UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JOHN T. JONES CONSTRUCTION CO., INC.

and

Cases: 17-CA-22607
17-CA-22614
17-CA-22708

CARPENTERS' DISTRICT COUNCIL
OF KANSAS CITY & VICINITY, affiliated with
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

Stanley D. Williams, Atty., Counsel for the General Counsel,
Region 17, Overland Park, Kansas
Donald W. Jones, Atty., Hulston, Jones, & Marsh, Counsel for Respondent,
Springfield, Missouri
Michael Stapp, Atty., Blake & Uhlig, Charging Party, Kansas City, Kansas

DECISION

Statement of the Case

LANA H. PARKE, Administrative Law Judge. The National Labor Relations Board (the Board) issued an unpublished Order in the above-captioned matter dated December 16, 2004, which directed that John T. Jones Construction Co., Inc. (Respondent) take certain affirmative action, including making Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King (respectively, Mr. Estenson, Mr. Reynolds, Mr. Hammons, and Mr. King) whole for any loss of earnings and other benefits suffered as a result of unlawful discrimination against them.

A controversy having arisen over the amount of backpay and benefit compensation due under the terms of the Board's Order, the Regional Director of Region 17 of the Board issued a compliance specification and notice of hearing on December 15, 2005.[1]

I heard this matter in Springfield, Missouri on March 1 and 2, 2006. All parties submitted post-hearing briefs.

[1] The General Counsel twice amended the specification at the hearing, altering the alleged backpay figures for each discriminatee, the accuracy of which Respondent denied. At the hearing, Respondent moved to strike the pleadings, contending that Mr. Hammons, Mr. Estenson, and Mr. King had forfeited their right to a make-whole remedy by giving perjured testimony in April 2005 at a post-election hearing on objections and challenges. I denied the motion.

Issues

1. Whether the backpay periods calculated by the General Counsel for each discriminatee are appropriate.
2. Whether the General Counsel appropriately utilized a comparable employee analysis in determining the number of hours discriminatees would have worked during the backpay period.
3. Whether the General Counsel's backpay and benefit computations are appropriate.
4. Whether Respondent sustained its burden of showing that any discriminatee failed to mitigate backpay by making a reasonable search for interim employment.
5. Whether Respondent sustained its burden of showing that any discriminatee concealed interim earnings.

Findings and Conclusions

I. The Board's Order

The Board's unpublished Order directed that Respondent effect the recommended Order of Administrative Law Judge (the judge), Margaret G. Brakebusch, in her Decision (JD(ATL)-50-04) dated September 24, 2004, which states in pertinent part:

> Take the following affirmative action necessary to effectuate the policies of the Act:
>
> (a) Within 14 days from the date of this Order, offer Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.
> (b) Make Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King whole for any loss of earnings and any other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

The Order further adopted the judge's remedy that compensation to Mr. Estenson, Mr. Reynolds, Mr. Hammons, and Mr. King be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

II. The General Counsel's Backpay Calculations

Based upon its review of Respondent's payroll records following the Board's Order, Region 17 determined that the wages and hours of comparable employees best approximated the compensation each discriminatee would have received had Respondent not unlawfully fired him.[2] In designating comparable employees, the Region selected individuals less senior than the respective discriminatee who performed the same work during the relevant time period. The Region also queried the discriminatees as to efforts to secure work following termination and work performed during the relevant backpay period along with attendant expenses. Based on the discriminatees' responses, the Region calculated net interim earnings (gross interim

[2] Robert A. Fetsch, Region 17 Compliance Officer, testified at the hearing regarding the calculations detailed herein.

earnings less expenses). Utilizing the pay rates and hours worked of the comparable employees, less the net interim earnings of the discriminatees, the Region calculated the compensable amounts due each discriminatee as detailed below.

A. Brian Estenson

At the time of his termination, October 31, 2003, Respondent employed Mr. Estenson as a carpenter on the Southwest Wastewater Treatment Project in Springfield, Missouri (SWWTP), a prevailing wage job.[3] Respondent paid Mr. Estenson $18.33/hour plus, in compliance with the prevailing wage requirement, $6.65/hour in lieu of fringe benefits. Respondent unlawfully terminated Mr. Estenson on October 31, 2003. The General Counsel fixes Mr. Estenson's make-whole period from date of termination to June 5, 2004, when, by the Region's analysis, representative hours for Mr. Estenson on SWWTP ended.

The General Counsel computed Mr. Estenson's gross back pay for the make-whole period based on the allegedly comparable earnings of the following carpenters employed by Respondent during the make-whole period as indicated by their respective pay periods:

Ricky Johnston	11/08/03 – 02/14/04
Bruce Wales	02/21/04 – 03/13/04[4]
Dallas Black	05/01/04 – 06/05/04[5]

The General Counsel computed Mr. Estenson's net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings[6] from his calendar quarter gross backpay, arriving at the following figures:

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
IV/03	$4,339.65	$1,429.77	$5,905.75	$1,068.00	$14.60	$1,053.40	$4,852.325
I/04	6,786.49	2, 367.45	9,153.94	6,468.00	60.00	6,408.00	2,745.94
II/04	3,918.05	1,416.46	5,334.51	0.00	135.00	0.00	5,334.51

TOTAL NET BACKPAY: $12,932.80

[3] A "prevailing wage" job is one funded by public monies for which the contracting governmental agency requires that employees working on the project be paid the area standard or "prevailing" wages. The parties stipulated that prevailing wages in Greene County, where Springfield is situated, are the rate of the relevant union contract wage and benefit package minus the industry advancement fund. Here, Respondent treated the prevailing-wage monies it paid employees as taxable wages, and the Region included them in its gross-wage computation for each discriminatee.

[4] Formerly employed by Respondent as a journeyman carpenter, David Wales worked as a foreman carpenter at a wage rate of $19.33/hr during the relevant period. Based on its conclusion that foreman carpenter was a standard progression for Respondent's journeyman carpenters, the Region utilized Mr. Wales' $19.33/hr wage rate as Mr. Estenson's backpay benchmark during the applicable period.

[5] The Region did not credit Mr. Estenson with any back pay during the gap reflected between the employment of David Wales and Dallas Black, as no comparable employee existed during that period of time.

[6] Net interim earnings are interim earnings less interim expenses.

Following his discharge, Mr. Estenson placed his name on the union employment call list, registered with the Missouri employment office, and visited various construction jobsites seeking employment. His listed expenses reflect, for each respective quarter, his estimated job search transportation costs of 40 miles at $.365 per mile; and 160 and 360 miles at $.375 per mile. Mr. Estenson secured the following employment for the following dates: 12/15/03 to 03/07/04, Good Labor, Inc.

B. Ryan Reynolds

At the time of his termination, February 2, 2004, Respondent employed Mr. Reynolds as a laborer on SWWTP. Respondent paid Mr. Reynolds $14.53/hour plus, in compliance with the prevailing wage requirement, $6.35/hour in lieu of fringe benefits. Respondent unlawfully terminated Mr. Reynolds on February 2, 2004. The General Counsel fixes Mr. Reynolds' make-whole period from date of termination to August 6, 2004, the approximate date he started law school.

The General Counsel computed Mr. Reynolds' gross back pay for the make-whole period based on the allegedly comparable earnings of the following laborer employed by Respondent during the make-whole period as indicated:

Daniel Shane Landers 02/07/04 – 08/14/04

Prior to his discharge, Mr. Reynolds worked fewer than 40 hours in all weeks but two. Daniel Landers worked 19% more hours during Mr. Reynolds' make-whole period than Mr. Reynolds worked during his pre-termination work period. Mr. Guida testified that Mr. Reynolds' reduced work hours were due to his having called in sick "quite a bit" and having taken discretionary time off for school.

The General Counsel computed Mr. Reynolds' net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings from his calendar quarter gross backpay, arriving at the following figures:

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
I/04	$4,207.37	$1,806.25	$6,013.62	$3,059.88	$0.00	$3,059.88	$2,953.74
II/04	7,703.82	3,215.68	10,919.50	9,064.96	845.00	8,219.96	2,699.54
III/04[7]	4,718.91	1,807.55	6,526.46	6,251.58	1,077.63	5,173.95	1,352.51

TOTAL NET BACKPAY: $7,005.79

Following his discharge, Mr. Reynolds secured the following employment for the approximate following dates:

02/20/04 to 03/27/04	Artisan Construction	Springfield
04/18/04 to 06/04/04	HBC	Springfield
06/09/04 to 06/30/04	Bender Construction	St. Louis

[7] The date of this quarter reads as corrected at the hearing.

Reynolds' listed expenses reflect the following: travel costs connected with his job search in St. Louis, relocation to St. Louis upon obtaining work, uniform costs during employment with Bender Construction, during the third quarter 2004, commuting costs from St. Louis to Mr. Reynolds' job with Bender Construction in O'Fallon, Missouri beyond commuting costs engendered during Mr. Reynolds' employment with Respondent, and costs of carpentry tools purchased during employment with Bender Construction.[8]

C. Sterling Jason Hammons

At the time of his termination, February 13, 2004, Respondent employed Mr. Hammons as a carpenter on SWWTP. Respondent paid Mr. Hammons $18.33/hour plus, in compliance with the prevailing wage requirement, $6.65/hour in lieu of fringe benefits. Respondent unlawfully terminated Mr. Hammons on February 13, 2004. The General Counsel fixes Mr. Hammons' make-whole period from date of termination to about August 21, 2004 when, by the Region's analysis, representative hours for Mr. Hammons on SWWTP ended.

The General Counsel computed Mr. Hammons' gross back pay for the make-whole period based on the allegedly comparable earnings of the following carpenters employed by Respondent during the make-whole period as indicated:

Jim Michels	02/21/04 – 05/29/04
David Mobley	06/05/04 – 08/21/04

The General Counsel computed Mr. Hammons' net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings from his calendar quarter gross backpay, arriving at the following figures:

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
I/04	$2,217.21	$ 788.06	$3,005.27	$ 0.00	$ 0.00	$ 0.00	$3,005.27
II/04	7,689.49	2,773.10	10,462.59	7,798.35	0.00	7,798.35	2,664.24
III/04	4,303.20	1,596.23	5,899.43	6,876.34	0.00	6,876.34	0.00

TOTAL NET BACKPAY: $5,669.51

Following his discharge, Mr. Hammons registered for work on the Union's employment call list and visited various jobsites two-three times a week seeking work. On May 11, 2004, he obtained employment with Benchmark Construction, a union contractor that made benefit payments into the appropriate union trust funds.

C. Bob King

Mr. King began working for Respondent on December 16, 2002. Respondent laid Mr. King off on February 13, 2003 and rehired him on March 23, 2003. On July 31, 2003, Respondent listed Mr. King as a voluntary quit upon his incarceration. Thereafter Respondent rehired Mr. King on September 11, 2003, and he continued working for Respondent until his

[8] According to Mr. Reynolds, he expended $300 for a plumb laser, a shark saw, a screw gun, and miscellaneous hand tools, which enabled him to be a competitive worker and which he has thereafter utilized in his own construction company. I accept Mr. Reynolds' testimony regarding the extent and use of his equipment purchases.

unlawful termination on March 30, 2004. At the time of his termination, Respondent employed Mr. King as a carpenter on SWWTP. Respondent paid Mr. King $18.33/hour plus, in compliance with the prevailing wage requirement, $6.65/hour in lieu of fringe benefits. Respondent unlawfully terminated Mr. King on March 30, 2004. The General Counsel fixes Mr. King's make-whole period from date of termination to January 18, 2005 when Mr. King returned to work for Respondent. Thereafter, Mr. King voluntarily terminated him employment with Respondent on February 11, 2005.

The General Counsel computed Mr. King's gross back pay for the make-whole period based on the allegedly comparable earnings of the following carpenters employed by Respondent during the make-whole period as indicated:

James Moody	04/03/04 – 08/21/04
David Mobley	08/28/04 – 01/15/05

The General Counsel computed Mr. King's net backpay for the make-whole period by subtracting his alleged calendar quarter net interim earnings from his calendar quarter gross backpay, arriving at the following figures:

Quarter	Gross Backpay	Prevailing Wages	Total Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
II/04	$ 9,641.74	$3,202.00	$12,843.74	$6,721.80	$ 7.50	$ 6,714.30	$6,129.44
III/04	8,569.67	2,978.75	11,548.42	9,843.25	0.00	9,843.25	1,705.17
IV/04	8,030.20	2,917.94	10,948.14	9,116.40	67.50	9,048.90	1,899.24
I/05	1,535.17	548.64	2,083.81	262.40	0.00	262.40	1,821.41

TOTAL NET BACKPAY: $11,555.26

Following his discharge, Mr. King secured the following employment for the approximate following dates:

04/14/04 to 04/30/04	Travis Meyers	
05/10/04 to 10/30/04	J.C. Industries	Springfield
11/12/04 to 12/23/04	Donco	

Mr. King's listed expenses reflect personal vehicle costs incurred while seeking interim employment.

III. Discussion

A. Legal Principles

The general principles in determining backpay are well-established: the General Counsel's must show the gross backpay due each claimant, i. e., the amount the employees would have received but for the employer's illegal conduct. Any backpay computation formula that closely approximates the amount due, if it is not unreasonable or arbitrary in the circumstances, is acceptable. *Midwestern Personnel Services,* 346 NLRB No. 58 (2006); *Performance Friction Corporation,* 335 NLRB 1117 (2001); *Reliable Electric Company,* 330 NLRB 714, 723 (2000) (citations omitted.) The comparable or representative approach to determining backpay is an accepted methodology. *Performance Friction Corporation* at 1117.

The burden is on Respondent to establish any affirmative defenses that would mitigate its liability, including the amount of interim earnings to be deducted from the backpay amount due, and any claim of willful loss of earnings. *Midwestern Personnel Services* at slip op. 2.

Further, the Board has stated,

> [R]emedial questions implicate two statutory principles that must be applied. The first principle is that the remedy should restore the status that would have obtained if Respondent had committed no unfair labor practice. The second principle is that any uncertainty and ambiguity regarding the status that would have obtained without the unlawful conduct must be resolved against the Respondent, the wrongdoer who is responsible for the existence of the uncertainty and ambiguity [citations omitted]. *Campbell Electric Co., Inc.,* 340 NLRB 825, 826 (2003).

B. Respondent's Affirmative Defenses

Respondent raises a number of affirmative defenses to the General Counsel's backpay calculations. Respondent asserts that the prevailing wage rate for employees on the SWWTP job was calculated so as to bringing nonunion employees' compensation into sync with wage and benefit rates paid for union-covered employment. That being the case, Respondent argues, if interim earnings resulted from employment under a union contract that provided for fringe benefits, the comparable monetary worth of such benefits must be added to the interim earnings. To do otherwise, Respondent contends, would result in a windfall to the discriminatee. Counsel for the General Counsel asserts that the Board will recognize the offset of interim benefits only against equivalent benefits provided by Respondent, which benefits do not exist here.[9] Counsel for the General Counsel's argument is supported by *Tualatin Electric,* 331 NLRB 36 (1997). In pertinent part of that case, as in the present, certain of the employer's wages reflected rates required on prevailing wage jobs and representing compensation in lieu of benefits. The Board affirmed without comment the Administrative Law Judge's conclusion that interim employer fringe benefit payments are not an appropriate offset to gross wages. Accordingly, I reject Respondent's argument.

Respondent also contends that all interim earnings in a given quarter must be deducted from backpay owed in that quarter even if the earnings occurred after the backpay obligation ended. Specifically, Respondent argues that although the make-whole period for Mr. Estenson ended on June 5, 2004, the wages he received from June 2004 employment after that date must be deducted from net backpay for the second quarter of 2004. Respondent similarly argues that although the make-whole period for Mr. Hammons ended on August 21, 2004, his wages from employers other than Respondent earned through September 2004 should offset backpay during that quarter. Under established Board procedure, discriminatees are entitled to backpay for the period between unlawful discrimination and a valid offer of reinstatement. See NLRB Casehandling Manual (Part 3) Compliance Proceedings Sec. 10530.2 (defining backpay period as "beginning when the unlawful action took place and ending when a valid offer of reinstatement is made") and Sec. 10542.2 ("Earnings During Periods Excepted from Gross Backpay Not Deductible"). Respondent has offered no authority to support its argument that an interim earnings offset must continue beyond the end of the backpay period, and it may be

[9]As Counsel for the General Counsel points out, fundamental differences exist between payment of wages, which are immediately and unrestrictedly available to an employee, and payments into benefit programs, the proceeds of which depend on the potentially uncertain fulfillment of specific, prerequisite conditions.

inferred from *Painters Local 419 (Spoon Tile Co.),* 117 NLRB 1596 (1957)[10] that the Board would not endorse such a position. In *Spoon Tile Co.,* the Board stated that its "practice is that during a period when no gross earnings are attributable to a discriminatee…no deductions are made either for interim earnings or willful loss during this same time." Id at 1598. Accordingly, I reject Respondent's argument.

To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Midwestern Personnel Services, Inc.,* supra at slip op. 2 (2006). It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. Ibid. Respondent maintains that the discriminatees did not make a genuine effort to find interim employment following their discharges. In support of this position, Respondent presented testimony from Roger Guida (Mr. Guida), Respondent's project manager at SWWTP, who opined that during the relevant make-whole period herein, a good qualified carpenter in the Springfield area should be able to find employment in no more than two or three weeks. As to laborers, in Mr. Guida's opinion, anybody that wanted to find work could do so. Mr. Guida's testimony was based solely on his general observations of company hiring efforts and applicant responses at SWWTP. In spite of his assertion that employment for qualified carpenters abounded in the area, Mr. Guida agreed that Respondent was able to amass a pool of applications from which it could select hirees and that it was never strapped for labor, which suggests that the supply of construction workers well exceeded the demand. As Mr. Guida's opinion is based on imprecise and even vague factors and as Respondent's admitted surplus of applicants tends to contradict his opinion, it has little probative value. See *Midwestern Personnel Services, Inc.,* at slip op. 3.

Respondent contends that monies the discriminatees received from the Union should be counted as interim earnings and deducted from gross backpay. The Board has held that money received from a union should be deducted where the amounts received constitute wages or earnings resulting from interim employment, but unearned income and collateral benefits are not interim earnings. *United Enviro Systems,* 314 NLRB 1130, 1131 (1994). The burden of proving that monetary amounts are wages rather than collateral benefits is on Respondent,[11] which burden Respondent has not met herein.

Respondent objects to the General Counsel's use of more than one representative employee in calculating backpay for Mr. Estenson, Mr. Hammons, and Mr. King. Respondent argues that the General Counsel is restricted to using one single employee per discriminatee as a comparable employee. In selecting comparable employees for backpay analysis purposes, Compliance Officer Fetsch considered that, but for Respondent's discrimination, Mr. Estenson, Mr. Hammons, and Mr. King would have been available to perform hours worked by any less senior carpenters, even though the less senior carpenters may have varied. The General

[10] Enforced *National Labor Rel. Bd. v. Brotherhood of Painters*, 242 F.2d 477 (10th Cir. 1957).

[11] *Rice Lake Creamery,* 151 NLRB 1113, 1131, enfd. As modified, 365 F.2d 888 (D.C. Cir. 1966).

Counsel's approach was reasonable, particularly in the context of the construction industry, where one single comparator would be unlikely to cover the entire backpay period.[12]

Citing *Aneco, Inc. v. NLRB,* 285 F.3d 326 (4th Cir. 2002), Respondent further argues that the General Counsel abuses his discretion by presuming that Mr. Estenson, Mr. Reynolds, and Mr. Hammons, who were union organizer applicants ("salts") would have worked more than a short period of time had they been offered reinstatement earlier than they were. The Fourth Circuit set no such axiom. Rather the court found the employer in *Aneco* presented specific evidence to rebut any presumption that the discriminatee therein would have completed an uninterrupted five-year employment period but for the employer's discrimination, an evidentiary burden that the Board clearly requires. See *Diamond Walnut*, supra at 1132-1133, wherein the Board noted its decision in *Aneco, Inc.,* 333 NLRB 691 (2001) requiring the respondent to "present 'specific evidence' of factors that would have led to the discriminatee's departure from work." Id at 1132–1133. Here, Respondent presented no specific factors to show that any discriminatee would not have continued his employment with Respondent during the assigned backpay period, had he not been unlawfully terminated. Accordingly, I reject this argument.

Respondent also argues that in calculating backpay the General Counsel did not follow the Board's Casehandling Manual (Compliance) in a number of instances. While compliance with casehandling manual provisions is the better practice, strict adherence is not a legal mandate. Moreover, Respondent has not shown that the General Counsel failed substantially to follow the compliance manual's guidelines. Accordingly, I reject Respondent's arguments in this regard.

Respondent requests that the General Counsel be ordered to give Respondent a full explanation of any interest computations with full documentation of computerized or other calculations. Respondent has neither made cogent argument nor pointed out miscalculation that permits identification of specific issues related to interest calculations. Therefore, I decline to order the General Counsel to provide documentation of interest calculations beyond its customary and discretional practices.

C. Brian Estenson

As to Mr. Estenson's calculated backpay, Respondent argues that the General Counsel inappropriately utilized Bruce Wales as a comparable employee for the period of February 21 to March 13, 2004, during which period Mr. Wales worked as a carpenter foreman at a rate $1.00 higher than carpenter journeyman wages. Respondent did not refute the General Counsel's conclusion that the position of foreman carpenter was a standard progression for Respondent's journeyman carpenters but asserted that Mr. Estenson would likely have declined any nonunit position such as carpenter foreman where he would "have no vote or voice in a union election case." So speculative an objection does not justify eliminating Mr. Wales as a comparable employee, and the calculation stands.

[12] As Senator Humphrey, reporting from the Committee on Labor and Public Welfare (S. Rep. No. 1509, 82nd Cong. 2d Sess. (1952) pointed out, the building and construction industry is characterized by casual, intermittent, and often seasonal employer/employee relationships on separate projects. The Board also recognized that the construction industry is one "where workers change employers from day to day or week to week." *James Luterbach Construction Co., Inc.*, 315 NLRB 976, 983 (1994).

Respondent argues that the approximately six-week gap between the employment of comparators Bruce Wales and Dallas Black demonstrates the unreliability and inappropriateness of their use as comparators. It is true that during that period of time, no carpenter less senior to Mr. Estenson was on Respondent's payroll. Resuming backpay liability for Mr. Estenson when Dallas Black was hired requires an hypothesis that Mr. Estenson could have been recalled to employment at SWWTP at that time. While such a premise may be refutable, it is not unreasonable, and as the courts and the Board have generally indicated, the backpay claimant receives the benefit of any doubt. See *Midwestern Personnel Services, Inc.*, supra; *United Aircraft Corp.,* 204 NLRB 1068, (1973). Respondent further argues that any interim earnings that accrue during such hiatus periods must be applied against backpay assessed during that same quarter. Respondent has not provided authority for its position, and, as stated earlier, the Board's practice is that "during a period when no gross earnings are attributable to a discriminatee…no deductions are made either for interim earnings or willful loss during this same time." *Spoon Tile Co*, supra at 1598. Accordingly, I reject Respondent's argument.

Respondent also argues that Mr. Estenson concealed earnings during the fourth quarter of 2004 from the Carpenters Union and SDS. No evidence supports Respondent's assertion, and I disregard it.

D. Ryan Reynolds

Prior to his discharge, Mr. Reynolds worked fewer than 40 hours in all weeks but two. Daniel Landers, whom the General Counsel designated as a comparable employee, worked 19% more hours during Mr. Reynolds' make-whole period than Mr. Reynolds worked during his pre-termination work period. Respondent contends that Mr. Reynolds' work record demonstrates he would have worked only 81% of the work hours available during the make-whole period and that, therefore, his gross back pay figure should be decreased by 19%. Mr. Guida testified that Mr. Reynold's reduced work hours were due to his having called in sick "quite a bit" and having taken discretionary time off for school.

Counsel for the General Counsel does not dispute that Mr. Reynolds logged comparatively fewer work hours than Daniel Landers. Counsel argues, however, that the record does not contain sufficient evidence to show whether Mr. Reynolds' 19% work attenuation was based on discretional work ethic or persistent personal circumstances rather than on ad hoc factors, including work availability. If Mr. Reynolds' lower work hours were the result of his work ethic or persistent personal circumstances, it is reasonable to infer that those circumstances would continue throughout the backpay period with a consequent work pattern of fewer hours than the norm. In that case, it would be fair to reduce his backpay by 19%. If, on the other hand, Mr. Reynolds' lower work hours resulted from transient, situational factors or even jobsite work unavailability, it is reasonable to assume that he would have worked hours similar to those worked by a comparably situated employee. On the instant record, the evidence isn't clear one way or the other. Mr. Guida's testimony, unsupported by documentary evidence, was not persuasive, and, in any event, does not answer the question of whether the alleged factors (illness and school attendance) would have persisted through the backpay period. The Board applies a general rule that Respondent, as the wrongdoer, must establish any facts to negate or mitigate its backpay liability,[13] and, as stated above, uncertainties in evidence are to be

[13] V*elocity Express, Inc.,* 342 NLRB No. 87, slip op. 3 (2004); *Aneco, Inc.,* 333 NLRB 691 (2001), enf. Denied 285 F.3d 326 (4th Cir. 2002).

resolved against the wrongdoer. Accordingly, I resolve this particular uncertainty against Respondent and find Daniel Landers to be an appropriate comparable employee for backpay calculation purposes.

Respondent argues, essentially, that Mr. Reynolds willfully failed to look for interim employment because he did not seek work as a laborer, the job he had with Respondent. Willful loss of earnings is one of the affirmative defenses Respondent must prove to mitigate its liability. Discriminatees are not limited to seeking employment in their prior employment sphere in order to demonstrate good faith efforts to mitigate damages. The Board has found a discriminatee who started his own business, albeit unsuccessfully, and learned a new skilled trade, albeit without finding work in it, nonetheless demonstrated a good faith effort. *Weldun International, Inc.,* 340 NLRB 666 (2003). Respondent has not, therefore, met its burden of showing that Mr. Reynolds failed to make reasonable efforts to find interim employment. Respondent further objects to the expenses claimed by Mr. Reynolds as excessive but again has failed to show, other than by simple assertion, that the expenses were excessive or unnecessary to Mr. Reynolds' mitigation of damages. Respondent also contends that Mr. Reynolds claim for expenses should be rejected as it is uncorroborated by documentary evidence and as the equipment that forms a portion of the expenses remain in Mr. Reynolds' possession as undepreciated assets. The Board neither requires corroboration for expenses nor considers whether equipment purchased as attendant aids to interim employment may have outlived the interim employment. See *Coronet Foods, Inc.,* 322 NLRB 837 and fn 4 (1997), enfd. in part 158 F.3d 782 (4th Cir. 1998). Therefore, I reject Respondent's defenses in these regards.[14]

E. Sterling Jason Hammons

As to Mr. Hammons' backpay, Respondent again argues that the General Counsel is restricted to using one single employee as a comparable employee. For the reasons set forth above regarding computations for Mr. Estenson, I reject this argument. Relying on Mr. Guida's testimony of the relevant labor market, Respondent also argues that Mr. Hammons "has not shown sufficient evidence that he has diligently sought work as a carpenter and has not met his duty to mitigate his backpay…" Respondent misstates the burden of proof as to mitigation of backpay, which burden falls on Respondent. See *Midwestern Personnel Services, Inc.,* and cases cited therein, supra, slip op. 2 ("It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work."). Moreover, as stated above, I have discounted Mr. Guida's opinion of the area labor market during the backpay periods relevant to the discriminatees. Accordingly, I reject this argument, as well.

Respondent also argues that Mr. Hammons failed to make sufficient effort to mitigate his backpay claim, as his only reported effort to obtain other work was to register at the union referral hall. Respondent's assertion in this regard apparently overlooks Mr. Hammons' hearing testimony. Although Mr. Hammons agreed that he noted only "registered for work at union hall" in the job search information portion of the backpay questionnaire he completed for the regional office, he testified that he also submitted applications to all the large union contractors in the

[14] As to Respondent's contention that Mr. Reynolds committed perjury in an unrelated matter, which precludes backpay, I denied Respondent's motion to introduce allegedly supportive evidence. The proffered evidence was too tangential and too unlikely to demonstrate perjury to be probative to the instant issues.

area and investigated work opportunities at various jobsites.[15] As tribute to his efforts, the evidence shows Mr. Hammons had significant interim earnings in two of the three quarters comprising his backpay period. In these circumstances, Respondent has failed to show that Mr. Hammons did not search for work with reasonable diligence.

F. Bob King

Respondent essentially argues that Mr. King's spotty work history and his post-reinstatement voluntary quit demonstrate a disinterest in the job that either significantly reduces Respondent's backpay liability or curtails it altogether.[16] Mr. King began working for Respondent on December 16, 2002. During Mr. King's 2003 employment, he experienced two gaps in employment: an involuntary layoff from February 13 to March 23, and an absence from July 31, to September 11, consequent on his incarceration. Mr. King worked for Respondent without further hiatus from September 11, 2003 until his unlawful termination on March 30, 2004. After Respondent reinstated Mr. King on January 18, 2005, he worked until February 11, 2005, whereupon he voluntarily terminated his employment.

Respondent unlawfully discharged Mr. King, which entitled him to reinstatement and backpay; Respondent's valid offer of reinstatement to Mr. King tolled the backpay. Those legal realities are in no way impacted by Mr. King's pre-termination work history with Respondent or his post-reinstatement voluntary termination. The question of whether Mr. King may have had gaps in interim employment during which Respondent should not be responsible for backpay may be ascertained without reference to Mr. King's work record with Respondent. In fact, Mr. King secured interim employment within two weeks of his unlawful termination and seriatim employment thereafter with only such brief intervals as might reasonably be expected to accompany job searches. Respondent has presented no evidence that Mr. King did not put forth an honest, good faith effort to find or to retain interim work. *Diamond Walnut Growers, Inc.,* 340 NLRB 1129 (2003), relied on by Respondent, is inapposite. In *Diamond,* evidence showed that whenever the employer would have offered a particular job to the discriminatee, he would have resigned after six weeks. In the instant matter, Respondent has presented no evidence to justify an inference that Mr. King would have resigned employment within four weeks of any offer of reinstatement. The mere fact of Mr. King's having quit four weeks after his 2005 reinstatement does not provide the necessary evidence.

Conclusion

General Counsel has met his burden of proving gross backpay as to each of the discriminatees, herein, and Respondent has not met its burden of proving any affirmative defenses. I find the General Counsel's calculations to be fair, reasonable, and accurate approximations of the earnings the discriminatees would have enjoyed had they not been unlawfully terminated. See *weldun International, Inc.*, 340 NLRB 666 (2003).

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[15] Even assuming Mr. Hammons' primary effort to obtain interim employment was limited to registration at the union hall, such does not show lack of diligence. See *Midwestern Personnel Services, Inc.,* supra at slip op. 4, citing *Tualatin Electric, Inc.,* supra (obligation to mitigate met when discriminatees follow normal pattern of seeking employment through union hiring hall).

[16] Citing transcript pages 354-358, Respondent's post-hearing brief asserts that Mr. Guida testified Mr. King worked less than 40-hour weeks for Respondent because of illness or other unavailability. Transcript pages 354-358, however, reflect Mr. Guida's testimony regarding Mr. Reynolds, not Mr. King.

I recommend that Respondent, John T. Jones Construction Co., Inc., be ordered to pay the following amounts to the employees listed below plus interest[17] accrued to the date of payment:

Brian Estenson	$12,932.80
Ryan Reynolds	$ 7,005.79
Sterling Jason Hammons	$ 5,669.51
Bob King	$11,555.26

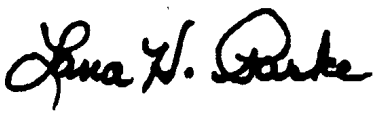
SUPPLEMENTAL ORDER

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following Supplemental Order: [18]

IT IS HEREBY ORDERED that Respondent, John T. Jones Construction Co., Inc., its officers, agents, successors and assigns, shall forthwith make whole the following individuals by paying each of them, respectively, the sum set forth, plus interest and minus tax withholdings, if any, required by Federal and state laws:

Brian Estenson	$12,932.80
Ryan Reynolds	$ 7,005.79
Sterling Jason Hammons	$ 5,669.51
Bob King	$11,555.26

Dated: Washington, D.C., June 8, 2006.



Lana H. Parke
Administrative Law Judge

[17] See *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Supplemental Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.