1994 WL 151292
Only the Westlaw citation is currently available.
United States District Court,
District of Columbia.

Jessie L. BERGER, et al., Plaintiffs,
v.
IRON WORKERS, Reinforced Rodman, et al., Defendants.

No. C.A.75–1743(JGP/PJA). | April 14, 1994.

Attorneys and Law Firms

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Opinion

REPORT OF SPECIAL MASTER

ATTRIDGE, United States Magistrate Judge.

I

BACKGROUND

***1** This case arose out of the defendants' racially discriminatory actions in denying or delaying the admission of black rod workers[1] to Local 201 of the Iron Workers Reinforced Rodmen (the "Union"). The history of this case, which is well-documented in more than one court opinion,[2] will not be recounted here. For our purposes, it is sufficient to note that Local 201 and the International Association of Bridge, Structural and Ornamental Workers were found to have illegally discriminated against certified classes of black plaintiffs in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *See Berger v. Iron Workers Reinforced Rodmen Local 201,* 843 F.2d 1395 (D.C.Cir.1988), *as modified by* 852 F.2d 619 (D.C.Cir.1988), *cert. denied, International Assoc. of Bridge, Structural & Ornamental Ironworkers AFL–CIO,* 490 U.S. 1105 (1989).

In February of 1989, this case was referred to the undersigned as a Special Master pursuant to Federal Rules of Civil Procedure Rule 53 in order to determine the applicants eligible to participate as members of the class, and to determine the amount of damages due. (*See* Order of Reference to Special Master filed February 15, 1989 in *Berger v. Iron Workers,* C.A. No. 75–1743 (D.D.C.1989).)[3] Pursuant to the referral, this court as Special Master has held hearings and received both written exhibits and oral testimony to identify those eligible for class membership and the damages due to them.

This opinion sets out the conclusions of law that will govern the resolution of the claims as well as the Special Master's findings of fact that have class-wide application. Individual findings for each claimant are found at the end of the Report.

II

ENTITLEMENT TO DAMAGES

The damage phases of class action discrimination suits can be divided into essentially two separate stages. The first stage consists of determining a claimant's entitlement to damages; the second consists of assessing the extent of those damages. In each stage, burdens of proof and requirements of production vary.

A. *Conclusions of Law*

The defendant has already been found to have discriminated against the plaintiff class as a whole, in violation of both Title VII and § 1981. "Once a class has established liability in a disparate treatment case ... [a]ny individual class claimant may raise a presumption that he is entitled to relief upon a *prima facie* showing of class membership. The burden of proof then shifts to the employer to rebut that presumption in each individual case." *Trout v. Lehman,* 702 F.2d 1094, 1107 (D.C.Cir.1983), *vacated on other grounds,* 465 U.S. 1056 (1984); *see also International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 362 (1977), *Day v. Mathews,* 503 F.2d 1083, 1085 (D.C.Cir.1976).[4] Such a presumption in favor of the claimant is warranted as the "force of proof [of discrimination] does not dissipate at the remedial stage of the trial." *Teamsters v. United States,* 431 U.S. at 361; *McKenzie v. Sawyer,* 684 F.2d 62, 77 (D.C.Cir.1982). Therefore, reasonable grounds exist to infer that the defendants' individual employment decisions were discriminatorily based because the defendant has already been shown to have maintained a policy of discriminatory decision making. *Id.; Franks v. Bowman Transportation Corp.,* 424 U.S. 747 (1976).

***2** However, each claimant does not automatically benefit by a presumption of entitlement to damages. That presumption first must be earned through an initial showing by the claimant that he is a member of the certified class of plaintiffs.[5]

The District Court certified two classes of plaintiffs. These classes consist, in pertinent part, of all black persons who sought admission into the Union's Apprenticeship and/or Training Program, and those who were discouraged from seeking admission into the Union by the "racially discriminatory practices of the Defendants." *Berger v. Iron Workers,* C.A. 75–1743 (D.C.C. July 26, 1976) (Penn, J.). The only practice of the defendants that was found to be discriminatory was the Union's requirement that experienced rodmen complete an educational program run by Union committees. *Berger v. Iron Workers,* 852 F.2d 619, 621 (D.C.Cir.1988). Consequently, to establish class membership the claimant must make a *prima facie* showing that he was an experienced rod worker,[6] and that he sought or was discouraged from seeking admission to the Union. Once a claimant makes a *prima facie* showing that he was black, experienced, and did apply, the claimant "will have the presumption of discrimination that results from the Court's finding of defendant's [class-wide] liability." *Hartman v. Wick,* 678 F.Supp. 312, 335 (D.D.C.1988).

Following a claimant's *prima facie* showing, the defendants must establish by clear and convincing evidence that the claimant was rejected in a non-discriminatory manner, i.e. an articulated, legitimate, nondiscriminatory reason supported the rejection. *See McDonnel Douglas,* 411 U.S. at 802. Any uncertainty in this regard should be resolved in favor of the claimants. *Hartman v. Wick,* 678 F.Supp. at 335. Such an admittedly difficult standard of rebuttal is necessary in order to achieve Title VII's goal of eliminating discriminatory practices, given that only a "reasonably certain prospect" of liability will deter future discriminatory conduct. *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975).

The defendants have urged the Special Master to adopt a less onerous standard for rebutting each claimant's *prima facie* case, (*see* Defendants' Memorandum Regarding Burden of Proof filed Aug. 17, 1981, at 5), citing the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). In *Price Waterhouse,* the Supreme Court held that in a "mixed motives" sex discrimination case maintained by an individual, the presumption of discrimination can be overcome by a mere preponderance of the evidence, rather than applying the "clear and convincing" standard. 490 U.S. at 252–53.

The Special Master does not agree that this lower standard is applicable to the case at hand for several reasons. First, it should be noted that *Price Waterhouse* involved an action brought by an individual plaintiff, rather than a class action suit. This court has recognized that “the situation of an individual class member after a showing of class-wide liability is not analogous to the situation of an individual plaintiff who has made out a prima facie case of [discrimination] ... [b]ecause such class members are presumptively entitled to relief upon showing that they were potential victims of the defendants’ discriminatory practices.” *Trout v. Lehman,* 702 F.2d at 1107 (citations omitted). In contrast, no such presumption exists in mixed-motives cases brought by individuals. Therefore, it is not self-evident that the lesser burden of proof applicable in a case involving an individual plaintiff during the liability stage will necessarily control in the damages portion of a class action suit.[7]

***3** In addition to arguing that a lesser standard of rebuttal is applicable, the defendants also have asserted challenges against the claimants pursuant to Fed.R.Civ.P. 41(b).[8] The defendants did not rest on these pleading but instead introduced evidence in rebuttal of each claim. Therefore, the Special Master as the finder of fact must take all evidence presented by both sides into consideration, and judgment against a claimant on grounds raised in the 41(b) motions will be proper only if a nondiscriminatory reason for defendants’ actions was proved clearly and convincingly. *Mitchell v. Baldrige,* 759 F.2d 80, 84 (D.C.Cir.1985); 9 Miller and Wright, Federal Practice and Procedure § 2371 at 222 (1971). The Special Master need not make special inferences in favor of the plaintiff, but instead must weigh all the evidence in deciding the defendants’ motions. *See Baldridge,* 759 F.2d at 82.

The defendants’ urge basically two categories of grounds for dismissal. The first category concerns alleged defects contained in the certification form completed by claimants as proof-of-claim. In the second category, the defendants argue as a matter of law that the claimants were not eligible to join the ranks of union membership because they were not experienced rod workers during the relevant time period; therefore their actions in delaying or rejecting those claimants’ applications for union membership were clearly and convincingly for non-discriminatory reasons. Each of these arguments will be addressed in turn.

1. *Defects in the Proof–of–Claim Form*

The defendants originally complained that forty-six claimants should be dismissed pursuant to Federal Rule of Civil Procedure Rule 41(b) due to alleged defects in their certification forms. Of these forty-six claimants, the defendants claimed twenty-eight did not submit a properly notarized certification form. The defects range from (1) failure to obtain the notary’s jurisdiction and seal, (2) failure to obtain the expiration date of the notary’s commission, to (3) failure to obtain a complete signature of the notary. The defendants assert that the eighteen other claimants were not proper class members because their answers to the questions on the class certification forms revealed that they did not meet the substantive qualifications of a class member as spelled out in the Order of Reference.

All but seven claimants have subsequently accepted the defendants’ offers of judgment or otherwise dismissed their claims, thereby rendering the defendants’ 41(b) motions moot as to these individuals. As for these remaining seven, the only issues that remain are whether the Special Master must dismiss the claims of those whose answers in the certification forms do not on their own establish membership in this class action, or whose certification forms fail to contain the expiration date of the notary’s commission.

Rule 23(d) of the Federal Rules of Civil Procedure authorizes a court to issue orders “(1) ... prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument” or “(5) dealing with similar procedural matters.” This ordinarily gives a court significant discretion in imposing various requirements to facilitate the course of litigation. *See In re Ampicillin Antitrust Litigation,* 88 F.R.D. 174 (D.D.C.1980); 7B Wright & Miller, Federal Practice and Procedure, § 1791 at 289 (1986). In this particular case, Judge Penn required potential claimants to fill out a short questionnaire that had been appended to the Notice and have the completed form notarized and sent to class counsel for the plaintiffs. This practice has been commended by courts and scholars alike as an aid to efficient case management. *See* 7B Wright & Miller, § 1793 at 312; *see also* Special Project, “Back Pay in Employment Discrimination Cases,” 35 Vand.L.Rev. 893, 946 (1982).

***4** Also unquestioned is a court’s authority to impose appropriate sanctions for failing to heed orders issued under the authority of Federal Rule Civil Procedure 23. For example, it is well settled that a court could bar potential class members from asserting claims for failing to return completed certification forms within time limits prescribed by the court. *See Sledge v. J.P. Stevens & Co.,* 585 F.2d 625, 652 (4th Cir.1978), *cert. denied* 440 U.S. 981; *cf. Bachman v. Miller* 559 F.Supp. 150

(D.D.C.1982) (excluding late filers from settlement negotiations in class action). In fact, this Special Master has previously determined that exclusion was warranted in this case where claimants had not submitted certifications within the thirty-day time limit explicit in the Notice authorized by Judge Penn. (*See* Order filed July 9, 1990.) Therefore, in an appropriate case, a Special Master may exclude or dismiss parties for failure to comply with specific requirements imposed upon them.

However, in contrast to the very explicit time limit imposed by the Notice in this case, the Notice contains no specific instruction that claimants must provide "magic" answers to the questions in the certification forms (many completed without the help of an attorney) or be forever barred from further participation in this action.[9] Instead, the thrust of the Notice is simply that prompt completion of the certification, and completion only, is the initial hurdle for further participation.[10] It would be a strained reading of the Notice indeed to say that it in effect required a lay person to artfully craft his legal claim to class membership from a three-page list of short-answer questions.[11] Therefore, the fact that a claimant failed to show through the answers on his certification form that he fell within the legal definition of a class member alone will not preclude class membership.

On the other hand, the Notice to Class Members does plainly and explicitly impose the requirement that the certification "must be notarized at the time [the claimant] sign[s] it." (Notice to Class Members at 3.) Although notarial seals were in fact obtained by the remaining claimants, the notarial seal to two of the remaining claimants' certifications fail to show the notary's commission expiration date in contravention of the law of the state in which the notary was executed.[12] The defendants are correct in contending that the notarial seals in these cases are deficient for failing to meet state legal requirements. *See e.g., In re Universal Storage & Transfer Co.,* 4 F.Supp. 425 (D.Md.1933), *aff'd, sub. nom. Skutch v. Buch,* 70 F.2d 107 (4th Cir.1934).

Generally, the purpose of notarial seal is to "authenticate the document to which it is duly affixed," and to make the document "admissible in evidence without further proof of its due execution." 58 Am.Jur.2d, *Notaries Public,* §§ 43, 47 at pp. 548, 550 (1989) (footnotes omitted). It is reasonable to assume that this also is essentially the purpose underlying the notarization requirement for the certification forms in this case. The logical consequence then of a defective notarial seal is that the party wishing to offer the certification form to which it is affixed into evidence should be required to authenticate the document by alternative means.

2. *Eligibility for Union Membership*

***5** The defendants proffer several bases for a finding as a matter of law that a claimant is inexperienced or otherwise ineligible for union membership, and that therefore they did not act illegally in denying or delaying an application for union membership: (1) That a claimant failed the journeymen's exam for admission to the union; or (2) that a claimant failed to accumulate 2,150 hours by October 21, 1975 or until claimant was in the Training Program conducted by Local 201. To resolve this issue, it is appropriate to issue preliminary findings of fact as to what will constitute the requisite rodworking "experience" necessary for class membership. Not only will the following findings control the outcome of the defendants' Rule 41(b) motions, but these findings will serve as a guideline in resolving each individual claimant's case.

The Special Master notes that the District Court found rod work to be a "less skilled subset of the general category of ironworker" and that during February of 1971 to June, 1971, Local 201 allowed any rodworker with two years of experience to take the union entrance exam (*See Berger v. Iron Workers,* Trial Findings at ¶ 26, ¶ 34 (June 7, 1985).) However, the union had discretion during the claim period to admit any applicant, regardless of experience, if that applicant passed the entrance exam, (Tr. Nov. 28, 1990 at 100),[13] but normally, the union was looking for workers with approximately three years experience (*Id.* at 99.) In addition, non-union work was taken into consideration when determining admittance into union. (Tr. Nov. 28, 1990 at 188.)

"Because it is impossible to recreate the past," our Court of Appeals has held that "it is only equitable that any resulting uncertainty be resolved against the party whose actions gave rise to the problem." *McKenzie v. Sawyer,* 684 F.2d 62, 77 (D.C.Cir.1982) *quoting Day v. Mathews,* 530 F.2d 1083, 1086 (D.C.Cir.1976). However, the Special Master notes that while it was Local 201 which in the first instance chose not to have articulated guidelines in assessing the experience of potential union members, it is also the plaintiffs in this case who chose not to put any affirmative evidence that would otherwise tend to establish the minimum qualifications for union membership. Instead, the plaintiffs suggest that no rodworking experience was necessary for union membership. That position is untenable, both factually and as a matter of law.

The Special Master is bound by the law of the case which holds that only experienced rodmen suffered discrimination and are properly members of the plaintiff class. Therefore, it would be irrelevant that the union required no experience for admittance in the union—for this court would still be obligated to admit only experienced rodworkers into the plaintiff class. The Special Master need not go this far however, because we find that although the union required an unspecified amount of experience before admittance, at least some rodworking skills were required before an applicant would considered "experienced."

***6** Mindful of admonitions in *McKenzie v. Sawyer, supra,* the Special Master will consider particularized evidence of work history in order to determine if a given claimant was an experienced rodworker and therefore eligible to participate as a claimant in these proceedings.

B. ***Findings of Fact***

With these guidelines in place then, the defendants' contention that a claimant with less than 2,150[14] hours of rodworking experienced can be rejected summarily. As stated previously, 2,150 hours rod working experience could perhaps be a reasonable benchmark in determining whether a claimant possessed the requisite amount of experience necessary for class membership; however, the absence of such extensive experience will not automatically preclude class membership. Moreover, the defendants' own witness, Russell Hatch, an official with Local 201's sister local in Baltimore, testified that workers were considered eligible for union referral with only the most minimal showing of rod work experience. (Tr. Nov. 27, 1990 at 71–75.) Accordingly, the Special Master finds that a lack of over two thousand hours of previous rod work experience will not necessarily compel a factual finding that a claimant is not experienced for purposes of class membership.

The defendants' contention that failure to pass the journeymen's exam justifies exclusion from the class is also not persuasive. Although inability to pass the journeymen's exam may be compelling evidence that a claimant was not an experienced rod worker during the relevant time frame, failing the journeymen's exam at one point does not, as a matter of law or fact, mean in each case clearly and convincingly establish that the defendants did not act in a discriminatory manner.

First, although passing the exam may be a prerequisite for membership in the union, the Special Master is charged with determining prerequisites for membership for the plaintiff class. The District Court found that the exam given by Local 201 was not shown to be "a valid predictor of job performance." (Trial Findings at ¶ 31.) Therefore, it is conceivable that a claimant could fail the Local's exam, yet nevertheless be an "experienced" rodman within the definition for class membership.

Moreover, failing the exam at one point does not mean the claimant could not have passed it at an earlier time and under other conditions, given that testing situations, and the preparedness of the test taker, vary widely from one day to the next. In any event, the Special Master has the benefit of oral testimony and other evidence from which to make a factual determination of whether the defendant proved clearly and convincingly that it did not act in a discriminatory manner. Failing the exam is significant factor in the total mix of information available to the court, but not the sole factor. However, the Special Master notes that a claimant's damage award will not extend beyond that time when he was given a "bona fide opportunity" to take Local 201's exam, as per Judge Penn's February 15, 1989 Order of Reference.

***7** With these considerations in mind then, the determination of whether a claimant possessed "experience" for purposes of class membership will be made by the Special Master in the individual findings of fact and conclusions of law.

Finally, notwithstanding protestations regarding the defective certification forms, the defendants themselves have offered several of the certification forms at issue in evidence.[15] The Special Master is extremely reluctant to dismiss a claimant's entire claim for want of an expiration date on the notarial seal to his certification forms, especially when defendants seem to consider its omission immaterial as to the purposes for which the notarial requirement meant to effectuate. Moreover, each of the claimants testified under oath in open court and was subject to cross examination of counsel for the defendants. The defendants have not demonstrated how the deficient notarization prejudiced them so as to warrant the extreme consequence of dismissal for these technical deficiencies. Therefore, the fact that some claims forms contained notarizationed defects will not, of itself, preclude class membership.

III

COMPUTING THE AWARD

A. *Conclusions of Law*

1. *Back Pay*

As stated in the Special Master's conclusions of law, once a claimant has shown he is a member of the plaintiff class, there exists an rebuttable presumption that he is entitled to an award.[16] However, in accordance with the Order of Reference each claimant must make a *prima facie* evidentiary showing of the amounts of any damages claimed (*See* Order of Reference to Special Master filed February 15, 1989, at para. 6.) Ultimately, each claimant bears the burden of persuasion of establishing the extent of the loss occasioned by the defendants' discriminatory actions. *See Carter v. Duncan–Huggins, Ltd.,* 727 F.2d 1225, 1237 (D.C.Cir.1984). However, the claimants need not show the quantum of damages owing with "unrealistic exactitude," and any uncertainties are to be resolved in the plaintiff's favor. *Pettaway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 260 (5th Cir.) *reh'g denied,* 494 F.2d 1296 (5th Cir.1974), *cert. denied* 439 U.S. 1115 (1979); *cf. McKenzie v. Sawyer,* 684 F.2d 62, 77 (D.C.Cir.1982).

2. *Compensatory Damages*

The remedial nature of anti-discrimination law requires that "persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975) (*quoting* 118 Cong.Rec. 7168 (1972)). A claimant is therefore entitled to receive, in addition to back pay, any "fringe benefits" he would have received as member of the Union. *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 574 (8th Cir.1982) (citations omitted), *cert. denied* 460 U.S. 1083 (1983). These fringe benefits can include, but are not limited to, contributions to pension plans,[17] medical expenses otherwise covered by employer insurance programs,[18] as well as any other damages a claimant can prove was proximately caused by the defendants' discrimination (*See* Order of Reference to Special Master filed February 15, 1989, at para. 7(a)(ii).)

***8** In addition to an award for fringe benefits, damages for claims of emotional distress are also allowed under Title VII and § 1981 *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir.1977). However, as stated earlier, each claimant bears the ultimate burden of persuasion in establishing the amount of these damages.

Emotional harm under § 1981 can be "presumed from the violation of the constitutional right when plaintiff's testimony establishes humiliation or mental distress; specific proof of out-of-pocket loss or medical testimony is not necessary." Richey, C.R., *Discrimination Law and Civil Rights Actions in the Federal Courts* (Federal Judicial Center Publication, 1988 at D1–13) *citing Williams v. Trans World Airlines,* 660 F.2d 1267, 1272–73 (8th Cir.1981); *Gore v. Turner,* 563 F.2d at 164. Furthermore, an inference of emotional distress is much more reliable "when the plaintiff has been subjected to open racial discrimination." *Carter v. Duncan–Huggins,* 727 F.2d at 1238. Moreover, "(w)hen a plaintiff seeks compensation for an injury likely to have occurred but difficult to establish, some form of presumed damage may possibly be appropriate." *Memphis Community School District v. Stachura,* 477 U.S. 299, 310 (1986).

3. *Mitigation of Damages and Interim Earnings*

Pursuant to the Order of Reference, the Special Master must calculate on a year-by-year basis the amount of back pay owing (Order of Reference to Special Master filed February 15, 1989, at para. 7(a)(i).) From each yearly figure the Special Master must then deduct "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against" for that year as required by 42 U.S.C. § 2000e–5(g). Once a claimant has established the gross amount of damages, it is for the defendant to prove by a preponderance of the evidence that those sums are to be reduced pursuant to § 2000e–5(g). *Paxton v. Union National Bank, supra,* at 574; *cf. Wisconsin Avenue Nursing Home v. District of Columbia Com. on Human Right,* 527 A.2d 282 (D.C.1987) (case involving the comparable D.C.Human Rights Act) (*citing Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614, 623 (6th Cir.1983), *cert. denied,* 466 U.S. 950, 104 (1984) (Title VII case)).

a. *Interim Earnings*

The defendants have asked this court to deduct unemployment compensation from any awards to the claimants. This jurisdiction has never addressed whether such sums may be properly deductible from awards made under Title VII, and those circuits which have addressed the issue have come to different conclusions. *Compare, e.g., E.E.O.C. v. Killir, Philips, Ross, Inc.,* 420 F.Supp. 919 (S.D.N.Y.1976) (deducting unemployment compensation), *aff'd* 559 F.2d 1203 (2nd Cir.), *cert. denied* 434 U.S. 920 (1977); *Satty v. Nashville Gas Co.,* 522 F.2d 850 (6th Cir.1975) (holding it appropriate to deduct unemployment compensation from Title VII award), *aff'd in part and vacated on other grounds,* 434 U.S. 136 (1977) *with Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614, 623 (6th Cir.1983), *cert. denied,* 466 U.S. 950 (1984) (trial court has no discretion to deduct unemployment benefits from Title VII award); *Naton v. Bank of California,* 649 F.2d 691, 700 (9th Cir.1981) (affirming district court's refusal to deduct in ADEA suit).

***9** The Special Master can find no compelling justification to reduce awards on account of unemployment compensation. First, because Local 201 is not an employer of the claimants and has not paid taxes to an unemployment compensation fund, receipt of these benefits could not, in any sense be characterized as flowing directly from the defendants. *Cf. E.E.O.C. v. Enterprise Ass'n Steamfitters,* 542 F.2d 579, 591 (2nd Cir.1976), *cert. denied,* 430 U.S. 911 (1977). Instead, this compensation is clearly from a collateral source which, as a general rule, does not serve to offset any award granted by the court. *Cf. Clark v. National R.R. Pass. Corp.,* 654 F.Supp. 376, 377 (D.D.C.1987). Accordingly, failure to consider unemployment compensation will not make a claimant "more than whole" as that phrase has been understood and applied under these circumstances. *NLRB v. Gullett Gin Co.,* 340 U.S. 361, 364 (1951).

Moreover, unemployment compensation is not paid to qualifying employees to "discharge any liability of obligation of [the defendant], but to carry out a policy of social betterment of the entire state." *Id.* at 364 (citations omitted). Therefore, because this compensation is to further an "independent social policy," payments made pursuant to an unemployment compensation scheme must in any event be considered a "collateral source" and not deductible as such from a subsequent award of back pay. *E.E.O.C. v. Ford Motor Co.,* 645 F.2d 183, 195 (4th Cir.1981) (citations omitted) *rev'd. on other grounds,* 458 U.S. 219 (1982) *cf. Gullet Gin, supra,* at 364 (upholding lower court's refusal to deduct in a suit brought pursuant to the National Labor Relations Act).

In addition, such a deduction would be inequitable in this instance in light of the goals sought to be effectuated by Title VII. The purpose of Title VII is to "make whole" those who have suffered due to unlawful employment discrimination and to ultimately eradicate that discrimination by means of private litigation. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *see also Garner v. Giarrusso,* 571 F.2d 1330, (5th Cir.) *reh'g den.,* 575 F.2d 300 (5th Cir.1978). Not only would deductions for unemployment compensation "undercut to some degree the corrective force of a Title VII back pay award" (*E.E.O.C. v. Ford,* 645 F.2d at 196), the deterrent goals of Title VII would also be undermined since potential discriminators would have little incentive to comply with the Act due to a lessened financial responsibility for any discriminatory behavior. *See* Special Project, "Back Pay in Employment Discrimination Cases," 35 Vand.L.Rev. at 1013. Therefore, the Special Master declines to deduct sums representing received unemployment compensation from any award to which a claimant may be entitled.

b. *Mitigation of Damages*

In order to establish that a claimant failed to comply with his statutory duty to be "reasonably diligent," the defendants must prove that a diligent search would have disclosed that comparable employment was available, and that the claimant had a reasonable chance of obtaining such a job. *Clark v. Marsh,* 665 F.2d 1168, 1171–72 (D.C.Cir.1981). If after due diligence the claimant is unable to secure comparable employment, he or she is not obligated to continue to search for a job that pays a higher wage. A claimant need not go into another line of work, accept a demotion or take a demeaning position; however, a claimant forfeits the right to back pay if he refuses a job substantially equivalent to the one he was denied. *Ford Motor Co. v. E.E.O.C., supra,* at 231–32 (1982).

4. *Punitive Damages*

***10** An action pursuant to 42 U.S.C. § 1981 entitles a plaintiff to "both equitable and legal relief, including compensatory, and under certain circumstances, punitive damages." *Johnson v. Railway Express Agency,* 421 U.S. 454, 460 (1975). However, there has been no finding that class-wide punitive damages are owed in this case as a matter of law. *See Berger v. Iron Workers,* 843 F.2d 1395. On the contrary, the Court of Appeals has held that the plaintiff class failed to show an ongoing policy and plan to discriminate by the defendants and that, except as to one named class plaintiff,[19] no evidence was presented that could be construed as harassment sufficient to establish a claim of retaliation. *Id.* at 1424 and 1427. Nevertheless, pursuant to the Order of Reference, an individual class member may still present a claim for punitive damages alleged as a result of being "deterred or discouraged" from joining the Local or International if the claimant can prove that the defendants "have engaged in unlawful discrimination against [that claimant] that is intentional, malicious, wanton or willful" (Order of Reference to Special Master filed February 15, 1989, at para. 7(b).)

Although any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit under § 1981 calls for an award of punitive damages under § 1981. *Beauford v. Sisters of Mercy,* 816 F.2d 1104, 1109 (6th Cir.), *cert. denied,* 484 U.S. 913 (1987). A punitive damage award is an extraordinary remedy and is designed to punish and deter particularly egregious conduct, *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 268 (1981), and the granting of such relief will turn on the particular facts of each case. *Stephens v. South Atlantic Canners, Inc.,* 848 F.2d 484, 489 (4th Cir.1988); *cert. denied* 488 U.S. 996 (1988). As restated in Judge Penn's Order of Reference, punitive damages will be recoverable for conduct exhibiting malice, evil motive, recklessness or callous indifference to a federally protected right. *Smith v. Wade,* 461 U.S. 30, 56 (1983).[20] Moreover, every successful claim under § 1981 requires a showing of "purposeful," *Block v. R.H. Macy & Co., Inc.,* 712 F.2d 1241, 1245 (8th Cir.1983) and "intentional" discrimination, *Carter, supra,* at 1231. Therefore, something more than purposeful, intentional discrimination must be established to warrant punitive damage award. The evidence of the individual claimant's shall be viewed with that standard in mind.

5. *Prejudgment Interest*

Pursuant to the Order of Reference, each class member shall be awarded prejudgment interest on back pay at the rate of six percent (*See* Order at para. 7(a)(i).) Just as the decision to award prejudgment interest under Title VII as an initial matter is within the discretion of the trial court, so to is the method by which that interest is computed. *E.E.O.C. v. Gurnee Inn Corp.,* 914 F.2d 815, 819 (7th Cir.1990), *Kelly v. American Standard, Inc.,* 640 F.2d 974, 982–83 (9th Cir.1981). Judge Penn did not specify whether the interest was to be compounded; therefore, the Special Master assumes that this decision was to be left to the Special Master's discretion.

***11** In light of the "make whole" provisions of Title VII, "full compensation requires recognition of the time value of money." *See Albemarle Paper Co. v. Moody, supra; Hunter v. Allis–Chalmers Corp.,* 797 F.2d 1417, 1426 (7th Cir.1986). Here, class members were deprived of the use of back pay wrongfully denied them through the discriminatory action of the defendants, therefore it is only by compounding prejudgment interest that class members may be made whole. *See, e.g., Gurnee Inn Corp.,* 914 F.2d at 820, *Berndt v. Kaiser Alum. Sales,* 629 F.Supp. 768, 770 (E.D.Pa.1985), *aff'd* 789 F.2d 253 (3rd Cir.1986). Moreover, the Special Master notes that although defendants challenge the propriety of awarding any prejudgment interest,[21] they have not objected to the interest being compounded once awarded.

B. *Findings of Fact*

1. *Back Pay*

Once a claimant is found to have suffered from the defendants' discrimination, he will be awarded an amount as back pay equal to difference between what was actually earned and what the claimant would have earned absent discrimination. *Albemarle Paper Co. v. Moody,* 422 U.S. at 421. Both the plaintiffs and defendants have presented expert testimony on the issue, voluminous documentary evidence was submitted by both sides, and hearings were held on this issue.

Both parties would readily concede that the developing an accurate formula posed numerous difficulties.[22] And both parties would also concede that the linchpin of any formula is the number of hours worked each year by union rodmen in the District of Columbia. The following constitutes the Special Master's evaluation of the evidence and findings of fact on the issue of the probable number of hours that a union rodman would reasonably expect to work per year during the applicable claim period. Individual calculations and adjustments consistent with this opinion will be made in the court's findings of fact for

individual claimants.

a. *Marc Bendick, Jr.*

Marc Bendick, Jr., Ph.D., an economist and principal in the Washington, D.C. firm of Egan Economic Consultants, Inc., was the claimants' principal witness with respect to the back pay issue. Dr. Bendick calculated back-pay awards in numerous employment discrimination suits, and has specialized several years in labor economics concerning the construction industry.

In order to calculate the number of hours worked by union rodmen in the District of Columbia during the claim period, Dr. Bendick devised a formula for calculating yearly hours as follows:[23]

(1) The average work week (in hours) in the construction industry

(2) Times 52 weeks

(3) Minus the assumed hours of involuntary unemployment

(4) Minus lost hours due to illness or injury

(5) Minus the annual holiday hours allocated

(6) Minus voluntary days off taken annually

(7) Equals the net hours per year an average full time journeyman rodman would have worked in that year.

***12** The foundation for Dr. Bendick's yearly hours figure begins with statistics from the *Handbook of Labor Statistics,* U.S. Department of Labor Bureau of Labor Statistics (BLS), Bulletin 2340 (Aug.1989).[24] First he obtained the average weekly hours of non-supervisory workers in the private construction industry as a whole from Table 75 of this publication. Then Dr. Bendick calculated a "benchmark" yearly hour figure for each year from 1970 to 1988 by multiplying the average hours worked by a construction worker per week times the number of weeks in a year.[25] Several adjustments were then made to this figure to more accurately portray the number of hours worked per year by the average rodman.

First, the yearly total was reduced by a figure representing assumed unemployment for that year.[26] To calculate this figure, Dr. Bendick started with the BLS statistics indicating average unemployment rates for each industry. This unemployment rate was then reduced because, in Dr. Bendick's opinion, union members would suffer unemployment at a lesser rate than those reflected in the BLS statistics. This was mainly because union journeymen only performed a percentage of total rod work in the Washington, D.C. area; therefore permit workers would absorb the brunt of most unemployment.[27]

After Dr. Bendick calculated the reductions for unemployment, additional reductions were made for hours lost due to illness and injuries, holidays, and voluntary vacations.[28] Dr. Bendick subtracted an annual loss of 48 hours or 6 working days due to illness and injury. This figure was reached by utilizing a 5–day annual loss calculated from a U.S. Department of Health and Human Services publication,[29] plus one extra day added to account for the fact that the construction industry, "because of the nature of the trade, the outdoor work and the physical labor—would have a higher illness and injury rate than the national average" (Tr. Apr. 17, 1990 at 30–31.)

Dr. Bendick then read the Local 201 collective bargaining agreements which allocated either eight or nine days per year of holidays, depending on whether an inauguration day was added. (Tr. Apr. 11, 1990 at 31–32.)[30] Dr. Bendick then estimated that a journeyman rodman would take as voluntary time off or personal leave 40 hours per year.[31] This 40–hours figure is based on certain assumptions made by Dr. Bendick. First, he concluded that "the personal business hours off would be quite a small number because the work hours in the rod trade typically ended around 3:30 in the afternoon, so that people had the late afternoons during which they could do personal business" in addition to rain days, and other days of involuntary unemployment (Tr. Apr. 17, 1990 at 32.) Second, Dr. Bendick stated that he knew construction workers tended to take their vacations while they were involuntarily unemployed or during bad weather when their sites were shut down. As a result of these two assumptions, and no statistical data, Dr. Bendick arrived at the 40 hour figure as a "generally reasonable estimate." (*Id.* at 33.)

***13** In sum, Dr. Bendick concluded that a union rodman in the District of Columbia worked on average 1,679 hours per year.[32] However, the Special Master rejects Dr. Bendick's calculations for several reasons.

First, the Special Master notes several shortcomings in the way Dr. Bendick calculated benchmark figures and subsequent adjustments. While these imperfections might be relatively minor when viewed separately, added together they are substantial enough to give the court pause. For example, Dr. Bendick's "benchmark" yearly hour figure was obtained from BLS statistics calculated from the yearly hours for *all* construction workers. No distinction was made in the Table or by Mr. Bendick between light construction and heavy construction, such as rod work. The lack of any distinction is troubling. First, rod work depends on favorable weather because it is done at the initial stages of construction and is necessarily performed outdoors. In addition, this work also entails a higher level of injuries because it is labor intensive by nature. Therefore, one could readily infer that the number of hours worked per year by the average light construction worker would be higher than that of a heavy construction worker. Although Dr. Bendick thought that days lost due to these factors would be made up through overtime, as the defendants pointed out, Dr. Bendick did not test this assumption by asking any contractors if there were any makeup days during any of the work years at issue.[33] In fact, Dr. Bendick's only direct contact with the rod industry was one visit to a job site and conversations with a few workers on the site.[34]

In addition, after Dr. Bendick "ratioed down" the BLS unemployment figures to reflect his understanding of the unemployment suffered by union rodmen, the resulting figures were only a small percentage of rates contained in the BLS statistics.[35] For example, the BLS figures show an unemployment rate of 18 percent in the construction industry for 1975. Dr. Bendick has determined that because journeymen worked 21 percent of the overall Local 201 hours worked in that year that there was a large "buffer" of permitmen to absorb the 21 percent unemployment and thus the 18 percent figure should be ratioed down 10 percent of the BLS figure. Ultimately, then, Dr. Bendick surmised that Local 201 rodmen suffered only 1.8 percent total unemployment in 1975. This reduction impacts significantly on the yearly figure. An eighteen percent adjustment for unemployment would result in an initial yearly hours total to 1,552 whereas the 1.8 percent figure arrived at by Dr. Bendick yielded 1,858 hours per year.

Although it is conceivable that based on Dr. Bendick's rationale that journeymen rodmen would not feel the effects of the unemployment rate as much as permitmen, there simply is no empirical evidence cited to support the degree of "ratioing down" of the BLS unemployment figures. Instead, Dr. Bendick concedes that his ultimate unemployment percentages were not "numbers derived from other figures in a direct proportion or ratio" (Tr. Apr 17, 1990 at 30.) This concession represents a major gap in the statistical support for Dr. Bendick's methodology.[36]

***14** In addition, the adjustments Dr. Bendick made to account for days off due to illness also give rise to concern. The tables used by Dr. Bendick indicate that the overall average lost work days for those in the heavy construction field due to illness and injury in the years 1979–87 was almost twice the average for the private sector as a whole in the United States.[37] *See* "Current Labor Statistics: Illness & Injury," 112 *Monthly Labor Review* 98, col. 1 (Oct.1989).[38] Yet Dr. Bendick added only one extra day (from five "sick" days to six days) to reflect this difference.

Dr. Bendick also estimated time off for personal leave of forty hours per year without the benefit of any statistical data whatsoever. This calculation was made on the basis of anecdotal information only. The Special Master notes that the extent to which Dr. Bendick has acquired anecdotal information with regards to the practice of Local 201 may be limited given that he made but one visit to a job site in preparation for his testimony. Accordingly, while the Special Master has no reason to reject Dr. Bendick's estimation of personal leave time, neither does the court have an adequate basis on which to accept it unquestioningly.

These weaknesses are but minor however in comparison to the larger deficiencies plaguing the plaintiff's methodology. In adopting a back-pay formula, the Supreme Court has instructed us to "as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination." *International Brotherhood of Teamsters,* 431 U.S. at 372 (citations omitted). This directive naturally would lead one to the work records of Local 201 to recreate the actual working hours of union rod workers in the union, rather than engage in the creative manipulation of generalized and all-encompassing figures compiled by the Bureau of Labor Statistics. Because BLS statistics were utilized, we cannot tell if unemployment rates in the D.C. Metropolitan area differed from that of other areas, we have no indication of how much union rodmen work in comparison to non-union workers, and ultimately we do not have the benefit of knowing the average hours worked by District of Columbia rodmen as compared to the rest of the nation. In sum, plaintiffs' calculations are severely lacking in hard data accurately depicting the working conditions of those District of Columbia union rodmen not subject to discrimination during the applicable claim period.

Dr. Bendick did endeavor to corroborate these figures calculated on the basis of general BLS statistics and personal

observations against the pension fund records of Local 201.[39] As Dr. Bendick testified, to check his figures against those suggested by the pension records, he:

> ... went to the pension fund records and started eliminating pension fund records, dropped out all the zero people, dropped out all the 8–hour people, the 16–hour people. And so I kept dropping them out until I got the pension fund records to give me the same average [as the one he obtained from BLS data]

***15** (Tr. Apr. 17, 1990 at 42.) However, this corroborative attempt makes clear that resort to the pension records in the first instance is the better course in computing back-pay. And although Bendick eliminated those workers who he felt were not full-time rod workers, the manner in which this "corroboration" was effected further suggests that the plaintiffs were more interested in imaginative "numbers crunching" to obtain the highest yearly hours total possible rather than in reproducing an accurate computation.

Therefore, because the plaintiffs use data that is not specific to the actual working situations of Local 201, and because inexplicable failings in the methodology suggest that the plaintiffs made certain adjustments in a manner to maximize the yearly hour figure at the expense of accuracy, the Special Master rejects the plaintiffs' back pay computations.

b.*Daniel Quinn Mills*

Dr. Daniel Quinn Mills, Ph.D, was recognized as an expert in the field of labor economics without any objection by the plaintiffs (Tr. Apr. 20, 1990 at 9.) He appears to have a construction-specific background in economics and is generally more familiar with the construction industry in general and rod work in particular than Dr. Bendick.

Structurally, Dr. Mills' methodology was similar to that of Dr. Bendick's: he began with the assumption that the average journeyman rodman worked 260 days[40] during the period from 1972 to 1986. He then adjusted the figure downward to account for days lost for eight specific reasons. Dr. Mills testified that he made a conscious effort to separate the lost days due to different factors even though the factors affecting lost hours overlaps. He does not specifically indicate how this was accomplished and cross-examination does not reveal it.

Dr. Mills' stated that his conclusions were based on figures for the Northeast Corridor, that is, the coastal region from Boston to Washington, D.C.; his figures are not exclusive to the D.C. area or the rod trade only (*Id.* at 34.) However, Dr. Mills offered no tangible data to support any of his conclusions. Neither statistics, tables, or calculations were offered into evidence, although Dr. Mills did refer to his notes during direct examination.

Based on his experience and calculations, Dr. Mills assigned 17 days as lost due to the weather precluding rod work on job sites (*Id.* at 29.) He was of the opinion that weather plays an important role in the heavy labor and outdoor nature of rod work (*Id.* at 11 and 16.) However, if a rod worker shows up on a job site and the contractor subsequently sends him home because of the weather or other problems caused for example by material delays, the worker gets what is called show-up pay. The amount of show-up pay varies according to the provisions of the collective bargaining agreement but the average pay is for 1 to 4 hours. Dr. Mills did not know what the show-up pay provision was for the Local 201, so presumably this was not accounted for in calculating days off for weather.

***16** He further opined that rod work is seasonal, not completely by necessity, but rather by tradition (*Id.* at 11.) Because it would not be uncommon for a rodman to decline rod work that would require outdoor, heavy physical labor in freezing temperatures, little work was done in the winter.[41] He concluded that twenty days a year was lost due to seasonality (*Id.* at 29.)

Dr. Mills does not comment on work hours lost to work stoppages and strikes to any extent except to testify that three days a year were lost as a result of their combined effect (*Id.*) The Special Master does not know the basis, other than Dr. Mills' own general experience, for this calculation.

Adding to the time off, Dr. Mills observed that rod work is dependent on the timely arrival of the necessary materials. Material delays may force the contractor to send rodmen home because the rod work cannot be done without certain unavailable materials. Dr. Mills appropriated five days for material delays. Moreover, other trade delays, presumably due to

other workers not completing the portion of the job which precedes the rod work, accounted for an additional six days of lost work per year (*Id.* at 30.) He testified that these delays are not usually reported to the union so the rod worker on the job site is considered to still be on that job and is not considered for other work. The rod worker may get paid for part of the day or his standard show-up pay according to the collective bargaining agreement (*Id.* at 12–15.) Again, Mills did not know the specific provision in this regards as for Local 201, nor did he indicate how this fact affected his calculation, if at all.

Further contributing to lost time was that a rod worker traditionally moved from one project to another. He allocated nine days lost per year to this phenomena (*Id.* at 29.) Presumably, this nine day figure accounts for the practice known as "booming," which simply is when a worker travels to locations nationwide where work is available. Dr. Mills stated that booming was prevalent in the construction industry and that it was not unusual for a rod worker to travel up to 100 miles to work each day because heavy construction work is not always available in heavily populated areas (*Id.* at 24.) However, Mills did not state whether such a practice was common in the D.C. area specifically.

In so far as injuries and illness are concerned, Dr. Mills assigned five days of lost work due to illness and injury (*Id.* at 29.) Dr. Mills felt that due to the nature of the work, injuries and illnesses are higher than average. Lastly, he considered the matter of voluntary absenteeism. Dr. Mills felt that the level of voluntary absenteeism was very high even in good weather (*Id.* at 18.) According to Mills, it is the nature of the industry that a rod worker may voluntarily choose not to do rod work for up to six months a year (*Id.* at 19.) Therefore, sixty days were subtracted for voluntary absenteeism.

***17** Thus, from the starting figure of 260 available days of work, Dr. Mills subtracted 125 days—almost half of the work year—for days lost due to the above eight factors. Accordingly, Dr. Mills felt that the average number of hours a union rodman could have expected to work during the period 1972 to 1986 would be 135 days or 1,080 hours.

Dr. Mills also double checked the 1,080 figure against another method of calculation. First, Dr. Mills felt that "fully committed rodmen," that is, those individuals who are available for all year round[42] would accumulate an average of 1415 hours a year. However, Dr. Mills felt that supplemental earners would only get about 855 hours a year (*Id.* at 30–31.) Although he did not indicate how he obtained the 1415 hour and 855 hour figure, he did testify that these figures were not based on statistics exclusive to the rod trade; they reflect hours worked in the basic construction trades such as carpenters, iron workers, brick layers, cement masons and a lot of laborers (*Id.* at 31.)

Then Mills estimated that fully committed workers would make up about 40 percent of the whole group and the supplemental workers would comprise the remaining 60 percent. Thus, when these two figures were average out proportionally, a 1080 hour per year figure was obtained[43] (*Id.*.) Moreover, he did not think that 1,080 hours per year was unreasonable because he characterized rod workers in general as target earners who earn enough to pay for rent, food, clothing, transportation, etc. to support a certain standard of living (*Id.* at 59.)

Dr. Mills acknowledged that some iron workers accumulated over 2,000 hours of work a year during the claim period. Rather than account for this in calculating his averages, he chose to disregard that phenomena completely. He chose to do so for several reasons: First, because it was not uncommon for a contractor to report the hours of a rod worker that actually represent more that one year's worth of hours because the contractor failed to timely report the previous year's hours. Second, some hours may be credited hours although they were not actually worked. Dr. Mills does not explain this occurrence, although it could be attributed to show-up hours or some other type of agreed to compensation. Third, the hours could reflect work performed by the rodman out of the area that get grouped with a previous years' hours or with the premium hours just described. Dr. Mills felt it was unlikely that 2,000 hours per year were worked in the claim period (*Id.* at 32–33.)

There are several weaknesses in Dr. Mills' approach. Mills excludes all weekend hours from his yearly estimates and does not account for make-up hours a contractor may allow (*Id.* at 35.) If he had included these hours, it would certainly have raised the average hours per year. Moreover, Dr. Mills provided the Special Master one calculation to apply for each of the fourteen claim years. The utility of this single yearly figure is called into question given that economic fluctuations would naturally lead to yearly variations of the amount of available work in the construction trade. Although Mills testified that in his opinion, yearly hours worked remained stable, (*id.* at 60), he did not provide the Special Master with any data to confirm this conclusion.

***18** More important, however, is the fact that Dr. Mills' estimates are completely anecdotal. He does not refer to any published statistics during his testimony, therefore his estimates are largely uncorroborated. Although the Special Master appreciates Mills' personal knowledge of the construction industry, this personal knowledge is simply not adequate to support a highly detailed statistical calculation for purposes of allocating back pay among class members.

c. *Farrell Bloch*

The defendants' other expert was Farrell Bloch. Dr. Bloch earned his Ph.D in economics from Stanford University and was a former professor of labor economics at Princeton University. Dr. Bloch has analyzed back pay issues in several employment discrimination cases, and has served as litigation support for numerous other such cases.

Bloch used a proxy or cohort group approach in his analysis in an effort to create a mythical individual—the average journeyman rodman who was admitted to Local 201 between 1971 and 1975.[44] In creating his cohort group, Bloch included both black and white union members admitted between 1971 and 1975. However, those union members who were retirees, had injuries which prevented them from working, were incarcerated, were deceased, or worked in the office as opposed to performing rod work were excluded from the cohort. The number of workers included in the cohort varied from 38 cohort members in 1973 to 136 in 1977.

Bloch then tracked the group over a 15 year period and averaged the yearly totals of hours worked as determined from the pension records (Tr. Apr. 20, 1990 at 89.) Unlike Dr. Bendick's methodology which excluded from the calculations those union members who worked relatively few hours in a given year, Dr. Bloch's cohort analysis included those union members on whose behalf zero hours were reported in the pension fund records. This was so that his analysis would reflect a natural tendency toward injury and attrition, and to reflect the plain fact that, for whatever reason, some union members simply did not work any hours in a given year.[45]

These yearly totals were further reduced in some instances by what Dr. Bloch termed the "fixed pie" theory. This theory, which assumed there were a fixed number of hours available each year for a rodman to work, is referred to herein as the "fixed pie" theory (Tr. Apr. 20, 1990 at 93; Defendants' Exh. 1 at Tab 1, ¶ 13 (explaining the fixed pie theory).) As more rodmen would be allowed participate in the "fixed pie" of available hours, there would be fewer hours to go around. In some years this would result in a lower annual figure of hours worked.

In some years, the fixed pie theory does not affect the calculations. For instance, when the number of hours that would have been worked by the claimants (according the yearly hours figure calculated previously by Dr. Bloch) in a given year is less than the number of hours actually worked by non-union rodmen in positions obtained through Local 201's hiring hall, the claimants are assumed to have replaced them and worked their hours (Defendants' Exh. 1 at Tab 1, ¶ 13.) On the other hand, if all the rod work performed in a given year was performed by union members, then the fixed number of hours would have to be divided among the previously admitted union members and the claimants. Dr. Bloch also referred to a third, intermediate situation in which there were some non-union hours but not enough to accommodate all the claimants hours. Dr. Bloch concluded that the "pie" would not decrease in the 1970's because there were a sufficient number of hours available to the claimants if they had been admitted to the union (Tr. Apr. 20, 1990 at 102.) However, each succeeding yearly calculation would have to be adjusted based on Dr. Bloch's theory.

***19** The fundamental problem with the "fixed pie" theory is that there really is no "fixed" pie. The union is not an employer with a finite set of positions available; rather the union merely refers out its members. The "fixed" portion of Bloch's theory represents not the number of rodworking positions available in the D.C. area, but only those positions actually worked by union members. Therefore, the "fixed pie theory" is not "fixed" at all. There was no evidence presented that the union would not have solicited other employment opportunities for its members had it been faced with an influx of members, or taken other actions to expand its piece of the rod work "pie." Therefore the "fixed pie" theory becomes at best speculative and as such will be rejected by the Special Master.

The Special Master also rejects the annual figures computed by Dr. Bloch. If the plaintiffs' calculations are wanting because the data from which they are derived is so all-encompassing as to be statistically irrelevant, the defendants' calculations fail for precisely the opposite reason: the foundational data is pared down to such a degree as to be statistically insignificant. For example, Bloch's cohort consisted of only thirty eight workers for 1973 calculation, while at that same time the pension records reveal that over two hundred men working out of Local 201 were union members. This type of disaggregation into groups "too small to generate any statistically significant evidence" has been viewed by this jurisdiction with a "wary eye." *Segar v. Smith,* 738 F.2d 1249, 1286, (D.C.Cir.1984), *cert. denied sub nom. Meese v. Segar,* 471 U.S. 1115 (1985). The Special Master fails to see how a relatively small cohort group can predict with any kind of statistical accuracy an average number of hours worked by a Local 201 union member during the relevant time period. Therefore, Dr. Bloch's calculations

must be rejected.

d. *Institute of Ironworking Industry Records*

Yet another method by which hours-per-year figures can be calculated is from statistics compiled by the Ironworking Industry in its report entitled: "Approximation of manpower requirements to place reinforcing steel including general contractors, concrete subcontractors, and reinforcing steel subcontractors in metropolitan Washington, D.C. for the years 1972–1988."[46] The report is intended to portray "the big picture" of employment levels in the District of Columbia area, but is admittedly not statistically precise.[47] Nonetheless, these statistics bear witness to the decline in the percentage of rodwork being performed in the Washington Metropolitan area during the period 1973 to 1984 by union contractors.

e. *Pension Records*

As perhaps suggested by the Special Master's comments in the previous section, the preferred method by which to accurately recreate the conditions and relationships of Local 201 had there been no unlawful discrimination is to turn to the pension records of Local 201 itself (Plaintiff's Exh. F.) The pension records automatically take into account the unemployment levels of District of Columbia union rodmen and the average number of days lost due to injury, sickness, and attrition. Moreover, these figures account for the practice of "booming out" given that any hours worked outside a Local 201 rodman's jurisdiction will have been logged in Local 201's pension records. In addition, these figures reflect the variation of hours worked solely by union workers during the course of any given year. In sum, these figures most closely enable the Special Master to comply with its duty to recreate, as closely as possible, the number of hours worked by union rodmen not subject to discrimination in the District of Columbia, as per the Supreme Court's directive in *International Brotherhood of Teamsters v. U.S., supra.*

***20** From the Local 201 pension records, a representative group of workers is readily identifiable. The representative group are those workers who received steady referrals during the relevant time period, as evidenced by a consistent number of hours worked per year. Workers with consistent referrals worked remarkably similar total numbers of hours for any given year. Excluded from this group are non-representative workers, i.e., those who for several years during the relevant period worked no hours at all.

By taking an average of the number of hours worked by those engaged in full time employment and checking that figure for ball-park accuracy against certain indicators of local ironworker productivity during the relevant time periods,[48] the undersigned arrived at the representative or "proxy"[49] number of hours per year that an ironworker could be expected to work. Based upon these indicia, and taking into consideration the testimony regarding the relatively recent concept of "double breasting,"[50] and also having considered all the testimony and exhibits received in evidence, the Special Master finds that the annual hours reasonably expected to be worked by a member of Local 201 is as follows:

YEAR	*HOURS WORKED*
1972	1711
1973	1557
1974	1627

1975	1447
1976	1419
1977	1253
1978	1179
1979	1230
1980	1210
1981	1263
1982	1168
1983	1126
1984	953
1985	1397
1986	1549

2. Mitigation of Damages

The defendants have averred that each class member must prove that the member appeared at Local 201's hiring hall on each day for which he seeks back pay, and that failure to do so constitutes a failure to mitigate the claimant's damages. This defendants' contention is unreasonable. A claimant entitled to an award is only required to mitigate damages as specified in the case law cited above (*see supra* part 3 at pp. 22–25.)

The defendants have also submitted in evidence advertisements appearing in the Washington Post for available rod working jobs in Washington, D.C. area. However, the mere existence of advertisements alone does not establish that there were jobs actually available.[51] The mere existence of want-ads does not prove by a preponderance of the evidence that the plaintiff class as a whole failed to be reasonably diligent in mitigating damages. Moreover, as we found out during the individual hearings, many of the claimants cannot read.

The Special Master received testimony concerning rod work available for purposes of "booming out." The Special Master makes no class-wide finding as to this issue except to note that a class member is required to accept only work within a reasonable distance from his residence. *Hadra v. Herman Blum, supra.* What is "reasonable" under the circumstances will be made on a case-by-case basis.

VI

PRELIMINARY CONCLUSION

The preceding comprises the Special Master's conclusions of law that govern the resolution of individual claims as well as the Special Master's findings of fact having class-wide applicability. Below, individual findings of fact are discussed with reference to each separate claimant.

***21** Where it is determined that a claimant is entitled to back pay for one or more years, the cumulative present value of the award is provided. The cumulative present value represents the total back pay awarded to that claimant, plus 6% interest[52] compounded annually from the date of the award. Interest has only been computed through March 31, 1994, the last full month prior to the date on which it is anticipated that his report will be filed.

For example, Mr. X is awarded back pay in the sum of $1,000 for the year 1975. $1,000 at 6% interest compounded annually from January 1976 equals $2,733.16 through March 31, 1994 ($2,692.77 to January 1994, plus an additional $40.39 for the first quarter of 1994). If Mr. X was also awarded back pay in the sum of $1,000 for the year 1976, the cumulative present value of his back pay award would total $5,311.61: the 1976 award of $1,000 at 6% through March 31, 1994 is $2,578.45, to which the $2,733.16 award for the previous year is added for the cumulative total.

VII

FINDINGS OF FACT & CONCLUSIONS OF LAW REGARDING INDIVIDUAL CLAIMANTS

Jiles Allen
Jiles Allen died prior to the damage hearing. A suggestion of death was filed on November 1, 1990, and on November 26, 1990, Edna L. Allen was substituted as a representative of Mr. Allen's estate. Mrs. Allen testified that she and Mr. Allen were married but had not lived together since 1976. She offered four exhibits in to evidence: Exhibit 1, offered but ultimately not received, is a certification to the class form dated May 27, 1986; Exhibit 2 is Mr. Allen's pension records; Exhibit 3 is Mr. Allen's social security records, and Exhibit 4, Mr. Allen's journeyman's application.

With respect to the authenticity of exhibit number one, Mrs. Allen testified that the signature on the third page of Exhibit 1 as that of her deceased husband (T. 197.)[53] However, she testified that the handwriting on the first page of the form was not Mr. Allen's handwriting (T. 201.) Ms. Allen also testified that Mr. Allen's Journeyman application form, (Plaintiff Allen's Exh. 4), dated February 20, 1971, did not bear his signature (T. 200–201.)

The basis for Mrs. Allen's identification of her husband's signature was apparently the distinctive manner in which he signed the letter "J" (T. 200–201.) In addition, Mrs. Allen testified that the signature on the Journeyman's exam (Plaintiff Allen's Exh. 4), could not have been her husband's because the person who signed had listed the wrong address (T. 200.) When the backpay hearing resumed the following day, Mrs. Allen changed her testimony and asserted that the signature on the Journeyman's application was Mr. Allen's (T. 6.)[54]

In order to corroborate Jiles Allen's signature, Mrs. Allen first proffered that she had a copy of their marriage license, which was in the possession of her attorney, containing Mr. Allen's signature. On the second day of the hearing, it became clear that Mr. Allen's signature did not appear on the marriage certificate (T. 6, 10.)

***22** Mrs. Allen never produced copies of any document containing Mr. Allen's signature. She testified that they only filed one joint income tax return while married and that she did not have a copy of it (T. 9–10.) She stated that on Mr. Allen's death, none of his personal papers were turned over to her (T. 11.) Mrs. Allen changed her testimony concerning Mr. Allen's signature on the Journeyman's application form before concluding that it did contain his signature (T. 197, 201, 7.) She conceded that she had not lived with Mr. Allen since 1976, (T. 8–9), and provided no testimony regarding her familiarity with Mr. Allen's signature. It is obvious to this untrained eye that the signatures on the two exhibits are not the same.

Mrs. Allen was the only witness with respect to authentication. An examination of the certification form discloses that the telephone numbers and social security numbers were altered. Mrs. Allen testified that she had no social security information for Mr. Allen (T. 11.) Moreover, the form identifies “Don Grissley” as the union representative who denied Mr. Allen admission to the Training Program in early 1970. However, the Training Program was not created until 1972, and Grigsby did not become an officer of Local 201 until 1972.

Furthermore, the application contains additional obvious errors: in response to a question inquiring if Jiles Allen was ever referred out for employment by Local 201, the response “no” is recorded. However, the pension records reflect in excess of 1400 hours a year for the period 1968 to 1972 (*See* Plaintiff Allen’s Exh. 2.) Finally, in answer to an inquiry whether Mr. Allen was denied admission to a Training Program because of racial discrimination, the answer recorded is “no.”

The Special Master declined to accept the certification form, since its trustworthiness was not established. The document, in different hand writings, contained significant errors and the signature on the form was not proved to be that of Jiles Allen. Consequently, it was not received into evidence. Absent a trustworthy and verifiable certification in the form established by the Court pursuant to the Notice to Class members bearing the signature of a claimant, no prima facie claim is established.

The Special Master therefore concludes that Edna Allen failed to establish that her former husband was, and therefore she as his substitute representative, is entitled to an award of damages in this class action for compensatory damages.

Alexander Bellamy

Pursuant to the Special Master’s order, the direct testimony of Claimant Alexander Bellamy was presented in affidavit form and Bellamy appeared personally at a hearing held April 25, 1990 to be cross examined by counsel for the defendants. At the hearing, Bellamy offered into evidence his affidavit, (*see* Aff. of Alexander Bellamy, Plaintiff A. Bellamy’s Exh. 1, hereinafter Aff.), orally corrected with respect to incorrect dates and identification of his employer (*see* T. 154–163.)[55]

***23** The order of reference directs that once a claimant has shown that he is a class member, the burden shifts to the defendants to establish by clear and convincing evidence that the claimant is not a class member and not entitled to damages.

By stipulation, Alexander Bellamy limited his back pay claim to the period October 21, 1972 through December 31, 1976 (T. 163.)

Mr. Bellamy, a black man, was employed as a rodman by union contractors by way of referral from Local 201 during the period July 1, 1969 through June 30, 1975 for the following number of hours per year:

1970	1190
1971	1566
1972	1526
1973	1617
1974	1758
1975	1704
1976	704[56]

This work history as a rodman more than amply demonstrates that Mr. Bellamy possessed the requisite amount of experience to qualify for class membership. The defendants offered no contrary evidence.

In 1972 and 1973, Mr. Bellamy was discouraged from participating in the Training Program by the Local 201 business agent, Ronnie Vermillion (Aff. ¶ 11; T. 176–77; 181–82)

Through the calendar year 1974, Bellamy's employment hours based on referrals from Local 201 exceeded that of the number of hours reasonably expected to be worked by the average member of Local 201.

During calendar years 1975 and 1976, Mr. Bellamy was ready, willing and able to accept referrals for work from Local 201, and he made reasonable efforts to obtain referrals from Local 201 (*See* Aff. ¶¶ 15, 21, 22; T. 196–98.)

After being laid off by George Hyman Construction Company in the late summer of 1975, (T. 193), Mr. Bellamy obtained employment for the remainder of that year with N & S, Inc., a non-union employer, (Plaintiff A. Bellamy's Exh. 2.), because of the lack of referrals from Local 201 (Aff. ¶ 20.) In early 1976, Bellamy was employed by George Hyman through Local 201; which corroborates Bellamy's testimony that he sought Local 201 referrals and stood ready to accept employment through such referrals.

The average hourly rate of compensation including all adjustments for Local 201 members in 1975 was $9.78 per hour and in 1976 it was $10.54 an hour (*see* Stipulation at Bench, T. 43–53.)[57] Accordingly, in 1975 the proxy Local 201 member would have earned $14,152 (1447 hrs. x $10.54 per hour). In 1976 the proxy member would have earned $14,956.26 (1419 hrs. x $10.54 per hour).

Mr. Bellamy's social security records reveal that he earned $10,437.00 in 1975, and $5,250.00 in 1976. Pursuant to the above calculations, Bellamy had a shortfall of $3,715 in 1975 and a shortfall of $9,706 in 1976.

Following his lay-offs by Re–Bar and George Hyman, Bellamy went to the Local 201 hall on an intermittent but regular basis seeking job referrals, only to observe bookmen receiving assignments to jobs while he waited (Aff. ¶¶ 15, 16.) Bellamy's social security records disclose that he was fully employed most of his claim period, and therefore, he did not have to go to the Local for referral until after he was laid off by Re–Bar in mid–1975. He was quickly referred by the Local to George Hyman, another union contractor (Plaintiff A. Bellamy's Exh. 2.) After the Hyman job concluded in the late summer of 1975, Bellamy found non-union construction work for the remainder of 1975 (*Id.*.) In early 1976, he was again referred to George Hyman but that job closed in mid–1976 (*Id.*.) Bellamy received no other referrals in 1976 before abandoning his efforts to obtain referrals through Local 201 in December 1976 (Aff. ¶ 20.)

***24** I find that Alexander Bellamy is eligible to participate as a class member in these proceedings by reason of his race, his experience, and the fact that he was discouraged from participation as a full member by requiring that he first enter the Training Program and then refusing to allow him admission to the program, notwithstanding over 3000 hours of 201 referrals. I further find that Mr. Bellamy is entitled to a back pay award of $3,7156 plus interest from January 1, 1976 and $9,706 with interest from January 1, 1977. The cumulative present value of that award is $37,290.74.

Bellamy also seeks damages to compensate him for injuries alleged to have been incurred by reason of the defendants' discriminatory actions. The only evidence on that issue consisted of Bellamy's testimony that his hypertension condition was aggravated as a result of stress due to no work and mounting bills (T. 244; *see also* Aff. ¶¶ 28–30.) Although the defendants claim this was not supported by independent medical corroboration, it is well established that even in the absence of corroboration, the fact finder may measure the plaintiff's testimony in the light of surrounding circumstances, and in proper circumstances award damages on the basis of the plaintiff's testimony. *Hobson v. Wilson,* 737 F.2d 1, 62 (D.C.Cir.1984). Specific proof of out of pocket loss or medical testimony is not necessary. *Williams v. Trans World Airlines,* 660 F.2d 1267, 1273–73 (8th Cir.1981).

It is the law of this case that the discriminatory conduct of the defendants precluded many blacks from becoming members of Local 201; a status that assured priority in work referral. Moreover, the order of reference directs that once a claimant makes a *prima facie* showing that he is a class member, the burden is on the defendant to show by clear and convincing evidence that the claimant is not a member of the class and not entitled to damages.

Although there is no evidence of physical or emotional trauma, "when a plaintiff seeks compensation for an injury that is

likely to have occurred but difficult to establish, some form of presumed damage may possibly be appropriate." *Memphis Community School District, supra* at 310; *Gore v. Turner, supra* at 164 (damage presumed).

I find, and accordingly conclude, that in addition to the back pay award to which Alexander Bellamy is entitled, he is also entitled pursuant to § 1981 to an award of compensatory damages for the emotional distress. Mr. Bellamy suffered humiliation and mental distress, and also suffered anguish as a result of his medical condition. For this, I find and conclude that he is entitled to compensatory damages in the sum of $5,000 for his emotional distress.

Ernest Bellamy

By stipulation of counsel, the back pay claim of Ernest Bellamy is limited to the period October 21, 1972 until October 17, 1975 (T. 74.)[58]

Ernest Bellamy is a named plaintiff in these proceedings and pursuant to the order of reference is deemed a class member and entitled to damages. Moreover, the order of reference shifts the burden of persuasion to the defendants to show by clear and convincing evidence that as a claimant, Bellamy is not entitled to damages.

***25** Ernest Bellamy, a black permit man and named class member, was employed during the period of October 21, 1972 to October 17, 1975, following referral by Local 201 to three different union contractors. At the beginning of his claim period, Bellamy was employed by M.J. Byorick, Inc. and remained fully employed by it through the third quarter of 1973 (*See* Plaintiff E. Bellamy's Exh. 1 at 006.) Beginning in the last quarter of 1973, he worked for Wahib Steel and remained fully employed by it until the end of the third quarter of 1974, (*id.* at 008), at which point he returned to Byorick during the fourth quarter of 1974, the first quarter of 1975 and for about a week in the third quarter of 1975 (*Id.* at 006.) Bellamy has no record of social security earnings in the second quarter of 1975 (*See* Plaintiff E. Bellamy's Exh. 1.) During the last half of 1975, he was employed full time by Blake Construction Company, Inc. (*Id.* at 008.)

For the first three quarters of the calendar year 1972, Bellamy's social security records show that he earned $9,178.75, and no earnings during the last quarter of 1972; in the calendar year 1973, he earned $14,269.05, and in calendar year 1974, he earned $14,466.65 (*Id.*.)[59]

During the year 1972, the proxy Local 201 journeyman worked 1711 or 428 hours each quarter. Therefore, the proxy would have earned $3,497 during the last quarter of 1972 (428 hours @ $8.17 per hour). However, the claim period began on October 21 and concluded on December 31. This represents 71 days of the 91 days remaining in the quarter. Accordingly, the proxy earning during the claim period represents only 78% of the full quarter earning or $2,728. Since Mr. Bellamy had no reported earning during the last quarter, Mr. Bellamy is entitled to an award in that sum for that period, the present value of which is $9,413.

Bellamy's 1973 and 1974 earnings from Local 201 referrals exceeded earnings of the proxy Local 201 journeyman based upon the benchmark hours for those years times the stipulated hourly rate of compensation including all adjustments. (*See* Stipulation at bench; T. 43–46.)[60] In 1973, the proxy's earnings are calculated at $13,343.49 (1557 hrs x $8.57 per hour) whereas Bellamy's actual earnings were $16,043.00. In 1974, the proxy's earnings were $14,756.89 (1627 x $9.07 per hour) and Bellamy's actual earnings were $19,842.00.

Bellamy contends he was deprived of many hours of overtime, and seeks additional income for that alleged loss. However, he was unable to state how much overtime he probably would have worked and even if the Special Master were inclined to consider this item, any finding would be purely speculative and wholly without evidentiary support. Therefore, no allowance is made for alleged loss of overtime.

The order of reference mandates that the claim period run from the date a claimant first attempted to become a member or was deterred or discouraged from doing so, but no earlier than October 21, 1972, concluding on the day that the claimant was first allowed to take the exam or was given an opportunity to do so. Mr. Bellamy took the journeyman's exam on September 30, 1974 and failed it.[61] Therefore, Ernest Bellamy's claim period encompasses the period between October 21, 1972 and September 30, 1974, and the only back pay attributed to that period was for the last quarter of 1972, in the amount of $2,728.00.

***26** It has already been determined as a matter of law "that plaintiff (Ernest) Bellamy was subjected to retaliation in violation of Title VII." *by Local 201 only. Berger v. Iron Workers,* 843 F.2d 1395, 1426–27 (D.C.Cir.1988). The stipulated applicable

hourly wage rate for the retaliatory period was $9.78 whereas Bellamy actually earned $7.95 an hour; a loss of $1.83 an hour. Bellamy worked at this reduced wage rate for approximately 4 months in early 1975.[62] Accordingly, I find that as a result of the retaliation, he lost $882 in earnings in that sum with interest from May 1, 1975, the present value of which is $2,644. He is therefore awarded that sum solely against Local 201. However, his back pay award is against the International as well as the Local, the present value of which as indicated earlier is $9,413.

Ernest Bellamy also seeks compensatory and punitive damages for the retaliatory actions of Local 201. The Court of Appeals affirmed that the retaliation violated Title VII, *Id.* at 1426. It is clear however that compensatory and punitive damages are not available under Title VII, *Bundy v. Jackson,* 641 F.2d 934, 946 n. 12 (D.C.Cir.1981). *See also Walker v. Ford Motor Co.,* 684 F.2d 1355, 1363–65 (11th Cir.1982).

Throughout his claim period, Ernest Bellamy was regularly and steadily employed; first by M.J. Byorick, Inc. and later by Wahib Steel (Plaintiff E. Bellamy's Exh. 1.) Bellamy testified that he endured isolation and felt ashamed as well as depressed because he had been branded a "troublemaker" by his fellow permitmen. Much of his depression and shame he related to his cut in pay and failure, in his mind, to give him a fair chance to take the journeyman's test.

To the extent that Bellamy's emotional distress was related to his cut in pay, found to be retaliatory conduct in violation of Title VII, Bellamy is not entitled to compensatory damages. To the extent it was related to his subjective determination that he was not given a fair chance to pass the entrance exam, it is not compensatory because the administering of the exam has been challenged and found lawful.[63]

Nevertheless, Bellamy is a named party and suffered the consequences of discriminatory practice. "When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damage may possibly be appropriate." *Memphis Comm. School District, supra,* at 310–11. Moreover, the fact finder may infer emotional distress when the plaintiff has been subject to open racial discrimination, *Gore supra* at 164.

Accordingly, the Special Master finds in favor of Ernest Bellamy on this issue pursuant to and awards him $5,000 as damages for the emotional distress he is presumed to have sustained and humiliation he underwent by reason of the defendants racial discrimination.

Albert Berger

Albert Berger is not a named plaintiff. In order to be considered for a damage award, he must prove class membership eligibility.

***27** Albert Berger, a black rodman, was born in Leesville, Virginia on November 23, 1940. He has a 10th grade education, (T. 4),[64] and therefore was not eligible for the apprentice program, which required a high school education.

Mr. Berger first obtained job referrals from Local 201 in 1966 (T. 5.) He made inquires around 1970 about becoming a union member because he believed he had the necessary experience (T. 7.) Berger claims that he never was notified of the results of the entrance exam that he took in 1970 (T. 15.) The defendants contend that Berger passed the written portion of that exam but failed the oral portion and that he was notified in writing of these results in late October 1970 (Defendants' Exh. 2(c).)

Mr. Berger was given another opportunity to take the entrance exam in February of 1971, (Defendants' Exh. 3), during the open period. He failed to appear for this examination (T. 19, 20, 26, 29.)

In September 1973, Berger began the Training Program, (T. 28), successfully completed it, and took the exam in July 1974 (T. 29.) He was successful, and was admitted at that time to journeyman status.

I find that Mr. Berger has failed to prove that he was deterred or discouraged from taking the entrance examination leading to full membership in Local 201.

The records unequivocally establish that he was given an opportunity to take the examination in October 1970 and that he took but did not pass the exam at that time (Defendants' Exh. 2(a), (b), (c).) Berger was given a second opportunity in February 1971, (Defendants' Exh. 3), but failed to show up for the exam (Defendants' Exh. 4). He was given a third opportunity in July 1974, after completion of the training program. At that time he successfully completed the exam and was admitted to membership in 1974.

Between October 1970 and February 1971, Albert Berger was given two opportunities to take the admissions exam. He failed the first exam and failed to show up for the second examination.

In view of the opportunities provided Albert Berger, an experienced rodman, for admission to full membership solely by examination, I find that there is no evidence from which to conclude that Berger was discriminatorily denied entry into membership by reason of the barrier of the Training Program. Accordingly, I find that Mr. Berger has failed to carry his burden of proving that he was deterred or discouraged from participating in the entrance examination by reason of the defendants' discriminatory practice of requiring experienced black ironworkers to participate in a Training Program before being eligible to take the entrance exam. Therefore, Berger is not entitled to any damage award.

Alfonzia Berger

Alfonzia Berger is not a named plaintiff. Therefore he must establish that he is a class member and entitled to remedial relief (*See* Order of Reference to Special Master filed February 15, 1989.)

Alfonzia Berger is a black man, born August 29, 1945 (T. 97.)[65] Mr. Berger is not presently, nor has he ever been, a member of Local 201 (T. 97.)

***28** After Mr. Berger left the 11th grade, he was employed as a custodian in 1964 (T. 97, 105.) He continued that line of work until 1974 (T. 99.) On the first occasion that Berger went to Local 201 for referral, he sought to join Local 201 but was told by Ronnie Vermillion, Local 201's business agent, that he would have to have 8 or more years experience before he was eligible for the Training Program (T. 100, 112.) Berger was nonetheless referred for work as a permitman.

Berger's social security records disclose that he was first referred in the 3rd quarter of 1974 (July—September), and in the beginning of the Local 201 pension year 1975. During the 1975 pension year, (July 1, 1974—June 30, 1975), Berger worked 1009 hours on Local 201 referrals (Plaintiff Berger's Exh. 3.)

In the pension year 1976, Berger performed 617 hours of rodwork as a result of Local 201 referrals and in pension year 1977, he worked 872 hours of union rodwork (*Id.*.) Although Berger claims that he did non-union rodwork for Potomac Iron Works in 1976, (T. 102), there is no evidence of the nature and extent of that work.[66] In the early part of 1975, Berger asked Vermillion, Local 201's business agent, about enrolling in the Training Program. He was told that there were people on the list ahead of him with more experience, (T. 123), and that he would have to wait. Berger knew at that time that he was ineligible because he had not yet reached the required 30 years of age (T 110, 124.) After being told to wait, Berger made no further inquiry until sometime in 1978, several years after the applicable claim period (T. 124; 125.) When he did make inquiry, it was merely to talk with another individual who was not an agent or official of the union (T. 125.)

The conduct which the courts have held racially discriminatory was the defendant's requirement that experienced black workers qualify to enter the ranks of journeymen rodmen.[67] It is therefore not sufficient for Alfonzia Berger to show that he was black and that he sought to join the union or participate in its Training Programs. In order to qualify for relief, Berger must also show that he was experienced or was denied the opportunity to gain training through an available program.

At the time of Alfonzia Berger's initial efforts to join the union in 1974, he had absolutely no experience. The failure to admit an inexperienced applicant into the union or failure to allow such an applicant to take the examination for union admission has not been deemed discriminatory conduct.[68] Therefore, in order to prevail, Mr. Berger must show that he timely applied for and was denied an opportunity to participate in a program leading to admission.

The two programs available were the Apprenticeship Program and the Training Program. The Apprenticeship Program required that all applicants have a high school diploma prior to admission. The Training Program, on the other hand, was open only to applicants thirty years of age and older without regard to the applicant's educational status.

***29** The prerequisite of a high school diploma for admission to the Apprenticeship Program was not deemed racially discriminatory. *See Berger, supra* at 1411 (stating that "the class action challenging the high school diploma requirement under both Title VII and Section 1981 ... (failed) for want of a suitable representative.") Alfonzia Berger admittedly did not have a high school diploma or its equivalent (T. 105.) Therefore, he has failed to show eligibility for class membership on grounds that he was discriminatorily denied admission to the Apprenticeship Program on the basis of his race.

Moreover, Berger candidly admitted that he only sought admission to the Training Program on one occasion in early 1975, while he was still 29 years of age. Since he was not yet 31, he did not qualify for admission to that program and failed to show that he was denied program admission because of his race.

Accordingly, since Berger lacked the experience appropriate for admission to the journeyman exam during the applicable claim period, lacked the educational prerequisite for admission to the Apprenticeship Program, and failed to establish that once eligible by reason of age for admission to the Training Program, he was denied admission or discouraged from applying for admission to the program, Alfonzia Berger has failed to show that he is eligible for class membership and, therefore, entitled to remedial relief.

Jessie Berger

Jessie Berger is a named plaintiff and class representative in this suit. In addition to back pay, he seeks compensatory damages for pain, suffering and humiliation as well as punitive damages.

Jessie Berger's claim period commenced on October 21, 1972, 3 years before the filing of this suit. His back pay claim period ended once he was admitted to Local 201 as a bookman following successful completion of the examination in February 1976. Berger contends that after commencement of this suit and up until 1981, he was harassed and intimidated by white Local 201 members because of this litigation.

Jessie Berger, a black iron worker, was born in 1935. He has an 8th grade education (PM T. 19.)[69] In 1960, he moved to the Washington, D.C. area to seek employment (PM T. 20.) Initially, he worked for a trash company and after several years became a construction laborer and a member of Labor Local 74 (*Id.*.) In 1968, he sought work as a rod man out of Local 201 (PM T. 25.) After an initial assignment to a job that lasted several weeks, he was referred to M J. Byorick, Inc., where he remained employed rather steadily for 4–5 years (PM T. 27–28.)

Berger's claim period, like all the other claimants' began October 21, 1972, three years before the filing of this suit. Upon successful completion of the training exam in February 1976, Berger received his book and was admitted to full membership as a journeyman. Under the law of this case, his claim for back-pay terminated upon being given a fair opportunity to take the admissions examination.

***30** Jessie Berger's earnings records disclose that during the calendar year 1972, his earnings exceeded those of the bench mark, therefore, he is entitled to no back pay award for the year 1972. Similarly, his earnings in 1973 exceeded those earned by the hypothetical average Local 201 iron worker.

However, Berger's earnings in 1974 and 1975 reveal a shortfall. In 1974, Berger's social security records disclose earnings of $12,025.00 whereas the proxy 201 member would have worked 1627 hours at $9.07 an hour for total earnings of $14,757.00. Therefore, Berger is credited with net back pay for the year 1974 in the amount of $2,732.00.

In 1975, Jessie Berger's social security records disclose earnings of $5,264.00. The proxy 201 member would have worked 1447 hours at $9.78 for total earnings of $14,152.00. Thus, Berger's shortfall for 1975 was $8,888.00.

In 1976, Berger earned $12,070.00 according to his social security records. The hypothetical 201 member would have worked 1419 hours at $10.54 an hour for total earnings of $14,956.00. However, Berger was admitted to membership in February of that year following successful completion of the examination. Therefore, Berger's back pay award for the year 1976 is limited to $^1/_6$th of the total shortfall of $2,956.00, or $493.[70] The cumulative present value of these awards is $35,487.28.

I further find that, after the inauguration of the Training Program in 1972, Jessie Berger was discouraged by reason of his race from applying for admission to that program. Once this action was commenced in 1975, naming him as a lead plaintiff, Local 201 substantially reduced Berger's referrals for employment. The pension records reflect that from July 1968 until June 30, 1973, Berger had over 1500 hours a year of referrals from Local 201. In the year ending January 30, 1974, referrals dropped to 1244 hours and continued dropping every year thereafter, with the exception of fiscal year 1979, during which he worked 1399 hours. Berger's referrals dropped to 899 hours in 1976; 875 hours in 1977; 995 hours in 1978; 773 hours in 1980; 841 hours in 1981; 72 hours in 1982; and 202 hours in 1983, until he had no referral hours for the fiscal year ending June 30, 1984. During the calendar year 1984, Berger's social security records reflect wages of $19,235.03 (Plaintiff J. Berger's Exh. 2.) These monies were earned during non-union work.

It is more than coincidental that following the filing of this suit his referral rate dropped substantially. Nonetheless, it is apparent from his social security earnings that he persevered and attempted to gain referrals out of Local 201 until 1984, when out of desperation, he worked non-union. It is equally significant that following the liability phase of these proceedings in 1981, Jessie Berger's referrals dropped to 72 hours for the fiscal year July 1, 1981 through June 30, 1982.

Although the circuit court reversed the trial court's findings in favor of Berger on his claim for retaliation, this evidence nonetheless bears witness to the anguish Jessie Berger claims to have suffered in leading the fight to obtain full integration of Local 201. After working approximately 10,000 hours as an iron-worker permit man on referrals by Local 201, he was told that before being permitted to take the membership exam, he must complete a 2 year training course. In 1972, by the time the Training Program was initiated, Berger had, according to Local 201's own pension records, over 5 years and over 7100 hours of on-the-job experience. Although the circuit court observed that "the rodman trade has historically been apprenticeable; ..., it stands to reason that on-the-job experience may not necessarily teach all that a fully qualified rodman should know." 843 F.2d at 1420. Nevertheless the court unequivocally held that the crux of the plaintiff's challenge was "the requirement of classroom training before experienced workers may qualify to enter the ranks of journeymen rodman." 843 F.2d at 1419. And it was this very practice, i.e., delaying experienced black workers "entry to (the) Union ranks by the particular educational prerequisite (which) affected them from the end of the Open Period (in 1971) until the filing of suit on October 21, 1975," that the circuit court found to have been established by the plaintiffs as racially discriminatory conduct. 843 F.2d at 1422.

***31** The record clearly establishes that Jessie Berger was the victim of this practice. Berger was not invited to participate in the Training Program until 2 years after it was initiated and he had to wait until its completion 2 years later before being able to take the exam, notwithstanding his extensive work experience as an ironworker.

Once the law suit was filed, Berger's referral hours dropped sharply. Moreover, Judge Penn found in the liability stage of these proceedings that "Berger heard Tommy Gilmen, their business agent for Local 201, state at a union membership meeting ... that he was going to make it bad on those who filed this suit." *See* 843 F.2d at 1424. The court of appeals concluded that there was no evidence that this threat was carried out and that that statement standing alone was insufficient to support a retaliation claim.

In the case's current posture, I conclude that Jessie Berger was indeed discriminated against. The evidence at this stage of the proceedings, viz., requiring a six year veteran of union referrals to undergo training, deferring entry into participation in the Training Program for two years and substantially cutting the number of his referrals, clearly and convincingly establishes that Mr. Berger underwent substantial discrimination designed to discourage him from pursuing union admission. I further find that these actions caused him mental anguish as well as anxiety and suffering for which he is entitled to damages. Accordingly, the Special Master finds in favor of Jessie Berger and awards him, pursuant to § 1981, $25,000 for the emotional distress and humiliation he endured because of the defendants racially discriminatory actions in delaying him entry into the union.

Alvin Martin Boone

By stipulation of counsel, the back pay period of Alvin Martin Boone is limited to the period between October 21, 1972 and January 11, 1978 (T. 279.)[71]

Alvin Boone, a black permit man and named class member, began working as a rodman in 1963. Sometime during 1965, Mr. Boone learned by word of mouth about Local 201 (T. 287.) Thereafter, Boone registered with the Local and was referred for work with Blake Construction Co (T. 288.) In March 1991, Boone took and failed the journeyman's exam (T. 289.) His efforts to retake the exam were rebuffed (T. 290.)

Although he initially learned rod work at a non-union job, once Boone sought work out of Local 201, he never sought nor worked non-union jobs during his claim period (Boone Exh. 1, hereinafter Aff., at ¶ 15.)

Mr. Boone's social security records disclose that he earned $2,767 during the last quarter of 1972 while employed by M.J. Byorick, Inc. (*See* Boone Exh. 2.) The proxy Local 201 journeyman worked 1711 hours during 1972 or 428 per quarter, at an hourly wage of $8.17 for total quarterly earnings of $3,497.00. Boone's claim period for that year amounts to 71 days (Oct. 21—Dec. 31), or 78% of the quarter. 78% of $3,497.00 amounts to $2,728.00. Since Boone's actual earnings for the 71 day claim period exceeded that of the proxy, he is entitled to no back-pay for 1972.

***32** The proxy 201 journeyman would have worked 1557 hours during 1973 at a stipulated hourly rate of $8.57 for total earnings of $13,343.00. Boone's actual earnings for that year as reported in his Social Security records were $3,036.00 from M.J. Byorick, Inc., and $8,576.00 from George Hyman Construction, for a total of $11,612.00. Accordingly, Boone had a shortfall of $1,731.00 in 1973. In 1974, Boone earned $12,558 from George Hyman, leaving him $2,199 short of the $14,757 earned by the Local 201 proxy (1627 hours at $9.07/hour.).

Boone earned $6,721.00 from George Hyman Construction in 1975, whereas the proxy 201 journeyman would have worked 1447 hours at $9.78 per hour for total annual earnings of $14,152.00, leaving Boone with a shortfall for the year 1975 of $7,430.00

During 1976, Boone had earnings of $8,814.87 from George Hyman Construction and $80.00 from Blake Construction for a total of $8,875.00.[72] The hypothetical worker would have earned $14,956.00 (1419 hours at $10.54 an hour.) Boone, therefore, sustained a shortfall of $6,081.00 in 1976.

For the calendar year 1977, Boone's social security records disclosed wages of $2,066.00 from Hyman Construction, $186.00 from C.J. Roberts Reinforcing Steel, and $3,321.00 from Frank Briscoe Company for a total annual earnings of $5,573.00 (*See* Boone Exh. 2.) Our proxy journeyman would have earned $13,645.00; leaving Boone with a shortfall in 1977 of $8,072.00.

Boone earned the following wages in 1978: $635.00 from Hyman Construction, $294.00 from J.W. Bateson Company, $88.00 from Garlinski Steel, $1,708.00 from Keystone Steel, $4,270.00 from Providence Steel, $2,699.00 from King Erectors, $871.00 from Y & M Steel and $88.00 from Syphax–Byorick Joint Venture for a total of $10,652. (*See* Boone Exh. 2.) The proxy journeyman would have earned $12,745.00 (1179 hrs. at $10.81) for the calendar year, or $3,186.00 for each quarter. Boone averaged $2,663.00 per quarter. He therefore had a first quarter shortfall of $523.00. However, his claim period only includes 11 days (8.5%) in the first quarter, reducing to $44.00 his net shortfall for 1978. Boone is awarded the cumulative present value of the back pay awards described above, in the sum of $71,458.89.

Boone also seeks damages for emotional distress. He testified that during his claim period he went to the hiring hall 3 or 4 days a week seeking work but that on many occasions, he was passed over in favor of white workers (Aff. ¶ 18.) Indeed, Boone's social security records disclose that beginning in early 1970, his annual earnings increased until the year in which this suit was filed and he joined as a class member. His earnings dropped steadily from $12,558.00 in 1974 to $6,720.00 in 1975; $8,875.00 in 1976, and $5,573 in 1977. The earnings of the proxy journeyman, on the other hand, increased annually.

Discrimination in job assignments took its toll on Boone and his relations with his family. He was unable to provide them with amenities such as vacations, (Aff. ¶ 36) and birthday presents (Aff. ¶ 36.) His relationship with his wife and children suffered (T. 350, 51.) His wife became the principal provider holding down two jobs, (T. 336), while Boone spent his idle time in frustration (T. 350.) The anguish, frustration and humiliation caused by the defendants' discriminatory conduct was a very real injury to Boone for which the Special Master finds in his favor and pursuant to § 1981 awards him $25,000 in compensatory damages for the emotional distress and humiliation incurred at the hands of the defendants because of race.

James E. Brown

***33** James E. Brown is not a named plaintiff. The burden of proof rests with him to demonstrate that he qualifies for class membership before being eligible for remedial damages.

James E. Brown is a black union worker born on July 22, 1940 (T. 8.)[73] He attended but did not complete high school (T. 9.) He began rod work in 1963, and first sought referrals from Local 201 in 1963 (T. 9–10; Defendant's Exh. 4), and progressively worked more hours from referrals by Local 201, so that during the pension year 1974 (July 1, 1973 to June 30, 1974), he worked 1670 hours. His referrals dropped off in 1975 to 1102 hours and finally in the pension year 1976, to 333 hours (Defendant's Exh. 4.)

I find that as of October 21, 1972, Brown had almost 7000 hours of iron worker experience and I further find that he was an experienced iron worker eligible for full membership admission upon successful completion of the examination. Nevertheless, around 1974 or 1975, he was required to enter a training program in order to be eligible to take the admission exam—precisely the type of requirement deemed by the Court to be racially discriminatory. The "training" was such a facade that Brown became frustrated and quit (T. 14.) I find that James E. Brown has proved that he is entitled to class membership and eligible for remedial damages.

Brown's social security earnings records reveal that his actual earnings exceeded those of the proxy journeyman for the last quarter of 1972 and about equalled those of the proxy in 1974. Therefore, he is entitled to no back pay for those years. However, in 1973, his earnings of $13,101 were $242 short of the proxy's earnings of $13,343 (1557 hrs. at $8.57 per hour), thus Brown is entitled to a back pay award of that sum. In 1975, the proxy earned $14,152 whereas Brown's earnings were $4,342, leaving a short-fall of $9,810 for which he is entitled to an award. In 1976, he had a short-fall in earnings of $5,915 based upon the difference between the proxy's earnings of $14,956 and Brown's actual earnings from his social security records of $9,041. Therefore, Brown is awarded a sum of $5,915 for 1976. The cumulative present value of these awards totals $45,375.45.

Although Brown testified that he continually sought referrals after he obtained non-union employment after 1976, I find that this testimony is not credible and that after 1976, Brown abandoned efforts to seek Local 201 referrals. His pension records reflect no credit hours after receiving credits of 33 hours for union work performed during the pension year 1976. Although Brown contends that he entered a training program in 1985 and 1986, and received a referral to Charles Thompkins Construction Company, neither his social security earnings records nor his pension records disclose any such employment.[74]

Brown testified regarding his frustration at having to participate in a training program inspite of his documented experience. This is the core of the class complaint and evidences the emotional distress and humiliation Brown endured in an effort to become a union journeyman. Pursuant to § 1981, the Special Master awards James Brown the sum of $2,500 as compensation for emotional distress due to the defendants racial discrimination.

O.C. Brown

***34** O.C. Brown, a black man, first sought Local 201 rod work referrals in 1964. He learned of the union by word of mouth (T. 66.)[75] Although Mr. Brown had performed non-union rod work for Miller and Long beginning in 1960, and later for Eberson, (T. 96), Brown believed that he could earn better wages through union referrals (T. 67.) Beginning sometime in 1965, Brown inquired about joining the union but was told by Ronnie Vermillion, Local 201's business agent, that he would have to undergo training before he was eligible to join and that Vermillion would tell him when he could go for training (T. 68.)

In response to Brown's follow-up requests, it was made clear to Brown that if he persisted in his efforts, he would not receive any referrals (T. 69.) When Don Grigsby later became Local 201's business agent, Brown again inquired about membership but Grigsby kept stalling (T. 70, 71.)

Finally, in 1977, Grigsby asked Brown if he was willing to go to training school (T. 70.) Brown agreed and after completion of the Training Program was admitted to union membership in March 1978 (T. 77; pension list.)

Brown can neither read nor write (T. 80) and therefore could not read any notices concerning the open period exam that may have been posted on the bulletin board of the union hall. There is no evidence that Brown otherwise knew of the open period exam, (T. 107), so he was never given a bona fide opportunity to take it. Instead, Brown was deterred from taking any positive steps to become a union member until such time as the union wanted him as a member.

I find that Mr. Brown was referred for employment as a rod worker to union shops by Local 201 as early as 1964, that he was an experienced rodman. He sought full membership in Local 201 but was discouraged and deterred from admission solely because of his race. Brown could have filed timely charges with the EEOC when the class representatives did so, or could have filed a timely lawsuit in 1975 when the class representatives filed this lawsuit because of Local 201's refusal to provide him with a fair opportunity to take the admissions exam given his extensive experience prior to 1972. Therefore, Mr. Brown is entitled to remedial relief.

Mr. Brown first sought membership in Local 201 about 1965. He was not given a bona fide opportunity to take the open period exam. Brown was finally admitted to membership in March 1978 following completion of a Training Program and successful completion of his first journeyman's examination. Therefore his claim period ends on February 28, 1978.

Mr. Brown's social security records show that during the last quarter of 1972, he earned $1,809.00 with C.J. Roberts and $83.00 from Dennison Masonry for total earnings during that period of $1,892.00 (Plaintiff O. Brown's Exh. 1.) During the portion of that quarter beginning on October 21, 1972, (Oct. 21—Dec. 31), the proxy 201 member would have earned $2,728.00,[76] leaving Brown with a shortfall of $866.00 in 1972, for which he is entitled to a back pay award.

***35** In 1973, Mr. Brown's social security records show gross earning from all employment of $9,145.00 (Plaintiff O. Brown's Exh. 1.) This represents a shortfall of $4,198.00, since the gross earnings of the proxy 201 journeyman for 1973 was $13,343.00 (1557 hrs. X $8.57 per hour). Brown's back pay award shall include that amount.

In 1974, Brown's documented earnings based on his social security records were $11,786.00, (Plaintiff O. Brown's Exh. 1), whereas the union proxy would have earned $14,757.00 (1627 hrs. X $9.07 per hour), resulting in a shortfall of $2,971.00, for which Brown is entitled to recovery.

In 1975 Brown's only documented income was $2,334.00 from employment with Garlinski Steel, (Plaintiff O. Brown's Exh. 1), resulting in a shortfall of $11,817.00, since the proxy 201 journeyman earned $14,152.00 that year (1447 hrs. X 9.78 per hour). Thus, Brown is entitled to a back pay award for 1975 of $11,817.00.

In 1976, Brown's social security records show earnings of $2,410.00 from employment with Hyman Construction & Volpe Construction (Plaintiff O. Brown's Exh. 1.) The proxy 201 journeyman would expect earnings of $14,956.00, leaving Brown with a shortfall of $12,546.00, for which he is entitled to a back pay award.

In 1977, Mr. Brown worked for 5 different employers and earned $4,265.00 (Plaintiff O. Brown's Exh. 1.) The proxy 201 journeyman would have earned $13,645.00 (1253 hrs. X $10.89 per hour) leaving Brown with a shortfall of $9,380.00 for 1977.

Brown's 1978 total annual earnings (from 10 different employers) totalled $6,806.00 (Plaintiff O. Brown's Exh. 1.)[77] However, since Brown was admitted to membership in March 1978, only the wage shortfall prior to his admission will be considered. One sixth of Brown's earnings of $6,806.00 is $1,134.00, whereas one sixth of the proxy 201 journeyman's wages is $2,124.00 (1179 hrs. X $10.81 per hour), leaving Brown with a shortfall of $990.00 for that period. The cumulative present value of these back pay awards totals $123,272..

Brown testified that he did "catch-work" about 2 or 3 times a month in warm weather, (T. 109), and also earned about $1,000.00 a year selling scrap iron. Given the fact that in the best of times during his claim period, the proxy 201 journeyman would not have worked more than 1627 hours in any one year and on the average would have worked a little over 1400 hours a year, the Special Master finds that these pursuits did not impact on Brown's availability for referrals out of Local 201 and therefore, no deduction or off set will be made from his back pay award. Moreover, there is no evidence from which the Special Master can determine how much Brown earned per day doing 'catch-out" work. Nor will any deduction be made for unemployment income since the proxy journeyman would also have received unemployment compensation because his work year only averaged about 35 weeks (1400 + hrs. divided by 40 hour week).

The defendants made much of two facts: that Brown quit Wahib employment in 1973 after working one or two days because of differences with the foreman; and that one other claimant testified that anyone employed by Wahib at that time could have worked there for the next several years because there was plenty of work (T. 90, 93.) Brown's social security records reflect that while he only earned $151.05 from Wahib during the second quarter of 1973, he also earned $1,586.03 from Hyman Construction during that same quarter and $3,331.06 during the third quarter (Plaintiff O. Brown's Exh. 1.) Therefore, Brown was not unemployed after quitting Wahib but appears to have immediately obtained employment from Hyman. Accordingly, I find that no deduction or offset to a back pay award is appropriate because of his personality clash with the foreman resulting in his quitting or being fired.

***36** Mr. Brown testified that he regularly and repeatedly sought journeyman status in Local 201. He was willing to do whatever necessary to obtain full membership, including training in spite of the fact that he had experience in the following amount of referrals per year: 690 hours of referrals in 1965; 1559 hours in 1966; 1562 hours in 1967; 972 hours in 1968; 962 hours in 1969, and 1607 hours in 1970. Brown's 201 referrals during those early years amply demonstrate that he was experienced and otherwise qualified, and that he did go to the hall seeking work. Nonetheless, his every request for membership was rebuffed by cajoling and veiled threats to "bench" him (T. 69.) Even when referred, Brown was fired on instructions from the business agent solely because of his status as a permit man, (T. 76, 77), a status which he was not permitted to rise above because of his race.

Brown testified, as did most of the other claimants, that he felt badly because of the treatment he received. Mr. Brown used other rote expressions as well to describe his frustration. The Special Master is mindful that Brown has very little formal education. Though he is not articulate, his feelings are no less sensitive than others to the discrimination visited upon him by the union.

"When a plaintiff seeks compensation for an injury likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate." *Memphis Comm. School District, supra,* at 310–11. In such circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure. *Id.* at 311.

Accordingly, pursuant to § 1981 O.C. Brown is awarded compensatory damages in the sum of $15,000 for the humiliation and anguish he suffered because of the defendants discriminatory conduct.

Paul Brown

Paul Brown is not a named plaintiff. Therefore he is required to prove class eligibility and entitlement to remedial damages.

Mr. Brown, a black iron worker, was born in South Carolina on July 16, 1935 (T. 79.)[78] He came to the Washington, D.C. area in 1952 and began construction work for Marten Brothers doing labor and rod work (T. 80.) In 1957, he went to work for Miller & Long Construction Co., a non-union contractor, as a rodman (T. 81.) About 10 years later, he went to Local 201 seeking job referrals (T. 81), and was referred to Moses–Ecco Construction Company and later to Blake Construction (T. 83.)

In 1971, Brown received notification that he was eligible to take the journeyman's examination for admission to Local 201 (T. 83–85.) After completing the exam, he was informed by Ronnie Vermillion, Local 201's business agent, that he had failed (T. 86.) Brown asked repeatedly to retake the test but was denied any further opportunity (T. 86.) When Brown continued to ask to retake the exam, Ronnie Vermillion admonished that if he persisted in his requests he would not receive any further referrals (T. 86.) Afraid of reprisal, Brown never again raised the topic of union membership (T. 87.)

***37** In October 1975, Brown was laid off and returned to Local 201 for another referral (T. 89.) Work was slow and when Brown received no referrals, he decided to accept non-union employment with Miller and Long, where he still remains employed (T. 96, 97.) Brown concedes that he never attempted or requested to join Local 201 after he last sought a referral in October of 1975 (T. 96.) "When I could not get a job referral I gave up on the union and started working for Miller and Long, a non-union employer." (T. 114, 115.)

Brown's Local 201 pension records (Defendant's Exh. 3) show that in 1967, he had 1435 hours of job referrals; in 1968, 1640 hours; in 1969, 1374 hours; in 1970, 1527 hours; 1971, 1703 hours; and in 1072, 1522 hours. I find that after October 1972 and prior to October 19, 1975, Brown was an experienced rodman eligible for admission to the union upon passage of the, which the Local refused to allow him to retake. Therefore, Brown has established eligibility as a class member.

Brown's social security earnings records report earnings for 1972, 1973 and 1974 at the then maximum subject to social security withholdings. There is no showing what his gross earnings were during that time in order to compare them with the proxy's earnings for those years. Any finding of a short fall during those years would be purely speculative. Therefore, no back pay award can be made for the years 1972 through 1974.

The social security records show M.J. Byorick earnings of $9,950 in 1975 plus $1,079 from Miller and Long. This is far short of the maximum subject to social security withholding, which means these sums represent his total earnings for that year. The proxy earned $14,152 in 1975, leaving Brown $3,123 short of the proxy's income. Therefore, he is awarded that sum for back pay, plus interest, from January 1, 1976.

I find that by the end of 1975, Brown had abandoned all efforts to join Local 201. "When I could not get a job referral, I gave up the union and started working for Miller and Long," where Brown remains to this day.[79] Therefore Brown is entitled to no back pay beyond 1975. The cumulative present value of the back pay award to which Mr. Brown is entitled is $9,047.81.

Brown's testimony with respect to his claim for damages due to emotional distress is sparse. He did what he had to do to get work and feed his family (T. 87.) Nonetheless, having found that he was denied a fair opportunity to become a union member because of his race, it can be presumed that an injury is likely to have occurred although difficult to establish and that therefore a damage award is appropriate. *See Memphis Comm. School District, supra,* at 310–11; *Gore, supra* at 164.

Accordingly, I find that Paul Brown is entitled to an award pursuant to § 1981, of $5,000 as compensation for emotional distress and humiliation.

George Clark

George Clark first sought rod work referrals from Local 201 in 1964. He went to the Local because he believed he could obtain better health and dental benefits than he could by doing non-union work (T. 162.)[80] Clark first began rod work in 1963 about one year before going to Local 201 for referrals. (T. 162) His pension records reflect that after initial referral amounting to 482 hours in 1964 and 527 hours in 1965, Clark's referrals doubled to 1076 in 1966 and 1008 hours in 1967. However, in 1968 they dropped to 8 hours (Def's.Exh. 2.) Clark became discouraged and stopped going to the hiring hall (T. 163.) Instead, Clark decided to do non-union work (T. 164.)

***38** It was not until early 1974 that Clark returned to Local 201 to again seek referrals (T. 164.) He was immediately referred to C.J. Roberts Reinforcing Steel; a job which lasted until early 1976 when he was laid off (Plaintiff's Exh. 1).

Clark first inquired about getting a union book in 1975 but was told he had to go through an apprenticeship program. (T. 170)

Since George Clark is not a named plaintiff, he is required to establish that he is a member of the class (*See* Order of Reference to Special Master filed February 15, 1989.)

In the notice to class members, the class is defined as:

> (1) black persons who applied for or sought, from representatives of Local 201 or the International, membership in Local 201 and, in connection therewith ... have applied for or sought ... admission to the Apprenticeship Program and/or Training Program and who have been or might (have been) excluded ... by alleged discriminatory practices ...' or (2) black persons who have been referred ... or who applied ... for referrals for employment ... and who (were) discouraged from applying for membership in Local 201 (and/or the training or apprenticeship programs by reason of) the alleged racially discriminatory practices of the Defendants

(Notice to Class Members filed April 11, 1986.) No matter which category, a claimant must also prove that he "could have filed timely charges with the EEOC when the class representative filed such charges or [who] could have filed timely lawsuits when the class representative filed the instant lawsuit" *Id.*

There is no credible evidence that Clark, a black man, ever sought or was discouraged from seeking membership during the late 1960's. Mr. Clark testified that he stopped going to the hall because "(he) got laid off and they did not have any work, they did not send me out" (T. 163.). Although Clark's certification form (Def.Exh. 1) shows a check mark, yes, in response to question number 4, which reads: "I applied or tried to apply for membership in Local 201, I did so in 1960's and was denied admission to Local 201 at that time by (__________)", Clark testified that he could read very little (T. 175) and that with the exception of his name all the information contained in the form was filled out by someone else (T. 237, 239.) The Special Master concludes that this exhibit standing alone is entitled to no evidentiary weight. After being laid off, Clark sporadically sought referrals, for about 1 year (T. 163.) In 1968, Clark abandoned all efforts to obtain referrals from Local 201. Moreover, he did not try to become a member until he returned to the hall in 1975 (T. 170.)

Since there is no evidence that Clark ever sought membership in the Local or admission to any training or apprenticeship programs before 1975, nor was he discouraged from doing so and therefore he could not have filed timely charges with the EEOC or a timely lawsuit when the class members filed this suit. He has failed to establish his right to class membership.

***39** Accordingly, the claim of George Clark is dismissed for failure to show that he qualifies for class membership.

Charles Dean

Charles Dean is not a named plaintiff. Therefore it is incumbent upon him to show that he qualified for class membership and damages (*See* Order of Reference to Special Master filed February 15, 1989.)

Charles Dean is a black man born in Alabama in 1948. He completed the 9th grade before moving to the Washington, D.C. area (T. 132.)[81]

Mr. Dean began employment in 1964 as a laborer and in 1968, he began to do non-union rod work for Pomponio Brothers in

Crystal City, Virginia (T. 133.) About a year later, Dean inquired about joining Local 201. However when Ronnie Vermillion, 201's business agent learned that Dean was working for Pomponio Brothers, he told Dean to get out of the hall (T. 133.)

Dean returned to Local 201 in 1973, (T. 134), and received a job referral. His pension records, (Plaintiff Dean's Exh. 3), show 624 hours of work for the fiscal year 1974 (July 1, 1973 to June 30, 1974), and 734 hours for fiscal year 1975 (July 1, 1974 to Jun. 30, 1975).

Dean recalls that he next sought to join the union in May 1975 (T. 135, 151.) He had been referred to a job with Bernstein Concrete Company. On one occasion, Vermillion appeared at the job site and Dean inquired about union membership. Vermillion told him that no new members were being admitted at that time. Vermillion informed Dean that there was a Training Program ongoing but that there were no present openings (T. 135, 152.) Several weeks later, Dean again approached Vermillion, this time at the hiring hall. He inquired about entering the apprenticeship program, but Vermillion told him to get out of the hall (T. 135, 156.)

Although Dean testified that these attempts to join Local 201 or do what was necessary to become a member were in May 1975, he also stated that he was working for Bernstein Construction at the time. It appears from Dean's social security records that he worked for Bernstein in 1974. Because Dean's social security records disclose that his employment with Bernstein covered the first three quarters of calendar year 1974, I find that the conversations with Vermillion at the Bernstein job site and a couple of weeks thereafter in the Local 201 hall, must have taken place in May 1974.

Given the passage of 16 years since those events, it is not unusual for a witness to be mistaken about the dates. Nor is Dean's certification form, (Defendant's Exh. 1), contradictory. Dean responded to questions 4 and 5 that he sought admission to the union or its programs from 1969 to 1982. These answers merely evidence a continuing desire to join the union between the time of his first contact with Local 201 to his membership admission in 1982.

I further find that Charles Dean has shown that he was eligible for admission by examination because of his prior work-related experience, over 1300 hours of union referrals between July 1973 and June 1985 plus 5 years of non-union rod work for Pompanio Brothers.[82] Dean's testimony evidences his desire to join the union no matter what preliminary steps were entailed. Furthermore, by 1974, Dean had performed rod work for 7 years by reason of this ample rod work experience, was eligible to take the exam without the necessity of enrolling in either entering the Training Program or apprenticeship programs (both of which he was ineligible to attend).

***40** Although Dean seeks damages from May 1975 until his admission to journeyman status in January 1982, I have found that the conversations with Local 201's business agent, at which time he was denied an opportunity to take the necessary steps for admission, actually occurred in 1974. However because Dean's earnings for 1974 as shown by his social security records approximately equaled the earnings of the proxy 201 journeyman, (Plaintiff Dean's Exh. 2), Dean is not entitled to a back pay award for 1974.

In 1975, Dean's social security record earnings were $9,645.66, (Plaintiff Dean's Exh. 2), or $4,506.00 short of the proxy's earning of $14,152.00 (1447 hrs. x 9.78 per hour). Therefore, Dean is awarded back pay for 1975 of $4,506.00. In 1976, Dean's earnings were $173.00 short of the proxy's earning of $14,956.00 (1419 hrs. x 10.54 per hour), therefore, he is entitled to an award of that sum. Dean's 1977 earnings, according to his social security records of $14,743.00, (Plaintiff Dean's Exh. 2), exceeded that of the proxy's $13,645.00 (1253 hrs. x $10.89 per hour), therefore, he suffered no back pay loss for that year.

Dean's social security records for 1978 show earnings of $12,191.00, (Plaintiff Dean's Exh. 2), whereas the proxy would have earned $12,745.00 (1179 hrs. x 10.81 per hour), resulting in a shortfall to Dean of $554.00, for which he is entitled to an award.

In 1979 the social security records show earnings of $12,178.00, (Plaintiff Dean's Exh. 2), which is $1,684.00 short of what the proxy journeyman would have earned, and Dean is entitled to an award in that sum for 1979.

Dean's earnings in 1980 exceeded that of the proxy so that no back pay award is applicable. Finally, in January 1981, Dean was admitted to journeyman status, ending his claim period. The cumulative present value of these back pay awards totals $18,739.46.

In support of his request for emotional distress damages, Mr. Dean testified about his state of mind when he was denied the

opportunity to become a bookman; his anguish at having to apply for public assistance and food stamps as well as his problems coping with his wife's illness and lack of medical benefits (T. 136—138.)

The evidence clearly demonstrates the anguish caused by the defendant's discriminatory practices. Pursuant to § 1981, the Special Master finds that Charles Dean is entitled to an award of $15,000 as compensatory damages for the mental anguish and humiliation be suffered.

Willie Dickie

Willie Dickie is not a named class member. Therefore, he is must establish that he is entitled to class membership (*See* Order of Reference to Special Master filed February 15, 1989.)

Willie Dickie is a black iron worker and current member of Local 201 (T. 7.)[83] He was born in 1950, (T. 46), and graduated from high school in 1969.

When Dickie attempted to join Local 201 in June 1972, Ronnie Vermillion, Local 201's business agent, asked if he had any experience (T. 16, 46.) Dickie replied that he had worked for Republic Construction. Vermillion responded that he was not familiar with that organization, (T. 54), and stated that in order to become a member, Dickie would have to enter the apprenticeship program and be recommended for admission by 2 members of the union (T. 16; 90.) Since Dickie knew none of the members, he made no further attempt to join at that time (T. 90.)

***41** Dickie's first experience in the construction field was in 1967. During the summer vacation of that year, he worked for Republic Construction in Sumpter, South Carolina for three months tying steel on an Interstate 95 bridge project (T. 56–57.) At the end of the summer, Dickie returned to high school (T. 57.) Upon high school graduation in 1969, Dickie went to work for two or three months for Marbro Construction Company doing laborer's work putting in sewer and water lines, installing man holes, and tying steel (T. 58–59.)

In April 1970, Dickie entered the U.S. Army and served with distinction before he was honorably discharged as a decorated combat veteran on December 16, 1971 (T. 10.)

After his return to civilian life, Dickie worked at a commercial printing company for two months and then returned to construction work in the spring of 1972 at Stauffer Construction Company laying sewer and water pipe and tying steel (T. 10.) He left Stauffer after two months and, on referral from Laborer's Local 456, began employment with Marbro Construction Company; again laying pipe and "tying a little steel" (T. 12.) After several months employment with Marbro, Dickie left and from the latter part of 1972, was employed by Noran Engineering Company (Plaintiff Dickie's Exh. 1.)[84]

In early 1973, Dickie was referred by Laborer's Local 456 to American Structures where he remained for several months working on Metro Construction tying steel and welding (T. 13, 72.) Dickie was not a certified welder (T. 52, 53.) Late in the first quarter of 1973, Dickie was dispatched by Local 456 to Massman Construction Company where he worked on the concrete crew finishing cement pours (T. 47, 48.)

While at Massman's, Dickie met several Local 201 members, two of whom agreed to sponsor his application for membership (T. 91.) In August 1973, Dickie went back to 201 and completed an apprenticeship questionnaire (T. 70 –72; Defendants' Exh. 2.) The employment history section of that questionnaire appears to have been completed in two different handwritings. The only prior rod work experience listed on the questionnaire reads:

Date From–To	*Name of Employer*	*Address*
Dec.1972—Feb. '73	American St	placing rods.

Dickie, in an affidavit filed later in these proceedings, estimated that that rod experience amounted to about 350 hours (T. 76.) He never provided Local 201 with any further experience history because he claims he was not asked for any (T. 76, 77.) The only evidence relating to Mr. Dickie's experience before the Special Master is Mr. Dickie's testimony that while

employed by Republic Contracting in the summer of 1967, he tied steel, (T. 57), and while employed by Marbro Company in the summers of 1969 and 1972, he "tied a little steel" (T. 58.) Mr. Dickie's principal job at least for the Marbro Company was installing sewer and water pipe, not tying steel (T. 58.)

Dickie alleges that he was discriminated against because he was not admitted to Local 201 when he applied in June of 1972, and when he reapplied in August 1973.

***42** Dickie contends that since he was a veteran, he was entitled to admission into the apprentice program in June 1972 without the necessity of two members' recommendations. This impediment, Dickie contends, was racially motivated.

Garfield Trumble testified on Mr. Dickie's behalf, in general supporting Dickie's contention that the two member recommendation was racially motivated. Trumble testified that he was a veteran and he was admitted to the Training Program without providing recommendations from two members (T. 97.)

The evidence is insufficient to establish that Dickie was deterred or discouraged from becoming a member because of his race. First of all, Garfield Trumble is also black and he was admitted to the Training Program at about the same time Dickie was admitted to the apprenticeship program without the recommendation of two members, therefore, race cannot be said to have been the real reason behind the refusal to initially admit Dickie to the apprentice program. More importantly, however, this event took place in June 1972, over 3 years before the bringing of this action. Lastly, and more importantly, this theory was never advanced in the liability phase of these proceedings and found to have constituted racially discriminatory conduct. And therefore cannot be considered in these remedial proceedings as a basis for a compensatory award. Any claims arising out of incidents that occurred more than 3 years prior to the filing of this suit in October 1975, are time-barred.

Dickie next contends that he was entitled to take the examination in August 1973, for admission to Local 201 without the necessity of completing a two year apprenticeship program because he was well experienced. However, his application form did not reflect any degree of rod work experience. In response to information about his work history, either he or someone on his behalf recorded that he worked for American Structures for three months placing rods. Dickie listed 4 other employers; Massman Construction following which he listed he did laboring work (L.B.); U.S. Army; Menhle Press with no indication of what he did; and Marbro Construction following which some wrote "laying pipe." He conceded that he did not orally provide any additional work experience because "nobody asked me about no hours." (T. 76.)

Moreover, Dickie's trial testimony was broad and non-specific as to his rod work experience. As a 17 year old during summer vacation, he tied steel while working on a bridge project; two years later, he tied "a little steel" during a 2–3 month period he worked for Marbro Construction installing sewer and water lines and over two years later, he was again employed by Marbro for a couple of months laying pipe and "tying a little steel." Six months later, he was hired by American Structures on referral from Laborer's Local 456 to work on the Metro construction tying steel and welding. After several months, he left that job and was referred by the Local 456 to Massman, where he worked finishing concrete.

***43** I find that this evidence is insufficient to allow the Special Master to conclude that he was an "experienced ironworker" entitled to take the examination for admission to Local 201. I further find that the work-experience information Dickie furnished Local 201 in August 1973, was insufficient to allow the Special Master to conclude that Local 201 "deterred or discouraged" Dickie from taking the examination for union membership by requiring that he first participate in an apprenticeship program and that such alleged deterrence or effort to discourage him from union membership was racially motivated.

Dickie contends that following completion of the apprenticeship program, he was wrongfully found to have failed the admission examination by the Apprenticeship Committee and that the decision to fail him was made solely because of his race. However, two of the witnesses he called to testify on his behalf, Garfield Trumble and Julius Elby, both of whom are black men and both of whom took and passed the admission exam about the same time as Dickie, testified that Dickie was failed because the examiners didn't like his attitude (T. 94, 102, 109.)

Admission to the union was to be based on successful completion of the examination, not attitude. Exclusion solely based on attitude is as wrongful as exclusion based on race or any other wrongful classification. Although none of the witnesses came out directly and said it, it appears what they intended to convey is that Dickie's so called bad attitude reflected his feeling that the white Apprenticeship Committee and Local leadership were deterring or discouraging and in some cases, preventing blacks from joining the union and enjoying the full benefits of the union, including the right to speak up at meetings and therefore failure based on attitude, was failure based on race.

This issue, if appropriate for resolution, should have been raised at the merits hearing of this case. The court of appeals specifically rejected the claimants contentions that the "Union erected a series of barriers which, in succession, accomplished the discriminatory purpose of keeping blacks out of the Union." *Berger v. Iron Workers Reinforced Rodmen, Local 201,* 843 F.2d 1395, 1422 (D.C.Cir.1988).

More importantly, the decision to fail Dickie was made by the Apprenticeship Committee, and was found by the court to be legally separate and distinct from the International or Local 201 in the sense that the Committee's actions are not binding on either the International or the Local. *Berger,* 852 F.2d at 621.

Accordingly, the Special Master concludes that Willie Dickie has not established that he is entitled to class membership in that his allegations regarding his first attempt at union membership in June 1972 are issue precluded and time-barred, and Mr. Dickie has failed to show that during his second attempt at union membership, in August 1973, he was deterred or discouraged from full membership by reason of his race. The evidence presented fails to establish that Dickie was an experienced rod worker entitled to take the examination without further training. The evidence demonstrates by a preponderance that the sole reason Dickie was required to enter the apprenticeship program before being admitted to take the examination was not his race, but his failure to demonstrate he possessed sufficient experience.

Silburn B. Francis

***44** Silburn B. Francis is not a named plaintiff, therefore, it is necessary for him to prove eligibility as a class member.

Mr. Francis, a black iron worker, was born in Jamaica, West Indies on March 29, 1932, and came to the United States in 1967 (T.[1] 5.)[85]

In 1968 Francis went to Local 201 to seek job referrals as an ironworker (T.[1] 7.) Later that same year he applied for membership in the Union but was told by Ronnie Vermillion, Local 201's business agent, that he would have to become a U.S. citizen in order to be eligible to join the Union (T.[1] 9, 26, 27.) Francis did not apply for membership again until he became a U.S. citizen. In 1973, Francis became a citizen and in 1974, he inquired about union membership (T.[1] 10.) He was referred to the training program center but never enrolled in class (T.[1] 10.)

The defendant argues that Francis gave conflicting testimony on whether or not he sought admission to Local 201 or its apprentice or training programs during the October 1972 to October 1975 time frame and that therefore Francis has not established his eligibility for class membership. However I am satisfied, based on all the evidence, that Francis did make efforts to obtain Local 201 membership in 1974 and again in 1975, and I so find.

Francis testified on direct examination that he attempted to join the union in 1974, and to that end, he was referred to the ironworkers training center (T.[1] 10), and enrolled in the training program (T.[1] 10.) Francis' counsel then attempted to "refresh" Francis' memory as to when he formally enrolled in the training program by directing his attention to a recruit application to the Ironworkers and Employers Training Program, (Plaintiff's Exh. 2), which Francis signed on December 20, 1978. After having seen this document, Francis testified that he *applied for* and entered the training program in 1978 (T.[1] 13.) After successful completion of the program Francis was admitted to journeyman status in July 1980 (Plaintiff's Exh. 4).

During cross examination, Francis testified that he tried to enter the training program in the latter half of 1974 (T.[1] 23.)[86] He was then shown his class certification form (Defendant's Exh. 1), which asked whether he ever *applied* for admission to either the apprentice or training programs and he responded yes in September 1978. Finally, Francis was asked if between October 1972 and October 1975, he ever filled out an application form or blank to become a Local 201 member, and he responded no (T.[1] 47.)

It seems that a great deal of the confusion and as a consequence misunderstanding arose out of the terminology used. At all times, Francis has maintained that he tried to join the union in August 1974. It appears however, that in response to that inquiry, he was directed to the training facility and from there back to the hiring hall. Francis never formally applied for admission to the training program until 1978. He did, however, ask to join the union and was directed to the training facility where he reported in an effort to join the union. As it turned out, he was unable to enroll in the training program at that time. However, in December 1978, Francis submitted a written application for admission to the training program as a way of obtaining full membership (Plaintiff's Exh. 2). And after a year and one-half, he was examined and admitted to full membership.

***45** The defendants urge that the first time Francis ever contended that he tried to join the union in 1974 was during his direct testimony at the hearing on October 25, 1990, (T.[1] 27, 28), implying that the 1974 date was a recent fabrication in order to qualify for class eligibility. The defendants are wrong. Francis' certification form, (Defendant's Exh. 1), completed in May 1986, over four and one-half years before the October 1990 hearing, stated that he applied or tried to apply for union membership in August 1974. His testimony is consistent with his certification form.

During the hearing, it developed that Francis kept handwritten notes in 1974 and 1975 in which he recorded events that transpired about that time (T.[1] 58.) He was directed to produce those notes at a further hearing on the following morning. The notes, (Plaintiff's Exh. 7(b)), recorded a visit to the Ironworkers Training Program site at Walkers Mill Road on December 3, 1974, and a later telephone discussion with Ronnie Vermillion on December 9, 1974, during which Francis was told that no one was being admitted to the training program at the time.

Although the defendants claim that this exhibit was a recent fabrication, (T.[2] 23), I am satisfied that plaintiff's Exh. 7(b) is authentic and that the entries were made around the time the events recorded took place. The exhibit also refers to efforts made by Francis on May 30, 1975 and September 15, 1975, (dates within the critical October 1972—October 1975 time frame), to gain admission to the training program.

I find that Silburn B. Francis has proven that he was an experienced ironworker in the relevant period. His pension records, (Plaintiff's Exh. 1), show that by August 1974, Francis had been credited with over 9300 hours of job referrals by Local 201. Notwithstanding this extensive experience, Francis was denied the opportunity to take the admission examination and was denied the opportunity even to participate in the meaningless training program.[87] I further find that following his first effort in 1968 to become a member of the union, Francis was told that he first had to become a citizen. Francis was discouraged from again applying until he became a citizen in 1973. Consequently, Francis is entitled to back pay beginning October 21, 1972.

Silburn Francis' social security earnings records, (Plaintiff's Exh. 5), show that his last quarter earnings for 1972 and those of the proxy were approximately the same, therefore, no back pay is awarded for that period. However, for the remainder of his claim period, Francis' earnings as reflected in his social security records, (Plaintiff's Exhs. 5, 6), show earnings substantially below those of the proxy. In 1973, his records show earnings of $11,861, or $1,482 less than the proxy's earnings of $13,343 (1557 hours at $8.57 per hour). In 1974, Francis had earnings of only $2,506 compared to the proxy's earnings of $14,757 (1628 hours at $9.07 per hour) for a shortfall of $12,251. In 1975, the proxy earned $14,152 (1447 hours at $9.78 per hour), whereas Francis earned only $1,128, or $13,024 less than the proxy. In 1976, Francis' earnings of $3,099 was $11,857 less than the proxy's earnings of $14,956 (1419 hours at $9.78 per hour). Similarly in 1977, Francis' $4,132 in earnings was $9,513 less than the proxy's $13,645 (1253 hours at 10.89 per hour). In 1978, the proxy earned $12,745 (1179 hours at $11.27 per hour), whereas Francis only earned $5,478, or $7,262 less than the proxy. In 1979, while enrolled in the training program, Francis only earned $9,780, $4,082 less than the proxy's earnings of $13,862 (1230 hours at $11.27 per hour). And for the half year before his admission to membership in July 1980, Francis earned $4,324 versus the proxy's earnings of $7,333 for the same period of time, resulting in a short fall of $3,009.

***46** I find that during the period October 1972 through July 1980, Silburn Francis made good faith and diligent efforts to obtain employment through references from Local 201. In 1973, he had earnings from 8 different employers and from 6 different employers in 1974. During pension years 1977 and 1978, Francis only received 56 hours of referrals even though he reported to the hiring hall every morning (T.[1] 39.) In calendar year 1978, Francis had earnings from 7 different employers. While enrolled in the training program his social security records show income from 11 different employers. Although all of these jobs were not Local 201 contractors, many of them were. This clearly and convincingly demonstrates Francis' tenacity in seeking work as an ironworker.[88]

Therefore, Francis is awarded back pay for the years 1973 through July 1, 1980, in the amounts indicated for each year. The cumulative present value of those awards totals $170,822.39.

Mr. Francis offered no evidence of mental anguish or mental suffering. However, there is no doubt that he did suffer because of the racial discrimination against him. When such an injury is likely to have occurred but difficult to establish, some form of award for presumed damage is appropriate. *Memphis Comm. School District, supra,* at 310–11; *Gore supra* at 164. Accordingly, pursuant to § 1981, Silburn Francis is awarded the sum of $10,000 as compensatory damages for the emotional distress, humiliation and anguish he suffered due to the defendants racially discriminatory conduct.

Eldridge Harmon

Eldridge Harmon is not a named plaintiff, therefore, it is incumbent upon him to establish that he is entitled to class membership and damages (*See* Order of Reference to Special Master filed February 15, 1989.)

Eldridge Harmon is a black rod worker with a 10th grade education (T. 6.)[89] He was born on February 17, 1939 and first began doing rod work in 1965 (T. 6, 32.) Harmon came to the Washington area in 1972; he had been doing rod work for six years (T. 8) before coming to Washington.

Although Harmon was vague with respect to his exact work experience, he did state that during the six years before coming to Washington he worked at rod work in excess of 2150 hours. Harmon was about 34 years of age when he first approached Local 201 in December 1972. The Special Master accepts his testimony that by that time he was well experienced. The defendants offered no evidence to the contrary.

In late November or early December 1972, Harmon made an inquiry of Ronnie Vermillion about a job referral or union membership (T. 10, 11.) Vermillion told him that nothing was available because of a strike and suggested that Harmon try again at a later date (T. 11.) Harmon returned again and sometime in 1973 he was referred out (T. 12.) He again inquired about joining the union in 1973 but was told there were no openings at the time (T. 15.)

Harmon worked rather steadily in 1973 (mostly non-union) and in 1974 (mostly union) (*See* Plaintiff Harmon's Exh. 1.) In the latter part of 1974, he sustained a severe job related back injury and was unable to work until the latter part of 1976 (T. 20, 21.)

***47** Upon his return to 201 in November 1976, Harmon informed the business agent that his back injury prevented him from doing heavy work. Harmon was informed that only heavy foundation work was available so he decided to return to Houston, Texas (T. 22, 23.) While in Houston, Harmon entered a non-worker's Training Program for two years following which he received job referrals in the Houston area until he was laid off in December 1982 because of lack of work (T. 24, 25.)

Harmon returned to the Washington area in May 1985 (T. 26.) In June 1985, he again sought referrals from 201 but received none so he obtained non-union work at Miller–Long. Harmon attempted to join 201 based on his completion of the Houston Training Program, but was informed by the business agent, George Kendel, that 201 would not recognize that training[90] (T. 27.)

Harmon testified that he was denied membership in 201 because of his race and that that discrimination has effected him emotionally so as to require hospital treatment for depressive syndrome (T. 28.)

The Special Master rejects Harmon's claim that the discriminatory conduct of the defendants caused a mental illness and required hospital treatment. First of all, the Special Master cannot accept the self serving testimony of a party untrained in the medical sciences to make such a finding. Such a finding must be based upon the testimony of an expert witness, who by training and experience is found qualified to express opinions as to the causal relationship between a specific diagnosis and the conduct of defendants. More importantly, Harmon deliberately attempted to mislead the Court by not producing medical reports in his possession which he knew related his mental problems, if any, directly to an automobile accident (T. 99.)

By stipulation, Harmon's back pay claim period ends in April 1986 and excludes the two year period from November 1974 until November 1976, when his work related injury physically precluded him from working. (T. 37, 38.)

Harmon first sought employment through Local 201 in late November or early December 1972 (T. 10.) During the last quarter (October—December) of 1972, the proxy journeyman had earnings of $3,497 whereas Harmon had earnings of $1,122 according to his social security records (Plaintiff Harmon's Exh. 1.) Therefore, Harmon had a shortfall in that quarter of $2,375. However, since his first attempt to obtain referrals from Local 201 was in December 1972, Harmon is only entitled to recover one month or one-third of the quarterly shortfall, which amounts to $792.

In 1973, Harmon earned $8,706, leaving him $4,637 short of the proxy's $13,343 earnings for that year (1557 hours x $8.57 per hour). In 1974 Harmon had gross earnings of $8,316, whereas the proxy journeyman earned $14,757, leaving Harmon with a shortfall of $6,441. However, Harmon injured his back in November of 1974 and was unable to work in December. Therefore, Harmon's shortfall should be reduced by $537 or one-twelfth of his yearly shortfall leaving a net recovery of $5,904 for the year.

***48** Harmon was unable to work in 1975 and returned to Local 201 for referrals in November 1976. He was still unable to perform the full duties of a rod man so he requested a referral not involving heavy work. None was available. There is no

evidence that the Union's failure to refer Harmon at that time was racially motivated. Harmon could not perform the duties of a rod man because of his physical limitations. Therefore, no back pay award will be made for 1976.

Upon learning there were no jobs available that could accommodate his physical disabilities, Harmon moved to Texas, and did not return to the Washington area until May 1985. At that time, Harmon again sought referrals from Local 201 but received none. Harmon's social security records show earnings of $13,398.75 from four employers in 1985 (Plaintiff Harmon's Exh. 1.) The 1985 earnings record is not broken down by quarter; therefore, it is impossible to say how much he earned after his return to this area in May 1985 versus how much the proxy journeyman would have earned in the same period. At least three of his jobs appear to be local; Reddi Steel of Suitland, Maryland, Cargill Co. of Maryland and Miller & Long of Bethesda, Maryland. Harmon earned $11,241.25 from these three employers or $1,405 a month for the seven months between June and December, which would have projected to annual earnings at that monthly rate of $19,271. The annual earnings of the proxy journeyman for 1985 were $19,390, leaving Mr. Harmon with an annual shortfall of $119.79 or $10 a month for the seven months in which Harmon was available for work in this area. The monthly shortfall of $10 for seven months amounts to an annual shortfall of $70 for 1985. Harmon is entitled to back pay in that amount for 1985.

By stipulation, Harmon's claim period ended April 1, 1986. His social security records show that during 1986 Harmon earned $1,426. These earnings are not broken down by calendar quarter so it is not possible to determine the extent of his earnings for the first quarter. Harmon's actual annual earnings pro rated monthly amount to $1,189 a month. The proxy would have earned $22,290 in 1986 or $1,857.50 a month, leaving a monthly difference of $668 for three months resulting in a 1986 shortfall of $2,005 for which Harmon is entitled to an award. The cumulative present value of those back pay awards totals $39,134.

Harmon really had very little exposure to the racial injustices that prevailed in Local 201. He sought referrals for about 2 years prior to his disabling injury and less than a year after his return from Texas. Although the defendants successfully challenged Mr. Harmon's attempts to prove that he had a partial permanent mental illness as a consequence of the defendants' conduct, still Harmon, along with the other claimants, was the victim of a social injustice for which he is entitled to compensation. Moreover, damages due to emotional distress may be inferred from the circumstances. *Gore supra* at 164. The Special Master finds in Eldridge Harmon's favor on this issue in the sum of $2,500.

James Hicks

***49** James Hicks is a black iron worker, born on October 30, 1937 (T. 119.)[91] He began work as an iron worker for Miller and Long in 1963 (T. 120), and first sought referrals from Local 201 in 1967 (T. 120.) He took the open exam in 1971 but failed it (T. 120, 121.) By 1971, Hicks had almost 4200 hours of iron work experience from Local 201.[92]

In 1972, Ronnie Vermillion, the business agent for Local 201, offered Hicks an opportunity to participate in the Training Program (T. 121), which Hicks accepted. By that time, Hicks had an additional 1248 hours of union referrals. He remained in the Training Program for two more years during which time he accumulated an additional 2717 hours of union referrals as an iron worker (defendant's Exh. 2.) In October 1974, he passed the exam and received his journeyman's book (T. 121.)

The practice of requiring experienced black rodmen to enroll in a training program before being deemed eligible to take the entrance exam in order to gain full admission to journeyman status is the conduct which the Court has found to be discriminatory.

I find that James Hicks was an experienced black ironworker prior to October 1972, and that after October 22, 1972, and prior to his admission to full membership in October 1974, Hicks was denied the opportunity to become a journeyman without the necessity of enrolling in the training program, all because of his race. Therefore, Hicks is an eligible class member.

Hicks' social security earnings record (Plaintiff's Exh. 1) shows that in the last quarter of 1972, he had earnings of $2,512. The proxy Local 201 member's earnings for 1972 after October 21 were $2,708 based on projected quarterly earnings of $3,497 (428 hours at $8.17 per hour). However, the claim period only involved 78% of that quarter which amounts to potential proxy earnings of $2,728. It can also be assumed that 78% of Hicks' 4th quarter earnings were generated after October 21, which amounts to $1959 leaving him with a short fall of $769.

Hicks' 1973 earnings according to his social security records were $12,280 or $1,063 less than those of the proxy, who earned $13,343.49 (1557 hours at $8.57 per hour). Accordingly, Hicks is entitled to an award of $1,063 for this 1973

shortfall. For the nine months prior to his admission to Local 201 in October 1974, Hicks earned $10,092, which was $976 less than the proxy would have earned for the same period.[93] Thus, a back pay award of $976, with interest from October 1, 1974 is made on his behalf. The cumulative present value of these back pay awards totals $9,140.

Hicks complained of having lost his home in early 1975 because he was behind in his 1974 monthly mortgage payments due to insufficient income. However, it appears from the testimony that Hicks was unable to meet a balloon note of $4,500 due at the end of his mortgage term and that this was the real cause of the default (T. 127, 128.) Hick's earnings during his claims period of October 1972 to October 1974 were not substantially less than those of the proxy member and therefore the loss of his home due to foreclosure on his mortgage note cannot be attributed to the defendants' discriminatory admissions practice. Therefore no award will be made for the monetary loss associated with the foreclosure.

***50** Nevertheless, Hicks is presumed to have suffered a compensable loss due to the defendants' discriminatory conduct and is entitled to an award for those presumed damages. *See Memphis Comm. School District, supra,* at 310–11; *Gore supra* at 164. Accordingly, pursuant to § 1981, James Hicks is awarded $2,500 in damages for the emotional distress and humiliation he underwent in having to participate in a training program to learn something he had been doing on referral from Local 201 for 4 years before entry into the program.

George Hudnall

George Hudnall is a black iron worker. He was born on September 23, 1942, and graduated from high school in 1961 (T. 92.)[94] In early 1968, Hudnall began work as a rodman for R.W. Webb Co. and later worked for C & W Steel Company as a foreman before first attempting to join Local 201 in 1970 (T. 93, 94.)

Hudnall learned of Local 201 and the benefits of union membership through an acquaintance who was a Local 201 permit man (T. 94.) Hudnall inquired of Local 201's business agent, Ronnie Vermillion, about union membership, and disclosed to Vermillion that he had experience as an ironworker, including work as a job foreman (T. 94, 129, 130.) Hudnall was referred to a job with M.J. Byorick, Inc., which lasted about one year before he was laid off (T. 95, 130.)

Hudnall returned to Local 201 for another referral but received none, (T. 95), so he resumed non-union work. From 1972 to 1976, Hudnall inquired of Ronnie Vermillion on several occasions about joining the union but was told that no new members were being accepted at the time (T. 96.) Inquiries in 1975 to Mr. Vermillion's successor as 201's business agent met with the same negative response (T. 98.)

Although Hudnall contends that he went to the hiring hall at least twice a week seeking a referral, (T. 96), the Special Master finds that if he did so, his efforts were not made in good faith. Hudnall's efforts consisted of merely looking to see if others were waiting (T. 143.) If there were others waiting, Hudnall would continue on to his non-union job without notifying anyone of his availability for union referral (T. 162, 172.) Nevertheless, I find that up until he abandoned efforts at obtaining membership in 1976 because he was discouraged by the responses to his inquiries, (T. 100), Hudnall displayed a continuing interest in joining the union.

I also find that during the period from October 21, 1972 to October 22, 1975 in which Mr. Hudnall sought union membership, he was an experienced rodman: Hudnall worked non-union as a rodman prior to his initial inquiry about union membership in 1970; he worked 841 hours of union work in the pension year 1970, and he worked full time at non-union rod work in 1973, 1974, and 1975 (*see* Plaintiff Hudnall's Exh. 1.) This wealth of experience made Mr. Hudnall eligible for admission without the necessity of enrolling in apprenticeship or Training Programs, and I find that he was nonetheless denied an opportunity to take the examination for admission to Local 201 because of his race.

***51** George Hudnall seeks back pay from October 1972 until his admission to the Local in June 1980. However, his earnings as shown in his social security records and tax returns exceed those of the proxy journeyman for every year except the period from October 21, 1972 to the end of 1972 (Plaintiff Hudnall's Exh. 1, 2.) Mr. Hudnall's financial records for that period disclose no income. The proxy 201 member earned $3,497 in the last quarter of 1972 (428 hours x $8.17 per hour). That quarter for our purposes began on Oct 21, therefore, his back pay for that period is 78% of 3497 or $2,728. He is awarded that sum plus interest from January 1, 1973. The present value of which is $9,413.

Although George Hudnall sustained little pay loss by reason of the defendant's discriminatory conduct, he was a victim of that discrimination and it is presumed that he was damaged. The Special Master finds he is entitled to a compensatory award of $2,500 for the mental anguish assumed to have been sustained because of the defendant's racially discriminatory conduct.

See Memphis Comm. School District, supra, at 310–11; *Gore, supra* at 164.

Arthur Jackson

Arthur Jackson is not a named plaintiff. The burden of proof therefore rests with him to establish class eligibility and entitlement to remedial relief.

Mr. Jackson, a black ironworker, was born on June 18, 1946 (T. 133.)[95] He completed the first seven years of school. Since he is not a high school graduate, Jackson was not eligible for participation in the apprentice program (T. 133.) Neither was he eligible for the Training Program until 1977 when he reached 31 years of age.

Jackson sought job referrals for the first time from Local 201 in 1972. During the pension year 1973, he was credited with 1103 hours of job referrals; in 1974, 1381 hours; in 1975, 1038 hours; and in 1976, 596 hours. Jackson had no hours of referrals in 1977 and only 50 hours in 1978 (Defendant's Exh. 2.)

Although he stated a desire to join the union, Jackson never made any effort to do so (T. 170.) He never inquired about taking the examination for journeyman status, (T. 172), even though he had considerable experience as early as 1974. Nor did he apply for admission to the Training Program as a means to join the union once he reached the age of 31 (T. 139, 141.)

On redirect examination, Mr. Jackson contended that he was discouraged from seeking to apply for union membership because of the discrimination he perceived at the time (T. 171.) However, I conclude that this testimony was a veiled and insincere attempt at establishing class eligibility. The tenor of Mr. Jackson's testimony in its entirety leads me to conclude that Jackson was solely interested in job referrals and had no real interest in becoming a Local 201 member. Jackson seemed to be satisfied with his status as a permitman so long as he received sufficient referrals as to be regularly employed. Once his union job at Wahib Steel ended in 1975, Jackson, understandably, went to where the work was found—at that time it was non-union work—and abandoned efforts at obtaining Local 201 referrals (T. 158, 159.)

***52** From Mr. Jackson's testimony, I find no evidence from which to conclude that he was ever deterred or discouraged from taking the journeyman's examination. Accordingly, I find that he has not carried his burden of establishing class membership eligibility.

Augusta A. Jackson, Jr.

Augusta A. Jackson, Jr. is not a named plaintiff. He must therefore establish his eligibility for class membership and his entitlement to remedial relief.

Augusta A. Jackson, Jr., a black ironworker, received his first referral out of Local 201 in 1968, shortly after his arrival in the District of Columbia area (T. 24.)[96] His pension records, (Defendant's Exh. 1), show extensive work via job referrals from Local 201 throughout his career. In the pension year 1969, Jackson was credited with 1400 hours; in 1970 with 1628 hours; in 1971 with 1534 hours; and in 1972 with 1414 hours; in 1973, 1221 hours; in 1974 with 1660 hours, and in 1975, the year in which he was admitted to full journeyman status, Jackson was credited with 928 hours.

In response to Question No. 4 of his certification form, Mr. Jackson replied that he first applied for union membership in 1968. During his hearing, however, Jackson testified that he was in error regarding the date, and that he first applied to take the test for admission in August 1973 (T. 24, 25.) He testified that in 1973 he was told by Ronnie Vermillion, Local 201's business agent, that he had not worked long enough out of Local 201 to be eligible to take the journeyman's test (T. 24.)

Upon hearing that he had insufficient 201 work referral hours, Jackson inquired about joining the Training Program. In response to that inquiry, Mr. Vermillion is alleged to have said that Jackson was too old for the apprentice program since he was 29 at the time, but was too young for the Training Program (T. 26.) Nonetheless, Jackson went directly to the training center and was admitted to the Training Program by its instructor (T. 26.) After completing the program, Jackson successfully passed the admissions test and was admitted to journeyman status in October 1975.

Mr. Jackson contends that the first time he sought admission to the union was in August of 1973, at which time he was turned down because of insufficient work out of Local 201. His pension records show that by August 1973, Jackson had over 7600 hours of Local 201 referral hours. I find it hard to believe that he was told in 1973 that he lacked sufficient work referral to be

eligible to take the admissions exam, particularly in view of the fact that in April 1971, he was offered an opportunity to take the open period exam (Defendant's Exh. 3.) I credit Jackson's certification form over his oral testimony. As shown in the certification form, Mr. Jackson first applied for admission in 1968, at about the time he first sought referrals, and at that time, he was told he lacked sufficient work experience.

Nevertheless, at the time he did apply for membership in August 1973, Jackson was turned down. On his own he sought out and found the training instructor, and gained admission to the training program. With his experience, Jackson never should have been required to participate in the Training Program. He was well qualified by reason of experience to take the test in August 1973.

***53** I find, therefore, that as of August 1973, Mr. Jackson was deterred from taking the entrance exam and that he is eligible for consideration for a damage award between August 1973, and the date of his admission in October 1975.

Mr. Jackson's social security earnings records show earnings in excess of the proxy's earnings for the second half of 1973 and all of 1974. Therefore, no back pay award shall be made for that period. However, his earnings for the first nine months of 1975 totalled $2,265. In contrast, the proxy journeyman earned $10,617 for the first nine months of 1975, leaving Jackson with a shortfall of $8,352. He is entitled to back pay in that amount, the present value of which is $24,435.43.

The only evidence of compensatory loss is Mr. Jackson's testimony that he felt depressed and that depression had an impact on his marriage. Jackson testified that he separated from his wife in 1970, at a time when he enjoyed full-time employment. He did not obtain a divorce until 1978, three years after his admission to the union. Given that chronology, it is difficult to see how the union's discrimination effected Jackson's marriage. Nevertheless, it can be presumed that he suffered losses difficult to express for which he is presumed to be entitled to damages. *See Memphis Comm. School District, supra* at 310–11; *Gore, supra* at 164. Accordingly, pursuant to § 1981 Mr. Jackson is awarded compensatory damages in the sum of $2,500 for pain, suffering and mental anguish due to the defendants' racially discriminatory conduct.

Randolph Jackson

Randolph Jackson is a named plaintiff and class representative. He seeks a back pay award, compensatory damages, and punitive damages. His claim period commenced on October 21, 1972 and ended following his admission to full journeyman status on December 13, 1975 (T. 34.)[97]

Randolph Jackson, a black man, was born on February 24, 1939 in Stafford County, Virginia (T. 3.) He did not attend school beyond elementary school (T. 4.)

Mr. Jackson began construction work in 1965 as a member of Labor Local 801 in Fredericksburg, Virginia (T. 6.) In 1965, Jackson began non-union rod work for Pompanio Brothers at which time he learned to weld and read blueprints (T. 7.) Eventually, Jackson rose to the level of foreman (*Id.*.)

Some time during 1965 or 1966, Jackson sought to join Local 201 but was informed that he did not have enough experience (T. 7.) Jackson sought membership because of the benefits and higher wages enjoyed by union members (*Id.*.) Jackson did not return to Local 201 until late 1971 or early 1972, at which time he was dispatched to Kirk Lindsey where he worked for 3–4 weeks before being laid off (T. 8.) Jackson was next dispatched to Wahib Steel where he worked steadily until laid off in early 1975 (T. 8.) While employed by Wahib, Jackson rose to the level of foreman (T. 8, 63.) After being fired from that position in 1975, Jackson complained to the Local and the International but received no satisfaction (T. 13, 16.) Jackson also filed an EEOC complaint (T. 13.)

***54** During 1975, Jackson regularly reported to the hiring hall for work but received few referrals although others were being dispatched (T. 15.) Mr. Jackson found it necessary to move in with a friend because of lack of income (T. 15.)

In late 1972 or early 1973, Mr. Jackson and Albert Berger obtained admission to the Training Program from the program administrator, by-passing the Local referral system to the program (T. 17, 18.) The training sessions were held on Tuesday and Thursday evenings but since Jackson could read blueprints and weld, he was informed that he need not attend the Thursday sessions on those topics (T. 18.)

During the latter part of 1973, Mr. Jackson and Mr. Berger were threatened at the training site by Ronnie Vermillion, Local 201's business manager, with a 30/30 rifle, (T. 19), and after taking an oral exam for journeyman which was administered by

Vermillion, Jackson was told that he had failed because he did not know the steel tubing sizes (T. 20.) Jackson knew this to be a lie designed to prevent his admission because by that time, he had almost 10 years experience in rod work and over 2 years in the Training Program (T. 20.)

Following a retake of the exam in November 1975, Jackson was informed that he had passed, and was admitted to journeyman status on December 13, 1975 (T. 34.) Thereafter, Jackson was dispatched to Volpe and Heard but after working a day and a half, an accident left him permanently injured. He has not worked since that time due to his disabilities (T. 22, 23, 49.)

Jackson claims that his health and marriage suffered because of the defendants' discriminatory conduct. According to Jackson's own testimony, his wife's difficult pregnancy (ending in the birth of a still born in 1974), and Mr. Jackson's own treatment for ulcers, both occurred while he was fully and steadily employed by Wahib (T. 55, 60.) However, during that time period, Jackson was undergoing the Training Program, and tension existed within the Local as is evidenced by Vermillion's threats to him and Berger with a rifle (T. 19, 20.)

Prior to October 21, 1972, and up until early 1975, Randolph Jackson worked steadily and full-time for Wahib Steel. His earnings exceeded those of the proxy. Therefore, he has no backpay claim for late 1972, all of 1973 and 1974. Jackson was laid off by Wahib in early 1975. His social security records show earnings of only $2,712 for 1975.

The proxy 201 journeyman would have worked 1447 hours during 1975 at $9.78 an hour for total wages of $14,152. Therefore, Jackson has a shortfall of $11,440 for calendar year 1975, for which he is awarded back pay. The present value of that award is $33,145.35.

The proxy journeyman would have worked 1419 hours in 1976 at an hourly rate of $10.54 for total earnings of $14,956 or $3,739.00 each calendar quarter. Jackson was injured in early 1976 and has been physically disabled from rod work ever since. His social security records show earnings of $4,222 in 1976 (Plaintiff R. Jackson's Exh. 2.) Since he was unable to work after his injury, these earnings must have been earned prior to that date. These quarterly earnings exceed the quarterly earnings of the proxy journeyman, thus Jackson is not entitled to a back pay award for 1976. Nor is he entitled to back pay for any subsequent year since he has been unable to work due to his injury (T. 22, 23, 49.)

***55** As a named plaintiff, Randolph Jackson is deemed entitled to damages (*see* order of reference.) Moreover, Jackson has established that he is entitled to compensatory damages because of the defendants' discriminatory conduct.

Jackson was a well-experienced rodman at the time he first sought referrals from 201. Indeed, after being referred to Wahib Steel in early 1972, he rose to the level of foreman. Nonetheless, Jackson was required to undergo two years of training before being permitted to take the admission exam, simply because of his race. This was, indeed, a frustrating and humiliating experience which had an impact on his life and social relationships.

Furthermore, Mr. Vermillion threatened Jackson with a rifle at the training site and refused to dispatch him during a substantial part of 1975, although Jackson stood ready and able to work. This conduct created apprehension and tensions for which Jackson is entitled to compensatory damage.

Accordingly, the Special Master finds that pursuant to § 1981 Randolph Jackson is entitled to compensatory damages against the defendants in the sum of $25,000 for the mental anguish and humiliation he suffered because of the defendants racially discriminatory actions over a three year period.

Edgar James

Edgar James is a black iron worker, born on April 11, 1933 in Louisiana (T. 181.)[98] He completed the 8th grade (T. 181.)

James began working as a rodman in 1962, (T. 181), and became a journeyman member of Local 500 in New Orleans, which later merged into Local 58 of the International Association of Bridge, Structural and Ornamental Iron Workers (T. 182, 4, 5; Defendants' Exh. 4.)

In August 1969, James moved to the Washington D.C. area to seek employment with Bechtel Corporation, which was constructing a power plant in Maryland (T. 182.) He went to Local 201, spoke with the business agent, identified himself, (T. 183), and was dispatched to Bechtel. However, James lacked transportation and therefore could not accept the referral (T.

185, 188.) He was subsequently dispatched to J.W. Bateson Company to work on the Third Street Tunnel, (T. 186), where he remained employed until 1971 (T. 197.) Thereafter, James returned to Local 201 and received additional referrals (T. 193, 194.) Sometime in 1971, James made an informal inquiry of an unidentified individual concerning transferring his membership but was told that Local 201 was a closed shop (T. 194.)

Although he learned in 1974 that at least one co-worker had transferred his membership from New Orleans Local 58 to Local 201, James elected not to transfer because of the way blacks were treated by Local 201 (T. 14.) James continued to send his dues payment to Local 58 in New Orleans (T. 9.)

Article XXI of the Constitution of the International Association of Bridge, Structural and Ornamental Iron Workers provides:

> Sec. 30. A member of the International Association who desires a clearance card for the purpose of transferring his membership to another local union must be a member of the International Association for at least two (2) years. Any member who has been a member of the International Association for at least two (2) years, desiring a clearance card for the purpose of transferring his membership to another Local Union shall apply to the Financial Secretary of his Local Union, and if such member is in good standing, and no charges are pending against him, the Financial Secretary shall grant a clearance card upon the payment by the member of unpaid dues or other obligations, plus One Dollar ($1.00) for the clearance card. The Financial Secretary of the said Local Union, upon issuance of the clearance card shall ... report the same on regular monthly report submitted to international Headquarters.
>
> ***56** Sec. 31. Thereafter a member obtaining a clearance card must present the same to the Local Union into which he desires to transfer, for acceptance by it, and the matter shall be referred to the Executive Committee which shall accept or reject such clearance card within the discretion of the Executive Committee. The decision of the Executive Committee of either acceptance or rejection of the clearance card shall be subject to review by the General Executive Board.

(Plaintiff James' Exh. 6.)

James never applied for membership in Local 201, (T. 33; Ques. no. 4 in Defendants' Exh. 1), and never requested clearance from Local 58 for transfer to Local 201. He elected to remain a dues paying member of Local 58 because of the way that blacks were treated by Local 201 (T. 9, 14.)

The Special Master is bound by the law of this case as set forth by the trial judge and the court of appeals. The order of reference mandates that each claimant other than the eight named plaintiffs establish that they are members of the class.

The court certified the following two classes:

> 1) All black persons who have applied for or sought, from representatives of Local 201 or the international, membership in Local 201 and, in connection therewith, the International or who have applied for or sought, from representatives of Local 201, the Apprenticeship Program or the Training Program, admission to the Apprenticeship Program and/or the Training Program and should have been or might be excluded from Local 201 and, in connection therewith, the International or the Apprenticeship Program or the Training Program or any of the above by the alleged discriminatory practices of the Defendants and ...
>
> 2) All black persons who have been referred for employment by Local 201 or who have applied to Local 201 for referral for employment by any means, including filling out a referral slip, or presenting themselves at Local 201 and requesting representatives of Local 201 to refer them for work, and who have been or might be discouraged from applying for membership in Local 201 and in connection therewith, the international and/or Apprenticeship Program and/or the Training Program by the alleged racial discriminatory practices of the Defendants and ...

Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d. 1395, 1406 (D.C.Cir.1988).

The court held that the racially discriminatory practice challenged was "that (1) unnecessary barriers to taking the journeyman's exam prevented (or delayed) the entry of otherwise qualified workers into the Union ranks, and (2) those barriers disproportionately disadvantaged black rodmen." *Id.* at 1413–14.

In the words of the court of appeals, the Plaintiffs challenge was simply that "*an educational prerequisite—either Apprenticeship or Training—discriminatorily delayed union membership for qualified black permit workers.*" (Italics in original) *Id.* at 1414.

Therefore, in order for a claimant to qualify for inclusion in the class, he must show that he was an experienced black rodman and was denied membership or discouraged from applying for membership in Local 201 unless he completed either an apprenticeship or Training Program. No other allegedly racially discriminatory conduct is at issue in these proceedings.

***57** Edgar James was a journeyman member of the International Association prior to moving to the Washington area and seeking referral from Local 201. Therefore, he has no claim against the International for allegedly precluding him from membership.

As a member of the International, James did not have to complete any educational program before transferring into Local 201. The procedures for transferring membership from one local to another is spelled out in §§ 30–31 of Article XXI of the Constitution of the International Association (*See* Plaintiff James' Exh. 6, quoted *supra.*)

Mr. James admittedly never complied with that procedure, but rather elected to remain a dues paying member of Local 58 in Louisiana, while seeking referrals out of Local 201. James elected not to seek a transfer because of the way he perceived blacks were treated by Local 201. James' challenge in that regard is beyond the scope of the issues resolved at the merits trial of these proceedings.

Since James, an experienced rodman, was not denied or discouraged from admission to Local 201 because of the education requirements that had to be completed before being eligible for the admission examination, he has not shown that he is a member of the certified class.

Accordingly, the Special Master concludes that Edgar James is not entitled to monetary relief.

Sherman Johnson

Sherman Johnson is not a named plaintiff. He must therefore establish that he is a class member and entitled to any award sought (*See* Order of Reference to Special Master filed February 15, 1989.)

Sherman Johnson, a black man, was born in Jackson, North Carolina on May 17, 1938 (T. 64.)[99] Mr. Johnson attained a sixth grade education (T. 65.) Johnson came to the District of Columbia area in 1963 and begin work as a laborer for Miller and Long Construction Company after rising to the level of a rodman (T. 65–66.) He left Miller and Long in 1968 to seek referrals from Local 201 (T. 66.)

Some time between 1970 and 1972,[100] Johnson approached Ronnie Vermillion, the local business agent, about full membership in the local but was told that the membership ranks were filled for the year (T. 67) Johnson made a further inquiry into membership around 1973, but again was informed that no new members were being taken in (T. 67.)

Although by 1971 Johnson had been doing rod work on referrals from Local 201 for about three years, he never learned of the open period exam scheduled for that year. He did not receive written communication nor did he see any notifications posted on the hall bulletin board (T. 68.)

In 1973 or '74, in a further effort to become a journeyman, Johnson inquired about participating in the Training Program (T. 68–69.) He was told by the 201 business agent that the program was full, but that Johnson would be on the list of the next group to participate (T. 69.) Johnson again inquired about the Training Program in 1976 or 1977, but was told that it was being closed down (T. 69.)

***58** Sherman Johnson was admitted to union membership in March 1987 (T. 64–65.) Johnson concedes that he abandoned efforts at seeking jobs from Local 201 sometime in 1978, (T. 67, 90, 96), because he received very few referrals in 1976 and 1977 (T. 98.)

Johnson's medical records, however, disclose extensive periods of time during which Johnson was unable to work due to respiratory illnesses (*See* Defendant's Exh. 3.) In mid November 1973, Johnson was diagnosed as having bronchial pneumonia and, according to his treating physician's records, was disabled from November 3, 1973 until January 4, 1974 (Entry 12/7/73 in Defendant's Exh. 3.) The same records reflect that on March 29, 1974, Johnson sought treatment for a cough and fever (*See* Defendant's Exh. 3.) He was diagnosed as having bronchitis and pleurisy and given medication (*Id.*.)

On June 10, 1974, Johnson returned with complaints of a bad cold with a cough, and was treated on that occasion and in a follow-up visit with prescription medication (*Id.*.) In the latter part of September 1974, Johnson's bronchial asthma condition flared-up and he again sought medical treatment on about five occasions during the remainder of 1974 (*Id.*.)

The asthma condition continued to trouble Johnson throughout 1975 and required about six visits to his physician (*Id.*.) During the first five months of 1976, Johnson visited his treating physician on seven occasions with complaints of shortness of breath, wheezing, stiff neck and coughing (*Id.*.) He was discharged to return to work on June 1, 1976. However, on July 12, 1976, he again went to the doctor with complaints of wheezing (*Id.*.)

On September 7, 1976, the doctor's records reflect that Johnson was unable to work between July 12, and September 7 and on November 1, the notes reflect that Johnson was unable to work between October 15 and November 1 (*Id.*.) On December 13, the physician's records disclose that the Doctor reported to Local 201 that Johnson's bronchial asthma was active between November 22 and December 13, 1976 (*Id.*.) Johnson was again incapacitated from January 17, 1977 until January 19. Following several more visits to his treating doctor, the union was notified that Johnson had acute bronchitis and bronchial asthma between May 9 and June 16 and again between July 24 and 26, 1977 (*Id.*.)

Johnson claims that he abandoned efforts to seek employment on referrals from Local 201 in 1978 (T. 67, 90, 96.) His physician's records disclose that apparently Johnson's asthma condition subsided at about the same time (*See* Defendant's Exh. 3.) Johnson saw the doctor on only two occasions in 1978; once on February 13 for bronchial asthma and once in May for a rash on his hand (*Id.*.) The records disclose three visits in 1979 with complaints of shoulder pain in March; ear and leg pains in August and left hand rash in October (*Id.*.)

Notwithstanding Sherman Johnson's contentions that he was physically ready, able and willing to do rod work and that he left Local 201 because of lack of referrals, I find that in 1976 Johnson was physically unable to perform the strenuous, outdoor activities of an iron worker. During the year 1976, Johnson had 15 or 16 visits to the doctor with complaints of shortness of breath, wheezing, weakness and tired feelings (*See* Defendant's Exh. 3.) His doctor notified Local 201 on at least three occasions that Johnson was unable to work during certain times (*Id.*.)

***59** Before the illnesses of 1976, Mr. Johnson sought to become a Local 201 member on at least two occasions between 1970 and 1973, and again in 1973 or 1974. By the end of fiscal year 1972, Johnson had over 3900 hours in referrals from Local 201 plus non-union experience at Miller and Long Construction Company.

I find that Sherman Johnson had been referred for employment by Local 201 beginning in the fiscal year 1968, that he was experienced by 1972; that he sought full admission to Local 201 during 1972 and 1973 and despite his extensive experience, he even sought to enter the training program in his effort to obtain union admission but was discouraged, denied and deterred from admission solely because of his race. I find further that Johnson could have filed timely charges with the EEOC when the class representatives did so, or could have filed a timely lawsuit when the class representatives filed this suit and, therefore, is entitled to back pay remedial relief.[101]

Sherman Johnson's social security records show earnings of $1,369 for the last quarter of 1972 (Plaintiff Johnson's Exh. 2.) The proxy 201 member's earnings for the portion of that year beginning on October 21 would have been $2,728.[102] Johnson's last quarter social security earnings are adjusted to reflect that 78% earned after October 21 is 1068 leaving a short fall for that portion of 1972 of $1660.

In 1973, Johnson earned $12,838 from referrals to four different employers (Plaintiff Johnson's Exh. 2.) The proxy 201 member would have earned $13,343 (1557 hrs. x $8.57 per hour). However, Johnson was physically unable to work for two out of three months in the last quarter due to bronchial pneumonia. The quarterly earnings of the hypothetical would have been $3,335; one month's income would have been $1,112. Johnson exceeded that sum since his social security records show earnings of $2,464 for one month of the last quarter of 1973 (Plaintiff Johnson's Exh. 2), so he is not entitled to a back pay award for 1973.

During 1974, Sherman Johnson had social security earnings of $14,100.78 (*Id.*.) The proxy member earned $14,756.84 (1627 hrs. x $9.07 per hour); leaving Johnson with a shortfall of $656, for which he is entitled to a back pay award.

Johnson's social security records for 1975 show earnings of $5,049 (Plaintiff Johnson's Exh. 2.) Of that sum, $3,198 was earned in the first quarter from employment with M.J. Byorick, Inc. (*Id.*.) In the second quarter, Johnson earned $51 from Byorick. Although he had monthly visits to a physician for his asthma condition, there is no indication that Johnson was unable to work. The proxy 201 member earned $3,539 per quarter in 1975, leaving Johnson with a shortfall of $3,829 for the

first two quarters in 1975 (Johnson's first half earnings were $3,249, versus the proxy's first half earnings of $7,078).

In the third quarter of 1975, Johnson had earnings of $1,800.00 from two employers, and no earnings during the fourth quarter (Plaintiff Johnson's Exh. 2.) There is no evidence he was not available for work during that period (*See* Defendant's Exh. 3.) The proxy member would have earned $3,538 during that quarter; leaving Mr. Johnson with a shortfall of $1,738. During the last quarter of 1975, Johnson suffered various medical disabilities (*See* Defendant's Exh. 3.) In December 1975, his doctor filled out a union welfare form indicating that Johnson suffered from bronchitis and chronic bronchial asthma, for which he required treatment between November 5 and December 8 (*Id.*.) I conclude that Johnson's medical condition precluded employment during that one month period, therefore, his back pay award for that quarter is $2,358 (⅔ of $3,538, which was the anticipated quarterly earnings of the hypothetical). Mr. Johnson's 1975 back pay award totals $7,925.45

***60** Since Johnson's medical illnesses precluded him from doing rod work in 1976, I find that he abandoned his pursuit of union referrals in 1976 and sought other employment until he was admitted to the union in March of 1987. Therefore, I conclude that Johnson is entitled to no back pay award after December 1975. The cumulative present value of the back pay awards to which Mr. Johnson is entitled totals $30,704.

Tommy Kirkland

Tommy Kirkland is a named plaintiff and class representative. He seeks back pay, compensatory and punitive damages. His claim period commenced on October 21, 1972 and terminated on his admission as a journeyman on January 1, 1978.

Mr. Kirkland, a black man, was born on August 2, 1938 in South Carolina (Affidavit submitted as Kirkland Exhibit 1, hereinafter Aff., ¶ 6, T. 59.)[103] His education stopped upon completion of the 6th grade. (Aff. ¶¶ 6, T. 68.)

Kirkland came to the Washington area in 1963 (T. 59, 60.) He began rod work with Miller and Long, a non-union contractor in late 1963 (Aff. ¶ 7.) In 1965, Kirkland learned of Local 201 from union organizers who came to the Miller and Long job site (Aff. ¶ 8, T. 61, 63.) In late 1965 or 1966, he signed up with Local 201 as a permit worker, (Aff. ¶ 9, T. 61), and was dispatched for work at Moses—Ecco, a union contractor (T. 66.) Thereafter, Kirkland sought work out of Local 201 on a regular basis (Aff. ¶¶ 16, 18, 19.)

Between 1966 and 1971, Kirkland made repeated inquires about union membership but was told that the union was not accepting new members.

In early 1971, Kirkland received a letter advising that rodmen with 2 or more years experience could take an examination for journeyman status (T. 9) and on February 20, 1971, he took the exam (T. 8) but failed it (T. 9.) He then learned of the Training Program and applied for admission. He was again told by 201 that the program was full. (Aff. ¶ 13.) Finally, in 1977, he was admitted to the Training Program. (Aff. ¶ 14.) In late 1977, he took and passed the exam and was admitted to journeyman status on January 1, 1978 (Aff. ¶ 16.) In 1975, shortly after this lawsuit was filed, Kirkland was laid off by M.J. Byorick, Inc. Steel.

Thereafter, Kirkland went to the hiring hall on a regular basis. However, between 1975 and his admission to the union in 1978, he was dispatched to only two jobs, both of which lasted only a few days (Aff. ¶ 20.) Between 1968 and 1976, Kirkland had an assortment of illnesses and injuries which periodically kept him from working, (T. 47). When between jobs, he applied for and received unemployment compensation (T. 50.)

Although Kirkland diligently sought union membership and job referrals, he was frustrated and humiliated. He observed inexperienced white workers, whom he had trained, become journeymen and eventually his job bosses; jobs which Mr. Kirkland had been told by Local 201 representatives were filled (T. 35, Aff. ¶¶ 35, 38.) He and the other blacks were dispatched to new construction in Maryland and Virginia, (T. 38, Aff. ¶ 36), and required to do heavy work in ankle deep mud only to be replaced by white bookmen once the job progressed up out of the ground (T. 25, 34, 43, Aff. ¶¶ 29, 30, 32.)

***61** Tommy Kirkland's pension records reflect that from the beginning of his claim period on October 21, 1972 until the end of the pension year 1975 (June 30, 1975), he earned at least as much as the proxy 201 journeyman. Therefore, Kirkland is not entitled to any back pay award for the latter part of 1972, nor for 1973 or 1974.

Kirkland's social security records disclose earnings of $12,800 for 1975, whereas the proxy journeyman would have earned $14,152 (1447 hrs. x $9.78). Therefore, Kirkland had a shortfall of $1,352 in 1975. In 1976, Kirkland had earnings of $3,940.

The proxy journeyman would have earned $14,956 (1419 hrs. x $10.54); resulting in a shortfall to Kirkland of $11,016. In 1977 Kirkland's social security records show earnings of $14,312. The proxy 201 member would have earned $13,645 (1253 hrs. x $10.89), so Kirkland suffered no back pay loss in 1977. He was admitted to membership on January 1, 1978. The cumulative present value of the back pay awards to which Mr. Kirkland is entitled is $33,636.23.

As a named plaintiff, Tommy Kirkland is deemed entitled to damages under the order of reference. In addition, there is ample evidence to support Kirkland's claim for compensatory damages. Kirkland started doing rod work in 1965 and worked regularly at that trade. Although he took and failed the open period exam, he thereafter continuously sought referral to the Training Program only to be told that it was full. It took 5 years after the program was instituted for Kirkland to gain admission. During this time, he provided on the job training to countless white permit men only to see them be admitted to union membership and obtain the perks of the trade while he suffered indignities and humiliation based solely on his race which denied him a bona fide earlier opportunity for admission to the union through the training program. breaking construction. The 201 Accordingly, pursuant to § 1981, I find that he is entitled to an award of $15,000 as damages against the defendants for the emotional distress, indignity and humiliation he endured by reason of the defendants racial discrimination.

Van Edward Lewis

Van Edward Lewis is a named plaintiff and class representative. He seeks damages for the period Jan 1, 1974 to April 10, 1986, excluding three periods during which he was unable to work due to job related injuries (T. 161.)[104]

Mr. Lewis, a black man, first sought work out of Local 201 in 1974 (T. 146.) He injured his hand during that year while working for Re–Bar, (T. 207), however, his earnings history for 1974 does not show any substantial period of lost time.[105]

Mr. Lewis is a poor historian. However, from his testimony it appears that injuries prevented him from doing iron work for about 3 years following a shoulder injury (T. 146, 147) in 1980 (T. 207, 208), and for almost 1 year following a chest injury in 1985 (T. 149, 207.)

Lewis testified that he first sought membership in Local 201 in the winter of 1974, (T. 150, 151, 170), but was denied that opportunity by Ronnie Vermillion, the business agent (T. 151.) In response to his periodic inquiries about joining the local, Lewis was given the "run around" by the business agent (T. 170.) He was told that the books were closed (T. 150–152), and to check back in 6 months or a year (T. 170.)

***62** Lewis began employment with Re–Bar on referral from 201 sometime in early 1974 (Plaintiff Lewis' Exh. 1 at 002.) After his employment with Re–Bar ended during the summer of 1974, Lewis worked the balance of the year for Wahib Steelon a Local 201 referral (*Id.*.) In the early part of 1975, Lewis worked for a couple of weeks for M.J. Byorick, Inc., a union steel contractor (*Id.*.) In early 1975, after doing union rod work for about a year, referrals ceased and Lewis began work as a laborer for Dravo Corporation, a union shop, on referral from Laborers Local 456 (T. 165, 166.) His social security records show that Lewis worked there rather steadily until the fall of 1975 (Plaintiff Lewis' Exh. 1 at 003.)

In early 1976, Lewis again went back to Local 201 but received few referrals (T. 155.) It was not until the latter part of 1976, following the completion of a Laborers Local 456 Training Program, that Lewis resumed rather steady employment as a laborer with Blake Construction Company, which carried him through the end of the summer of 1977 (Plaintiff Lewis' Exh. 1.)

Unable to obtain work as a Local 201 rod man (T. 177, 178), Lewis worked as a cook for Stanley Foods, (T. 156, 193; Plaintiff Lewis' Exh. 1), and as a porter for the U.S. House of Representatives from late 1977 to 1978 (T. 156, 190, 191, 192.) He also tried his hand at starting a janitorial business (T. 182, 157; Plaintiff Lewis' Exh. 1.)

Sometime during 1979, Lewis obtained non-union rod work at Miller & Long and worked rather steadily until he injured his left shoulder in 1980 (T. 180, 207.) Just prior to this injury, he was admitted to the Local 201 Training Program but had to drop out because of his injury, (T. 152, 194, 195), which prevented him from doing rod work for about 3 years (T. 147.)

In 1984, Lewis resumed steady non-union steel work at Miller & Long but was injured again in April 1985, (T. 188, 189, 207), and was unable to resume rod work until the latter part of 1985 (T. 149, 188, 189.) After recovery from his injury, he was admitted to Local 201 pursuant to Judge Penn's remedial order of April 1986 (T. 181.)

Lewis had a particularly troublesome time following his 1985 injury. His workman's compensation payments were slow or insufficient, and consequently Lewis was unable to pay his rent, was dispossessed from his apartment and had an otherwise stressful family life (T. 188, 189.)

Lewis' social security records show that in the early part of 1974, he was initially employed by Laffra Construction Co. & Square Construction Co. with earnings of $1,792.50 (Plaintiff Lewis' Exh. 1 at 002.) During the winter of 1973, Lewis was referred to Re–Bar by Local 201 and through the end of the summer earned $6,419.07 (*Id.*.) In mid 1974, Lewis was referred by Local 201 to Wahib Steel and remained steadily employed until the end of the year, earning $6,479.56. During brief employment with another union steel contractor, Lewis earned another $710.60 in that year, bringing his total earnings for 1974 to $15,401.73 (*Id.*.)

***63** In 1974 the proxy average Local 201 member earned $14,467 (1595 hrs. x 9.07 per hour). Since Lewis' earnings exceed this benchmark, Lewis is not entitled to any back pay award for 1974.

In 1975, Lewis earned $11,521 (*See* Plaintiff Lewis' Exh. 1.) The proxy 201 member would have earned $14,152 in 1975 (1447 hrs. x 9.78 per hour). I am satisfied that Lewis made reasonable efforts during 1975 to obtain 201 referrals and in their absence, he obtained work as a laborer. Thus Lewis is entitled to a back pay award of $2,631; his earnings shortfall for 1975.

In 1976, Lewis had few referrals from 201. He earned $725.00 during the first quarter of the year; $274 during the second quarter, and nothing during the third quarter from union referrals. In the fall of 1976, Lewis went back to the Laborers Union and earned $403.00 while undergoing training. He then obtained employment with Blake Construction where he earned $1,485 (Plaintiff Lewis' Exh. 1.) His total 1976 earnings were $2,887. (*Id.*.) The 201 proxy would have earned $14,956 for 1976 (1419 hrs. x 10.54 per hour), resulting in a shortfall of $12,069, which Mr. Lewis is entitled to receive as back pay for that year.

In 1977, the proxy union member earned $13,645 (1253 hrs. x 10.89 per hour), whereas Lewis' social security records show earnings of $8,934 (*See* Plaintiff Lewis' Exh. 1.) Lewis is entitled to recover this 1977 shortfall of $4,711 as back pay.

Lewis had earnings of $1,298 from employment as a cook in 1978 as well as $4,937.00 from self-employment janitorial services. Mr. Lewis also worked for the House of Representatives as a porter, for which he had record earnings of $5,000.00 in severance pay (T. 191, 192.) In addition, Lewis testified that he earned $3.55 an hour during the time (approximately one year) in which he worked at the House (T. 192.) Thus the total of Lewis' documented earnings for 1978 is $11,235. In 1978 the 201 proxy would have earned $12,745 (1179 hrs. x $10.81 per hour), leaving Mr. Lewis with a shortfall of $1,510 if it were not for his undocumented pay at the House of Representatives. However, taking into account the undocumented salary to which Mr. Lewis testified, (T. 192.), I conclude that the sum of his earnings leave Mr. Lewis without a shortfall for 1978 and that therefore he is not entitled to back pay for that year.

During 1979, Lewis earned $5,067 from non-union employment with Miller and Long (Plaintiff Lewis' Exh 1 at 004.) Our proxy 201 member earned $13,862, leaving Lewis with a shortfall of $8,795, for which he is entitled to a back pay award for 1979.

After earning $7,935 from non-union employment with Miller & Long in 1980, Lewis injured his shoulder in a work related accident and was unable to work for the next 3 years (T. 180.) This extensive period of unemployment due to injury falls outside our statistical model of reasonable hours discussed in part B(1)(e) *supra* at 49. Since Lewis was unable to do rod work even if it was available, (T. 146; 200), and concedes that he makes no back pay claim for the periods during which he was injured, (T. 161), I conclude that Mr. Lewis is not entitled to any back pay award for the calendar years 1980, 1981, and 1982.

***64** In 1983, Lewis worked for Capital Service driving a truck (T. 198.) However he was unable to do rod work because of medical restrictions (T. 200), and did not return to rod work until 1984. In 1984, Lewis earned $13,170 from Miller & Long as well as $4,478 from Capital Services (Plaintiff Lewis' Exh. 1 at 004.) This income exceeded that of the proxy 201 member (953 hrs. x $13.92 per hour) and, therefore, no back pay award will be made for 1984.

On April 5, 1985, Lewis injured his chest and for about a year, was unable to do rod work (T. 181, 188, 189.) Prior to his injury Lewis earned $5,282.96 during the first quarter of 1985. Our proxy would have earned $19,446.24 for the full year (1397 hrs. x 13.88 per hour). One quarter of that sum is less than that which Lewis actually earned, therefore, no back pay award will be made for 1985. In April 1986, Lewis was admitted to Local 201 pursuant to Judge Penn's order and was referred for work to George Hyman Construction. Prior to that referral, Lewis was still physically unable to do rod work.

Therefore, no back pay award will be made for 1986.

The cumulative present value of the back pay awards to which Mr. Lewis is entitled totals $72,937.32.

Lewis had a particularly stressful time in 1985. He was dispossessed from his apartment due to non-payment of rent (T. 188), had a bleak Christmas and suffered a strained relationship with his wife because of his lack of employment and income (T. 189.) However, it appears that the cause of this anguish was Mr. Lewis' April 1985 injury and not the lack of Local 201 referrals (T. 188–89.) Lewis complains that he was dispossessed from his apartment in 1974 and 1975 (T. 186.) However, his earnings record show no loss of income in 1974 due to lack of referrals from Local 201. Further, Lewis testified that his car was repossessed in 1979, (T. 190), which testimony is corroborated by a substantial loss of income during that year (*See* Plaintiff Lewis' Exh. 1 at 004.)

I find that Lewis' loss of income during the years 1975 through 1977 and 1979, on the other hand, were causally related to the defendant's discriminatory conduct. The lack of union referrals during those years resulted in Lewis being forced to resort to work as a cook, a porter, and a janitor; all of which caused the plaintiff anguish and humiliation for which he is entitled to an award of $10,000 as damages pursuant to § 1981.

Barbara Ann McGee, Executrix Estate of James McGee, deceased

James McGee, also known as Johnny J. McGee, died on December 11, 1989 (Plaintiff McGee's Exh. 1.) Barbara McGee, the executrix of James McGee's last will and testament was substituted as claimant for the deceased by order of the Court (*See* Order filed July 9, 1990.) Prior to his death, James McGee signed and filed a class certification form (Plaintiff McGee's Exh. 10.)

On September 5, 1989, McGee signed an "Affidavit" prepared by his counsel, which set out the scope of his proposed testimony at the damage hearing (Plaintiff McGee's Exh. 11.) Although the "Affidavit" was not sworn to before a notary, it was received in evidence pursuant to Fed.R.Evid. 804(b)(5), the Special Master is satisfied that the writing contained matters of material fact; that it was more probative on the matters at issue than any other evidence that the claimant could procure through reasonable efforts, and that the interests of justice as well as the purpose of the rules of evidence would best be served by its admission (*See* T. 131, 164.)[106]

***65** Due to the death of Mr. McGee, the executrix of his estate withdrew any claim for compensatory damages and seeks damages only for back pay from October 21, 1972 until McGee's admission to Local 201 on June 30, 1980 (T. 122, 128.)

McGee, a black man, first began work as a rodman in 1970 (Para. 7 in Plaintiff McGee's Exh. 11.) The record of Mr. McGee's social security earnings, (Plaintiff McGee's Exh. 3), start with the year 1972; therefore, there is no evidence of the amount of income McGee received or the nature and extent of any work he did in 1970 or 1971.

It was not until late 1972 that McGee first sought a referral from Local 201 at which time he was dispatched to M.J. Byorick, Inc.. McGee's social security records disclose that he worked rather steadily with Byorick from the summer of 1972 until the late spring of 1975. Part of that employment was in Augusta, Georgia (Para. 10 in Plaintiff's. Exh. 11.)

Based on the wage rate in effect in 1972 ($8.17 per hour), McGee worked approximately 736 hours during that calendar year. McGee's pension records credit him with 1617 hours during the fiscal year concluding June 30, 1973 (Plaintiff McGee's Exh. 4), and we know that McGee continued working steadily for Byorick throughout 1973 until he left the area for Georgia in late 1973 (Para. 10 in Plaintiff McGee's. Exh. 11.) During the pension year 1974 (July 1, 1973 to June 30, 1974), McGee was credited with 1461 hours of union work (Plaintiff McGee's Exh. 4.) Thus by June 1974, McGee, according to Local 201's own pension records, had over 3078 hours of rod work experience. Nonetheless, the union rebuffed Mr. McGee's efforts to join in 1973 and 1974 (Ques. no. 4 in Defendant's Exh 1.)

I find that by the end of the third quarter of 1973, McGee was an experienced rodman qualified to take the exam and that at that time, he was deterred from his efforts to become a journeyman. Therefore, McGee's estate is eligible for a back pay award beginning October 1, 1973 until his admission to the union on July 1, 1980.

In 1973, McGee earned in excess of the social security maximum earnings for that year of $10,800.00.[107] During the first three quarters of 1973, McGee earned in excess of $3,400.00 each quarter (Plaintiff McGee's Exh. 3.) Based on McGee's representation that he worked for M.J. Byorick, Inc. continually until 1975, (Para. 11 in Plaintiff McGee's Exh. 11), I find

that McGee likely earned at least $3,400.00 in the last quarter of 1973, which would bring his total earnings for that year to approximately $13,600.00. That amount is roughly equal to the sum earned by the proxy journeyman for that year. So McGee is not entitled to a back pay award for 1973.

In 1974, McGee earned $15,590.00, (Plaintiff McGee's Exh. 3), more than the proxy's earnings of $14,757. Therefore, McGee is not entitled to a back pay award for 1974.

In 1975, McGee earned $8,703.00 before sustaining a back injury in September, (Para 12 in Plaintiff McGee's. Exh. 11), which prevented him from doing rod work until 1977. The proxy journeyman would have earned $14,152.00 for the full year, or $10,614.00 for the first 9 months of the year. Since McGee only earned $8,703.00 during the first 9 months prior to his injury, he is entitled to a back pay award of $1,911.00 for 1975.

***66** McGee returned to rod work in 1977. His social security records show that during the second half of that year, he was employed by Redi Steel and earned $3,392.00 (Plaintiff McGee's Exh. 3.) McGee also earned $1,046.00 from Bellamy Bros. in the last quarter of 1977, (*Id.*), for total 1977 earnings of $4,438.00. The proxy journeyman's equivalent half year earnings for 1977 are $6,823.00. Accordingly, McGee is entitled to the sum of $2,385.00 in back pay for the latter half of 1977.

McGee's annual earnings during the remaining years of employment prior to his July 1, 1980 admission to Local 201 exceed those of the proxy, therefore, no back pay award shall be made for 1978, 1979 or 1980. The cumulative present value of the back pay awards to which Mr. McGee's estate is entitled is $11,686.08.

Since James McGee has died, his estate seeks only damages for back pay. Accordingly, no award is made for compensatory damages.

Willie Paul Montgomery

Willie Paul Montgomery is not a named plaintiff. Therefore it is incumbent upon him to establish that he is a class member and eligible for remedial relief (*See* Order of Reference to Special Master filed February 15, 1989.)

Willie Paul Montgomery, a black man, was born July 6, 1950 (T. 56.)[108] Mr. Montgomery finished the 10th grade in school but does not read well (T. 57.)

In 1968 or 1969, Montgomery began construction work as a laborer for Pompanio Bros, a non-union construction, and after about one year, switched to iron work for the same company (T. 57.) Montgomery seeks back pay for the period October 21, 1972 until April 10, 1986, excluding the period February 3, 1976 until October 21, 1980, during which he contends he was unable to do heavy rod work because of an injury (T. 63, 72.)

Understandably, Montgomery's memory of dates, like that of so many of the other claimants, is unreliable since the critical events occurred many years ago. Mr. Montgomery's pension records, (Plaintiff Montgomery's Exh. 2), reveal that he first received referrals out of Local 201 in pension year 1970 and accumulated over 900 hours.[109] Montgomery had no other referrals until pension year 1975, when he recorded 1330 hours (Plaintiff Montgomery's Exh. 2.) The following year, 1976, Montgomery logged 889 hours (*Id.*.) Montgomery's pension records disclose no other Local 201 referrals.

Mr. Montgomery's social security records, (Plaintiff Montgomery's Exh. 1), cover the period January 1972 to December 1988, but they do not disclose for whom he worked during the 1970 pension year. However, Montgomery testified that he believed his first union referral was to M.J. Byorick, Inc. (T. 75, 76.)

Montgomery worked non-union from 1970 through 1973, and in the 3rd quarter of 1974 he was referred by Local 201 to Blake Construction where he worked steadily until he suffered an on the job injury in early 1976 (T. 77, 93; Plaintiff Montgomery's Exh. 1.)

Montgomery initially testified that he first tried to join 201 in 1972 (T. 57.) He later testified that it was actually 1970 (T. 58.) Nevertheless, after Ronnie Vermillion, Local 201's business agent, denied him membership in the spring of 1971, Montgomery tried every year to join (T. 65.) He tried to take the entrance exam in the winter of 1973 but was not permitted to do so, (T. 66), and again inquired of Vermillion's successor, Don Grigsby, about admission in 1975, 1976 and 1977 (T. 68.) All inquiries were unsuccessful.

***67** Montgomery testified that he desired to join the union for the better benefits (T. 70.) He testified that he felt depressed and discouraged when he was turned down (T. 71.)

Prior to October 21, 1972, Montgomery had acquired over 2150 hours and more than 2 years experience as a rod worker, and was therefore qualified to take the entrance exam without participating in any Training Program. However, Montgomery testified that he was never given an opportunity to do so though he made repeated inquiries (T. 57, 65, 68.)

I find that Mr. Montgomery has established that he was, by reason of his rod work experience beginning in 1970 with over 900 union hours which continued during 1971 and 1972 with additional non-union rod work, an experienced rod worker and therefore is found to be eligible to participate as a class member and that the defendant has failed to produce clear and convincing evidence to the contrary (*See* Order of Reference to Special Master filed February 15, 1989.)

During the applicable claim period in 1972, the proxy journeyman would have earned $2,728 (71/91 days or 428 hrs. at $8.17 per hour). Montgomery's social security records show 1972 fourth quarter earnings of $4,287.00 (Plaintiff Montgomery's Exh. 1.) Because Montgomery's relevant quarter earnings in 1972 exceeded the proxy's earnings, Montgomery is entitled to no back pay in 1972. In 1973, the proxy's earnings were $13,343.49 (1557 hrs. x $8.57 per hour). Montgomery's 1973 social security records disclose earnings of $12,676, (Plaintiff Montgomery's Exh. 1), resulting in a shortfall to Montgomery of $667.

In 1974, Montgomery had earnings of $15,506, (*Id.*), which exceeded the proxy's earnings of $14,757 (1627 hrs. x $9.07 per hour). But in 1975, Montgomery's earnings of $11,841 fell short of the proxy's earnings of $14,152 (1447 hrs. x $9.78 per hour), by $2,311.00, for which he is awarded back pay.

During the first month of 1976, before his injury, Montgomery earned $1,520.00, which put him on an annual earnings rate higher than that of the proxy (1419 hrs. x $10.54 per. hour). Therefore, Montgomery is not entitled to a back pay award for 1976. Montgomery stipulated that he was unable to engage in full-time rod work from February 3, 1976 to October 21, 1980. Therefore, no back pay will be allowed for that period.

In 1981, Montgomery earned $10,790.33 (plaintiff Montgomery's Exh. 1.) The proxy journeyman earned $16,722 (1263 hrs. x $13.34 per hour), leaving Mr. Montgomery with a shortfall of $5,932 for which he will be award back pay.

Montgomery stipulated that taxable income from earnings during the remainder of his claim period exceeded that of the proxy journeyman for each of those years (T. 88–89.) Therefore, he is entitled to no further back pay awards. The cumulative present value of the back pay awards to which Mr. Montgomery is entitled totals $21,384.31.

Montgomery desired union membership primarily for the fringe benefits that accompanied that status and, like the other claimants, he mentioned but did not dwell on the emotional deprivation he felt because of the way he was treated. For that injury, pursuant to § 1981 the Special Master finds that Montgomery is entitled to an award of damages in the sum of $2,500 for the emotional distress and humiliation he is presumed to have suffered by reason of the defendants discriminatory actions. *See Memphis Community District Schools, supra* at 310–11; *Gore, supra* at 164.

John Offer

***68** John F. Offer, Jr. is not a named plaintiff. Therefore, he must establish that he is a class member and entitled to damages. (*See* Order of Reference to Special Master filed February 15, 1989.)

John F. Offer, Jr., a black man, was born on June 30, 1924. He seeks a back pay award for the period October 21, 1972 until April of 1986[110] (T. 194.)[111]

Mr. Offer first sought job referrals from Local 201 in 1966 (T. 194.) Prior to that, he had worked non-union for Miller and Long Construction for 15 years (T. 222.) Offer specifically recalled inquiring about union membership twice in 1966 (T. 195.) On both occasions, Ronnie Vermillion, Local 201's business agent, said that the Local was full and he would let Offer know when space opened up (T. 195.)

Offer waited about 5½ years before again inquiring about membership. In June 1972, Offer inquired about the Training Program or the apprenticeship program.[112] Again, Vermillion stated that when space was available Offer would be told (T. 195.) Three or four years later, Offer again inquired about admission and this time Don Grigsby, Vermillion's successor, told

him that all classes were filled and that Offer would be notified when an opening arose (T. 196.)

Offer's certification form, (Defendant's Exh. 2), states that he applied to Ronnie Vermillion for membership but lists no date (*See* response to question 4 in Defendant's Exh. 2.) The form reveals that Offer applied to Vermillion for admission to the Training Program or apprenticeship program in 1972 (Response to question 6 in Defendant's Exh. 2.)

I find that although Offer did not specifically apply for membership in the union between October 21, 1972 and October 21, 1975, he was very much interested in doing so and was discouraged from seeking admission. The pension records show that throughout this time Offer actively sought referrals. I conclude from this record that Offer wanted to join the union but was continually put off by Local 201's business agents. Accordingly, I find that Offer has established that by 1972, he had over 20 years of rodwork experience and therefore I find that he was an experienced rodworker eligible to take the entrance examination but by reason of his race was refused an opportunity to do so and that he qualifies for class membership. The Defendants have not shown by clear and convincing evidence that he is not eligible for class membership (*See* Order of Reference to Special Master filed February 15, 1989.)

Mr. Offer's social security records show last quarter earnings in 1972 of $2,108 (Plaintiff Offer's Exh. 1.) His earnings for the 71 day claim period from October 21 to the end of that quarter were $1,644, whereas the bench mark earnings for that portion of the quarter were $2,728,[113] resulting in a shortfall to Offer of $1,084, for which he is awarded back pay.

Offer's 1973 earnings were $10,571.75, (Plaintiff Offer's Exh. 1), whereas the benchmark earnings for 1973 were $13,343 (1557 hrs. x $8.57 per hour), resulting in a shortfall of $2,772 for 1973. In 1974, Offer earned $13,250 according to his social security records (Plaintiff Offer's Exh. 1.) The bench mark earnings for that year are $14,757 (1127 hours x $9.07 per hour), resulting in a shortfall to Offer of $1,507.

***69** Offer's 1975 social security earnings amounted to $5,299, (Plaintiff Offer's Exh. 1), compared to the bench mark earnings of $14,152 (1447 hrs. x $9.78 per hour), Offer is left with a shortfall of $8,853 for 1975.

In 1976, Offer's social security earnings amounted to $4,432 whereas the hypothetical 201 member would have earned $14,956 (1419 hrs. x $10.54 per hour), resulting in a 1976 shortfall of $10,524. In the latter part of 1976, Offer stopped going to Local 201 because he was not getting any referrals (T. 198.) He then obtained work as a custodian for the Anne Arundal County School Board (T. 199.) Thus by the latter part of 1976, Offer had abandoned further efforts to seek membership in Local 201.

Offer seeks back pay awards for the years during which he was employed by the school board, claiming that he would have worked through Local 201 had he received sufficient referrals. However by 1976 when Offer abandoned further efforts at obtaining Local 201 referrals, he had worked about 25 years as a rodman: 15 years with Miller and Long and 10 years for union employers on referral from Local 201. The work was physically demanding, so much so that Offer left 15 years of steady employment with Miller and Long in 1966 because of the physical demands of the job (T. 222.) Years later, not only had the work not become any easier but Offer had aged, such that the work would have been even more physically challenging for him. Although the salary with the school board was not as high as his "good year" earnings as a rodman, School Board work was steady and less physically demanding.

Accordingly, I find that John Offer is not entitled to back pay after 1976. The cumulative present value of the back pay awards to which Offer is entitled totals $71,803.

Offer's complaints in support of his claim for compensatory and punitive damages postdate his leaving Local 201. He testified that between 1977 and 1986, he had a hard time making ends meet, (T. 202), such that he filed for voluntary bankruptcy in 1979, (Plaintiff Offer's Exh. 3.) In addition, Offer's wife had her car repossessed for failure to make the monthly installment payments. Therefore, he is entitled to no compensatory damage award for the period after he abandoned efforts to join Local 201 in 1976. However, prior to 1977, Offer was denied an opportunity to become a union member. Judging by Offer's fifteen years non-union rodwork for Miller and Long, he was well experienced and well qualified for full membership admission without having to undergo the indignity of further training before being permitted to take the entrance exam. Although Offer did not articulate his feelings concerning this discriminatory conduct, he is nonetheless entitled to compensation for presumed damages under *Memphis Comm. School District, supra at 310–11; Gore, supra,* at 164.

Accordingly, pursuant to § 1981 John F. Offer, Jr. is awarded damages for the humiliation, indignity and anxiety he presumably sustained between October 21, 1972 and the latter party of 1976 because of the defendants discriminatory conduct in the sum of $5,000.

Wordia Parks

***70** Wordia Parks is not a named plaintiff, therefore he must establish that he is a class member and entitled to a damage award (*See* Order of Reference to Special Master filed February 15, 1989.)

Wordia Parks, a black man, was born in Kansas City on September 9, 1935 (T. 115.)[114] He has an 8th grade education (T. 116.)

Parks came to the District of Columbia area in 1957 and began working for Donahoe Construction Company in late 1957 (T. 117.) He remained employed by Donahoe until he went to Local 201 in 1963 seeking referrals as a rodman (T. 117.) At that time, Mr. Parks was told that no work was available but to try again in the Spring of 1964. Parks did so and received referrals (T. 118.)

In the late 1960's, Parks worked regularly, (*see* Plaintiff Parks' Exh. 1), and in June 1971 he received written notice to take the open period examination, which he did (T. 119.) Shortly thereafter, Parks received notice that he had failed the exam (T. 119.)

Upon learning that he had failed, Parks became discouraged and abandoned further efforts to seek referrals out of Local 201 (T. 120, 143.) Although he kept in touch with the goings on at the union hall through contacts with his brother-in-law and other rodmen, Parks could only recall one occasion in the relevant time period between October 21, 1972 and October 21, 1975, on which he personally went to the hiring hall (T. 121.) On that unspecified occasion, Parks only went to borrow Don Grigsby's truck (T. 122.)

Once Parks stopped going to Local 201, he became self-employed. First he sold vegetables from his home, (T. 122), and later, in 1974 and 1975, he got into the concrete construction business, (T. 123), under the name National Pride Concrete Company (T. 148.) Business apparently flourished: Parks employed about 75 people on a temporary basis over a two year span with up to five employees at any one time (T. 124.) His estimated earnings from over eighteen jobs, including installation of a runway at Andrews Air Force Base, (T. 159), was approximately $100,000 (Interrogatory 13 in Defendant's Exh. 1.) Although Parks alleges that he was the sole owner, manager or supervisor of this business, (Interrogatory 1–F in Defendant's Exh. 1), he was able to operate this business on apparently a part-time basis from his home, a Takoma Park, Maryland office, and truck telephone (Para. 4 in Plaintiff Parks' Exh. 5; T. 152, 153.)

Parks' evidence was inconsistent and contradictory. Parks gave inconsistent answers regarding his business records, saying at one point that the records were not destroyed in a fire in his Takoma Park office because he had taken some of them to his lawyer's office (T. 167.) Later, he said the records were burned in an office fire, (T. 168), and at yet another time, he said he still had at least some of the records at home (T. 168, 169.)

In 1977 when the concrete business ended, Parks sought work out of Local 77 as an operating engineer until he retired in 1984 (Interrogatory 10 in Defendant's Exh. 4; T. 137.)

***71** Although Parks claimed to have trouble reading, (Page 3 in Defendant's Exh. 3; T. 144), he testified that he attended night business school to learn to bid jobs, (T. 135), and that he was able for the most part to understand written proposals to make bids (T. 144.)

Parks repeatedly impeached his own responses to interrogatory questions and information previously provided in affidavit form. For example, on July 17, 1990, in response to interrogatory 1, Parks listed 18 concrete related jobs that he performed. At his hearing four months later, Parks denied ever doing the work on many of these jobs (T. 159–162.) In addition, in response to interrogatory 1(e), signed July 17, 1990, Parks stated that he had no records of the names and social security numbers of his concrete company employees and that he hired them through Laborer's Local 74 (Defendant's Exh. 1.) However, at the October 30 hearing, Parks testified that his sons and brothers were his steady employees, (T. 163), and that when he needed extra help, he hired men off the street corner at 7th and T Streets (T. 134.)

Mr. Parks even gave contradictory testimony regarding the number of his children. Orally he testified that he had 18 children, (T. 163), but in his affidavit he stated that he had 7 children (Para. 17 in Defendant's Exh. 5.)

I find that Wordia Parks failed to establish that he was denied membership or was discouraged from seeking membership in

the union or admission to the Training Program during the period October 21, 1972 to October 21, 1975, because of his race.

Prior to commencement of the applicable claim period, Parks took and failed the open period entrance examination. The fairness or unfairness of this exam or its results is not in issue in this case. Parks abandoned all efforts at seeking Local 201 membership after he was notified in 1971 that he had failed the test. Parks admits that he did not actually seek membership after 1971. Indeed, his counsel found the issue to be whether or not during the applicable claim period 1972 to 1975 Parks was *discouraged* from seeking membership. In support of his contention that he was so discouraged, Parks relies on the status reports given him by his brother-in-law and others during their coffee meetings at Roy Rogers on Rhode Island Avenue (T. 121.)

There is a complete hiatus of proof that Local 201 did anything to discourage Parks personally from seeking membership. Indeed, between 1972 and 1975, Parks could have entered the Training Program following which he was almost assured admission. *See Berger v. Iron Workers Reinforced Rodmen Local 201,* 843 F.2d 1395, 1405 n. 2 (D.C.Cir.1988).

I conclude that Wordia Parks was given a bona fide opportunity to take the journeyman's examination, which he failed. I further conclude that Parks has not furnished any credible evidence that between October 21, 1972 and October 21, 1975, he was denied membership in or discouraged from seeking membership in Local 201 or the Training Program by reason of his race. Parks has therefore failed to establish that he is a class member.

Rufus Parrish

***72** Rufus Parrish, a black man, was born on June 3, 1948 in Georgia (T. 23.)[115] After graduation from high school, Mr. Parrish settled in the Washington, D.C. area (T. 29.)

Parrish was inducted into the Army in 1969 and discharged from active duty in May 1971 (T. 5.) Later that year, he went to Local 201 to seek referrals as an iron worker (T. 5, 6; Defendant's Exh. 2.) Parrish worked as an iron worker for Pompanio Brothers for about six months (T. 4, 82–83) before his Army service and for another four or five months after he was discharged from the Army in 1971 (T. 32, 83.) Parrish's testimony was vague, not surprisingly considering the intervening twenty years, with respect to his Pompanio Brothers employment. He did not know the approximate number of hours he had worked, (T. 31), and qualified the length of his employment with Pompanio as "in the neighborhood" of six months (T. 83.) Although Parrish contends that his second employment with Pompanio Brothers began shortly after he was discharged from the service in May 1971 and lasted until he received a referral from Local 201, (T. 32), his social security records show no such employment (Plaintiff Parrish's Exh. 1.)

I find that Parrish has failed to establish the nature and extent of his rodwork experience prior to his first referral by Local 201. He did not describe the nature and extent of rod work that he performed for Pompanio Brothers, other than to say that he began rod work in 1968 (T. 4.) Nor did he testify that he worked as an iron worker for Pompanio after his Army discharge. (*see* T. 32, where Parrish testifies only that he worked for Pompanio.)

Local 201 pension records credit Parrish with 294 hours of employment as an iron worker for pension year 1972, which spans July 1, 1971 to June 30, 1972 (Defendant's Exh. 2.) Corroborating this, Parrish's social security records reveal that he earned $126.00 in the last quarter of 1971 from JAM Erectors, Inc., and $2,368.00 from M.J. Byorick, Inc. during the first half of 1972 (Plaintiff's Exh. 1.) Both of these employers are union shops with contracts with Local 201. Based on the prevailing wage rate at the time, I find that Mr. Parrish worked about seven weeks during the first half of 1972. In the latter part of 1972, Parrish earned close to $5,000.00. Based on the prevailing union rate at the time, I find that he worked about fifteen weeks during the second half of 1972 for a total of about 22 weeks experience as an iron worker for the entire year.

Parrish alleges that he first requested to take the journeyman's examination about the middle of 1972 (T. 12, 59.) At that time, he had worked as an iron worker only about 7 weeks. He claims that he next inquired about taking the exam roughly six months later (T. 11, 60.) By that time, Parrish had 12 or 13 weeks of additional experience, or about 20 weeks of total experience. Parrish inquired for the third and last time about admission during the latter part of 1973 (T. 13, 60), at which time he would have accrued an additional 10 weeks of experience for a cumulated total of about 33 weeks (based on earnings of $628.00 and $3,200.00 at the prevailing 1973 rate of $8.57 per hour.)

***73** A total of seven or eight months of work as an iron worker over a period of two years is insufficient experience, in my view, to qualify Parrish as an experienced ironworker at the time he sought to take the journeyman's examination in late 1973.

Therefore I am unable to find that during the period October 21, 1972 to October 22, 1975, Parrish was an experienced iron worker who was denied or discouraged from taking the journeyman's examination for admission to Local 201. Nor is there any evidence that Parrish ever attempted to enter the apprentice program.

Accordingly, Parrish has not proven his membership in the class according to the standards established for class membership in *Berger v. Iron Workers Reinforced Rodmen Local 201,* 843 F.2d. 1395, 1406 (D.C.Cir.1988), and therefore find that Parrish is not entitled to an award of back-pay or compensatory damages.

Robert Posey

Robert Posey is not a named plaintiff. Therefore he must qualify for class membership before consideration will be given to his damage claim.

Robert Posey, a high school graduate, was born on August 27, 1950 (T. 4.)[116] He first entered the construction field in 1968 following graduation from high school (T. 5, 6.) At that time, he did non-union rod work for Pomponio Brothers installing reinforcing steel on high rise office buildings under construction in Crystal City and Rosslyn, Virginia (T. 9, 10, 12.)

In 1969, Posey transferred to Philadelphia, Pennsylvania, where he did iron work as a permitman out of a Philadelphia union local (T. 6, 8.) That work did not last long and later in 1969, Posey returned to the Washington, D.C. area seeking referrals out of Local 201 (T. 6, 14.) Posey preferred union work to non-union because he believed it provided him with better opportunities (T. 6.)

Posey's first referral through Local 201 was to Kirk Lindsey Construction Company (T. 15.) Although Mr. Posey claims to have worked for this contractor for a year and a half (T. 15), his pension records only credit him with 841 hours of referrals from 201 during the pension year 1970 (July 1, 1969 to June 30, 1970) (Defendant's Exh. 1.) During his employment with Kirk Lindsey, Posey inquired of Ronnie Vermillion, Local 201's business agent, about a 201 membership. He was told to keep working and to see about union membership later (T. 15.) In response to another inquiry, Posey was told that the rolls were filled (T. 19, 20.) During the summer of 1970, Posey inquired of Vermillion about entry into the apprenticeship program. He was told to keep working because there was no room in the program (T. 19, 20.) In 1970, after he was laid off by Lindsey, Posey was unable to obtain any union referrals so he obtained non-union iron work at Vecco Construction (T. 21, 22), and continued periodically to seek 201 referrals.

The pension records reflect 58 hours of referrals in the year 1972 (Defendant's Exh. 1.) However, it was not until 1974 that Posey obtained steady employment when he was referred to Blake Construction Company where he remained until 1976 (T. 23.)[117]

***74** I find that by October 1972, Posey was an experienced union worker eligible to take the journeyman's examination. By October 1972, he had been doing iron work for both union and non-union contractors for over four years. During 1970, Posey was awarded certification to work as a foreman (T. 8.) Notwithstanding his experience, Posey sought an opportunity to take apprenticeship training as early as the summer of 1970, a program for which he was eligible by reason of education and age, but he was deterred or discouraged from entering. Moreover, I find that during the applicable claim period, Posey was discouraged and found it fruitless to continue to inquire about union membership. Accordingly, I find that Posey has established his eligibility for remedial relief.

Posey's social security records show last quarter 1972 earnings of $3,139. The proxy journeyman earnings for the period October 21 to the end of 1972 amount to $2,728. Since Posey's actual earnings exceeded that of the proxy, Posey is not entitled to a back pay award for 1972. Similarly, Posey's earnings according to his social security records exceeded those of the proxy journeyman for each year of his claim period except 1975 and 1976.

In 1975, Posey's earnings totalled $12,011 or $2,141 less than that of the proxy's $14,152 (1447 hrs. at $9.78 per hour). In 1976, the proxy's earnings amounted to $13,645 (1419 hrs. at $10.54 per hour), whereas Posey earned $10,914, leaving him with a shortfall of $2,731. During the following years until his admission to journeyman status in 1982, Posey's earnings exceeded that of the proxy, therefore, he is entitled to no further back pay award. The cumulative present value of the back pay awards to which Posey is entitled is $13,667.08.

Posey testified that he regularly went to the hiring hall to seek referrals and admission to the union only to be told that he

could not be admitted to full membership. Nor was he permitted even to enter the apprentice program which would lead to full admission. Understandably, Posey became discouraged (T. 33.)

The defendant urges that Posey's August 11, 1980, application for admission to the training program, which lists relatively few experience hours, demonstrates Posey's lack of prior experience, and therefore his ineligibility for remedial relief in these proceedings. However, it is obvious that Posey did not list all his work experiences for the prior twelve years[118] and the defendants should have known that since the Local's own pension records show over 3500 hours of referrals during the pension years 1974 through 1976.

The same is true with respect to Posey's Apprenticeship Council Trainee Certification Form (defendant's Exh. 3), dated August 12, 1980, this agreement credits Posey with only 2000 hours of previous experience (*see* defendant's Exh. 5.) These exhibits are clearly erroneous in so far as they purport to credit Posey with only 2000 hours of previous experience.

***75** As was the case with most of the other claimants, Posey did not go into detail regarding the mental anguish and frustration he experienced. However he did state that he felt "bad" at the way he was treated (T. 33, 34.) "When a plaintiff seeks compensation for an injury likely to have occurred but difficult to establish [or articulate], some form of presumed damages may possibly be appropriate" for the harms inflicted that are impossible to measure. *Memphis Comm. School District, supra,* at 310–311; *Gore, supra,* at 164. Accordingly, pursuant to § 1981 Mr. Posey is awarded damages in the sum of $5,000 for the emotional distress, indignity and humiliation he underwent because of the defendants' racially discriminatory actions.

Willie Roy

Willie Roy is not a named plaintiff. Pursuant to the order of reference, therefore, he must establish that he is eligible for class participation in order to be considered for an award of damages.

Willie Roy, a black rodman, was born in 1950 (T. 83.)[119] He first sought referrals from local 201 in 1969 (T. 83.) However, he had done some rodwork for National Realty in 1968 before going to 201 (T. 85.)

Mr. Roy's union pension records credit him with 749 hours of rod work for the pension years 1972 through 1975, or the calendar year equivalent of July 1, 1972 to June 30, 1975 (Defendant's Exh. 1.) Roy's records also credit him with 82 hours for the pension year 1976, which covered the period July 1, 1975 to June 30, 1976. Even if he were credited with the entire 86 hours as having been worked between July 1, 1975 and October 22, 1975, his gross total of 835 hours would be insufficient to consider him an experienced rodman by October 27, 1975, the cutoff date for eligibility for class membership.

Roy testified that before going to Local 201, he did rodwork in 1968 for National Realty. There is no evidence of the number of hours he performed rodwork prior to going to Local 201. Roy's social security earnings records only go back to January 1, 1972 (Plaintiff's Exh. 4.) They disclose employment by National Realty in 1972 as well as other union and non-union employment for the years 1972 through 1975. Those records show gross earnings in 1972 of $3,596; in 1973 of $3,375; in 1974 of $3,221 and in 1975 of $428. By dividing the gross income for each of those years by the stipulated union wage rate for each respective year, and even assuming that all employment involved rodwork, the maximum number of rodwork experience hours Roy accumulated was in the neighborhood of 1200 hours, far short of the number of hours a rodworker would have to have worked in order to be considered experienced.

Accordingly, since Mr. Roy's testimony and records fail to establish that he was an experienced rodworkman during the period October 21, 1997 to October 22, 1975, I find that he does not qualify for class membership in this litigation.

Earnest Sims

Earnest Sims is required to establish eligibility for class participation since he is not one of the eight named plaintiffs.

***76** Earnest Sims, a black rodman, was born on June 7, 1937 (T. 4.)[120] He attained an 11th grade education, (T. 5), and therefore was ineligible for the apprentice program.

Mr. Sims began doing rod work in the 1950's. Sometime during the mid–1960's, while performing non-union work at Miller & Long Construction Co., Sims was approached by a union representative who encouraged him to go to Local 201 for union

work. This unidentified recruiter is alleged to have assured Sims of union membership (T. 6.) However, since the recruiter is unidentified, and the limits of his authority undefined, his actions and statements are not binding on the defendants.

Sims thought about the benefits and greater salary associated with union membership and in the latter part of 1966, he went to Local 201 inquiring about membership (T. 7.) Ronnie Vermillion is alleged to have said that he would let Sims know when he would be allowed to get a book (T. 8.) Sims contends that he repeatedly inquired about union membership, (T. 9), and in 1971, he was given an opportunity to take the open period exam (T. 8.) He failed that exam but alleges that Ronnie Vermillion told him he could get Sims a book for $500 (T. 8, 14.) Sims believed from what he had heard from others that the initiation fee was $318, (T. 13, 14), and believed that Vermillion was looking for a $200 “personal gain” (T. 70.)

The Special Master gives no credence to this testimony. Of all of the claimants to testify, this claimant is the only one to contend that a union representative sought a bribe in return for union membership.

Sims contends he was told by Augusta Jackson that the initiation fee was only $318 because Jackson paid that sum when he got his book in the 1960’s. Augusta Jackson, also a claimant in these proceedings, testified that he never applied to become a union member until August 1973, (T. 24), and was not admitted to membership until October 1975 (T. 27.)[121] The union records corroborate Jackson’s testimony that he was admitted to membership in October 1975. Therefore, Sims testimony in this regard is a total fabrication, which calls into question the veracity of his other testimony regarding efforts to obtain union membership and his efforts to enter the training program.

Sims’ pension records (Plaintiff’s Exh. 2) show Local 201 job referrals beginning in 1966, and Sims thereafter accumulated enough hours for the Special Master to conclude that by October 1972, Sims was an experienced rodman. However those same records as well as his social security records also reveal that throughout his career at Local 201, spanning the period 1966 to 1987, Sims was apparently content to earn only minimal income. Moreover, his social security records disclose referrals to multiple contractors during the course of a year. In the pension year 1972, Sims had referrals to five different contractors; in 1973, he was referred to 8 different contractors; in 1974, Sims was referred to 5 different contractors; in 1975, 2 different contractors; in 1976, he had 3 different contractor referrals; only one union contractor referral in 1977 and none in 1978. During his training year of 1979, Sims had referrals to 3 different contractors and earned more income than any other year up until that time (Plaintiff’s Exh. 1).

***77** I conclude from this employment pattern that Sims either left jobs quickly of his own accord or was terminated by the contractor. In other words, Sims was apparently incapable of long term employment. Prior to entering the Training Program he worked steadily only in the latter half of 1972 and early 1973, (during which time he earned about $5,400 while employed by M.J. Byorick, Inc.), and in the latter half of 1974 and early 1975, when he earned about $7,000 from the same employer. During the remainder of the time, Sims was apparently satisfied with part-time employment.

Although he testified that he was not satisfied with the amount of referrals and sought non-union work, (T. 17), Sims’ social security records show that the only substantial amount of non-union work he obtained was in the last half of 1977, when he returned to Miller & Long but lasted there only six months.

In 1971, Sims was given an opportunity for admission to the union via the open period exam. He was given that opportunity because by that time he had been credited with almost 4000 hours of job referrals. He was, by union standards, experienced. Nonetheless, Sims failed the examination.

There is no credible evidence before me that thereafter Sims was deterred from entering the Training Program or that he was deprived of the opportunity to retake the exam. Although Sims claims vaguely that he continually requested to be admitted to the union or the Training Program, he was unable to testify when he made these efforts. For example, he said he tried to enroll in the Training Program from its inception but did not know when that program began. He said he continually sought admission to the union but that Vermillion refused to give him a book unless he paid $500. I find it incredible, and therefore do not accept as true, that notwithstanding the demand for $500 by Vermillion, which Sims understood to be a request for a bribe, Sims would have repeatedly sought admission to the union from Vermillion, the man whom Sims felt wanted a bribe.

I find that although Earnest Sims has established that he was an experienced rodman, he has not established that he was ever deterred from, discouraged from or denied a fair and reasonable opportunity to take the admissions test or to enter the training program between October 21, 1972 and October 22, 1975. His testimony as to his efforts is too general, lacks specificity and lacks credibility. Accordingly, he has not established his eligibility for class membership.

John Thomas

John Thomas is not a named plaintiff. He must therefore establish that he is entitled to class membership and remedial relief.

John Thomas, a black rodman, was born in Orangeburg, South Carolina on August 6, 1935. He left school after the 7th grade (T. 31.)[122]

Thomas arrived in the District of Columbia area in 1955, began rod work for Miller and Long, a non-union contractor, in 1956, (T. 32), and remained steadily employed there for about ten years (T. 32.) During that time, he worked as a foreman for about seven and one-half years (T. 33.)

***78** Sometime in May 1966, Thomas went to Local 201 for a job referral (T. 33.) He wanted to join the union because of its superior benefits (T. 36.) He was initially referred to Kirk Lindsey Construction, where he remained employed for about five months. He was then referred to Blake Construction Company and later to M.J. Byorick, Inc (T. 35.)

After a year, Thomas inquired of Local 201's business agent about joining the union but was told that the membership list was full and that he would be advised of an opening (T. 37.) Thereafter, several times a year, Thomas repeated his desire to join the union but was never given an opportunity to take the exam (T. 41.) Thomas was laid off by Byorick at the end of 1975 (T. 43.) According to his pension records, (Plaintiff's Exh. 2), he received few job referrals during the pension years 1976 and 1977. As a consequence, Thomas returned to Miller & Long in 1977. While at Miller & Long, Tommy Gilner, Local 201's business agent, came to the job site to encourage Thomas to return to the Local. Gilner stated that the Local had plenty of work and that Thomas would be able to get his book (T. 45.)

Thomas though about the offer and after several months, in early 1978, he left Miller & Long to return to Local 201 (T. 46.) He then learned that in order to get his book he had to participate in the Training Program, which was contrary to what he believed Gilner had promised him (T. 46.) Nonetheless, he enrolled in the program, completed it, and was admitted to membership in October 1980 (T. 47.)

I find that John Thomas was an experienced rodman. He had ten years of steady rod work with Miller & Long, including seven and one-half years of experience as a foreman before first seeking referrals from Local 201. His pension records show that during the pension year 1967, Thomas was credited with 1156 hours of job experience, in 1968 he was credited with 1745 hours; in 1969 with 1421 hours; in 1970 with 1693 hours; in 1971 with 1523 hours, and by July 1972 he was credited with an additional 1607 hours. (Plaintiff's Exh. 2.)

Notwithstanding all of this experience, Thomas was not permitted to take the entrance exam despite his repeated requests from 1967 to late 1976. Not only was Thomas deterred from taking the exam, he ultimately was required to spend almost two years in a Training Program before being permitted to sit for the exam.

I further find that Thomas was an experienced rodman who was deterred from admission to the union solely because of his race and that he is eligible to participate in class membership and entitled to a damage award.

John Thomas' social security earnings records, (Plaintiff's Exh. 1), show no earnings during the last quarter of 1972. However, that is due to the fact that the maximum earnings subject to social security withholding during 1972 was $9,000. The social security records show that Thomas was steadily employed by M.J. Byorick from at least the beginning of 1972,[123] until the end of 1975. Moreover, his pension records show steady and full time employment during the 1972 to 1975 time frame (Plaintiff's Exh. 2). Therefore, Thomas is entitled to no back pay award for that period.

***79** However, once terminated by Byorick in 1976, Thomas earned very little income. His earnings records show total 1976 income of $338 or $14,622 less than the proxy's earnings for that year. In 1977, while employed with Miller & Long, his gross earnings amounted to $10,689 or $2,956 less than the proxy. Thereafter, his earnings exceeded that of the proxy during the remainder of his claim period except for 1979, when he earned $13,458 or $404 less than the proxy's wages of $13,862.

Accordingly, John Thomas is award back pay in the sum of $14,622 with interest from January 1, 1977; $2,956 with interest from January 1, 1978 and $404 with interest from January 1, 1980, representing a present value total sum of $45,767.32.

Thomas expressed his frustration and disappointment at the obstacles he encountered on the way to union membership before he was finally admitted in 1980 after a 13 year effort. Moreover, as earlier stated, presumed damages may be awarded for harm suffered but impossible to measure. *Memphis Comm. School District, supra,* at 310–11; *Gore, supra,* at 164. Accordingly, pursuant to § 1981 John Thomas is awarded damages in the sum of $10,000 for the pain, emotional suffering,

anxiety and humiliation suffered by reason of the defendants' racially discriminatory actions.

Ronald Tucker

Ronald Tucker is a named plaintiff and class representative. He seeks back pay, compensatory and punitive damages. His claim period commenced 3 years prior to the filing of this suit. He seeks continuing damages alleging that he tried as recently as December of 1989 to become a union journeyman (T. 133, 134.)[124] However, his counsel contends that the back pay claim encompasses only the period from October 21, 1972 until April 10, 1989 (T. 131.)

Pursuant to the order of reference, Ronald Tucker, as a named plaintiff and class member, is presumed to be entitled to damages. To rebut this presumption, the defendants must prove by clear and convincing evidence that Tucker is not entitled to back pay and damages.

Ronald Tucker, a black man, was born on May 15, 1933 in Pennsylvania (T. 25, 28; Aff. in Tucker Exh. 1, hereinafter Aff., ¶ 6.) He left school after completing the 10th grade (T. 28; Aff. ¶ 6), and started construction work in the Washington area in 1964 (T. 33.) After several years of work as a laborer, (T. 34, 35), Tucker started doing rod work (T. 35.)

Sometime in 1966, Tucker learned about the union when union organizers distributed pamphlets outside a non-union job site (T. 36, 40.) Tucker went to Local 201 and was dispatched to work for M.J. Byorick, Inc. on the FBI building (T. 40, 43.) Thereafter, he tried to obtain union membership in Local 201 but was unsuccessful (T. 59; certification form.)

The benchmark earnings for the 1972 claim period beginning October 21 are $2,728.[125] Tucker had earnings of $1,491.00 during that time, leaving him with a net short fall of $1,237. Tucker's earnings for 1973 amounted to $13,177 whereas the benchmark earnings for that year are $13,343 (1557 hrs. x $8.57 per hour), which results in a shortfall of $166 for 1973. In 1974, Tucker's earnings exceeded $17,425,[126] which is more than the benchmark proxy earnings of $14,757 (1627 hrs. x $9.07 per hour). Therefore, Tucker can recover no back pay for 1974.

***80** In 1975, Tucker's earnings amounted to $9,178; a shortfall of $4,974 from the benchmark earnings of $14,152 (1447 hrs. x $9.78 per hour), for which he is awarded back pay. In 1976, Tucker had earnings of $10,183 before being hospitalized on September 16 for chest pains. He remained hospitalized for about a week before being discharged on September 24 (VA Hospital records in Tucker Exh. 1). Tucker was disabled for the balance of that year.[127] His earnings up to the date of his disability were roughly equal to the benchmark earnings up to that point in 1976, such that I find he is not entitled to a back-pay award for that year.

However, in 1977 Tucker had earnings of only $4,138. Though, as he testified, Tucker was disabled from steel work until July of 1977, from July to September of 1977 he returned to steel work for a company in Baltimore, (T. 108), and earned $1,379 (social security records in Tucker Exh. 1.) The benchmark earnings for one quarter of 1977 were $3,411 (¼ of 1253 hrs. x $10.89 per hour). Therefore, Mr. Tucker is entitled to a back pay award of $2,032 for 1977.

Following completion of the Baltimore job, Tucker abandoned efforts at seeking any other referrals from Local 201 (T. 109.) Nor did Tucker seek to follow up on Judge Penn's remedial order of April 1986, which would have admitted him to membership. Therefore, I find that beginning in October 1977, Mr. Tucker was no longer interested in obtaining union admission, notwithstanding his assertion that he was still interested as recently as December 1989. Therefore, he is entitled to no back pay award after September 1977. The cumulative present value of all back pay awards to which Mr. Tucker is entitled totals $24,459.

In the late 1960s, in response to written solicitations by union organizers, Mr. Tucker went to Local 201 for job referrals. He tried to become a journeyman and was even scheduled to take the exam in the fall of 1970, (T. 59), but was injured on the job and unable to take the exam (T. 60.) When Tucker recovered, he tried to take the exam for admission but was told by Ronnie Vermillion, Local 201's business agent, that the membership roles were full (Aff. ¶ 15.)

Tucker worked rather steadily on referrals from Local 201 up until hospitalization in September 1976, and his social security records show that he also worked for a number of contractors. Mr. Tucker testified that once a job progressed to street level, he and other black permit men were laid off and replaced by white journeymen (Aff. ¶ 35.) Indeed, while working new construction on a building at 18th & K Street, N.W., Tucker overheard Vermillion tell the rod foreman to lay off the black permit men because he had book men he wanted to put on the job (T. 99, 100, 101.) Tucker was laid off and then dispatched to another job at L'Enfant Plaza where he worked for two weeks before being laid off again (T. 100, 101.)

I find credible Tucker's testimony regarding Vermillion's instruction to replace black permit men with white book men once a job became more desirable.

***81** These indignities and discriminatory conduct existed solely because blacks, for the most part, were denied journeyman status and the benefits enjoyed by journeymen. For this discrimination Mr. Tucker is entitled to damages pursuant to § 1981. Accordingly, Ronald Tucker is awarded damages against the defendants in the sum of $10,000 for the emotional distress and indignities he suffered by reason of the defendants racially discriminatory actions.

Andrew Williams

Andrew Williams is not a named plaintiff. Therefore he must establish his eligibility as a class member in order to receive a damage award.

Andrew Williams, a black rodman, was born on July 1, 1932, and attained an 8th grade education (T. 4.)[128] Since he was not a high school graduate, Williams was not eligible for entry into the apprentice program.

Mr. Williams started rod work in 1949, when he was 17 years old (T. 4.) In the subsequent 40 years, he did rod work for union and non-union shops, on average, two or three days a week (T. 4.) Williams first sought work referrals from Local 201 in 1967.[129] At that time, he was told by Ronnie Vermillion, Local 201's business agent, that new recruits were not being accepted (T. 6.)

Williams returned to Local 201 in 1969, and after satisfying Vermillion that he had more experience, (T. 8), and at least a rudimentary knowledge of rod work, he was referred to work for a contractor on the 11th Street, S.E. bridge, where he remained employed for five or six months (T. 7.) He was then referred to M.J. Byorick, Inc. (T. 7.)[130]

In the late part of 1972, Williams spoke with Mr. Vermillion about joining the union. He felt that the pay, benefits and job protection were superior to non-union benefits (T. 8.) Vermillion told him that the Local was not admitting applicants at that time (T. 8.) During the next year, Williams made at least another half dozen inquiries of Vermillion, both at the hall and in the field when Vermillion visited the job sites, about joining the union (T. 10.)

In 1973, Williams learned that a Training Program had been started and felt that completion of that program was the only way to gain entry into union membership, so he enrolled in the Training Program in October 1973 (T. 10, 11.) He successfully completed the training and gained admission to the union on October 1, 1975.

Williams' social security earnings records (Plaintiff's Exh. 1) date back to 1950. However, it is impossible to determine the nature of his employment from those records. According to Williams, most of his employment between 1955 and 1969 was in the nature of laborer's work, including some rod work (T. 59.)

Nevertheless, Williams' Local 201 pension records credit him with 1458 hours during the pension year 1970; 1554 hours during the pension year 1971, and 1619 hours during the pension year 1972. Therefore, by October 1972, Williams had over 4600 hours of Local 201 job referrals as a rodman. Based on this, I find that by October 1972, Andrew Williams was an experienced rod worker. I further find that after October 21, 1972 until his admission to the training program in October 1973, Williams requested to join the union but was deterred from joining. Instead, he was forced to enroll in the Training Program despite his extensive experience, and complete the program before being admitted to union membership on October 1, 1975.

***82** The defendants conduct in this regard, setting up prerequisites to membership for experienced black workers, is the gravamen of the class complaint and has been found to be discriminatory.

Throughout most of his 3 year claim period, beginning October 21, 1972 and ending on October 1, 1975, Williams was employed by M.J. Byorick, Inc.. Although his social security records report no income during the last quarters of 1970, 1972, 1973 and 1974, I conclude that the reason for this is that the records only reflect earnings subject to social security tax. During the years 1968 to 1971, the maximum wages subject to social security withholding was $7,800. In 1972, the cap was raised to $9,000; in 1973 to $10,800; in 1974 to $13,200 and in 1975 to $14,100. *See* 42 U.S.C. §§ 409(a); 430(b) & (c).

The conclusion that Williams' earnings are not reflected because they exceeded the social security withholding amount is

supported by Williams' testimony that he worked for M.J. Byorick, Inc. during the day and for Peter Kieurt Company during the same period but at night (T. 34, 36.) The social security records show earnings from Peter Kieurt employment during the last quarter of 1972 but no earnings from M.J. Byorick for that period because as already indicated, Williams' wages from Byorick topped the maximum wages subject to social security tax.

Williams' 1973 social security records also show wages topped out at the withholding maximum for that year of $10,800. His earnings for the first three quarters of 1973, and the first quarter of 1974, exceeded $3,400 in each quarter, which indicates he was fully and steadily employed at that time. Therefore I conclude that Williams he had no wage shortfall in 1973 and is entitled to no back pay award for either 1972 or 1973.

In 1974, however, Williams' social security records show total earnings from M.J. Byorick, Inc. of $10,824 (the social security cap for that year was $13,200), and additional wages from a Byorick–Chelstrom partnership of $3,266, for a gross of $14,090, which is $667 less than the proxy's wages.

In the first nine months of 1975 before his admission on October 1, Williams earned $8,494, which is $2,120 less than the proxy wages for a comparable period.[131] Accordingly, Andrew Williams is awarded the sum of $667 plus interest from January 1, 1975 and the sum of $2,120 with interest from October 1, 1975 for back pay damages. The cumulative present value of those awards totals $8,250.82.

Williams also testified about his anguish and feelings about having to go through a training program, notwithstanding his years of experience. This requirement, as stated earlier, was the gravamen of the class complaint. I find that Andrew Williams is entitled pursuant to § 1981 to and therefore is awarded the sum of $5,000 as damages for the mental suffering and anguish he endured by reason of the defendants' racially discriminatory actions.

VIII

CONCLUSIONS

a. Punitive Damages

***83** The Special Master finds that although the evidence discloses that the actions of the defendants were unlawful, purposeful and intentional so as to support a § 1981 award for emotional distress, "(t)hat does not mean that punitive damages are appropriate in every case of an intentional wrong," *Bowlett v. Anheuser–Busch, Inc.,* 832 F.2d 194, 205 (1st Cir.1987), but only in those situations where it is necessary to punish a defendant for outrageous conduct and to deter similar conduct in the future. (Id.)

The evidence submitted by the individual claimants on the issue of punitive damages falls short of the standard mandated by the Order of Reference which required a showing of not only unlawful and intentional conduct but also evidence of malicious, wanton and wilful discrimination. Moreover, the Special Master finds that an imposition of punitive damages is not warranted in these proceedings in order to deter similar future conduct on the part of these defendants or others similarly situated.

Accordingly, the Special Master finds that none of the individual claimants is entitled to a punitive damage award.

b. Fringe Benefits

The parties shall calculate the monetary value of the fringe benefits pursuant to the stipulation of April 13, 1990, based upon the Special Master's finding regarding the back pay due each individual claimant. Furthermore, any overtime monies due shall bear interest at 6% per annum compounded from the date due.

The present value of each individual's back pay award has been calculated as of April 1, 1994. Each back pay award including the award for § 1981 damages shall bear interest from April 1, 1994.

ATTACHMENT A

YEARLY HOURS AS COMPUTED BY DR. BENDICK

YEAR	HOURS WORKED
1972	1718
1973	1729
1974	1723
1975	1699
1976	1724
1977	1682
1978	1693
1979	1705
1980	1655
1981	1631
1982	1596
1983	1592
1984	1665
1985	1664
1986	1657

ATTACHMENT B

YEARLY HOURS AS COMPUTED BY DR. BLOCH

YEAR	HOURS WORKED
1972	1586
1973	1586
1974	1456
1975	1265
1976	1117
1977	962
1978	826
1979	757
1980	692
1981	636
1982	598
1983	502
1984	513
1985	613
1986	641

ATTACHMENT C

Year	Hourly Rate
1972	8.17
1973	8.57
1974	9.07
1975	9.78
1976	10.54
1977	11.89
1978	11.81
1979	11.27
1980	12.12
1981	13.24
1982	14.25
1983	14.15
1984	13.92
1985	13.88
1986	14.99

Footnotes

1 Rod workers, or rodmen, are the construction workers who position and secure steel rods used to reinforce concrete construction.

2 *See Berger v. Iron Workers Reinforced Rodmen Local 201,* 843 F.2d 1395 (D.C.Cir.1988),

3 Throughout this Report, the Order of Reference is referred to interchangeably as “Order,” “Referral,” and “Order of Reference”.

4 The same burdens of proof apply in both Title VII and § 1981 cases. *See, e.g. Oates v. District of Columbia,* 824 F.2d 87, 90 (D.C.Cir.1987).

5 By the Order of Reference, eight named plaintiffs are already members of the plaintiff class and need not establish class membership before the special master. These named plaintiffs are: Jessie Berger, Randolph Jackson, Tommy Kirkland, Van Edward Lewis, Ronald Tucker, Ernest Bellamy, Willie McMillian, and Garrett Simmons. Order at ¶ 5.

6 As pointed out by the parties in their memoranda regarding the burden of proof for recovery of back pay and compensatory damages, the court acknowledges that there is some disagreement concerning the necessity in class action suits that the claimant show that he was qualified for the position he was discriminatorily denied and how convincing that showing must be. *Compare Hartman v. Wick,* 678 F.Supp. 312, 333 (D.D.C.1988) (citing *Teamsters,* 431 U.S. at 361–62); *McKenzie v. Sawyer,* 684 F.2d 62, 77 (D.C.Cir.1982); *Harrison v. Lewis,* 559 F.Supp. 943, 946 (D.D.C.1983), and *Chewning v. Schlesinger,* 471 F.Supp. 767, 770 (D.D.C.1979) (Richey, J.) (holding that once class-wide liability is established in a Title VII action, a *Teamsters* presumption arises and claimants need not prove or even show that they were minimally qualified for the position); *with* A. Larson, 2 Employment Discrimination § 55.39 at 11–80.59 (1990 ed.) (acknowledging conflicting standards among jurisdictions, but stating that the better rule is to require that each individual claimant prove by a preponderance of the evidence that he or she is qualified for the position). We need not address this issue, however, as we are bound by the specific instructions contained in Judge Penn’s Order of Reference and the law of the case as pronounced by the Court of Appeals. Previous decisions and the Order of reference specifically require that the claimants present a *prima facie* case that they were experienced rodmen yet were denied admission or were discouraged from applying.

7 However, the court does not agree with the plaintiff that the mere fact that *Price Waterhouse* addressed issues going towards liability while the court in this instance is concerned with determining damages, by itself, is a relevant distinction. By requiring the claimants to come forth with a *prima facie* showing of qualification, the court is deciding, for all intents and purposes, the defendants’ initial liability to each individual claimant. Therefore, the liability/damage distinction made by the plaintiff class counsel is not dispositive. Instead, as recognized in *Trout v. Lehman,* it is the *nature* of a defendant’s liability in an individual suit that is fundamentally distinguishable from a defendant’s liability to an individual claimant after a finding of class-wide liability.

8 *See* Defendants’ Motion for to Exclude Portions of Claimants’ Testimonial and Documentary Evidence and For Judgment of Dismissal Pursuant of Fed.R.Civ.P. 41(b), filed April 23, 1990; *see also* Defendants’ Second Supplemental Motion, filed June 22, 1990.

9 The Defendants allege that two claimants, Charles Daniels and Arthur Jackson, do not answer that they were discriminated against to the questions in the certification forms. As to a third claimant, Julius Brown, the Defendants claim that his answers show he could not have filed a timely suit as required by the notice to class members.

10 The Notice to class members states:

> IT IS IMPORTANT THAT YOU PROMPTLY FILL OUT THE CERTIFICATE AND RETURN IT, FOR TWO REASONS:
> FIRST, the Court’s order [finding the defendants liable for discrimination] granted certain affirmative relief to class members. That relief provides for admission to union membership and job referral priority for persons having certain qualifications. After you fill out and return this form, you may be entitled to some or all of these benefits.
> SECOND, the Court ordered that proceedings should be held to decide the remaining issues in the case, including back pay, other benefits (such as pension, health insurance compensation and vacation benefits) and damages, and the award of costs and attorneys fees. These issues will be decided in separate proceedings before the Court, or a magistrate or special master designated by the Court.
> *It is therefore now necessary to identify individual class members.* Accordingly, if you believe that you are a member of the class and you want to share in the benefits of any judgment favorable to the class, please complete the certification form that is attached....

Notice Class Members at 3, filed 4/11/86.

11 It also became clear during the hearings that the education of most of the claimants did not extend beyond the primary grades and that many could not read.

12 Claimant Robert Posey’s certificate was notarized in Maryland. The law of that state requires a notary to provide a seal or stamp to

authenticate his acts as well as providing his full name, place of residence, and expiration date of commission as a notary. Md.Ann.Code art. 68, § 6 (1988). Claimant Arthur Jackson notarized his certificate in Virginia, which requires the notary to include the date and place (county or city and state) of the notarial act and the date of expiration of the commission. Va.Code § 47.1–16 (1989). As to the fourth claimant, the jurisdiction for the notary seal on John Offer's certificate is illegible.

[13] References to "Tr." followed by a date, are to the transcript of hearings held on that date.

[14] This 2,150–hours figure was established by the District Court as a "proxy" for the two years experience necessary to take the Local's exam during the Open Period. This proxy represents the average number of hours worked by white rodmen taking the Open Period test—however, the union did not look at the actual hours in determining whether an applicant was eligible to take the test; they simply looked at the number of years. Of the white workers taking the test, the number of hours ranged from a total of 1,000 to 8,000 (Plaintiffs' Proposed Findings, p. 69 at ¶ 17.)

[15] For example, the defective certification form of claimant Melvin Davis is Defendant's Ex. 1, received in evidence Nov. 30, 1990.

[16] In the Order of Reference, Judge Penn ordered that an individual claimant may present a claim for back pay and other damages for the "period commencing on the date when [the claimant] first attempted to become or was deterred or discouraged from becoming a member of Local 201 and/or the International, and concluding on the date when he first was allowed to take the journeyman examination" (Order of Reference at 1–2.) Damages will not be awarded however for a period earlier than October 21, 1972, three years prior to the filing of the complaint in this case, nor later than April 10, 1986, the date when the plaintiff class was awarded injunctive relief by Judge Penn (Order of Reference at 1–2.)

[17] *See e.g., Patterson v. American Tobacco Co.,* 535 F.2d 257, 269 (4th Cir.), *cert. denied* 429 U.S. 920 (1976).

[18] *See e.g., EEOC v. Kallir, Phillips, Ross, Inc.,* 420 F.Supp. 919, 924 (S.D.N.Y.1976), *aff'd* 559 F.2d 1203 (2nd Cir.), *cert. denied* 434 U.S. 920 (1977).

[19] Ernest Bellamy

[20] Traditionally, cases awarding punitive damages under § 1981 have done so based on a showing of bad faith and actual malice. *See Acosta v. University of the District of Columbia,* 528 F.Supp. 1215, 1225 (D.D.C.1981).

[21] The Special Master need not address the defendants' arguments on this issue as we are bound to follow the Order of Reference, which very clearly states that prejudgment interest is to be awarded at the rate of 6% per annum. *See* Amended Order of Reference, May 24, 1989.

[22] One of the principal difficulties is that Local 201 merely referred individuals to employers; it does not employ them. It is the employer who determines the nature of the work to be performed and the length of employment, although some of the claimants inferred otherwise.

[23] These figures are reflected in column 1 of Tab 2 of Plaintiffs' Exhibit A, which is attached to the Special Master's report as Attachment A.

[24] See Pl.Ex. A, Tab 4, Tables 75 and 32. These tables cover the years 1932 to 1988 for ten broad categories of industries, including mining, construction, manufacturing of durable goods, manufacturing of nondurable goods, transportation and public utilities, wholesale trade, retail trade, finance and insurance and real estate, and services.

[25] These computations are reflected in Columns 1 and 2 of Tab 2 of Plaintiffs' Exhibit A. Dr. Bendick indicated that the average number of hours worked by a construction worker was relatively static with a low of 36.4 hours a week to a high of 37.9 hours per week.

[26] Pl.Ex. A, Column 3 of Tab 2.

[27] Dr. Bendick testified:

> We have a situation in this case where there is a sharp difference within various people working in the rod trades. In the work allocation process within the union, journeymen are given priority over permit holders in the allocation of work. Therefore, the journeymen will suffer much less unemployment than the permit holders, because the permit holders are the unemployment buffer. They are the ones who will take the unemployment when it's there.
>
> I wanted to adjust the Bureau of Labor Statistics down to something that appropriate for the journeymen group—this high-priority group—this group that has priority in getting work.

Tr. Apr. 17 at 28, lines 3–14. In Tab 3, Dr. Bendick used the pension fund records of Local 201 to calculate what percentage of the total hours of work by Local 201 permitmen and journeymen were done by journeymen because these are figures specific to Local 201 and are the same figures the defendants' expert Dr. Bloch used. Tr. Apr. 17 at 28. The journeymen worked an average

of 25 percent of the total hours reported to the pension fund from 1972 to 1976; 54 percent for 1977; an average of 75 percent for 1978–79; an average of 65.5 percent from 1980–82; and an average of 86.5 percent from 1983 to 86 according to the figures in column 3 of Tab 3 of Plaintiffs' Exhibit A.

[28] Plaintiff's Exh. A at Tab 2, columns 4–6.

[29] *Vital Statistics: Current Estimates from the National Health Interview Survey, United States, 1986,* National Health Survey Series 10, No. 164, Table 69 at 113 (Oct. 1987). Dr. Bendick determined that the closest group to the journeyman group is the category of males aged 18 and over. Tr. Apr. 17 at 30. The table reflects a nationwide survey of males aged 18 and over, regardless of race employment. Thus the 5 day figure quoted would be the same for white collar service industries as for heavy physical labor industries.

[30] Plaintiff's Exh. A. at Tab 2, Column 5.

[31] *Id.* at Column 6.

[32] *Id.* at Tab 2. Dr. Bendick also calculated the hours worked per year for each year from 1972 through 1989. These calculations can be found as Attachment A to this opinion.

[33] Tr. Apr. 17 at 74.

[34] Tr. Apr. 11 at 24.

[35] 10 percent of the BLS figures for the years 1972 to 1976; 20 percent for 1977; 30 percent for 1978–79; 40 percent for 1980–82; and 50 percent reduction in the BLS figures for 1983–89. *See* Tr. Apr. 17 at 29; Plaintiffs' Exhibit A, Tab 3 at col. 4.

[36] In addition, it is inconsistent for Dr. Bendick relies on the BLS statistics for the weekly hours and abandons them for the unemployment statistics. Such seemingly arbitrary action suggests that the methodology was established merely to maximize the number of hours worked, rather than to obtain a reasonably consistent approximation of the actual work year for a Washington, D.C. rod worker.

[37] 64 days per 100 full-time workers whereas during the same nine-year period the average number of days per 100 workers in the heavy construction field was of 123.7 workdays.

[38] This table breaks the construction industry into three categories: general building contractors, heavy construction contractors, and special trade contractors.

[39] The pension fund records are maintained for Local 201 and record the number of hours worked by individuals employed through the Local. In these records, the pension "year" begins July 1st of the calendar year through June 30th. Both the plaintiffs' and the defendants' experts did not indicate that the fact the pension year and calendar year did not correspond would have any impact upon their calculations of a yearly hour figure; therefore the Special Master will assume it has no such impact.

[40] 365 days excluding weekends.

[41] Mills thought the fact a union worker did not work any hours in a portion of the year, especially winter, may reflect a conscious choice not to do rod work. This was because many rod workers choose to work in other industries during the winter or to simply not work during that season. They may opt to hunt or spend time with their families (Tr. Apr. 20 at 18–19.) However, the significance of this fact in relation to Dr. Mills' calculation was not apparent.

[42] In other words, they are the ideal workers so to speak who are not affected to the same degree by the eight factors examined.

[43] (1415) (.40) + (855) (.60) = 1080.

[44] The journeymen in the Dr. Bloch's cohort group are listed at Tab 8 of Defendants' Exh. 1 (including their names, dates of admission to the union, race, hours worked in total, average hours worked over all years, and average hours worked during working years.)

[45] According to Dr. Bloch's analysis, the number of hours worked annually declined from 1973 to 1983 and then gained hours for the next two years. Bloch explained this trend by several theories. First, this fluctuation reflects the cyclical nature of the rod trade. In addition, as the injury rates for aging cohort increased, the total hours declined. Dr. Bloch's calculations can be found in Attachment B to this report.

[46] This report can be found in Defendants' Ex. 1, Tab 5.

[47] Preface to report by John J. McMahon, Executive Director of the Institute of the Ironworking Industry.

[48] *see, e.g.,* statistics compiled by the Ironworking Industry in its report entitled: "Approximation of manpower requirements to place reinforcing steel including general contractors, concrete subcontractors, and reinforcing steel subcontractors in metropolitan Washington, D.C. for the years 1972–1988." discussed *supra* part d. However, this report includes both union and non-union ironworkers and therefore is unreliable as a tool in recreating the number of hours worked solely by union rodmen, particularly in view of the phenomena of "double breasting" prevalent in this area beginning in the 1980s.

[49] In this report, hours worked by a "proxy" Local 201 member are compared against hours worked by the plaintiffs. The proxy is assumed to have worked the number of hours per year reflected in the above table, for benchmark earnings of a certain amount per year.

[50] In the 1980s many union contractors formed non-union shops so as to be more competitive when bidding on new construction jobs. This process created more construction employment opportunities for non-union workers to the detriment of union workers. Moreover, much of the cut and cover work earlier required by Metro construction was completed in the late 1970s. These two factors substantially reduced the amount of work available to union contractors.

[51] It appears that the defendants would like the best of both worlds. They would have the Special Master accept Dr. Bloch's testimony that there was but a limited amount of available work during the claim period for purposes of back pay while at the same time argue there was unlimited work available with regards to the mitigation issue.

[52] The order of reference as amended dictates that the interest rate to be applied is 6% per annum (*See* Order filed May 26, 1989) (Penn, J.).

[53] All references unless otherwise indicated are to the transcript of Mr. Allen's backpay hearing held November 29, 1990.

[54] References to transcript page numbers under page 12 refer to the transcript of Mr. Allen's backpay hearing continued on November 30, 1990, while triple digit transcript page numbers refer to the transcript of the first day of the hearing, November 29, 1990.

[55] All references unless otherwise indicated are to the transcript of Mr. Bellamy's back pay hearing held April 25, 1990.

56 These figures are derived from the Local 201 pension records, in A. Bellamy Exh. 2.

[57] transcript of April 17, 1990 hearing before Special Master. However, these figures were later motified as shown in the calculations attached to the plaintiffs' individual prepared findings. The Special Master has used the latter figures in determining the applicable hourly wage as set out in Attachment C.

[58] All references unless otherwise indicated are to the transcript of Mr. Bellamy's back pay hearing held July 10, 1990.

[59] Mr. Bellamy's proposed findings stated that his actual earnings during 1972, 1973 and 1974 were higher as reflected by his income tax returns and the Defendants assert in a footnote to their proposed findings that his earnings were higher. However, no other documents were offered in evidence other than his social security earnings history. Since this is the only evidence of record, the Special Master's findings with respect to back pay is based solely upon this record.

[60] Transcript of April 17, 1990 hearing before Special Master. However, those figures were later changed as shown in the calculations attached to the plaintiffs' individual findings. The Special Master has used the latter figures in determining the applicable hourly wage.

[61] No challenge to the examination was made in the merits trial of these proceedings. In fact, the Court of Appeals agreed that the lawfulness of the exam was never an issue, observing, that "it would be hard to imagine such an allegation since the pass rate on the exam is virtually 100 percent." *Berger v. Iron Workers,* 843 F.2d 1395, 1440 (D.C.Cir.1988).

[62] The benchmark hours for 1975 is 1447; one third of that sum is 482 hours at $1.83 per hour.

[63] Although Bellamy believes he did not receive a fair shake, neither the trial court nor the Court of Appeals concluded that the grading of the test or the manner in which it was administered was unlawful.

[64] All references unless otherwise indicated are to the transcript of Mr. Berger's back pay hearing held November 13, 1990.

[65] All references unless otherwise indicated are to the transcript of Mr. Berger's back pay hearing held October 31, 1990.

66 Alfonzia Berger's social security records indicate that his total earnings from Potomac Iron Works was $96.00 in 1974 (*See* Plaintiff Berger's Exh. 2.)

67 *See Berger, supra* at 1419.

68 *Id.* at 1421.

69 References to "T." unless otherwise indicated are to the transcript of Mr. Berger's back pay hearing beginning April 23, 1990. "PM T." denotes the transcript of the hearing's afternoon session.

70 There is no evidence of record of the date in February 1976 that Jessie Berger was admitted to membership, therefore, the Special Master concludes that date to be February 28. Consequently, 1/6 of the calendar year was used to calculate the net back pay loss. If the defendants had any evidence to the contrary, the order of reference at a minimum placed on them the burden producing it.

71 All references unless otherwise indicated are to the transcript of Mr. Boone's back pay hearing held April 25, 1990.

72 The plaintiffs proposed findings indicate interim 1976 earning of $8,895.00 or $21.00 plus in excess of those disclosed in the Social Security records.

73 All references unless otherwise indicated are to the transcript of Mr. Brown's back pay hearing held October 24, 1990.

74 Brown's counsel represented that Plaintiff's Exhibit 2, corroborates Brown's testimony that he was enrolled in a training program in 1985, however that still leaves a hiatus 9 years with no credible evidence of efforts to obtain Local 201 referrals.

75 All references unless otherwise indicated are to the transcript of Mr. Brown's back pay hearing held July 11, 1990.

76 The proxy journeyman would have earned $13,978.87 for this year or $3,494.72 a quarter.

77 Brown's social security records for 1978 are not broken down by quarters. *See* Plaintiff O. Brown's Exh. 1.

78 All references unless otherwise indicated are to the transcript of Mr. Brown's back pay hearing held October 24, 1990.

79 His social security records disclose that his annual earnings for all but one year through 1986 exceeds that of the proxy.

80 All reference unless otherwise indicated are to the transcript of Mr. Clark's pay hearing held July 11, 1990.

81 All references unless otherwise indicated are to the transcript of Mr. Dean's hearing held October 31, 1990.

82 Because of this finding, it is irrelevant that Dean was ineligible to join the apprenticeship program because he did not have a high school diploma.

83 All references unless otherwise indicated are to the transcript of Mr. Dickie's backpay hearing held November 1, 1990.

84 The Special Master believes that Mr. Dickie's memory is understandably faulty and that the social security record better reflect the specifics of Mr. Dickie's work history than does Mr. Dickie's testimony (*See* T. 11, 12, 17, naming American Structures as his post-Marbro employment.)

85 All references to transcript "T [1]" are of the hearing held on October 25, 1990. Whereas references to transcript "T.[2]" are to the hearing held October 26, 1990.

86 Francis never *applied* at that time, that is, he never filled out an application. He went to the training program site and was referred back to the hiring hall. (T.[1] 10.)

87 The training program as a condition precedent to membership was determined by the courts to have been a racially discriminatory impediment designed to preclude experienced black ironworkers such as this claimant from admission to full membership.

88 The social security records for some years show self-employment income which Silburn Francis testified came from Sunday collections received from his church congregation (T.[1] 1937.) Since the services which he performed were furnished on Sundays and did not preclude him from seeking and performing rodwork, this income has not been considered in determining the net back pay award.

89 All references unless otherwise indicated are to the transcript of Mr. Harmon's backpay hearing held November 5, 1990.

90 Harmon admits that he never had full membership in the Houston local because he had not completed payment of his initiation fee (T. 28.) Harmon does not claim to have presented any evidence to Local 201 that he had satisfactorily completed the training program. On cross examination, it was developed that Local 84 in Houston is a mixed local, i.e., the members do either rod work or ornamental work (T. 61.) There is no evidence before the Special Master which type of training Harmon received. Moreover, the failure to honor a transfer of membership or recognize training by another local is not a cognizable harm for purposes of this report.

91 All references unless otherwise indicated are to the transcript of Mr. Hicks' backpay hearing held October 24, 1990.

92 It is hard to imagine how anyone with that much experience could not pass a basic entrance examination for union membership, if the examinations were fairly given and graded. However, the administration and grading of the open exam is not at issue in these proceedings. It is ironic that after over 4200 hours of experience, Hicks was competent to be referred out to union contractors, yet still unable to pass the open exam.

93 $11,068 for three quarters of a year based on annual earnings of $1,4756.89 (1627 hours at $9.07 per hour).

94 All references unless otherwise indicated are to the transcript of Mr. Hudnall's backpay hearing held November 5, 1990.

95 All references unless otherwise indicated are to the transcript of Mr. Jackson's back pay hearing held October 25, 1990.

96 All references unless otherwise indicated are to Mr. Jackson's back pay hearing held October 26, 1990.

97 All references unless otherwise indicated are to the transcript of Mr. Jackson's back pay hearing held July 11, 1993.

98 All references unless otherwise indicated are to the transcript of Mr. James' backpay hearing held November 6, 1990.

99 All references unless otherwise indicated are to the transcript of Mr. Johnson's backpay hearing held October 26, 1990.

100 Johnson testified that he first tried in 1970 or 71. His certification form says he first tried in 1972.

101 Johnson does not seek compensatory damages (*See* T. 90.)

102 Based on 428 hours or one quarter of the annual hours at $8.17 per hour for 78% of the quarter—October 21 to December 31.

103 All references unless otherwise indicated are to the transcript of Kirkland's back pay hearing held April 24, 1990.

104 All references unless otherwise indicated are to the transcript of Mr. Lewis' back pay hearings held July 10, 1990.

105 Lewis' testimony reflects that a hand injury in 1975 kept him from working for either 6 to 8 weeks (T. 147) or 10 to 13 weeks (T. 185.) He later testified that he really does not know how long he was unemployed following the hand injury (T. 210.)

106 All references unless otherwise indicated are to the transcript of Mr. McGee's back pay hearing held November 6, 1990.

107 Although his social security records credit him with earnings of $580.00 for the last quarter of 1973, (Plaintiff McGee's Exh. 3), that sum does not represent McGee's total earnings for the quarter but rather the maximum amount subject to social security tax.

108 All references unless otherwise indicated are to the transcript of Mr. Montgomery's back pay hearing held October 30, 1990.

109 July 1, 1967 to June 30, 1970.

110 Although the transcript shows the date of 1976, that true date is 1986. The full context of his testimony on both direct and cross examination shows the true date to be 1986. The Special Master's notes taken contemporaneously with the oral testimony also reflect the back pay claim period to conclude April 1986.

111 All references unless otherwise indicated are to the transcript of Mr. Offer's back pay hearing held October 30, 1990.

112 The claimant seems to use the two terms interchangeably. Although the defendants contend that he was ineligible for admission to

the apprenticeship program because of his age (48 yrs.), Offer's testimony was that he wanted to join the union even if he was required to undergo training.

113 The proxy's 1972 work expectancy (1711 hours) yields 334 hours for 71 days (428 hours in a quarter divided by 91 days in the quarter equals 4.70 hours a day, multiplied by 71 days equals 334 hours in 71 days. At the 1972 wage rate of $8.17 an hour, the proxy's earnings for this 71 day period amounts to $2,727.00.

114 All references unless otherwise indicated are to the transcript of Mr. Parks' back pay hearing held October 30, 1990.

115 All references unless otherwise indicated are to the transcript of Mr. Parrish's backpay hearing held November 7, 1994.

116 All reference unless otherwise indicated are to this transcript of Mr. Posey's hearing held November 8, 1990.

117 Posey testified that his employment with Blake Construction lasted until 1977. However, the pension records and social security records show that employment ended by June 30, 1976.

118 The application was filed for the purpose of obtaining admission to the training program not to demonstrate experience in order to establish class eligibility in these proceedings.

119 All transcript references are to the hearing held on November 9, 1990.

120 All transcript references are to the hearing held November 9, 1990, unless otherwise noted.

121 These transcript references are to the Augusta Jackson hearing held on October 26, 1990, two weeks before Sims' hearing.

122 All references unless otherwise indicated are to the transcript of Mr. Thomas' back pay hearing held November 13, 1990.

123 Thomas concedes that he first started with M.J. Byorick about 1967 and remained steadily employed for nine years (T. 43.)

124 All references unless otherwise indicated are to the transcript of Mr. Tucker's back pay hearing on April 25, 1990.

125 There are 71 days in a claim period from October 21 to the end of 1972. Based on the proxy's 1972 work expectancy for the year 1972 (1711 hours), 71 days out of the 91 day quarter represents 334 hours (71 divided by 91 x 428 hours in the full quarter), which at $8.17 per hour amounts to $2,727.00.

126 Wahib Steel merely reported $13,200.00, the maximum earnings subject to FICA taxes in 1974.

127 Tucker said in his deposition that he was disabled for about 1 year—up until July 1977, (T. 103, 104, 108), however, the VA records do not reflect such a lengthy disability. Moreover, his social security records show limited earnings in the first half of 1977, which indicate that he sought employment prior to July 1977.

128 All transcript references unless otherwise indicated are to Mr. Williams' back pay hearing held on November 16, 1990.

129 The transcript erroneously states 1957.

130 Williams' social security records show that for the first 9 months of 1969, he was employed by George A. Fuller Company and for the remaining 3 months by Head Construction Company, followed by M.J. Byorick, Inc. in 1970.

131 1447 hours at $9.78 per hour times .75 equals $10,614.