over Respondent's objections, the Board granted the General Counsel's motion to clarify its order in the above, specifically finding that on June 6, 1995, the strikers had made an unconditional offer to return to work.

3. 247 F.3d 1307 (11th Cir. 2001)—The Court issued a Judgment temporarily denying enforcement and remanding the matter "for a thorough discussion of the evidence supporting the Board's determination of the Union's bargaining position," which had been contrary to the judge's, in connection with the issue of whether the Union had demonstrated an unlawful jurisdictional objective.

4. 344 NLRB 1033 (2005) – In addressing the court's remand, the Board concluded that the Union had not engaged in an unlawful jurisdictional strike. The Board reaffirmed its prior decision reported at 326 NLRB 401 (1998), as clarified by this opinion and the Board's July 27, 1999 Order.

5. 334 NLRB 934 (2001) – The Board adopted, as modified, Judge Pargen Robertson's decision, and found that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union since October 27, 1999, and refusing to furnish requested information that was relevant to the Union's performance of its duties as bargaining representative, to wit, requests in letters of May 7, June 14, and June 23, 1999, pertaining to work that Respondent performed for any governmental entity for the 3-year period prior to May 7, 1999, and payroll records for all of Respondent's projects in the two counties for the period from April 23–October 27, 1999.

[1] All dates hereinafter occurred in 2009 unless otherwise specified. At my suggestion, for ease of reference, the General Counsel prepared and submitted a document that combined the original compliance specification and the amendment (GC Exh. 1(d)(d) (the conformed specification)).

[2] GC Exhs. 1(a)–1(f).

6. 213 Fed. Appx. 781(11th Cir. December 27, 2006)—The Court granted the Board's applications for enforcement of its Orders in both 326 NLRB 401, as clarified, and 334 NLRB 1033. The Court rejected all of Respondent's challenges to the Board's findings that Respondent refused the Union's requests for payroll records, refused to bargain collectively, and refused to reinstate strikers, and that the Union's bargaining position did not evidence an unlawful jurisdictional dispute. I take administrative notice of the following. On February 6, 2008, Respondent filed a Motion to Partially Recall the Court's February 27, 2007 Mandate regarding its December 27, 2006 Opinion, essentially arguing that a bargaining unit no longer existed.[3] The Court denied the motion on February 25, 2008.[4]

Pursuant to notice, I conducted a trial in Miami, Florida, on June 1–4, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

I would not permit Respondent to relitigate before me facts or legal conclusions already addressed and decided by the Board and the Court, or allow Respondent to raise arguments that it should have timely brought up to the Board or the Court during the lengthy (decade-long) ULP proceedings. I adhere to those rulings as comporting with well-settled legal precedent and the nature of compliance cases. See, e.g., *Triple A Fire Protection, Inc.*, 353 NLRB No. 88 (2009); *Daniel Fluor, Inc.*, 353 NLRB No. 15 (2008); ; *Sceptor Ingot Castings, Inc.*, 341 NLRB 997, 998 (2004); *Paolicelli*, 335 NLRB 881, 883 (2001). Moreover, under Section 10(e) of the Act (29 U.S.C. Sec. 10(e)), I lack authority to modify the Court's December 27, 2006 Judgment. See *Fluor Daniel, Inc.*, 351 NLRB 103, 103 (2007); *Sceptor Ingot Castings*, ibid at 997; *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001).

In the interests of full due process, I afforded Respondent considerable latitude in presenting evidence. As I frequently stated at the trial, the requirements for a respondent's answer and its evidentiary burdens in a compliance proceeding are not the same as at ULP hearings, as the Board and the courts have long recognized.

I will address substantive burdens of proof in the analysis section. As the General Counsel correctly stated both in pretrial motions and at the hearing, Respondent's answer failed in many respects to satisfy the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations, to wit:

> As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of backpay, a general denial shall not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises in the specification on which they are based, the answer shall specifically state the basis for such disagreement setting forth in detail the Respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

In this regard, Respondent at trial attempted to raise arguments that were not contained in its answer, and it produced for the first time certain records that it had never previously furnished to the Agency.

I have duly considered the posthearing briefs that the General Counsel and Respondent filed.

Issues

1. Is Respondent obliged to bargain with the Union and furnish it with the information it has requested, as ordered by the Board and the Court?

2. Did the General Counsel meet its burden of showing that the gross backpay computations in the conformed compliance specification were not unreasonable or arbitrary?

3. Did Respondent meet its burden of showing that the discriminatees failed in their duty to seek to mitigate Respondent's backpay liability?

4. Are special bargaining remedies, as the General Counsel requests, appropriate?

Witnesses

The General Counsel called Compliance Officer (CO) Denise Rickenbacker; Lloyd Hunt and Dick Kruller, Respondent's sole co-vice presidents and sole co-owners, as adverse witnesses under Section 611(c); and Gary Waters, the Union's business manager.

Respondent called Hunt; discriminatees (in alphabetical order) Murray Chinners, Alfred Duey, Joseph MacNeil (who testified by telephone),[5] Barney Sims, and James Wilkerson, Sr.; and Waters as a 611(c) witness.

Rickenbacker testified credibly, and I have no reason to doubt her performance as a Board agent and CO in formulating backpay determinations, especially viewed in the light of backpay stretching back over 14 years and Respondent's failure to provide her with adequate documentation. Regarding the latter, I find it significant that Respondent had boxloads of documents, including personnel files, potentially relevant to backpay computations that it presented to Rickenbacker and Attorney Diaz on May 29, pursuant to the General Counsel's pretrial subpoena duces tecum. General Counsel's Exhibits 16 and 17, payroll reports for May 19–25 and November 3–9, 1996, were documents that Respondent first provided on that date. Yet, Rickenbacker had requested such documents as far back as January 2007. I also note Rickenbacker unrebutted testimony that prior to the issuance of the February 27 specification, Respondent represented that it had provided all of the records in its possession.

In contrast, Hunt, who provided most of the testimony on behalf of Respondent's contentions, was not credible. I base this conclusion in part, but by no means exclusively, on my observations of his demeanor and the manner in which he testified. He seemed clearly uncomfortable, his attitude was markedly defensive, he avoided eye contact with me when I asked him questions, and he did not appear to make a sincere attempt to answer questions that required some thought. In sum, he struck me as antagonistic to the whole process.

Even aside from the above, I would not find his testimony credible. Hunt has been a co-owner since Respondent began operations in 1986, employs 50–60 people, and handles the

[3] See GC Br. at Attachment A.

[4] See GC Br. at Attachment C.

[5] Discriminatee Joseph Robinson is deceased.

administrative side of the business, including estimating, bidding contracts, insurance, and bonding.[6[6]] I note his testimony that at times both he and Kruller personally engage in maintenance and repair of equipment, reflecting that they have direct contact with day-to-day operations.

Nevertheless, Hunt professed ignorance of many matters about which I would expect him to have some, if not complete, knowledge. For example, he testified that he did not know how many cranes Respondent presently has or what tools are located in Respondent's yard.

Further, Respondent contends that it no longer has any unit employees because it has no crane operators but "construction specialists" who perform a variety of tasks. When Hunt was asked when Respondent started using the term "crane specialists," he replied, rather conveniently, "I don't recall."[7] I then asked him the job titles of individuals who operate cranes and related equipment before Respondent started using the designation of construction specialist. He responded, contrary to his earlier answer, "Well, I don't know there was anything before construction specialist."[8] Obviously, at the time Respondent entered into an election agreement, it employed persons designated as equipment operators, oiler/drivers and equipment mechanics. Indeed, in October 1999, Respondent's prior counsel conceded the existence of crane operators.

I also note Kruller's testimony that certain individuals are identified as a crane operators on certified personnel records; those who would be predominantly operating a crane on the particular project. These would include Robert Collins, John Longworth, Luis Pratt, and David Trinidad. Kruller determines who will be designated as a crane operator. He further testified that on a current project, two construction specialists are operating a crane: Pratt and Trinidad, with the latter spending about half his time on the crane; the former, 10–15 percent.

Hunt testified on June 2 that Respondent kept "no written record, very little written records" of maintenance and repair of equipment, but that "[s]ome records are kept on the computer, very little. Some records are found in the accounts payable,"[9] testimony I find somewhat incredulous for a company with 50–60 employees who operate cranes that can be worth millions of dollars each, according to both Hunt and Kruller. In any event, on the last day of hearing, June 4, he identified General Counsel's Exhibit 27 as a repair log, explaining that subsequent to the engineer losing the repair log, "[I]t was decided that when major repairs were being done, that subsequent to that, he would turn it into the office manager, and she would make an entry into this log."[10[] He further testified that the document was created prior to September or November 2008 and is updated on an ongoing basis. Thus, he was not fully forthcoming in his earlier testimony on the subject.

As to documents requested by the Union, Hunt gave a deposition on October 10, 2007, in which he stated that they were not provided because they could not be located.[11] However, Hunt also admitted that since June 30, 2005, he has not done anything to search for or locate information that the Union requested.

Finally, when asked on cross-examination for records showing locations where two comparators, Longworth and Claudius Samuels, performed work since 1998, Hunt answered, "I don't know. We'd have to go looking."[12[12]] His answer to whether Respondent had records showing the dates that Longworth performed certain work and operated a particular piece of equipment was "We could piece that together, yes."[13] Obviously, Respondent had not made any efforts to obtain them before or during the hearing, despite their undisputed direct relevance to computation of gross backpay.

Kruller's testimony was considerably more limited in scope. As with Hunt, he appeared evasive in answering questions about Respondent's records relating to maintenance and repair of equipment. He answered somewhat equivocally, "Not really, no," when the General Counsel asked if Respondent maintained such records.[14] He then testified that the maintenance engineer had maintained such a log but lost it about 5 or 6 months ago and did not know if he had started another one, saying "I'd have to talk to him."[15] Again, Hunt's testimony on June 4 and General Counsel's Exhibit 27 reflect that such a log has been maintained on a continuous basis since at least November 2008, and I cannot believe that Kruller was not aware of its existence. In this regard, he testified "We're a small organization. We've owned the equipment for a long time and we generally pretty much know exactly what's been done to it."[16]

He also professed not to know if Respondent is required by its insurance liability carrier to maintain any records or documents about maintenance and repair of equipment. Granted, he testified that Hunt handles the administrative side. Nevertheless, as one of two co-owners of the business since 1986, I would expect him to know the answer. The same holds true for his knowledge of whether Respondent bid on any Miami-Dade freeway projects for which it requested and received information in 2008 and 2009. He answered, "I don't believe so."[17] He similarly hedged his answer as to whether Respondent had discussed working on any of these projects with other contractors by replying, "Probably.""[18]

For the above reasons, I do not find that Respondents co-owners were completely candid or reliable witnesses.

I generally credit the discriminatees, all but one of whom are retired. They appeared to be straightforward, and they readily answered questions, whether posed by the General Counsel, Respondent's counsel, or me. I take into account that they were asked about events occurring over many years and as far back

[6] Testimony of Kruller at Tr. 501.
[7] Tr. 330.
[8] Tr. 331.
[9] Tr. 303–304.
[10[] Tr. 768.
[11] Tr. 337.
[12] Tr. 766.
[13] Tr. 767.
[14] Tr. 504.
[15] Ibid.
[16] Tr. 507.
[17] Tr. 526.
[18] Ibid.

as 1995.

Facts

Based on the entire record, including testimony, my observations of witness' demeanor, documents, stipulations, and all previous findings of fact and orders of the Board, as enforced by the Court, I find the following.

Respondent is a heavy civil contractor specializing in harbor and marine construction in South Florida and the Caribbean. Since starting business in 1986, it has maintained an office and place of business in Hialeah Gardens, Miami-Dade County, Florida (the facility). The Board has previously found jurisdiction.

Pursuant to a Stipulated Election Agreement, the Union won an election on March 3, 1995, and was certified on March 20, 1995, as the bargaining representative of Respondent's equipment operators, oiler/drivers and equipment mechanics employed in the two counties.

The Union called an economic strike commencing on May 31, 1995, and the strikers, including the discriminatees, made an unconditional offer to return to work on June 6, 1995. Respondent has never made the discriminatees offers of full and immediate reinstatement.

Union's Requests to Bargain and for Information

The Union, by letters of May 7, June 14, and June 23, 1999, requested information pertaining to work that Respondent performed for any governmental entity for the 3-year period prior to May 7, 1999, and payroll records for all of Respondent's projects in the two counties for the period from April 23–October 27, 1999.

Respondent failed to provide such records or to meet and bargain, and the Union filed ULP charges culminating in the Board's Order in 334 NLRB 934. Soon after its issuance, Waters faxed and mailed a series of letters to Hunt, as follows.

By letter of July 12, 2005, Waters requested bargaining and stated that he was available on 3 days the following week.[19] By letter of July 25, he said that he had received no response and asked for one by July 29.

By letter of July 27, 2005, Waters requested the following information:

> 1. A list of bargaining unit employees (equipment operators, oiler/drivers and equipment mechanics) currently employed in the two counties, including the employee's current address, telephone number, date of hire, benefits provided, job classification, and wage rate.
>
> 2. The information requested by the Union in its letters of May 7, June 24, and July 23, 1999, including payroll and certified payroll records pertaining to Respondent's work for any governmental entity for the 3 years ending May 7, 1999, and payroll records for all of Respondent's projects within the Union's geographical jurisdiction for the period April 23–July 23, 1999.

By letter of September 22, 2005, Waters stated that he had received no response either to the Union's request to begin negotiations or to the request for information. He advised that the Union had filed ULP charges.

Following the Court's December 27, 2006 Judgment enforcing the Board's Orders, Rickenbacker sent a letter dated January 24, 2007 to Caulkins. She cited the decision and listed Respondent's obligations—supply the Union with information it had requested in May–July 1999; meet and bargain, on request; and comply with notice-posting requirements.[20]

By letter of January 17, 2007, Waters also referenced the Court's decision, including the portion ordering Respondent to meet and bargain with the Union upon request. He made a request to meet and bargain and gave January 26, 29, or 30 as dates that he was available.

By letter of February 27, 2007, Waters stated that he had received no response to his January 17 letter or to a message on Hunt's voice mail earlier that day, in which Waters asked Hunt to call him to arrange a meeting. He concluded, "I am assuming by your failure to respond, you are defying the court's order. Please contact me as soon as possible if my assumption is incorrect."

By letter of December 19, 2007, Waters sent a "notice of our demand to bargain" over any and all issues related to bargaining unit employees or former bargaining unit employees affected by the decisions and orders of the Board and the Court, including compensation for back wages, loss of pension benefits, health care, life insurance, and reinstatement. He asked Hunt to respond as soon as possible and stated that he was available to meet on any weekday of the first or second week in January 2008.

By letter of the same date, Waters made another request for information. First, he reiterated what the Union had requested in the first paragraph of its July 27, 2005 letter, set out above. He further requested a listing of any and all construction projects for which Respondent submitted bid proposals relating to construction projects in the two counties since January 1, 2007.

Caulkins, by letter of December 27, 2007, advised Waters that this law firm was representing Respondent. As to the December 19 letter respecting information, Caulkins stated that Gimrock currently had no construction projects in the two counties and, therefore, it had no information to provide to the Union. He further stated that Respondent had not submitted bid proposals for any construction projects in either county from January 1, 2007 to the present. The parties stipulated that this letter was Respondent's sole response to all of Waters' letters from January 17, 2007–March 10, 2008. It is undisputed that Respondent has provided no other information to the Union and has failed and refused to meet and bargain with the Union to date.

By letter of January 3, 2008 to Caulkins, Waters stated that his information request had asked for information on any bargaining unit employees working in the two counties and that the Union had reason to believe that a unit employee, an equipment mechanic, was performing unit work at Respondent's facility, located in Miami-Dade County. Waters asked for the requested information pertinent to this unit employee.

[19] See Jt. Exh. 1, which represents all written correspondence between the Union and Respondent in 2005 and thereafter.

[20] GC Exh. 2. All of Rickenbacker's letters to Caulkins were also faxed.

Waters further stated that he had not yet received a response to his request for dates to bargain over any and all issues related to unit or former unit employees affected by the Board and Court orders, including compensation for back wages, loss of pension benefits, health care, life insurance, and reinstatement. He asked Caulkins to let him know as soon as possible of his availability to meet and negotiate, saying that he was available to meet on any weekday of the second week in January.

Finally, by letter of March 10, 2008 to Caulkins, Waters again requested the information requested in the first paragraph of his July 27, 2005 letter, regarding unit employees. He also again requested dates to bargain over any and all issues related to unit or former unit employees affected by orders of the Board and the Court, including reinstatement and/or preferential hire for former strikers; backpay owed to former striking employees; loss of pension benefits, health care, and life insurance; or any other losses that the affected employees suffered due to Respondent's ULP's. Waters again asked Caulkins to let him know as soon as possible of his availability to meet and negotiate, stating he was available on March 17, 19, or 21, 2008, or any weekday the following week.

The General Counsel's Compliance Specification

By letter of January 24, 2007 to Caulkins, Rickenbacker referred to the Judgment as it related to the discriminatees, and set out the following as Respondent's obligations to comply:[21]

1. Upon application, offer to those strikers who had not yet returned immediate and full reinstatement to their former or substantially equivalent positions, dismissing if necessary all persons hired as striker replacements after June 6, 1995, and place on a preferential hiring list those striker applicants for whom positions were not immediately available.

2. Make whole any of the strikers for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them to their former jobs as per the Board's remedy.

3. Within 14 days of a request, make available to the Board for examination and copying all payroll and other records necessary to analyze the amount of backpay due.

4. Comply with the notice-posting requirements.

She further stated that it was necessary for Respondent to furnish her the following payroll and record information in order to calculate backpay:

1. An alphabetized list identifying, by name, each employee who performed unit work for Respondent in the two counties during the period June 6, 1995 to present, together with the following information:

(a) Beginning and ending dates of employment.
(b)Hourly rate(s) of pay received, and effective date(s).
(c) Job position/classification held.
(d) Assigned shift and work hours.
(e) Identity of each jobsite(s) worked and county location.

2. Payroll (weekly or biweekly) records listing the names of all employees who performed unit work for Respondent in the above counties for the above period, including straight time and overtime hours.

3. Weekly or biweekly payroll records showing the actual dollar cost, or amount of any copayment that unit employees were required to pay and/or contribute to receive health and welfare benefits for the above period.

4, Hourly pay rate received by each of the discriminatees at the time of the strike on May 31, 1995.

5. Documents and records showing the names of employees and equipment operated, dates employees operated said equipment, and the names and locations of the jobsites covering the above period.

6. A list of all fringe benefits that Respondent provided to any unit employee during the above period for hourly paid employees, including holiday pay, bonuses, sick leave, vacation, etc.

7. A summary description of each fringe benefit identified in No. 6, together with any applicable eligibility requirements and the dollar cost or copayment (if any) required to be paid by employees.

Rickenbacker requested that the above information be furnished to the Regional Office by close of business February 6, 2007, and stated that following receipt of said information, the Region at a later date would provide Respondent with preliminary make-whole backpay calculations.

On May 31, 2007, Barbara O'Neill of the Contempt Litigation and Compliance Branch of the General Counsel had a subpoena duces tecum issued on Respondent, directing it to produce the following documents at the Miami Resident Office on June 13:[22[

1. All documents reflecting Respondent's compliance with the Court's Judgment of December 27, 2006, including documents that would reflect that:

a. The discriminatees have been offered immediate reinstatement and/or placed on a preferential hiring list if no positions were immediately available.

b. Respondent provided the information requested in Rickenbacker's January 24 letter.

c. The two Notices to Employees have been signed, dated, and posted.

d. The information the Union requested in May–June 1999 has been provided to the Union.

e. Respondent has met and bargained or made arrangements to meet and bargain with the Union, and is continuing to meet and bargain.

2. If full compliance has not been achieved, all documents establishing Respondent's reasons and/or defenses for failure to comply with the Court Judgment, including documents that would reflect, for the period from December 27, 2006 to present:

a. The identification of Respondent's jobs, including geographic location of job sites by address, city, and county.

b. Identification of all of Respondent's bids, including geographic location of job sites by address, city, and

[21] GC Exh. 3.

[22] GC Exh. 4.

county, including currently pending bids, bids that Respondent successfully obtained, and those that it did not.

c. Identification of other individuals, entities, and/or employers (names and addresses) to whom Respondent provided equipment and/or equipment operators, including the geographic location of the jobsite by address, city, and county.

d. Payroll records listing the names of all employees who performed unit work for Respondent.

e. An alphabetized list of employees who performed unit work for Respondent, together with the following information: beginning and ending date(s) of employment; hourly rate(s) of pay received, and effective date(s); job position/classification held; assigned shift and work hours; and identity of each jobsite(s) worked and county location.

I take administrative notice that the above branch of the Board initiated proceedings against Respondent in *NLRB v. Gimrock Construction, Inc., Lloyd Hunt*, Case No. 07-22366-MC-Martinez (S.D. Fla.), and that Judge Jose Martinez issued an amended order on September 13, 2007.[23] He apparently ordered Respondent to post a notice and provide information pertinent to the discriminatees to the NLRB because, by letter of September 21, 2007 to O'Neill, Caulkins stated that without waiving Gimrock's right to seek relief from Judge Martinez' order, Respondent was providing responses to the NLRB subpoena, by Federal Express delivery to O'Neill's office.[24[

His responses were as follows:

1(a) (discriminatees were offered immediate reinstatement) –"No documents have been located."

1(b) (payroll records that Rickenbacker requested) – No documents were provided. "Some of these documents do not exist. Many of the other requested documents were lost as a result of a hurricane or are missing as a result of a move of the Company's office. However, our client has sent you all of the documents responsive to the January 24, 2007 letter that the Company located to this date."

1(c) (notices to employees) – Copies are being provided.[25[

1(d) (information the Union requested in 1999)—Not provided "because the Company cannot locate this information."

1(e) (bargaining with the Union) – No documentation in the Company's possession.

2(a) (identification of Company's jobs)—Is being provided.

2(b) (bids) – None pending on December 27, 2006 to present.

2(c) (others to whom the Company provided equipment/equipment operators)—No documents exist.

2(d) (payroll records)—Being provided.

2(e) (alphabetized list of employees performing unit work)—Being provided.

By letter of September 27, O'Neill summarized the contents of the 12 Federal Express boxes/packages that Caulkins had sent, as follows:[26]

Box 1—payroll, vacation information, and employment applications for the payroll periods ending 10/18/03–1/22/05.

Box 2 – Same documents for 1/1/06–2/18/07.

Box 3 – Same documents for 2/12/05–12/25/05, plus binder payroll records.

Box 4 – Timecards for 9/30–12/23/00, 4/26/03–5/7/05.

Box 5—Time cards for 4/21/02–4/20/03, 5/14/05–9/24/06, plus paycheck records from the late 1990's, mostly 1997–1999.

Box 6 – Paycheck records from 1997–1999, check registers from 8/12–12/21/05 and 8/30–12/20/06, and checks from 4/30–11/06/05.

Box 7—Certified paychecks for 9/21/03–9/10/04, 10/03/04–6/18/05, 12/12/05–1/1/07, & 2/18–9/9/07; check registers for 1/13–8/25/06.

Boxs 8–12 – Cashed checks for 1/10/97–8/03/01.

Box 13 – Disks with certified and other payroll records for 2004–2006, and the first three quarters of 2007.

By letter of November 10, 2008, Rickenbacker sent Caulkins preliminary net backpay calculations, stating that "The backpay figures were calculated based on the information that is currently available to the Region. Please note that the enclosed materials contain only preliminary calculations, which may be subject to revision by the Region."[27]

She explained that gross backpay was computed utilizing the pre-ULP earnings of the discriminatees, calculated on the basis of the discriminatees' total wages earned from Respondent in 1995 divided by the number of weeks Respondent employed them prior to June 5, 1995. She noted that the accrued interest amounts went through the fourth quarter of 2008 (Q4-2008) only. The sum total for backpay, interest, and FICA match amounted to $293,555.73.

The original compliance specification, issued on February 27, modified the period for which the pre-ULP earnings of the discriminatees was used as the basis for gross backpay, limiting it to the period from June 6, 1995 through Q2-1998; for later periods, the earnings of comparator employees were used.[28] Rickenbacker testified that she made this change in methodology because three of the discriminatees had a substantial backpay period, she had some company records concerning comparator earnings starting in Q3-1998, and she did not want to prejudice those discriminatees by not taking into account changes in pay rates, hours, or conditions that might have occurred through the years.

Rickenbacker further testified that in preparing the February

[23] See GC Exh. 5.

[24[GC Exh. 5.

[25] The notices were posted on September 20 and October 15, 2007. See GC Exhs. 9 & 10.

[26[GC Exh. 6. This was the first time that Respondent provided any payroll records to the NLRB. Tr. 205.

[27[R. Exh. 1.

[28] GC Exh. 1(g) at 4–5.

27 specification, she relied on pre-ULP earnings of the discriminatees (for the period through Q-2 1998), records in the underlying ULP case for portions of 1998 and 1999, and records that Respondent provided (in September 2007) for portions of 2003–2007. Judge Green had found that two–four permanent replacements were hired before the unconditional offer to return to work, but he did not name them.

At the time the specification was issued, Respondent had not provided Rickenbacker with sufficient records for her to determine when any of the alleged permanent replacements started working or stopped working, when positions otherwise became available for any of the alleged permanently replaced employees, or when new employees were hired after June 6, 1995.

As to the premise in the specification that each discriminatee would have continued to be employed in the journeyman equipment position during his backpay period, Rickenbacker based this on Judge Green's finding that equipment operators transferred from one job to another and on Company job labor reports and certified payroll reports provided for parts of 2003–2007.

Rickenbacker selected as comparator employees those identified in Respondent's records as crane operators.[29] In determining their wages, she used payroll records that Respondent had provided, as well as documents in the underlying ULP proceeding. In quarters for which Respondent had provided substantial payroll records, Rickenbacker added up gross earnings from the comparators and divided it by the number of comparators to arrive at the average weekly earnings, which she added up to get the average quarterly earnings.

For quarters for which she had inadequate information to formulate comparator earnings, Rickenbacker left them blank (shaded gray) in Appendix B to the specification. Timecards and cancelled checks could not be used for calculation, because timecards did not give wage rates paid at time or overtime, or job classification; cancelled checks did not give the job, hourly rate or hours worked, but only net pay. Instead, she carried over the average quarterly earnings from the previous quarter for which she could make a calculation. Most notably in this regard, she carried over the $14,911 in Q3-1999 to Q4-1999 through Q3-2003. Where weeks in a quarter were missing, she added up and averaged the other weeks to compute the quarterly earnings. Appendix B ended Q4-2007 because the last records Respondent provided were as of September 2007.

On April 2, Rickenbacker prepared a summary of compliance related documents, based on records that Respondent had furnished.[30] For 1998, she had certified payroll records for 26 weeks; for 1999, 29 weeks; and for 2000, 20 weeks. She had equipment pperator jobsite information (with names of equipment operators) for 6 weeks in 2003, 50 weeks in 2004, 19 weeks in 2005, 47 weeks in 2006, and 25 weeks in 2007.

On May 22, the Region issued an amendment to the compliance specification,[31] providing ending dates for the periods of backpay for all discriminatees but one (Duey).

On May 29, Respondent permitted Rickenbacker and Harvey access to numerous boxes of documents, including personnel files, pursuant to the General Counsel's pretrial subpoena duces tecum. They spent the entire day reviewing those records but did not have adequate time to go through all of them. Subpoenaed documents were not segregated from other documents, nor were the personnel files of the equipment operators separated from all other personnel files, except for Longworth's and Samuel's. Rickenbacker became aware that Respondent possessed documents that potentially could have been used to determine when positions became available for any replaced discriminatee, as she had requested in her January 24, 2007 letter. Rickenbacker testified without controversion, and I find, that prior to the issuance of the February 27 specification, Respondent represented that the records it had furnished to the Agency were all of the records in the Company's possession.Respondent never provided a complete list of all equipment operators employed since June 6, 1995.

On the opening day of trial, Respondent provided the General Counsel with certified payroll reports for payroll periods ending September 30, 2007–May 24, 2009 (some weeks are missing).[32] They reflect employees designated as "crane operators" on a continuing basis throughout, most frequently three weekly. The certified payroll records classify employees in accordance with prevailing wage standards, and those identified as crane operators are those who would be predominantly operating the crane on that project. Nonsupervisory employees so designated by Kruller include Collins, Timothy Davis, Longworth, Pratt, and Trinidad.

Respondent's "construction specialists" perform a variety of functions, including operating cranes and other equipment as part of their duties. Kruller testified that two of them are operating cranes on a current project (not in the two counties): Pratt, who spends about half his time performing such work, and Trinidad, 10–15 percent.

To a varying degree, about 20 construction specialists do maintenance and repair work. Kruller considers three of them able to perform more complex repairs: Collins, Danny Mellon, and Trinidad; and Longworth capable of "moderately" complex repair work. Minor repairs on equipment are generally made on jobsites, but work on smaller equipment or unused equipment is often done in the facility yard. Construction specialists may assist Kruller in making repairs in such situations. At the yard, cranes or forklifts are used for loading. Construction specialists, especially Danny Milian, may operate them.

Four equipment operators performed work in Miami-Dade County in the years 2003–2007, as follows (the CO used all of them as comparators):[33]

> 2003 – 87th Ave. Bridge (Cooper Howell & Bernardo Sando)
>
> 2004 – 87th Ave. Bridge (Howell & Longworth); Gimrock yard (Howell)

[29] Respondent's prior counsel asserted that two of them (Joseph Rodriguez and Samuels) were unit employees, in addition to 5 equipment operators, in an October 27, 1999 letter to Kathleen Phillips, the Union's attorney. See GC Exhs. 11 & 12.

[30] GC Exh. 8.

[31] GC Exh. 1(r).

[32] GC Exh. 28.

[33] See GC Exh. 8.

2005 – Gimrock yard (Collins & Sando); MDX (Collins & Sando)

2006 – Gimrock yard (Collins & Sando); MDX (Longworth & Sando)

2007 – Gimrock yard (Collins & Longworth)

Kruller and Hunt testified that Respondent has no current projects in the two counties. However, Respondent has shown recent interest in performing work in Miami-Dade County. Thus, Kruller testified that since April 30, 2008, Respondent has been a "plan holder" for at least four projects on the Miami-Dade freeway system.[34] He explained that the Company becomes a plan holder when it is considering whether to bid. He further testified that Respondent "probably" discussed with other contractors working on some of the projects.[35]

The Discriminatees and Mitigation

All of the discriminatees cooperated in submitting to the Region periodic reports of their interim earnings and job searches. The Region also obtained Social Security earnings reports on all the discriminatees shortly after December 2004 for the years 1995–2004 and, sometime after December 2007, for Duey's records for 1995–2007. The Region might have also gotten two such reports for one of the other discriminatees. If the discriminatee did not submit an authorization for the Region to obtain Social Security reports, the Region obtained earnings records from the Florida Department of Revenue. Rickenbacker used both the latter and Social Security reports to arrive at interim earnings calculations in approximately October 2008.

After issuance of the February 27 specification, Rickenbacker received trust fund reports showing contributions made by interim employers to the Union's trust funds.[36][36] She later provided them to Respondent. They reflected the discriminatees' work only for unionized employers, as opposed to the Federal and State agency records that encompassed all employment. She did not use these records to determine interim earnings because they did not tell the wage rate, type of hours worked (straight, time-and-a-half, or double), or type of work performed. Attorney Harvey did crosscheck the employers listed in the trust fund reports with the Region's other records.

After February 27, Rickenbacker also received further information about interim earnings of MacNeill, and she accordingly changed his net backpay in the May 22 amendment to the specification. Also in the amendment, Sims' net backpay was reduced because the Region had inadvertently erred in its original calculation.

None of the discriminatees ever said anything to Rickenbacker that led her to believe they were breaching their duty to mitigate.

The following reflects the dates that Respondent's backpay liability ceased, as per the conformed specification, and the testimony of certain discriminatees that Respondent contends shows they failed to mitigate.

Joseph MacNeill

MacNeill's backpay period tolled on August 26, 1995, the date he withdrew from the Union and returned to work for Gimrock.

James Wolf

Wolf's backpay period tolled on about January 8, 1996, when he obtained reemployment with Gimrock.[37[

Joseph Robinson

Robinson passed away on or about August 1, 1996, ending his backpay period. No evidence was adduced to controvert the CO's calculations concerning his interim earnings.

James Wilkerson

Wilkerson's backpay period ended on November 14, 1996, when he had an injury that prevented him from continuing to work. Between June 5, 1995 and November 14, 1996, he worked as a crane operator for about six other companies, mostly in Miami-Dade County. In all but one, he operated equipment similar to that he had used at Gimrock. He obtained these jobs through the Union's hiring hall. He did not turn down any hiring hall referrals or other job offers.

Murray Chinners

Chinners' backpay period ended on November 30, 1999, when he retired. During this period, he used union hiring hall referrals to obtain employment as a crane operator. Some involved work similar to what he had done at Gimrock, others hoisting up on buildings. He did the latter at his last interim employer, Ebsary Foundation.

The parties stipulated that Respondent's Exhibit 10 is a trust fund-generated document reflecting jobs for which employers made contributions on Chinners' behalf.

Barney Sims

Sims' backpay period ended after October 1, 2000, when he retired. He recalled working, through the Union's hiring hall system/Waters,[38][38] for four employers during the period between June 5, 1995 and September 30, 2000, either as a crane operator or as an oiler. He rejected two jobs because they required operating equipment that he had never used; one involved high climbing, the other a large crane that he was afraid to operate. Sims joined the Union in 1987.

Alfred Duey

Duey is the only discriminatee to whom the Respondent has a continuing liability for backpay until he receives a valid offer of reinstatement. Thus, his backpay period extends back 14 years. During this period, he sought and received employment

[34] See GC Exhs. 21–24, plan holder lists posted June 3, 2008 (Dolphin Expressway); April 30, 2008 (Dolphin Expressway); January 30, 2009 (SR 924); and April 28, 2009 (SR 924), respectively.

[35] Tr. 526.

[36] R. Exh. 2, generated on their face on April 2.

[37] During the trial, Respondent shifted its version of the date when Wolf returned, as either in June or September 1995. In any event, Respondent's counsel conceded that Gimrock has no records showing that Wolf went back to work prior to the January 8, 1996 date in the conformed specification. Tr. 718, 723.

[38] R's brief at 20 states that Sims did not use the hiring hall, but Sims' testimony reflects that after the strike, he went there with other discriminatees to sign up for work. Tr. 576–577. In any event, I consider Waters and the Union's hiring hall system to be effectively synonymous.

through the Union's hiring hall; through an affiliated hiring hall in Orlando, Florida; or by calling around to different companies, including former employers.[39]

General Counsel's Exhibit 26, which Duey prepared at different times based on his records, is a compilation of his employment history from November 14, 1994 –January 11.

He obtained his first job (Gold Coast Crane) on his own, not through the Union's hiring hall. His last job, for about 4-1/2 years, was with Maxim as a crane operator at various jobsites, primarily in Miami-Dade County and also in Broward County and the Orlando area. He last worked on January 11.

Duey voluntarily provided Respondent with a summary of the dates he was out of work after the strike and up to January 5,[40] and testified that it was "fairly accurate."[41] Respondent introduced trust fund records showing contributions unionized employers made on Duey's behalf from August 1996–July 2005.[42] However, Duey also worked for nonunion companies that did not make such contributions, recalling Zep Construction specifically.

Duey also provided to Respondent a list of jobs he quit or from which he was fired during the 14-year-backpay period.[43] It states therein that he quit the following:

> 1. Miami Crane Service, 7/08/03—Lack of hours and after receiving another job offer. His work summary reflects no hiatus in employment before the start of the subsequent job.
>
> 2. Gold Coast Crane, 11/13/03—Lack of hours. Again, his work summary reflects no unemployment after this quit.
>
> 3. HJ Foundation, 12/10/08 – Unsafe working conditions and harassment.

It further states that he was "fired" from the following:

> 1. Zep Construction, 5/31/96 – Accused of damaging equipment. Duey testified that he denied the allegation and that the company did not contest his receipt of unemployment benefits.
>
> 2. Gold Coast Crane, 9/24/98—A Crane tower and boom fell to the ground while he was lowering it in preparing for a hurricane. He was told to stay home, and, later, that the company had no work for him. Duey testified that the crane malfunctioned and that he was not directly told that he was fired but concluded that from the company's actions. He further testified that Gold Coast subsequently rehired him.
>
> 3. Kipp Crane Service, 12/19/99 – Expense money dispute. Duey testified that he objected to the amount of expense money the company paid him for out-of-town work, and "the owner said he'd heard enough."

Analysis and Conclusions

Failure to bargain and failure to provide information

I am not called upon to decide whether Respondent has failed and refused to bargain in good faith since October 27, 1999, or has failed and refused to provide the Union with information it requested on May 7, June 14, and June 23, 1999 that is relevant and necessary for its performance of its duties as collective-bargaining representative. As I set out at the beginning, the Board and the Court have already made these determinations, and even if I disagreed, I would have no authority to disregard their rulings. On February 28, 2008, the Court rejected Respondent's specific argument that it no longer had a duty to bargain because there was no bargaining unit.

Accordingly, I conclude that Respondent has failed to comply with the Board's Order and Court's Judgment as to bargaining with the Union and providing it with the information it requested. A contrary result would run counter to the purposes of the Act by effectively rewarding Respondent for committing ULP's.

I note that Respondent's certified payroll records reveal a consistent employment of employees entitled "crane operator" from September 2007 through as late as May 24 of this year; four equipment operators performed work in Miami-Dade County in the years 2003–2007; Respondent in 2008 and 2009 demonstrated an interest in performing work for government entities in Dade county; and, even according to Kruller, Respondent's employees still perform work that constitutes unit work if done in the two counties.

The General Counsel's Gross Backpay Computations

Because Respondent has already been found to have unlawfully discriminated against the discriminatees, the presumption arises that they would have received some backpay. *Minette Mills, Inc.*; 316 NLRB 1009, 1010–1011 (1995); *Arlington Hotel Co.* 287 NLRB 854, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989).

As the Board recognized in *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), "Determining what would have happened absent a respondent's unfair labor practices . . . is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat difficult result. Accordingly, the General Counsel is allowed a wide discretion in picking a formula." See also *Moran Printing*, 330 NLRB 376, 376–377 (1999). Thus, the Region has the burden of showing only that the gross backpay amounts contained in a backpay specification are reasonable and not arbitrary. *Virginia Electric v. NLRB*, 319 U.S. 533, 544 (1943); *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001); *Atlantic Limousine,* 328 NLRB 257, 258 (1986).

Once the General Counsel has arrived at such amounts, the burden shifts to the respondent to establish affirmative defenses that would mitigate its backpay liability. *Atlantic Limousine,* above at 258; *Hacienda Hotel & Casino*, 279 NLRB 601, 603

[39] See GC Exh. 25, an interim earnings report he filed with the CO for Q2-1996.

[40] R Exh. 5. This included a total of 5-1/2 weeks out of work in 1995, 4-1/2 weeks from May 30–June 30, and the last week in December. This does not suggest that he failed in his duty to mitigate, and I decline to find such based solely on statements in the Union's January and April 2005 newsletters and Waters' testimony that jobs for crane operators were plentiful in South Florida during that period.

[41] Tr. 592.

[42] R. Exh. 6.

[43] R. Exh. 9.

(1986). Any uncertainties in the amount of backpay due are resolved in favor of the discriminatee rather than the respondent, who is responsible for the underlying ULP's that have led to the uncertainties. *Alaska Pulp*, above at 522; *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973). Indeed, to hold otherwise would effectively punish backpay discriminatees for the respondent's illegal conduct against them.

I emphasize here that Respondent admittedly never provided the Region with complete payroll and/or other records and, indeed, demonstrated at the very least a lack of diligence in furnishing them. This is best illustrated by the fact that Respondent on May 29, 3 days before the start of trial, first allowed CO Rickenbacker access to voluminous records with a potential bearing on Respondent's backpay liability—nearly 2-1/2 years after she had requested such documents.

Rickenbacker testified that she based her gross backpay calculations on the Board's findings and conclusions in the underlying ULP case and on information that Respondent provided. She originally used the discriminatee's pre-ULP earnings for the entire backpay period but then decided to limit the period for which she used the discriminatee's pre-ULP earnings to June 6, 1995 through Q2-1998, and to use earnings of comparator employees for later periods. She explained that she made this change in methodology because three discriminatees had a substantial backpay period, she had Company records concerning comparator earnings starting in Q3-1998, and she did not want to prejudice those discriminatees by not taking into account changes in pay rates, hours, or conditions that might have occurred through the years. For comparators, she used employees designated in Respondent's (incomplete) records as crane operators. I take administrative notice that the Agency's Casehandling Manual Part III specifies both pre-ULP earnings and comparator earnings as alternative acceptable methods for computing gross backpay, depending on the circumstances.[44]

In light of the applicable precepts set out above, and taking into account Respondent's lack of cooperation and the lack of credibility of its principals, I conclude that the Region has satisfied its burden of showing that the gross backpay calculations in the conformed specification were reasonable and not arbitrary. Accordingly, I accept them in full.

Mitigation of Backpay Liability

A discriminatee must exercise "reasonable diligence" to obtain interim employment, as opposed to "the highest diligence." *Ferguson Electric Co.,* 330 NLRB 514, 518 (2000); *Arlington Hotel Co*., 287 NLRB 854, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989). Gross backpay is reduced for each period for which a respondent can show the discriminatee did not make reasonable efforts to obtain employment. An objective standard of reasonableness is used, with doubt resolved in the discriminatee's favor. *Midwestern Personnel Services, Inc.*, 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007); *Lundy Packing Co*., 286 NLRB 141, 141 (1987), enfd. 856 F.2d 627 (4th Cir. 1988). Consistent with the remedial nature of compliance proceedings, the burden is not on the discriminatees to show that they made a reasonable effort to secure interim employment but on a respondent to show their failure to do so. *Black Magic Resources*, 317 NLRB 721, 721 (1995); *Southern Household Products Co.*, 203 NLRB 881, 881 (1973).

Respondent first contends that Chinners, Sims, and Wilkerson failed to mitigate because they sought interim employment solely through the Union's hiring hall. The only case Respondent cites in its brief for this proposition is *Contractor Services, Inc.*, 351 NLRB 33 (2007). That case is distinguishable. The discriminatee therein was a paid union organizer or "salt" who had limited his job searches to nonunion employers.

The Board emphasized that it was a salt situation: "Our point is simply that where an organizerdiscriminatee's loyalty to his union employer results in an unreasonably limited job search, that individual cannot avoid the usual consequences of such an insufficient search. . . ." Id. at 38.

On the contrary, in nonsalt cases, "[t]he Board has long held that, in seeking interim employment, a discriminatee need only follow his regular method for obtaining work." *Midwestern Personnel Services*, above at 626, referencing *Tualatin Electric, Inc.*, 331 NLRB 36 (2000) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment through the union's hiring hall), enfd. 253 F.3d 714 (D.C. Cir. 2001). See also *Wright Elec., Inc.,* 334 NLRB 1031, 1031 (2001); *Seafarers Union (Isthmian Lines)*, 220 NLRB 698, 699 (1975).

When Chinners, Sims, and Wilkerson went out on strike, the Union was their certified bargaining representative. To accept Respondent's contention that they thereafter failed to mitigate by limiting their job searches to the Union's hiring hall referral system would be to turn the nature of compliance proceedings on its head and reward Respondent for its unlawful discrimination against them. I will not do so. The same holds true for Respondent's contention that Wilkerson failed to mitigate when he limited his job seeking efforts to employment in Miami-Dade County.

Respondent further asserts that Sims and Duey willfully lost interim earnings by their following conduct.

Sims turned down two job offers that both required operating equipment that he had never used, and one of them involved high climbing of which he was fearful. Thus, neither job was similar to what he had done at Gimrock. Respondent's brief (at 20) cites *Phelps Dog Corp. v. NLRB*, 313 US 177, 199–200 (1941), for the proposition that an employer may mitigate its backpay liability by showing that the discriminatee engaged in a "clearly *unjustified* refusal to take *desirable* new employment" (emphasis added). However, I cannot conclude that his refusals were unjustified or that the jobs offered were desirable, especially for an older worker such as Sims (he retired 5 years after the strike).

Duey has quit three jobs in the years since 1995. The first and second, both in 2003, were because of lack of hours, and he went to work immediately for other employers. Accordingly, those quits had no negative impact on his interim earnings. In contrast, the third, in 2008, was followed by 3 weeks of unemployment.

When a discriminatee voluntarily quits interim employment, the burden is on the Region to show that the decision was reasonable. The General Counsel carries this burden if the interim

[44] Sec. 10540.1, et seq.

job was substantially more onerous, involved unreasonable working conditions, or otherwise gave rise to a legitimate reason for quitting. *The Grosvenor Resort*, 350 NLRB 1197, 1201 (2007); *Lundy Packing*, 286 NLRB 141, 144 (1987), enfd. 856 F.2d 627 (4th Cir. 1988). Duey testified that he quit because of unsafe working conditions and harassment. Respondent did not elicit testimony from Duey or otherwise provide evidence that his conclusions were unreasonable, and they were therefore unrebutted. Accordingly, I conclude that this quit should not constitute a willful loss of earnings that would reduce his net backpay.

Duey has also been terminated three times since 1995. The first was in 1996 for alleging damaging equipment, which he denied. The second was in 1998, after a crane malfunctioned before a hurricane. He was not expressly terminated but assumed this from the fact that the company did not immediately call him back to work. He later again worked for this company. His last termination, in 1999, was because he had a dispute with the owner over the proper amount of expense money he was owed for out-of-town work.

The Board has consistently held that discharge from interim employment, without more, is not enough to constitute willful loss of employment. *Ryder System, Inc,* 302 NLRB 608, 610 (1991), enfd. 983 F.2d 705 (6th Cir. 1993), citing P*-I*-E* Nationwide, 297 NLRB 454 (1989), enfd. in pertinent part 923 F.2d 506 (7th Cir. 1991). Instead, the burden is on the respondent to show that the employee engaged in "deliberate or gross misconduct" to establish willful loss of employment and, hence, failure to mitigate. Ibid.

In evaluating the evidence, I bear in mind that three terminations over a period of 14 years in the construction industry hardly raises any negative inferences against Duey's exercise of good faith in seeking interim employment.

Counting the second incident as a termination, both it and the first termination involved equipment operation. Even if he was properly discharged for poor performance, the Board has held that this alone does not constitute a willful loss of earnings. *Arthur Young & Co.*, 304 NLRB 178, 178 fn. 1 180–181 (1991); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1162 (1980).

The third incident concerned Duey's termination for disputing proper payment for travel expenses, a term and condition of employment. His engaging in such conduct similarly did not constitute a willful loss of earnings. *Arthur & Young*, ibid; *Artrim Transportation System*, 193 NLRB 179, 181 (1971).

In sum, Respondent has not shown that Duey committed "any offense involving moral turpitude [or that] his conduct was so outrageous as to suggest deliberate courting of termination." *Ryder System*, supra at 610. See also *Lundy Packing*, supra at 146. Therefore, Respondent has failed to show that Duey's terminations should result in a diminution of his net backpay.

Based on the above, I conclude that Respondent has failed to meet its burden of showing that any of the discriminatees failed in their duty to mitigate Respondent's backpay liability, and I accept the calculations of net backpay contained in the General Counsel's conformed specification.

Scope of Bargaining Order

The General Counsel requests as part of my order certain remedies that the Board has deemed extraordinary. Thus, the General Counsel asks that Respondent be required to meet and bargain with the Union for a minimum of 16 hours per week until an agreement is reached, the parties agree to a hiatus in bargaining, or a lawful impasse is reached; and to prepare written bargaining progress reports every 30 days, submit them to the Regional Director, and serve copies on the Union to provide it with an opportunity to reply.

It is well established that the Board, in appropriate circumstances, may order unusual remedial relief to rectify particular ULP's. *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978); *Crystal Springs Shirt Corp.*, 229 NLRB 4, 4 fn. 1 (1977).

In ordering an employer to negotiate with a union, the Board has traditionally been reluctant to impose any specific obligations regarding the frequency or duration of bargaining sessions. In *Professional Eye Care*, 289 NLRB 1376, 1378 fn. 3 (1988), the Board declined to adopt the judge's recommendation that the respondent be ordered to bargain a minimum of 15 hours per week and to send bargaining reports to the Region every 15 days, stating that it would not impose standards for the respondent's compliance with its bargaining order. See also *Eastern Maine Medical Center*, 253 NLRB 224, 228 (1980), enfd. 658 F.2d 1 (1st Cir. 1981), wherein the Board did not adopt the judge's recommended order that respondent bargain 15 hours per week.

In two recent decisions, the Board specifically addressed the imposition of such special remedies. In *Monmouth Care Center*, 354 NLRB 1,1 fn. 3 (2009), the Board deleted that portion of the judge's recommended order that required two respondents to bargain jointly with the union at least once a week. The Board noted that the General Counsel had not requested this remedy or alleged the respondents were a single employer or joint employer. However, Chairman Liebman observed that "such a remedy may be worthy of consideration in a future case."

In *Myers Investigative & Security Services,* 354 NLRB No. 51, fn. 2 (2009), the Board denied the General Counsel's exception to the judge's failure to include as a remedy that respondent meet with the union not less than 6 hours per session or any other mutually agreed-upon schedule until a collective-bargaining agreement or good-faith impasse was reached. The Board stated that there was a lack of support for such a remedy in current law, but the Chairman repeated her observation in the *Monmouth Care Center* case.

In light of Chairman Liebman's comments, I consider it appropriate to determine whether the special remedies sought by the General Counsel are warranted in the circumstances of this case. I conclude that they are. Respondent's failure and refusal to bargain goes back years, Respondent's principals were not fully forthright in their testimony, and the totality of circumstances leads me to believe that Respondent will not satisfy its bargaining obligations to the Union in a timely and meaningful fashion under a standard order.

ORDER

IT IS HEREBY ORDERED that Respondent Gimrock Construc-

tion, its officers, agents, successors, and assigns, shall take the following actions:

1. Pay the individuals named below the indicated amounts of total net backpay and other reimbursable sums for the periods set out in the conformed backpay specification, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment and minus tax withholding required by Federal and State law:

Murray R. Chinners	$74,583.12
Alfred K. Duey	125,057.47
Joseph G. MacNeil	$10,367.77
Joseph T. Robinson	580.83[45]
BarneySims	92,243.40
James K. Wilkerson	37,208.66
James L.Wolf	14,311.31
TOTAL	$354,352.56

[45] Since Robinson is deceased, his backpay due shall be paid to the legal administrator of his estate or to any person authorized to receive such payment under applicable state law. See *United States Service Industries*, 325 NLRB 485, 487 (1998); *ABC Automotive Products*, 319 NLRB 874, 878 fn. 8 (1995).

2. Immediately offer Alfred K. Duey reinstatement to his former position or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing if necessary employees hired after June 6, 1995.

3. Pay Alfred K. Duey any additional amount of backpay and other reimbursable sums, with interest as per *New Horizons for the Retarded*, above, accruing after December 21, 2007, and until such time as Respondent makes him a valid offer of reinstatement.

4. Furnish the Union with all of the information it has requested from May 7, 1999 through March 10, 2008, and prepare written notification to the Regional Director as to what information it furnishes to the Union and when.

5. Within 21 days of the Board's issuance of its Supplemental Decision in this matter, bargain upon request with the Union; meet and bargain for a minimum of 16 hours per week until an agreement is reached, the parties agree to a hiatus in bargaining, or they reach a lawful impasse; and prepare written bargaining progress reports every 30 days, submitting them to the Regional Director and serving copies on the Union to provide it with an opportunity to reply.

Dated, Washington, D.C. November 16, 2009