

**International Brotherhood of Teamsters Local Union  
No. 657 (Texia Productions, Inc.) and Victor De  
La Fuente.** Case 16–CB–6348

March 27, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

On November 1, 2005, Administrative Law Judge George Carson II issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.<sup>1</sup> The General Counsel filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

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

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt

<sup>1</sup> The Charging Party filed a letter stating that he adopts and joins in the General Counsel's answering brief.

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

In adopting the judge's findings concerning the backpay amount owing to discriminatee Victor De La Fuente, we correct the following inadvertent error. During the second quarter of 2004, De La Fuente was unavailable for work for 4 days due to illness. Finding that no adjustment had been made to the backpay calculation to account for this period of unavailability, the judge determined that the backpay amount should be reduced \$702.31. The General Counsel excepts, stating that the compliance specification already took into account this period of unavailability; and the Respondent agrees with the General Counsel's exception. We accordingly correct the judge's backpay calculation by adding \$702.31 to De La Fuente's back wages.

Our dissenting colleague would find that the Board should add an additional \$40.49 for meal and per diem payments and \$40.49 for pension fund contributions that were subtracted by the judge for the same 4-day period of unavailability. The General Counsel excepted, however, only to the \$702.31 reduction in back wages for this period. Although the Board may, in its discretion, address remedial matters even in the absence of exceptions, we find it would not be appropriate to venture beyond the scope of the General Counsel's exceptions and arguments here. The Respondent has agreed to the General Counsel's narrow exception, and the Charging Party has not objected to this agreement. In these circumstances, we would not revive the dispute by injecting new matters.

Member Schaumber concurs with his colleagues' finding that the \$702.31 should be added to De La Fuente's back wages, and finds that the Board should also add \$40.49 for meal and per diem payments and \$40.49 in pension fund contributions that the judge similarly and erroneously deducted based on De La Fuente's unavailability during the second quarter of 2004. Although the General Counsel does not spe-

the recommended Order as modified<sup>3</sup> and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, International Brotherhood of Teamsters Local Union No. 657, San Antonio, Texas, its officers, agents, and representatives, shall make whole the employee named below by paying him the total backpay amount set forth below, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws. The Respondent shall also remit to the pension fund the total contribution amount set forth below, plus additional amounts, if any, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

NET BACKPAY

Victor De La Fuente	\$ 73,376.51
Meals/Per Diem	4,945.95
Medical Expenses	<u>1,692.25</u>
<b>TOTAL BACKPAY</b>	<b>\$ 80,014.71</b>

CONTRIBUTION OWED

Pension Fund Contribution	<u>\$ 3,835.52</u>
<b>TOTAL CONTRIBUTION</b>	<b>3,835.52</b>
<b>TOTAL AMOUNT DUE:</b>	<b>\$ 83,850.23</b>

*Linda C. Reeder, Esq.*, for the General Counsel.  
*G. William Baab, Esq.*, for the Respondent.  
*Ricardo E. Calderon, Esq.*, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. I heard this case in San Antonio, Texas, on September 7, 2005. In the underlying unfair labor practice case, the Board, on July 29, 2004, found that Teamsters Local 657 (the Union or the Respondent), discriminatorily removed Charging Party Victor De La Fuente from its motion picture craft-referral list and ordered, inter alia, that he be made whole for any loss of earnings and other benefits. *Teamsters Local 657 (Texia Productions, Inc.)*, 342 NLRB 637 (2004). The Respondent waived its right to contest the Board's Order. A controversy having arisen regarding the backpay due, the Regional Director for Region 16, on March

cifically include these payments in his exceptions, they are based on the same error to which the General Counsel excepts and are necessary to fully correct that error.

<sup>3</sup> In addition to the correction made in fn. 2, we also correct a mathematical error in the compliance specification. App. C of the compliance specification shows that the total wages owed to De La Fuente for the third quarter of 2004 are \$6,566.42. When this number was carried over to a later appendix, it was mistakenly transcribed as \$6,556.42. Therefore, we will add \$10 to De La Fuente's back wages.

30, 2005, issued a compliance specification that set out the backpay and benefits due to the Charging Party. The amount of backpay and benefits was thereafter revised twice. The operative compliance specification is the third amended compliance specification that issued on August 15, 2005. Insofar as no substantive change was made in that pleading, only a revision of figures, the parties agreed that the Respondent's answer to the second amended compliance specification would constitute its answer to the third amended compliance specification.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. BACKGROUND

Charging Party Victor De La Fuente was formerly the secretary-treasurer and a business agent of the Union. In late 1994, a new president, Richard Glasebrook, was elected, and De La Fuente was defeated as secretary-treasurer by Frank Perkins, who later became president of the Union. Glasebrook dismissed De La Fuente as business agent but, in a conciliatory gesture, placed him on the Union's motion picture craft-referral list, referred to as the A-list. *Teamsters Local 657 (Texia Productions, Inc.)*, 342 NLRB at 642. Thereafter, as more films began to be produced in Texas, De La Fuente, who possessed a class B chauffeur's license, received an increasing number of referrals to work as a driver on various productions. Despite this, De La Fuente spoke out at union meetings "protesting that the work was 'not being distributed in a fair and equal basis.'" Id. at 643. At a union meeting in early December 2002, De La Fuente protested the hiring of drivers not referred by the Union and told President Frank Perkins to "get off your dead ass and go do the job." On December 18, 2002, Perkins wrote De La Fuente advising that his name had been removed from the movie craft-referral list, the A-list. The Board found that De La Fuente's protected activity of criticizing a union officer and otherwise engaging in dissident union activity was a motivating factor in his removal from the A-list and "that the Respondent's proffered explanation for its conduct was pretextual." Id. at 637 fn. 1. The Board ordered that De La Fuente be reinstated to the craft-referral list and made whole. The Respondent restored De La Fuente's name to the A-list on September 1, 2004. The Respondent disagrees with the backpay and benefits determined by the Region to be due to De La Fuente.

Prior to beginning a movie production, the production companies enter into agreements that assure they will have the personnel necessary, including set construction personnel, camera crews, etc. Insofar as relevant herein, the production companies enter into agreements with the Union to provide drivers for the rolling stock necessary for the production, "anything with wheels, the camera truck, wardrobe trailer, production van, grip truck, hair/make-up trailer, [and] various star trailers." Typically, the agreement provides that the production company can request up to 10 percent of the drivers needed for a specific show by name and that it has the right to reject any employee referred. Id. at 641. The production companies hire transportation managers or transportation coordinators, the terms are interchangeable, to hire and oversee the drivers. Many of these

individuals began their association with the companies as drivers, progressing to the position of captain or co-captain, and ultimately to the position of transportation Manager or coordinator. Many have maintained their union membership.

The compliance specification computes the backpay due to De La Fuente on the basis of the average hours worked by individuals employed as class B drivers in each quarter of the backpay period. Emily Maas, the compliance officer for Region 16 when the compliance specification was prepared, explained that the decision to use averages for the backpay computation was made in order to "even out the discrepancies between the drivers who worked a lot and the drivers who did not, because the nature of the referral system being what it is, it's hard to predict exactly which productions Mr. De La Fuente would have been employed on."

The Respondent did not plead an alternative backpay formula, but objected to the inclusion of certain individuals who served as captains or cocaptains as comparable drivers. Compliance Officer Maas, who informed the Union of the drivers that she was using in the computation, testified that when employees such as Janice Knox and Jesus Tellez worked as captains or cocaptains, those hours were not included in the computation. She acknowledged that a single employee obviously could not be working on two movies at the same time. The Respondent introduced the 2002 income tax return of De La Fuente which reflects average earnings of about \$8500 per quarter. In its brief, the Respondent points out that Compliance Officer Maas admitted that she did not compare the 2002 income of comparable drivers with that of De La Fuente and argues that the compliance specification did not, therefore, "assure that the 'comparable drivers' were, as a group, representative of Charging Party's movie industry employability and earning capacity." The Respondent did not offer the income tax return of De La Fuente for any year prior to 2002 nor did it establish that other comparable drivers earned significantly more than De La Fuente in 2002 by presenting their 2002 income tax returns in support of the foregoing argument.

The Respondent's answer pleads that De La Fuente's earnings "would have been less than otherwise comparable Class B drivers because representatives of the production companies . . . would not have employed or agreed to accept the referral of De La Fuente. . . ." Unlike the situation in *Iron Workers Local 601 (Papco, Inc.)*, 307 NLRB 843 (1992), cited in the Respondent's brief, there is no evidence that any production company rejected De La Fuente. No representative of any production company testified. In support of the contention that De La Fuente would not have been hired, the Respondent presented three transportation managers who were employed by the production companies to hire and oversee the drivers on specific productions. Each of the transportation Managers who testified is a union member. All asserted that, even if De La Fuente had continued to be properly referred from the motion picture craft-referral list, they would not have hired him for the productions upon which they had been employed. As hereinafter discussed, I reject the Respondent's contention. In considering the testimony of the transportation Managers, I am mindful that, prior to his being discriminatorily removed from the A-list, no transportation manager had refused to hire De La Fuente. Counsel

for the General Counsel points out that, in the initial proceeding, President Frank Perkins testified, "I have never seen a coordinator reject a member."

Counsel for the General Counsel further points out that, if the transportation managers, statutory supervisors of the production companies, actually had refused to hire De La Fuente after proper referral because of his dissident union activities, that action would have violated the Act. I agree. Although "dissident internal union activities" are not "classic 'union activities'" in support of a union, such activities constitute union activity protected by the Act. *Nationsway Transport Service*, 327 NLRB 1033, 1034 (1999). An employer is liable for the actions of its own supervisors, even if the supervisors are "acting on behalf of the Union as well as the Employer." *North Carolina Shipping Assn.*, 326 NLRB 280 fn. 1, 286 (1998).

Although De La Fuente's name was removed from the A-list, he continued to register for work with the Union. His name was placed upon the general referral list. On various occasions when the A-list was exhausted or additional employees were needed for work at conventions, he was referred by the Union and worked. The Respondent Union, consistent with Board precedent set out in *Tualatin Electric*, 331 NLRB 36 (2000), makes no claim that De La Fuente failed to mitigate his damages by continuing to seek work through referral by the Union.

## II. FACTS

During De La Fuente's backpay period, from December 18, 2002, until September 1, 2004, the Union referred employees to 12 different film productions, identified by their working titles, which in some instances, such as *The Alamo*, is the same as the name of the final movie. In December 2002, the production of *Avery Pix* concluded. *Avery Pix* was the working title for the movie that bore the title *Secondhand Lions* when it was released. De La Fuente worked as a driver on that movie. In mid-December, when that production ended, he and several other drivers gathered in the office of Transportation Manager Phil Schriber, who offered the drivers a beer, thanked them for doing a good job on the show, and stated that they should complete their Christmas shopping "pretty quick" because, when filming began on *The Alamo*, "we were going to go straight to *The Alamo*, because they were going to need more drivers than we had on our roster." De La Fuente recalled that other drivers who were present included "Frank" (Francisco) De La Fuente and Jesus Tellez. Rolando DeHoya, although not at the meeting, also worked on *Secondhand Lions*.

De La Fuente was removed from the craft-referral list on December 18, 2002. He was not referred to *The Alamo*. In this proceeding, Counsel for the Respondent asked Schriber, "Did you promise or tell Mr. De La Fuente at any time that he would be employed on *The Alamo*?" Schriber answered, "No sir." Schriber did not deny that, upon the conclusion of *Secondhand Lions*, he informed the group of drivers present in his office, which included De La Fuente, that they had done a good job and "were going to go straight to *The Alamo*." I credit De La Fuente.

Transportation Manager Schriber testified that he would not have hired De La Fuente to work on any of the four films upon

which he served as transportation Manager during the backpay period. The four films were *The Alamo*, *Cheer Up*, *Jack & Bobby*, and *3001*. Schriber testified that the reason he would not have hired De La Fuente was because of "refusing duties, grandstanding, taking workers away from [sic] their job." When questioned on cross-examination regarding the foregoing, Schriber testified that cocaptain Janice Knox reported to him in November 2002, when working on *Secondhand Lions*, that De La Fuente had refused to haul trash. Knox did not testify. De La Fuente explained that he had protested the assignment since he had already hooked up his trailer, preparing to move it to another location, but that he unhooked the trailer and made the trash run as Knox requested. I find that Schriber ascribed no significance to Knox's report in that he could not remember whether he even spoke with De La Fuente regarding the report, and he admitted that no discipline was issued. Regarding grandstanding, Schriber testified that in 2001, when working on *The Life of David Gale*, he had observed De La Fuente addressing a group of five other drivers, and that such conduct "doesn't look good" to the producers. Schriber acknowledged that drivers have free time when waiting for assignments. He did not testify that he spoke with De La Fuente about the incident, and he hired him to work on *A Land Called Texas* and *Secondhand Lions* after the incident. In the initial proceeding in this case, Schriber testified that De La Fuente had threatened him at a union meeting in January 2003. Thereafter, at that hearing, when it was established that De La Fuente would not have been at such a meeting after being removed from the craft-referral list in December 2002, Schriber testified that it "was much prior to that."

After being placed upon the movie craft-referral list in late 1994 or early 1995, De La Fuente had consistently raised questions when he felt that either the Union or production companies were not acting properly. In 1996, when working on *Home Fries*, he requested a copy of the contract from Transportation Coordinator Phil Schriber because he believed the employees should be receiving per diem since they were working more than 50 miles from the union hall. He questioned Schriber and union officer Frank Perkins about this, and they informed him that, notwithstanding the contract, "we're not paying those benefits." De La Fuente and employee Joe Gallion were dismissed from that movie after engaging in a fight.

Notwithstanding the physical altercation in 1996, in 1997, Transportation Coordinator Schriber hired De La Fuente to work on *Varsity Blues*. In 2000, De La Fuente worked on *Miss Congeniality* and *The New Guy*. Schriber was transportation coordinator on both. As already noted, in 2001, De La Fuente worked on *The Life of David Gale* and in 2002, he worked on *A Land Called Texas* and *Secondhand Lions*. Schriber served as transportation coordinator on all three. When working on *The Life of David Gale*, De La Fuente protested not being reimbursed for a meal that he purchased when performing work away from the set.

Upon cross-examination, after Schriber ascribed his hiring of De La Fuente as giving him a second chance, counsel for the General Counsel pointed out that he had given him a third and fourth chance. Schriber answered, "Everybody deserves—well you know, I guess I'm stupid." Contrary to that answer, I find

that Schriber, himself a union member, refused to permit personal disagreements with a fellow craft employee affect his hiring decisions. I do not credit his testimony that he is stupid or that he would have refused to hire De La Fuente if he had remained on the A-list. Transportation Manager Schriber would have, as the record reflects he did from 1995 through 2002, nondiscriminatorily hired De La Fuente upon proper referral.

Transportation Manager Cecil Evans acknowledged that De La Fuente had never worked on a production upon which he served as transportation manager, but asserted that he would not have hired him because his "liabilities exceed his assets." I was unimpressed by the foregoing characterization which Evans repeated and which appeared to have been memorized. Evans was transportation coordinator for *Spy Kids III* and *Sin City* that were filmed during the backpay period. Evans asserted that De La Fuente was referred to work on *Spy Kids III* and that he rejected him. I do not credit that testimony. Neither the movie craft-referral list, the general referral list, or any document reflecting such referral was placed into evidence. There is no evidence that the A-list was exhausted, thereby necessitating referral of employees from the general referral list. Furthermore, Evans testified that the same 12 drivers worked on both *Spy Kids III* and *Sin City*. He acknowledged that his only personal knowledge relating to De La Fuente came from his attendance at union meetings in which De la Fuente did "everything in his power to make the president of our local look bad" including "telling the members how the Union is screwing them and how the various motion picture companies are screwing them, and how he can solve their problem." I do not credit Evans testimony that he would not have hired De La Fuente if he had been referred. I am satisfied that Evans, when employed as a transportation manager and hiring agent, would not have subjected the production company for which he was working to liability by discriminating against De La Fuente because of his dissident union activity and criticism of a union officer.

Greg Faucett, who was transportation manager on *The Ringer* and *The Wendell Baker Story*, testified that he would not have hired De La Fuente because of the fight in which he was involved when working on *Home Fries* in 1996, now 9 years ago, and one occasion, the date of which he could not specify, in which he observed that De La Fuente "crisscrossed several rows of chairs after somebody" at a union meeting. Faucett acknowledged that he had hired the other participant in the fight that occurred during the filming of *Home Fries*, Joe Gallion, but testified that he did so because the production company department head requested Gallion in a letter. Although Faucett asserted that he had the letter with him in his vehicle, the Respondent did not seek to introduce it. There is no evidence that any representative of the production companies that produced *The Ringer* and *The Wendell Baker Story* either stated or wrote that De La Fuente, who was never referred because he had been removed from the A-list, should not be hired. Faucett did not testify to any occasion upon which he had ever refused to hire an employee who had been properly referred from the A-list, and I do not credit his testimony that he would have refused to hire De La Fuente. Even if I were to assume that

Faucett would not have hired him, there was sufficient work for employees on the A-list when *The Ringer* and *Wendell Baker* were being filmed including *Cheer Up*, for which Schriber was the transportation manager, and *Friday Night Lights*, the transportation manager for which did not testify.

### III. BACKPAY

#### A. Wages

The backpay period herein begins on December 18, 2002, and ends on September 1, 2004. The Respondent argues that there is no backpay due in the fourth quarter of 2002, the period from December 18 through December 31, 2002. I agree. Work on *Secondhand Lions*, shown on the exhibits under its working title as *Avery Pix*, was concluded. Although some drivers were paid in late December, De La Fuente, who received a payment after December 18, testified that the work was done when the drivers with whom he worked gathered with Schriber in mid-December. It was at that gathering that Schriber advised them to be ready to go to work on *The Alamo*. There is no evidence establishing that De La Fuente would have been hired for pre-production work on *The Alamo*. Similarly situated employees, Francisco De La Fuente, Jesus Tellez, and Rolando DeHoya did not begin work on *The Alamo* until January.

In the backpay period, as reflected in General Counsel's Exhibit 2, employee Francisco De La Fuente worked on *The Alamo* for almost 6 months in 2003, and then worked for 5 months on *Cheer Up*. In 2004, he worked on *3001* for about 3 months. He worked a total of 2831.3 hours, 1912 regular hours and 919.3 overtime hours, 32 percent of the total. There is no evidence as to whether he ever refused overtime work.

Employee Rolando DeHoya worked on *Secondhand Lions* as confirmed by payment for 40 hours for the pay period ending December 21, 2002. Thereafter, in 2003, he worked for 6 months on *The Alamo* and 4 months on *Cheer Up*. In 2004, he worked on *Friday Night Lights* from February through April, for 2 weeks on *Scanner Darkly* in June, and again on *Friday Night Lights* in August. Employee DeHoya worked 2939.7 hours, 1976 regular hours and 963.7 overtime hours, 32.8 percent of the total. There is no evidence as to whether he ever refused overtime work.

Employee Jesus Tellez worked on *The Alamo* for 6 months in 2003, but did not work on *Cheer Up*. The next time Tellez is shown as working is in late December 2004, when he worked 40 regular hours and 10 overtime hours on *Friday Night Lights* earning a total of \$1,254.55. In January 2004, Tellez continued to work on *Friday Night Lights* until late April. In the last week of April and first week of May 2004, he worked for 2 weeks on *3001*. Victor De La Fuente was assigned from the general referral list to work on *\$5.15/Hour* in the fourth quarter of 2003 and earned \$3,606.51. For De La Fuente to be referred, the A-list would have to have been exhausted. Since Tellez was not referred to *\$5.15/Hour*, it would appear that he was working as a captain or cocaptain with those higher earnings excluded from the compliance specification, that he did not seek referral in the fourth quarter of 2003 until late December, or that he refused a referral. In the fourth quarter of 2003, Tellez worked 2693 hours, 1720 regular hours and 973.3 overtime hours, 36.1 percent of the total, as a class B driver. Fran-

ciso De La Fuente and DeHoya each worked more than 600 hours in the fourth quarter of 2003, the average being a total of 643.75 of which 476 were regular hours and 167.75 were overtime. If Tellez had worked those average hours as a class B driver rather than the 50 total hours he actually worked as a class B driver, his total would be 3286.75, 2155.75 regular hours and 1131 overtime hours.

The formula plead in the compliance specification reasonably and fairly projects the number of hours that De La Fuente would have worked. The foregoing summary of the employment of three similarly situated employees who worked on *The Alamo* after *Secondhand Lions*, just as Transportation Manager Schriber said they would, confirms the validity of the backpay formula employed by Compliance Officer Maas. The compliance specification reflects an average total of 3068.8 hours for class B drivers, 1,942.7 regular hours and 1126.1 overtime hours, 36.7 percent of the total hours worked. If backpay were to be calculated upon the employment of specific employees, it would need to take into account whether the employees ever refused overtime as well as the reason for the absence of earnings in any specific quarter. Thus, if Tellez had worked the average hours worked by Francisco De La Fuente and DeHoya rather than the 50 total hours he actually worked as a class B driver in the fourth quarter of 2003, his total hours would be 3286.75 of which 1131 would have been overtime hours. Both figures exceed the average computed in the compliance specification. The foregoing extrapolation confirms the reasonableness of the calculations reflected in the compliance specification based upon the average employment of all class B drivers, omitting earnings when serving as a captain or co-captain, in achieving the objective of “even[ing] out discrepancies between the drivers who worked a lot and the drivers who did not” stated by Compliance Officer Maas.

The gross backpay formula using the average number of hours worked by similarly situated class B drivers in each quarter, disregarding earnings when the drivers were not paid as class B drivers and without regard to whether the drivers sought overtime or referral, is an appropriate method for determining the hours that discriminatee Victor De La Fuente would have worked absent the discrimination against him. The Respondent’s brief sets out an alternative backpay computation based upon the earnings of three of the employees included in the averages utilized in the specification. Employee Cliff Hunt worked on *The Alamo* in early January but had no earnings as a class B driver from that production after January 10, 2003, when other drivers were working full weeks with overtime. The record does not show whether he became a captain or co-captain. Employee Allene Schriber had no earnings as a class B driver in the third and fourth quarters of 2003. Employee Alan Themer, who the Respondent’s answer denies was a class B driver, had no earnings as a class B driver in either the first or second quarters of 2003. Regarding Themer, Maas testified that the only “earnings of his that I used were when he was working as a class B driver.” De La Fuente would, consistent with Schriber’s December comments, have worked on *The Alamo*. There is no evidence establishing in what capacity, if any, the foregoing three employees were working in quarters in which they had no earnings as class B drivers. If they were

working as captains or cocaptains, that employment would not reduce the average number of hours of available employment for class B drivers. I find that the backpay formula of quarterly averages actually worked by employees when employed as class B drivers, untainted by extrapolation, is reasonable and that it appropriately projects the average number of hours that De La Fuente would have worked. See *Performance Friction Corp.*, 335 NLRB 1117 (2001).

The compliance specification acknowledges that De La Fuente was unavailable for work due to illness from June 20 through 24, 2004; however, no adjustment was made in that regard. I find that an appropriate adjustment is required. A 13-week quarter, with a regular workweek of 40 hours, yields 520 hours. June 20 was a Sunday, thus, De La Fuente was unavailable for 32 hours, 6.15 percent of the regular total hours available. His backpay for the second quarter should be reduced by 6.15 percent with a concomitant reduction in overtime. The foregoing results in a deduction of \$702.31 from the backpay for the second quarter of 2004.

Consistent with the foregoing findings and the calculations reflected on appendix E to the third amended compliance specification, deleting backpay liability in the amount of \$379.84 for the fourth quarter of 2002, and reducing the amount of backpay due for the second quarter of 2004, I find that the Respondent is liable for wages totaling \$72,664.20, which includes regular hours, overtime hours, and holiday pay.

#### B. Meals/Per Diem

The Respondent argues that the compliance specification’s inclusion of meals/per diem loss would reimburse De La Fuente for an expense that he did not incur. Testimony establishes that these employees regularly ate from the catering trucks that made food available for cast and crew. One of the confrontations between De La Fuente and Schriber was over reimbursement for a meal when De La Fuente had been sent off of the set. There is no evidence that employees paid for food from the catering trucks. Even if they did, the meal reimbursement was unrelated to actual cost. When a meal allowance was included in the contract between the Union and production company, the employee need not present any receipts. As De La Fuente testified, “You just get it.” “[A]utomatically paid emoluments of employment are properly deemed to be a part of gross backpay.” *Ryder System*, 302 NLRB 608 fn. 2 (1991). I find the Respondent Union liable for meal and per diem payments to Victor De La Fuente based upon the calculations set out in the compliance specification less \$40.49, 6.15 percent of the amount calculated for the second quarter of 2004. There was no liability for meal payments in the fourth quarter of 2002. Therefore, the total liability is \$4,945.95.

#### C. Pension Fund Contributions

At the hearing, counsel for the Respondent acknowledged that “[e]mployment under a contract will generate a benefit in the form of payment to a pension fund.” I find the Respondent liable for pension payments on behalf of Victor De La Fuente based upon the calculations set out in the compliance specification less the contribution for the fourth quarter of 2002, in the amount of \$28 and less \$40.49, 6.15 percent of the contribution

calculated for the second quarter of 2004. The total is \$3,835.52.

*D. Health and Welfare Fund Contributions  
(Medical Expenses)*

The compliance specification sets out the Respondent's liability to the union health and welfare fund for a contribution commensurate with De La Fuente's projected earnings. The Respondent acknowledges its liability for De La Fuente's out of pocket medical expenses, established by documentary evidence, but argues that any liability to the fund is punitive. De La Fuente made no claim for benefits to the union health and welfare fund when he received medical treatment because he believed, due to his limited employment, that he would not be eligible. The General Counsel presented no evidence contradicting De La Fuente's understanding that his eligibility was

dependent upon his current contributions, nor did counsel introduce any documents establishing the requirements for eligibility for fund benefits or the amount of benefits for which the fund, on behalf of De La Fuente, should have been liable. Insofar as a limited number of drivers were employed on each movie production, employment of De La Fuente would have simply substituted him for the individual on whose behalf the payments to the fund were being made. There is no evidence of any loss to the health and welfare fund, against which De La Fuente made no claim. The fund is not mentioned in the Order. I agree with the Respondent and find that its obligation is to make De La Fuente whole and that this will be accomplished by payment to him of the expenses established in the record, \$1,692.25.

[Recommended Order omitted from publication.]