

No. 08-3318

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

**CARPENTERS DISTRICT COUNCIL OF KANSAS CITY
& VICINITY LOCAL NO. 311 & 978**

Intervenor

v.

JOHN T. JONES CONSTRUCTION CO., INC.

Respondent/Cross-Petitioner

**ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION
FOR REVIEW OF A SUPPLEMENTAL ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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SUMMARY AND ORAL ARGUMENT STATEMENT

The Board reasonably determined the amount of backpay owed to Brian Estenson, Sterling Hammons, Ryan Reynolds, and Bob King for loss of earnings suffered because the Company unlawfully discharged them. On review, the Company has failed to meet its heavy burden of proving a reduction in backpay, and the Court should therefore enforce the Board's order in full. Moreover, because this case involves the application of settled principles of law to well-supported findings of fact, the Board submits that oral argument is unnecessary. Should the Court desire oral argument, 10 minutes per side should suffice for the parties to present their views.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court upon the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of John T. Jones

Construction Co., Inc. (“the Company”), to review, a Board order. The Carpenters District Council of Kansas City & Vicinity Local No. 311 & 978 (“the Union”) has intervened on the Board’s behalf. The Board’s Supplemental Decision and Order issued on August 19, 2008, and is reported at 352 NLRB 1063. (Add. 1-2.)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. §§ 151, 160(a). The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b) and the underlying unfair labor practices occurred in the state of Missouri, where the Company operates. (Add 1, n.4.)²

¹ “Add.” refers to an addendum attached to the back of the Board’s brief that contains the Board’s Supplemental Decision and Order. “A” references are to Volumes I and II of the Appendix filed by the Company. “Tr” references are to the transcript of the hearing before the administrative law judge, which is reproduced in Volume III of the Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

The Board filed its application for enforcement on October 6, 2008, and the Company filed its cross-petition for review on October 13, 2008. Both were timely filed, as the Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

The Board has broad remedial discretion in ordering backpay to unlawfully discharged employees and calculating the amount of backpay owed. Here, the Board reasonably awarded backpay to four discharged employees for loss of earnings suffered as a result of the Company's unlawful actions against them. Therefore, the issue before the Court is whether the Board acted within its remedial discretion in ordering the Company to pay backpay.

Woodline Motor Freight, Inc. v. NLRB, 972 F.2d 222 (8th Cir. 1992);

Arlington Hotel Co. v. NLRB, 876 F.2d 678 (8th Cir. 1989);

Tualatin Electric Inc., 331 NLRB 36 (2000), *enforced*, 253 F.3d 714 (D.C. Cir 2001)

STATEMENT OF THE CASE

This supplemental case arose from an unfair labor practice charge filed by the Union against the Company. In the underlying unfair labor practice proceeding, the Board found that the Company violated the Act by unlawfully discharging Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King because of their union affiliation. (A 11-60.) In the Board's supplemental

order now under review, the Board calculated the backpay owing to the discriminatees. (Add. 1-9.)

I. The Underlying Unfair Labor Practice Proceedings

The Company, with headquarters in Fargo, North Dakota, is engaged in the construction of heavy concrete projects and wastewater treatment facilities in various Midwestern states, including the Southwest Wastewater Treatment Plant (“SWWTP”) project in Springfield, Missouri, where the four discriminatees worked. (A 17-18.) In the underlying unfair labor practice proceeding, the Board found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging the four discriminatees because of their union affiliation. (A 16-60.) The Board ordered the Company to reinstate them to their former jobs and to make them whole for any loss of earnings and other benefits resulting from the Company’s discrimination, less any net interim earnings. (A 53-55.)

II. The Instant Compliance Proceeding

As the parties were unable to resolve their differences over the amount of backpay owed to the four discriminatees, the Regional Director for Region 17—the representative of the Board’s General Counsel—issued a compliance specification, which he later amended, detailing the amounts owed. (Add 1; A 101-10). The General Counsel’s investigation showed that the backpay period for Estenson

began on October 31, 2003, when he was unlawfully discharged, and ended on June 5, 2004, when representative hours for him as a carpenter on the SWWTP project ended.³ (Add. 3; Tr 28, A 102). Similarly, with respect to Hammons, his backpay period started with his unlawful discharge on February 13, 2004, and ended on August 21, 2004, when his representative hours ended. (Add. 4; Tr 86, A 104.) Concerning Reynolds, his backpay period began with his unlawful discharge on February 2, 2004, and ended on August 16, 2004, the approximate date he started law school. (Add. 3; Tr 71, A 103.) As for King, his backpay period began with his unlawful discharge on March 30, 2004, and ended on January 18, 2005, when the Company offered him reinstatement. (Add. 4-5; Tr 96-97, A 105.)

To calculate gross backpay, the compliance specification utilized a formula that relied on the wages and hours of comparable employees—that is, less senior workers who performed jobs that were similar to the discriminatees'. (Add. 3; Tr 23, A 101-10.) The General Counsel multiplied the comparable employees' wage rates by the hours they worked during the relevant backpay periods. (Add. 3; A 102-06.) Next, the General Counsel added the supplemental wages, termed

³ Estenson's backpay cut off as of the pay period ending June 5, 2004, even though the SWWTP project was ongoing, because there were no other comparators employed by the Company. (Tr 26-27.)

prevailing wage payments,⁴ to arrive at the total amount of gross backpay. (Tr 39-40.) From these gross backpay figures, the General Counsel subtracted the discriminatees' interim earnings to determine their net backpay. (Add. 3; Tr 39-40, 57-59.)

Thereafter, an administrative law judge conducted a compliance hearing on disputed issues, as the Company contended that the formula was inaccurate and the backpay amounts were incorrect. (Tr 1-241.) The Company asserted a number of defenses at the hearing, most of which the Company no longer presses on review. The administrative law judge rejected each of the Company's defenses and issued a supplemental decision and recommended order based on the methodology and calculations used in the compliance specification. (Add. 2-9.) The order required the Company to pay Estenson \$12,932.80, Hammons \$5,669.51, Reynolds \$7,005.79, and King \$11,555.26, plus interest. (Add. 9.)

III. The Board's Supplemental Decision and Order

On June 4, 2007, the Board issued a Supplemental Decision and Order affirming the administrative law judge's findings. (A 618-27.) On November 29,

⁴ The prevailing wage payment was an additional amount the Company was required to pay its employees in lieu of benefits, in addition to the prevailing hourly wage rate for their particular job classification as determined by the State of Missouri. (Tr 30, 38-40.) As explained *infra*, the General Counsel treated this supplement as a wage that the Company paid to its employees.

2007, however, the Board issued an unpublished Order vacating its earlier ruling to the extent it dealt with issues affected by *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007).⁵ (A 694.) After considering the Company's exceptions to the administrative law judge's decision and order, along with the parties' supplemental briefs regarding *Oil Capitol Sheet Metal*, the Board (Chairman Schaumber and Member Liebman) issued its Supplemental Decision and Order on August 19, 2008. (Add. 1-9.) The Board affirmed the judge's supplemental decision and adopted her order regarding the amount of backpay owed to Estenson, Hammons, Reynolds, and King. (Add. 2.) The Board specifically rejected the Company's argument under *Oil Capitol Sheet Metal*, which the Company (Br 44 n.8) has abandoned on review, and found that even assuming the discriminatees were salts, the backpay period would not be shortened as it was reasonable given the circumstances. (Add. 1-2.)

SUMMARY OF ARGUMENT

⁵ *Oil Capitol Sheet Metal* overruled the application of an indefinite backpay period presumption for discriminatees that were found to be union salts. 349 NLRB 1348, 1349. A union salt is a union member who seeks employment with nonunion employers for the purpose of organizing their employees. *Id.* at 1348, n.5.

In the underlying unfair labor practice case, the Board found that the Company unlawfully terminated Estenson, Hammons, Reynolds, and King, and directed the Company to reinstate them and make them whole for any loss of earnings. Thereafter, in this compliance proceeding, the Board applied well-settled principles to determine the amount of backpay owed to them. The Board used the wages and hours of comparable employees to compute the discriminatees' gross backpay. Thereafter, the Board subtracted the discriminatees' interim earnings to determine the net amount of backpay owed to them, and appropriately ended their backpay periods based on their individual circumstances. The Board's findings regarding the backpay amounts partake of nuanced decision-making that depends on its special expertise, and are entitled to great weight.

The Company failed to meet its heavy burden of proving a reduction in backpay and willful losses of earnings when the backpay case was before the Board. Before this Court, the Company has abandoned most of its challenges and instead raises only a few limited contentions, which the Board properly rejected.

First, the Company contends that the Board erred in including overtime worked by comparable employees and in selecting certain comparators for Reynolds, King and Estenson because they worked in different pay classifications for a fraction of the backpay period. The Board's backpay formula and

calculations, however, are only intended to approximate the total damages caused by the Company's unlawful behavior. The Company failed to show that but for the discriminatees' unlawful discharges, they would not have worked overtime or been promoted to higher classifications.

Next, the Company contends that the Board incorrectly failed to offset fringe benefit contributions made to various funds by interim employers on the discriminatees' behalf against the gross backpay owed by the Company. Under settled Board policy, however, fringe benefits paid by interim employers may only offset equivalent benefits paid by the wrongdoing employer. Here, it is undisputed that although some of the discriminatees' interim employers made fringe benefit contributions to various health, welfare, and pension trust funds, the Company did not make any such contributions; rather, it directly gave employees a cash wage supplement in lieu of benefits. Contrary to the Company's claim, simply referring to a portion of the discriminatees' wages as "wages in lieu of benefits" does not make them equivalent in nature to actual fringe benefit contributions.

Accordingly, the Board reasonably declined to treat the interim employers' fringe benefit contributions to the funds on the discriminatees' behalf as an offset against the Company's gross backpay liability.

Finally, the Company contends that the Board should have shortened the backpay periods for Reynolds and King. The Company argues that the Board

should have ended Reynolds' backpay period 3 months earlier, in June 2004, when he left Springfield and moved to St. Louis, where he immediately found interim employment. The Board, however, has long allowed discriminatees to mitigate their losses by seeking interim work outside the wrongdoer's immediate geographic area, particularly where, as here, Reynolds was unable to find a steady job in Springfield. Misreading the record, the Company also mistakenly asserts that Reynolds relocated in order to attend law school—even though he did not enroll until mid-August 2004. The Board, however, reasonably found that Reynolds continued to mitigate his losses by immediately finding interim work in St. Louis, and appropriately continued his backpay period for another 3 months, until he started school.

As for King, the Company speculates that he would have quit his job within 4 weeks had he not been unlawfully discharged in 2004 because he only lasted 4 weeks after his belated reinstatement in 2005. The Company also asserts that King was a union salt in 2005, and that he quit 2 weeks shy of the 2005 union election for that reason. The Company, however, failed to produce any evidence to support its counterintuitive assertions. The Board reasonably concluded that King's 2005 actions said nothing about what he would have done in 2004 when the Company discharged him unlawfully.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNTS OF BACKPAY OWED TO THE DISCRIMINATEES FOR THE EARNINGS THEY LOST BECAUSE OF THEIR UNLAWFUL DISCHARGES

A. Applicable Principles and Standard of Review

Where, as here, an unfair labor practice has occurred, the Act expressly authorizes the Board to order the violator “to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act” Section 10(c) of the Act (29 U.S.C. § 160(c)). To remedy an unlawful discharge, the Board normally requires the employer to reinstate the discriminatee and make him whole for any loss of earnings and other benefits suffered as a result of the unlawful conduct. *See, for example, NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262, 263, 265 (1969); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 197-200 (1941) (“*Phelps Dodge*”). *Accord NLRB v. J.S. Alberici Constr. Co.*, 591 F.2d 463, 468 (8th Cir. 1979). Indeed, a finding of an unlawful discharge is “presumptive proof that some backpay is owed by the violating employer.” *Arlington Hotel Co. v. NLRB*, 876 F.2d 678, 680 (8th Cir. 1989) (citation omitted) (“*Arlington Hotel*”). *See also Midwestern Personnel Services, Inc. v. NLRB*, 508 F.3d 418, 423 (7th Cir. 2007).

To restore the economic status quo, discriminatees are normally entitled to the difference between their gross backpay—the amount that they would have

earned but for the wrongful conduct—and their actual interim earnings. *Woodline Motor Freight, Inc. v. NLRB*, 972 F.2d 222, 224 (8th Cir. 1992) (citation omitted) (“*Woodline*”). Normally, the gross backpay period starts on the date of the unlawful act and ends when the employer properly reinstates the discriminatees, or when they decline valid employment offers, or in the case of salts, when employment no longer serves a union’s organizational interest, whichever comes first. See *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 432 (2d Cir. 2001); *Aneco, Inc. v. NLRB*, 285 F.3d 326, 332 (4th Cir. 2002) (“*Aneco*”).

In meeting the burden of proof with respect to gross backpay, the Board need not show the exact amount due. This Court has stated that in many cases it is “impossible for the Board to precisely determine the amount of backpay that should be awarded” *Woodline*, 972 F.2d at 225. In those circumstances, backpay specifications need not be exact; rather “the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations.” *Ibid.* (citation omitted); *NLRB v. International Ass’n of Bridge, Structural and Reinforced Iron Workers, Local 378*, 532 F.2d 1241, 1242 (9th Cir. 1976) (“*Iron Workers, Local 378*”). Moreover, “[i]n any case, there may be several equally valid methods of computation, each yielding a somewhat different result.” *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977). Consequently, “[t]he fact that the Board

necessarily chose to proceed by one method rather than another hardly makes out an abuse of discretion.” *Id.*

Once the backpay figures are established, the employer then has the burden “to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.” *Woodline*, 972 F.2d at 224-25 (citation omitted).⁶ Since backpay determinations are an inexact science, any uncertainties or ambiguities are resolved against the employer as the wrongdoer who committed the unfair labor practices. *See NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). *Accord NLRB v. Ferguson Elec. Co.*, 242 F.3d at 432-33.

The Board’s remedial power is a “broad, discretionary one, subject to limited judicial review.” *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord United Food & Commercial Workers Union v. NLRB*, 772 F.2d 421, 426-27 (8th Cir. 1985). This authority, as the Supreme Court has made clear, “is for the Board to wield, not for the courts.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S.

⁶ The General Counsel’s practice, followed here, is to try to ascertain the discriminatees’ interim earnings and to deduct them from their gross backpay. *See* Section 102.55 of the Board’s Rules and Regulations (29 C.F.R. § 102.55). The General Counsel performs this service in the public interest. This practice, however, does not relieve the employer of its burden to prove that interim earnings were greater than the amount discovered by the General Counsel, or to prove that backpay is limited by other mitigating factors. *NLRB v. Brown & Root Inc.*, 311 F.2d 447, 454 (8th Cir. 1963) (“*Brown & Root*”).

344, 346 (1953). *Accord Woodline*, 972 F.2d at 225. Thus, under settled law, in those cases where the components of a backpay determination are challenged in court, the Board's remedial order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord Woodline*, 972 F.2d at 225. Accordingly, "[o]nce a remedial order awarding backpay is issued by the Board," a court's "inquiry with respect to the formula used 'may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved.'" *Id.* (citation omitted).

B. The Board Reasonably Calculated Backpay; Overview of Uncontested and Contested Findings

Applying the settled principles set forth above, the Board reasonably determined the amounts of backpay owed to the discriminatees. As shown, the Board's order in the underlying unfair labor practice case required the Company to make the discriminatees whole for earnings that they lost as a result of the Company's unlawful discrimination. Thus, the discriminatees' backpay periods commenced when they were discharged. The backpay periods for Estenson and Hammons ended when there was no more carpenter work available for them on the SWWTP project; Reynolds' backpay period ended when he began law school; and King's backpay period ended when the Company offered him reinstatement. The

Board then properly deducted each discriminatee's interim earnings from his gross backpay to compute the actual amount of backpay owed.

The Company's sole global challenge to the General Counsel's computations is its meritless and unsubstantiated assertion (Br 32-33) that the General Counsel failed to provide specific evidence concerning the gross backpay amounts or interim earnings. As to the gross backpay amounts, the comparable employees' wages and hours were obtained from the Company's payroll records, which were certified by the State of Missouri. (Tr 30, 40). The General Counsel put those payroll records into evidence at the underlying hearing. (A 144-54, 161-64, 170-75, 181-208, 214-39, 244-85, 292-94.) Regarding the interim earnings, the General Counsel used various appropriate sources, including the discriminatees' tax returns, W-2s, Social Security reports, union documents and personal interviews. (Add. 3; Tr 40, 57-59, 67-68.) As mentioned above, p. 13 n.6, however, it is the Company's burden to prove that interim earnings were greater than the amount discovered by the General Counsel. Thus, it is clear that the General Counsel's gross backpay computations were appropriate.

Furthermore, contrary to the Company's assertion (Br 31-32), the administrative law judge did conduct a thorough analysis of that evidence and the

claims made by the Company in an effort to negate its liability.⁷ Moreover, as shown below, pp. 18-44, and contrary to the Company, the judge's well-reasoned findings are supported by substantial evidence.

Before this Court, the Company does not in general challenge the formula that the Board used to determine gross backpay, or the starting dates for the backpay periods, or the ending dates for Estenson and Hammons. Nor does the Company challenge the interim earnings attributed to each discriminatee, or the expenses incurred by them.⁸ Accordingly, the Company has waived any defense to those findings. *See Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1381-82 (8th Cir. 1993); *NLRB v. Mark I Tune-Up Centers, Inc.*, 691 F.2d 415, 416 n.2 (8th Cir. 1982). *See also U.S. v. Mitchell*, 31 F.3d 628, 633 (8th Cir. 1994) (issues not raised in appellant's opening brief are waived); Fed R. App. P. 28(a)(9)(A)

⁷ The Company (Br 31-32 n.5 & 6) cites several recent cases that the Board remanded for reassignment to a different administrative law judge because the judge who heard those cases copied extensively from the parties' briefs. However, a judge's incorporation of substantial portions of a brief into a decision is not inherently prejudicial or an otherwise reversible error. *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Indeed, the Company fails to point to a single case that was remanded because a judge substantially adopted language from a compliance specification.

⁸ Although the Company disputes (Br 10 n.4) Reynolds' expenses related to his job search in St. Louis, that challenge is directly linked to its argument (Br 50-53) that his backpay period should have ended in June 2004. As shown below, pp. 40-44, the Board reasonably found that Reynolds' backpay period continued until August 2004, and therefore his corresponding expenses were reasonable.

(appellant's brief must contain its contentions and reasons for them with citations to authority and the record).

Instead, the Company raises just a few limited claims with respect to each discriminatee. First, the Company contends (Br 33-36) that the gross backpay calculations should not have included overtime worked by comparable employees. The Company also argues (Br 36-42) that the Board erred in selecting certain comparators for Reynolds, King and Estenson because they worked in different pay classifications for a small part of the backpay period. The Company also contends (Br 24-31) that the Board should have offset its gross backpay liability by any fringe benefit contributions that interim employers made to various funds on the discriminatees' behalf. Finally, the Company argues (Br 42-53) that the backpay periods for King and Reynolds should be shortened because the Company speculates that King would have quit his job within 4 weeks had he not been unlawfully discharged and that Reynolds removed himself from the job market when he relocated to St. Louis, where he immediately found interim employment.

As we now show, the Board acted well within its broad remedial discretion in rejecting the Company's contentions. In short, the Company failed to carry its burden of establishing facts that would show the Board's backpay calculations were arbitrary or that would otherwise negate its liability.

C. The Board Acted within Its Discretion by Utilizing the Earnings of Comparable Employees To Approximate What the Discriminatees Would Have Earned Had They Not Been Unlawfully Discharged

As noted above, p.16, the Company does not in general take issue with the comparable employee formula approved in the Board's Casehandling Manual and by this Court. Under that formula, the General Counsel matches each discriminatee with comparable coworkers, and uses their hours and wages as a proxy for what the discriminatees would have earned during their backpay periods had the Company not unlawfully terminated them. *See generally* Board's Casehandling Manual (Part Three) Compliance Proceedings § 10540.3 (last revised 2008); *McGuire Plumbing & Heating*, 341 NLRB 204 (2004) (Board used comparable employee formula to compute backpay), *enf'd mem.*, 125 Fed.Appx. 81 (8th Cir. 2005); *Woodline*, 972 F.2d at 226 ("the Board's reasoning . . . and its conclusion that the representative employee formula was the most accurate were entirely reasonably and non-arbitrary"). The General Counsel rationally selected the comparable employee formula, which gave a reasonably accurate portrayal of the discriminatees' potential earnings by accounting for the fluctuations in work hours that typically occur on a construction project. (Add. 6; Tr 23-24, 109-10.) Further, in order to approximate the discriminatees' earnings as closely as possible, the General Counsel rationally limited the pool of comparable employees to those

who were less senior than the discriminatees, as more senior employees get preference for hours if work is slow. (Tr 24, 34, 42.)

On review, the Company (Br 31-42) makes just a few limited challenges, bickering about very narrow and detailed amounts. First, the Company contends (Br 33-36) that the backpay calculations should not have included comparable employees' overtime hours even though they amount to less than 4 percent of approximately 4,000 total hours during the discriminatees' backpay periods. Next, the Company claims (Br 36-42) that the Board used inappropriate comparators for a fraction of the backpay periods for Reynolds, King, and Estenson because their comparators were not in their exact same job classification. However, Reynolds' comparator, Daniel Landers, only spent about 4 percent of his time in different classifications. As for King and Estenson, substantial evidence shows that their comparators' positions were ones to which King and Estenson would have been promoted but for their unlawful discharges. We now show that the Company failed to meet its burden to reduce its liability, and therefore that the Court should not disturb the Board's backpay determinations.

1. The Board reasonably included all hours worked by comparable employees

The Company contends (Br 33-36) that the Board miscalculated the discriminatees' backpay by including overtime hours worked by comparable employees. The Company, however, failed to show but for their unlawful

discharges, the discriminatees would not have worked overtime like their comparators did. Instead of evidence, the Company relies on nothing more than its assertion (Br 34) that “it is a reasonable inference that, had the discriminatees not been terminated, there would have been more hands to do the same amount of work” and no need for overtime. That claim is not evidence, nor does it help the Company meet its burden of showing that the Board acted unreasonably by including overtime hours worked by the discriminatees’ comparators. Moreover, the Company presented no evidence that the discriminatees did not work overtime before their unlawful discharges. Finally, any ambiguities in the amount of backpay awarded, including determining whether employees would have worked overtime, must be held against the wrongdoer. *See Intermountain Rural Electric Assn.*, 317 NLRB 588, 590-91 (1995), *enforced* 83 F.3d 432 (10th Cir. 1996) (“there are variables that make it impossible to determine with certainty who would have worked particular days of overtime . . . , but in such cases, uncertainties are construed against the wrongdoer, and all that is required of the General Counsel is a nonarbitrary formula designed to produce a reasonable approximation of what is owed”).

In approximating what the discriminatees would have earned absent their unlawful discharges, it is the Board’s policy to include overtime hours worked by comparable employees. *See Performance Friction Corp.*, 335 NLRB 1117, 1117

n.3 (2001) (backpay formula appropriately uses comparators' average overtime hours). Consistent with this policy, the Board reasonably included the comparable employees' overtime hours in calculating the Company's backpay liability.

Further, the Board reasonably determined that each of the discriminatees would have worked the same hours as their respective less senior comparators because the Company gives preference to more senior employees. (Tr 42, 122.) Therefore, but for the discriminatees' unlawful discharges, they would have displaced their less senior comparators and worked those overtime hours. The Company has failed to produce any evidence showing otherwise, and thus has failed to meet its burden of establishing that the Board erred by including overtime hours.

2. The Board reasonably selected certain comparable employees even though they were not always in the exact same job classification as the discriminatees

In selecting comparators, the Board is not limited to employees who are exact replicas of the discriminatees; rather, comparators must only have similar or representative "work, earnings, and other conditions of employment." *Contractor Services, Inc.*, 351 NLRB 33, 35 (2007), *citing* NLRB Casehandling Manual (Part Three) Compliance Proceedings § 10540.3 (last revised 2008). The Company does not directly challenge this settled principle or take issue with most of the comparators chosen by the Board for most of the discriminatees' backpay periods. Instead, the Company limits itself to a few narrow challenges to small portions of

three discriminatees' backpay periods. Thus, concerning Reynolds, the Company claims (Br 38-40) that the Board erred in selecting Daniel Landers as his comparator because Landers worked in different job classifications for 45 of the 1,067.5 hours in Reynolds' backpay period. With respect to King, the Company alleges (Br 37, 40-41) that the Board erred in selecting "other carpenter" James Moody as his comparator for 4 of the 10 months in his backpay period. As for Estenson, the Company alleges (Br 37-38, 41) that the Board erred in selecting "foreman carpenter" Bruce Wales as his comparator for less than 1 month during his 7-month backpay period. As shown below, the Court should reject the Company's contentions.

a. The Board reasonably calculated Reynolds' backpay using laborer Landers as a comparable employee for Reynolds' entire backpay period

The Board reasonably selected Landers as a comparator for Reynolds because he was employed as a less senior laborer for the duration of Reynolds' backpay period. (Tr 73-74, A 181- 208.) The Company, however, argues (Br 37-41) that Landers is a poor choice as a comparator because in addition to working predominantly as a laborer, he also spent 45 hours in other higher-paying classifications. The Company's brief (Br 11-12, 37-41, 57-59) gives the mistaken impression that Landers was employed in the higher-paying classifications for the majority of the backpay period. Quite the contrary, however, Landers spent 1022.5

of the 1067.5 hours during Reynolds' backpay period as a laborer—the exact position as Reynolds held, for the exact same wages, and doing the exact same work. (A 181-208.) Put differently, during the backpay period, Landers worked 96 percent of the time in the identical position Reynolds would have held but for his unlawful discharge. An employee who works for the same wage 96 percent of the time clearly has similar “work, earnings and other conditions of employment.” *Contractor Services*, 351 NLRB at 35. Thus, the Company errs in asserting that the Board was not reasonable in selecting Landers as a comparator for Reynolds, and this Court should therefore enforce the Board's order with respect to Reynolds' backpay. *See NLRB v. Ozark Hardwood Co.*, 282 F.2d 1, 7 (8th Cir. 1960).⁹

b. The Board reasonably calculated King's backpay using other carpenter James Moody as a comparable employee from April 3 through August 21, 2004

Contrary to the Company (Br 37, 40-41), the Board reasonably selected James Moody, a less senior employee who performed carpentry work, as a

⁹ There is no more merit to the Company's similar claim (Br 36, 40) that the Board erred in using carpenter David Mobley as a comparator for discriminatee Robert King, who was also a carpenter, because Mobley additionally spent 35 hours as an ironworker and 10 hours as a laborer. Those 45 hours accounted for just 3 percent of the 1430.5 hours in King's backpay period. Accordingly, the Board reasonably used Mobley as a comparator for King from August 28, 2004, to January 15, 2005. (A 244-85.)

comparator for carpenter Robert King from April 4 to August 21, 2004. (Tr 98-100, A 244-64.) Although Moody was listed as an “other carpenter,” he was an appropriate comparator because carpenters like King were routinely promoted to “other carpenter” (and then to “foreman carpenter”). (Tr 47-49, 100-01, A 168-69.) Contrary to the Company (Br 42), the testimony of its Project Manager, Curt Guida, in the related representation case hearing, 17-RC-12330, establishes that this was the normal job progression; so does the testimony here that carpenter Bruce Wales followed this progression to “other carpenter.” (Tr 47-49, 101, A 165-69.) Indeed, King himself progressed from laborer to laborer foreman, and then to carpenter. (Tr 100-01, 178.) Given this evidence, if King had not been discharged unlawfully, his progression would have continued, propelling him to the “other carpenter” position. Moreover, the Company admits (Br 41) that King “possess[ed] the necessary skills” to work as an “other carpenter.”

The Company presented no evidence that King would not have been promoted had he remained employed. Furthermore, any ambiguities regarding pay rates and promotions are to be resolved against the wrongdoing employer, who should not be permitted to profit from any uncertainty caused by its discrimination. *Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001). Accordingly, the Board reasonably utilized Moody’s wages and hours to compute King’s gross backpay.

The cases cited by the Company (Br 37) to support its contention that Moody was not an appropriate comparator for King (or Wales for Estenson, *see pp.* 26-27 below) are distinguishable. For example, in *NLRB v. International Ass'n of Bridge, Structural and Reinforced Iron Workers, Local 378*, 532 F.2d 1241, 1243-44 (9th Cir. 1976) (“*Iron Workers, Local 378*”), the Court found that the discriminatee was not comparable to an elite group of employees with greater skills and higher pay rates. By contrast, the Board here reasonably compared Moody to King (and Wales to Estenson, *see pp.* 26-27 below) based on their respective job descriptions, experience, seniority, and normal job progression. Indeed, Moody and Wales had less experience than King and Estenson, unlike the comparators in *Iron Workers Local 378*, who were far more experienced than the discriminatee. Thus, *Iron Workers Local 378* does not help the Company here.

The Company also errs in relying (Br 37) on *Reliable Electric Company*, 330 NLRB 714, 723 n.17 (2000), where the administrative law judge corrected an inadvertent error: the compliance officer had mistakenly and without explanation calculated a discriminatee’s backpay at a higher rate than the one he was due under the collective-bargaining agreement. By contrast, the compliance officer here made no such inadvertent error, and he explained the General Counsel’s reason for selecting the higher pay rates—namely, because it could reasonably be anticipated that the discriminatees would have progressed to those pay rates but for the

Company's unlawful discrimination. (Add 7; Tr 47-49, 100-01.) Thus, the adjustment made in *Reliable Electric* has no bearing on the instant case.

c. The Board reasonably calculated Estenson's backpay using carpenter foreman Wales as a comparable employee from February 21 through March 13, 2004

On review, the Company (Br 36-38, 41-42) contends that the Board erred in utilizing Wales as a comparator for Estenson from February 21 through March 13, 2004, because Wales worked as a carpenter foreman, at a rate \$1 higher than Estenson, who was a carpenter when the Company unlawfully discharged him on October 31, 2003. The Company asserts (Br 41-42) that foreman carpenter was a supervisory position, and therefore that Estenson would not have accepted the promotion.

The Company's assertion however, cannot stand because throughout Estenson's entire backpay period, from October 2003 through June 2004, the Company treated the foreman carpenter position as a non-supervisory bargaining unit position. It was not until after the Hearing Officer's Report was released on May 18, 2005, in the related representation case, 11 months after Estenson's backpay period ended, that the Company abandoned its view that the foreman carpenter position was non-supervisory. (A 167-69, 317-20, 322-25.) On these facts, the Company cannot argue here that Estenson would not have accepted the foreman carpenter position. Accordingly, the Board reasonably utilized foreman

carpenter Wales as a comparable employee from February 21 through March 13, 2004.

There is no more merit to the Company's further contention (Br 36-38) that the Board erred in utilizing Wales as a comparator because he was a foreman carpenter whereas Estenson was only a carpenter. This contention fails for the reasons discussed at pp. 23-25 above with respect to discriminatee King. The Board reasonably chose Wales as a comparator for Estenson because Wales was a less senior employee who performed carpentry work during Estenson's backpay period. (Add. 3; Tr 45, A 161-64.) As shown above p. 24, the evidence establishes carpenters normally progressed to become foreman carpenters. (Add. 7; Tr 48, A 165-69.) Indeed, Wales himself was originally a carpenter before he was promoted to a foreman carpenter. (Tr 48-49.) Furthermore, the Company admits (Br 41) that Estenson "possess[ed] the necessary skills" to work as a foreman carpenter, and the journeyman carpentry work that he had previously performed for the Company qualified him for the promotion. (Tr 48, A 168-69.) In these circumstances, the Board reasonably concluded but for his unlawful discharge, Estenson would have been promoted to foreman carpenter. (Add. 7.) Accordingly, the Board reasonably used Wales as a comparator for Estenson.

The Company (Br 42) errs in relying on *NLRB v. Tama Meat Packing Corp.*, 634 F.2d 1071, 1073-74 (8th Cir. 1980), where an employer presented affirmative

evidence that a discriminatee had in fact turned down a higher-paying job. By contrast, there is no evidence here that Estenson would have rejected the progression to foreman carpenter had he not been unlawfully discharged. In sum, the Board reasonably used Wales as a comparator for Estenson, and the Company failed to meet its burden of showing that Estenson's backpay should be reduced.

D. The Board Reasonably Did Not Offset Interim Fringe Benefits against the Supplemental Wage Payments Made by the Company

The Board reasonably declined to offset fringe benefit contributions paid by interim employers on the discriminatees' behalf against the gross backpay paid by the Company because the Company did not provide any fringe benefits, let alone comparable ones. (Add. 5.) The Company (Br 24-31) challenges this finding, contending that the supplemental cash payments it made to its employees in lieu of fringe benefits should count as fringe benefits. The Company, however, misreads the Board's Casehandling Manual and the relevant case law to suggest incorrectly that its supplemental cash payments were somehow "benefits" that were "equivalent" to the fringe benefit contributions made by interim employers to various health, welfare, and pension trust funds. As shown below, the Board reasonably found (Add. 2, 5) that the Company's supplemental cash payments were not equivalent to the fringe benefit contributions that were made by the

interim employers. Accordingly, the Board appropriately declined to treat those interim fringe benefits as an offset against the Company's gross backpay liability.

The evidence supporting the Board's findings is not open to serious dispute. The Company did not provide any fringe benefits to the discriminatees who worked at prevailing wage jobs on the SWWTP project. (Add. 3-5; Tr 39-40.) Rather, in addition to paying them the prevailing hourly wage rate, the Company paid them an additional amount in the form of immediate cash compensation; this supplement was in place of making fringe benefit contributions on the discriminatees' behalf to various health, welfare, and pension trust funds. (Add. 3-5; Tr 29-30, 39-40.) By contrast, a number of interim employers paid premiums into those health, welfare, and pension trust funds. (Tr 162-63.) The discriminatees did not receive those premiums directly, but rather the amounts were paid into the trust funds for possible future consumption. (Tr 162-63.)

The Board reasonably determined that the supplemental wage payments should be treated as regular wages, as opposed to fringe benefits, because the discriminatees received the wages directly as part of their regular paycheck. (Add. 3; Tr 39-40.) Moreover, the supplemental wage payments were taxed in the same manner as regular wages. (Add. 3; Tr 165-66.) Fringe benefit contributions, on the other hand, are not taxed and are not paid to the discriminatees directly, but rather into various trust funds for possible future use. Thus, from the

discriminatees' perspective, the supplemental wage payments were the exact same compensation as cash wages. In short, there are fundamental differences between the payment of wages, which are fungible, as they are immediately and unrestrictedly available, and contributions to health, welfare, and pension trust funds, the proceeds of which are not directly or immediately available to the beneficiaries. (Add. 5.) Taking these distinctions in account, the Board (Add. 5) reasonably treated the Company's supplemental wage payments as gross wages rather than fringe benefit contributions.

The Board's treatment of the Company's supplemental wage payments is consistent with applicable precedent. In *Tualatin Electric, Inc.*, 331 NLRB 36, 42-43 (2000), *enforced*, 253 F.3d 714 (D.C. Cir. 2001), the Board held that an employer who pays discriminatees supplemental wages in lieu of benefits, the exact scenario here, is not entitled to offset its gross backpay liability by the benefit contributions made to various trust funds by interim employers.¹⁰ This is so, the Board reasoned, because the wrongdoing employer's supplemental cash payments

¹⁰ Contrary to the Company's contention (Br 28-29), the administrative law judge in *Tualatin Electric* did expressly state that the employer was paying its employees a prevailing wage supplement that the Board reasonably treated as wages rather than benefits. The judge stated, "I must conclude that what [the employer] did was to pay its employees prevailing wages and benefits as wages. . . ." *Id.* at 42.

were not equivalent to the interim employers' fringe benefit contributions. *Id.* at 43.¹¹

The distinction that the Board reasonably drew in *Tualatin Electric* and here is also supported by cases such as *Glen Raven Mills, Inc.*, 101 NLRB 239 (1952), *modified on other grounds*, 203 F.2d 946 (4th Cir. 1953). In that case, the Board found that if a wrongdoing employer made insurance or health plan benefit contributions on a discriminatee's behalf before his unlawful discharge, but the interim employer did not provide any benefits, then gross wages from interim employment cannot be used to offset those benefits. *Id.* at 250. The basic principle underlying this finding is the same as the one that the Board applied here: fringe benefit contributions may only offset equivalent fringe benefit contributions.

Further, contrary to the Company (Br 26-27), this precedent accords with and is supported by the Board's Casehandling Manual (Part Three) Compliance

¹¹ The Company contends (Br 29) that *Tualatin Electric* is not persuasive authority because neither the Board nor the D.C. Circuit explicitly referenced this issue. However, the employer filed exceptions, there is no indication in the Board's decision that the employer did not except on this issue, and the Board adopted the judge's findings. Subsequently, the D.C. Circuit enforced the Board's order. 253 F.3d 714 (D.C. Cir. 2001). The absence of any reference to this issue by the Board necessarily means that it rejected the employer's exceptions and agreed with the judge's finding. The Board's adoption and the D.C. Circuit's enforcement without comment of that finding, therefore, do not diminish its precedential value.

Proceedings (last revised 2008), which the Board reasonably followed here.¹²

Section 10552.4 of the Manual instructs that if an employer does not provide fringe benefits to its employees, it is not allowed to offset its gross backpay liability by subtracting interim fringe benefits.¹³ This instruction, like the cases cited above, is based on the principle that the wrongdoing employer must provide “benefits” that are “equivalent” to those provided by the interim employers—otherwise interim benefits are not offset against gross backpay liability. Given the undisputed fact that the Company did not provide any benefits, the fringe benefit contributions made by interim employers could hardly have been “equivalent” to the supplemental cash payments made by the Company.

The Company (Br 27) bases most of its argument on its misreading of the Casehandling Manual where it refers to “equivalent benefits.” The Company

¹² Although the Casehandling Manual is not binding on the Board, it is free to consider and cite the Manual when reviewing backpay calculations, and indeed often does so. *See Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998); *Starlite Cutting*, 280 NLRB 1071, 1071 n.3 (1986); *Demi’s Leather Corp.*, 333 NLRB 89, 91 (2006).

¹³ The text of § 10552.4 reads:

A medical insurance plan or contributions to a retirement fund are not normally treated as interim earnings and offset against gross backpay. Note also that although these benefits are considered components of gross backpay, they are not normally subjected to offsets from wages earned in interim employment. Health insurance and retirement contributions earned through interim employment may, however, be offset against equivalent benefits that are components of gross backpay.

incorrectly reads the Casehandling Manual as entitling a wrongdoing employer an offset if it provides cash payments that are equal in dollar value to fringe benefit premiums it might have otherwise made to various health, welfare, and pension funds. In effect, the Company misreads the phrase “equivalent benefits” to mean “dollar equivalent,” even though the Casehandling Manual makes no mention of that view and the cases cited above refute that interpretation.

Contrary to the Company’s further contention (Br 24-25), the General Counsel’s reference in the Compliance Specification to base wages and supplemental wage payments as distinct forms of compensation does not mean that the latter should be treated as fringe benefits.¹⁴ Rather, the General Counsel, for the sake of consistency, simply used the same specific breakdown of total wages listed on the Company’s pay records and W-2 forms, i.e., a dollar amount for gross wages and another dollar amount for the supplemental wage payments. (Tr 39-40.) *See, for example*, A 144. As the supplemental wage payments were wages, they

¹⁴ There is no more merit to the Company’s further suggestion (Br 25-26) that the supplemental wage payments should be treated as fringe benefits because the original Compliance Specification referred to them as “Fringe Benefits (Prevailing Wage).” In reviewing the case before the hearing, the General Counsel realized that the supplement closely resembled wages rather than benefits, as it was taxed by the Company and given to the employees directly. The General Counsel corrected this misnomer in the amended Compliance Specification, which referred to the supplemental payment as a “Prevailing Wage” because it did not resemble a benefit in any way. (A 62-72, 101-10.)

were treated in the same manner as other wages, and thus it is irrelevant that the General Counsel identified the items separately in the Compliance Specification.

Furthermore, *Catlett v. Missouri State Highway Commission*, 627 F.Supp. 1015 (W.D. Mo. 1985), cited by the Company (Br 30-31), is not only factually distinguishable but also based on principles that agree with Board law. In *Catlett*, a Title VII discrimination case, a district court judge held that the discriminatees' interim earnings, including fringe benefits, should be offset against and deducted from the wrongdoing employer's gross backpay obligations. *Id.* at 1018. The judge specifically mentioned, however, that the employer's gross backpay included the fringe benefits that it normally paid to its employees. *See id.* at 1018 ("the award of back pay should include not only the straight salary, but raises and fringe benefits as well"). Therefore, consistent with Board law, the judge in *Catlett* allowed interim fringe benefits to offset the wrongdoing employer's liability because the employer (unlike the Company here) provided equivalent benefits to its employees. Thus, contrary to the Company's claims, *Catlett* does not support the Company's contention that an employer should be allowed to offset interim fringe benefits from its gross backpay liability even if it provides no benefits to its employees.

In sum, the Board reasonably applied settled principles to the facts here, and found that because the Company's supplemental payments were cash wages paid

directly to the discriminatees, they were not equivalent to the fringe benefit contributions that interim employers paid into various health, welfare, and pension trust funds. Accordingly, the Board appropriately declined to offset the fringe benefit contributions made by the discriminatees' interim employers against the gross backpay owed by the Company. *See Tualatin Electric*, 331 NLRB at 42-43.

E. The Board Reasonably Ended the Discriminatees' Backpay Periods at Appropriate Times

As noted above, the Board ended the discriminatees' backpay periods based on their individual circumstances. For Estenson and Hammons, this occurred when there was no more comparable work on the SWWTP project; for King when the Company reinstated him; and for Reynolds when he exited the job market to begin law school. The Company no longer contests the Board's findings concerning the length of Estenson's and Hammons' backpay periods, hence the Company has waived those challenges before the Court. *See Radisson Plaza Minneapolis v. NLRB*, 987 F.2d at 1381-82. The Company (Br 43-44 n.8) also does not dispute the Board's finding that the General Counsel, consistent with *Oil Capitol Sheet Metal*, 349 NLRB 1348, 1349 (2007), met his burden of proving that the discriminatees' backpay periods would have ended when they did.

Instead, the Company makes just two specific arguments for shortening the backpay periods of King and Reynolds. First, the Company speculates (Br 42-50) that if it had not unlawfully discharged King in 2004, he would have resigned 4

weeks later. The Company bases its speculation, not on any contemporaneous evidence, but on its twin assertions—both unproven—that after King’s belated reinstatement in 2005, he became a union salt and soon quit for that reason. The Board, however, reasonably found (Add. 8) that King’s quitting in 2005 said nothing about whether he would have done the same thing in 2004.

Second, the Company argues (Br 50-53) that Reynolds’ backpay period should have ended in June 2004, when he left the Springfield area after an interim job ended and moved to St. Louis, where he promptly found a new job. The Company mistakenly contends (Br 51) that a discriminatee must remain in the same geographic area as the wrongdoing employer. The Company also misreads the record to arrive at its unwarranted conclusion (Br 53) that Reynolds moved “to pursue law school.” Based on that claim, the Company contends that the Board should have ended Reynolds’ backpay period, not when he actually enrolled in law school in August 2004, but rather in June 2004 when he moved to St. Louis, even though he held interim jobs throughout the summer. As we now show, however, those contentions must be rejected. Accordingly, the Company failed to meet its burden of demonstrating that Reynolds did not exercise reasonable diligence by searching for and immediately obtaining work in St. Louis, and the Board appropriately continued his backpay period until he actually enrolled in school.

1. The Board reasonably rejected the Company's claim that King's backpay period should have ended 4 weeks after his unlawful discharge

Rather than accept liability for King's 10-month backpay period, the Company in effect argues (Br 42-50) that the Board was required to infer that because he quit 4 weeks after the Company belatedly reinstated him in 2005, he would have done the same thing after his unlawful discharge in 2004. As we now show, the Board reasonably rejected the Company's contention to find (Add. 8) that King's backpay period continued for 10 months until the Company reinstated him.

There is no evidence to support the Company's assertion (Br 43) that if it had not discharged King in March 2004, he would have quit 4 weeks later. On the contrary, it is undisputed that King worked for the Company more or less continuously from December 2002 until his discharge in March 2004. (Add. 4; A 25-26.) Contrary to the Company's assertion (Br 43), there is no evidence that the Union had a plan for King to quit in April 2004. In these circumstances, the Board reasonably found that what King did in February 2005 said nothing about what he might have done in April 2004 but for his unlawful discharge. (Add. 8.)

The record also does not support the Company's assertion (Br 47) that King was a union salt in 2004 and/or 2005, and that the Union had a plan for him to quit in April 2004. King was not a union member when he began working for the

Company in 2002, and he did not even attend a union meeting until January 2004. (A 26.) Further, there is no evidence of a union plan for salts to quit in April 2004 or February 2005; on the contrary, the Union had every reason to want pro-union employees to remain employed, as the representation election did not take place until March 2005. (Add 1; A 304.) Indeed, the Company concedes (Br 43-44, n. 8) that all four discriminatees' backpay periods "were reasonable insofar as they ended prior to any representation election, an event that might indicate that the union's objectives were achieved or abandoned." Thus, substantial evidence supports the Board's finding that King's 10-month backpay period was reasonable.

The Company (Br 43-48) errs in its heavy reliance on *Aneco, Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002) ("*Aneco*"), a factually distinguishable case involving an employer that unlawfully refused to hire a union salt. The discriminatee in *Aneco*, unlike King, initially applied for work with the Company in order to further his union's objectives to organize the employer. In *Aneco*, unlike the instant case, the record established that the union had a plan, which the discriminatee intended to follow, for him to quit within 5 weeks of being hired. *Id.* at 328-29, 332. By contrast, as shown above p.37, there was no such evidence here of a union plan for King to quit by April 2004.

Further, in *Aneco*, unlike the instant case, the court was also concerned about an "extraordinarily long" backpay period of 5 years that would have been punitive

rather than remedial and would have provided a windfall to a discriminatee. 285 F.3d at 332-33 & n.3. Contrary to the Company's suggestion (Br 47-48), there is nothing unusual or punitive about King's 10-month backpay period that would require the Board to depart from its standard backpay formulas. *See, e.g., Tualatin Electric*, 331 NLRB at 45 (backpay period of approximately 2 years for several union salts); *NLRB v. Ferguson Elec., Co.*, 242 F.3d at 431 (backpay period of 10 months for union salt).

The Company also errs in relying on *Diamond Walnut Growers*, 340 NLRB 1129 (2003), a case that it acknowledges (Br 48) is "not so analogous." Nothing in that case is to the contrary to the Board's determination of King's backpay period. In *Diamond Walnut Growers*, unlike the instant case, there was specific evidence that the discriminatee would have resigned after 6 weeks regardless of when the employer would have offered him reinstatement because he had difficulty completing the job training. *Id.* at 1131-33. In those very different circumstances, the Board limited the backpay period to 6 weeks because it was apparent that the discriminatee would have only worked for that short amount of time after reinstatement. *Id.* at 1132.

The Company contends (Br 49) that it only had to show it was "more probable than not" King would have quit in April 2004. *See Diamond Walnut Growers*, 340 NLRB at 1132. Far from making that showing, however, the

Company presented no evidence, only an unreasonable and counterintuitive inference. Accordingly, the Board reasonably determined that King's backpay period lasted for 10 months, until the Company reinstated him.

2. The Board reasonably rejected the Company's claim that Reynolds' backpay period should have ended when he moved to St. Louis

The Company contends (Br 50-53) that Reynolds' backpay period should have ended in June 2004, when he left the Company's immediate geographic area and moved to St. Louis. As we now show, however, Reynolds did not incur a willful loss of earnings by seeking and immediately obtaining work in St. Louis, and his backpay period continued until he removed himself from the job market by enrolling in law school in August 2004.

It is settled that in calculating backpay, deductions are made for the discriminatee's actual interim earnings and for any losses that he willfully incurred by failing to make reasonable efforts to secure interim employment. *See Phelps Dodge*, 313 U.S. at 198, 199-200. *Accord Arlington Hotel*, 876 F.2d at 680; *Brown & Root*, 311 F.2d at 454. However, it is the wrongdoing employer that bears the burden of showing that the discriminatee failed to conduct a reasonable search for interim work. *Arlington Hotel*, 876 F.2d at 680. Here, after the General Counsel calculated Reynolds' gross backpay, the burden shifted to the Company to establish facts that would reduce that amount, including demonstrating that he did

not make an adequate effort to mitigate his losses. *See Woodline*, 972 F.2d at 224-25; *NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d at 423. The Company failed to meet its burden.

Contrary to the Company's contention (Br 51-52), the record establishes that throughout his short backpay period, Reynolds consistently made reasonable efforts to secure interim employment—including seeking and immediately obtaining work in a nearby city where steadier work was available. As noted above, during the first 2 months after his unlawful discharge on February 2, 2004, Reynolds applied for jobs with at least six different companies in the Springfield area. (Add. 3; Tr 187, 197-204, A 209.) He was able to secure employment with Artisan Construction from February 20 through March 27, but was then laid off because the project was complete. (Tr 188, 198, A 209.) Next, he began working for HBC on April 18, but was again laid off after completion of a job. (Tr 188, 199, A 210.) At that point, after being laid off twice within 3 months, and being informed that there was little work available in the Springfield area, Reynolds moved to St. Louis and began to search for steadier suitable employment. (Tr 199-201.) Within a few days, after visiting multiple jobsites and applying for at least seven jobs, he secured employment with John Bender Construction. (Tr 188-89, 204, A 210.) Reynolds remained at that job and successfully mitigated his losses through August 16, at which point the General Counsel ended his backpay period

because he started law school. (Tr 71.) *See NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 n.3 (2d Cir. 1965) (backpay period ended when discriminatee “fail[ed] to remain in the labor force”).

Contrary to the Company’s claim (Br 51), Reynolds was not obligated to seek employment only in the Springfield area. “A discharged employee is not confined to the geographical area of former employment; he or she remains in the labor market by seeking work in an area with comparable employment opportunities.” *Mandarin v. NLRB*, 621 F.2d 336, 338 (9th Cir. 1980). *Accord Baker Electric*, 351 NLRB 515, 537 (2007); *Glover Bottled Glass Corp.*, 313 NLRB 43, 43 (1993), *enforced*, 47 F.3d 1230 (D.C. Cir. 1995). Accordingly, there is no merit to the Company’s suggestion (Br 50) that to remain eligible for backpay, Reynolds had to be “in a position to maintain employment with [the Company] in Springfield.” Indeed, the sole cases cited by the Company (Br 52-53) actually support the Board’s position rather than the Company’s. In *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1202-03 (1982), *enforced*, 579 F.2d 304 (5th Cir. 1978), and *NLRB v. Baddour, Inc.*, 992 F.2d 1216, *2-3 (6th Cir. 1993) (Table), as here, the Board reasonably rejected the employers’ arguments that the discriminatees’ backpay periods should have been cut off when they moved to another city where they obtained interim employment. Reynolds, like the discriminatees in those cases, actually increased his interim earnings, and

thereby lessened the Company's backpay liability, by obtaining interim employment in a new city.

The Company misreads the record in asserting (Br 53) that Reynolds moved “not for the purpose of securing employment . . . but rather to pursue law school.” Contrary to the Company (Br 51-52), there is no evidence that Reynolds moved to St. Louis before he was laid off at HBC.¹⁵ The Company merely surmises Reynolds' motives (Br 52—“it appears that Reynolds had already made the decision to move”), but conjecture is no substitute for proof. The slender reed on which the Company relies (Br 52) is ambiguous at best:

Q: So when did you change your residence to St. Louis?

A: In the beginning of June, June 1st.

Q: Okay. And was that related in any way to the fact that you were going to law school?

A: I planned delaying law school over a year but since I needed a place to go and I was in St. Louis where there was a fine university that admitted me, I went ahead and started at that point. (Tr 197.)

Reynolds' testimony can be interpreted as meaning that it was not until he “was in St. Louis” that he decided to attend law school. Additionally, it can be read as declaring that his plan was to delay school for “over a year,” but “since . . .

¹⁵ Reynolds' unrebutted testimony states that he moved to St. Louis on June 1, which was after his last day of work at HBC. Contrary to the Company (Br 51-52), he did not work until June 4; rather that was just the end of HBC's pay period. (Tr 188, 197.)

[he] was in St. Louis,” he changed his mind and decided to “start[] at that point,” i.e., on August 16. In any event, regardless of any ambiguities in the record concerning Reynolds’ intentions, which are to be construed against the wrongdoer (*see* p. 13 above), the evidence demonstrates that he found work within a few days after being laid off from HBC, albeit in another city, which is perfectly reasonable given the circumstances here. In sum, because the Company did not meet its burden of proving that Reynolds failed to mitigate his losses as he continued to seek equivalent employment upon relocating to St. Louis, the Court should enforce the Board’s backpay award to Reynolds.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's order in full and denying the Company's cross-petition for review.

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January 2009

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UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner/Cross-Respondent) No. 08-3318
)
)
and) Board Case No.
) 17-CA-22607
CARPENTERS DISTRICT COUNCIL OF)
KANSAS CITY & VICINITY LOCAL NO.)
311 & 978)
)
Intervenor)
)
v.)
)
JOHN T. JONES CONSTRUCTION CO., INC.)
)
Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,402 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

**COMPLIANCE WITH CONTENT AND
VIRUS SCAN REQUIREMENTS**

Pursuant to Local Rule 28A(d), the Board certifies that the diskette containing its brief in the above-captioned case that was sent by first-class mail to the Court is identical to the hard copy of the Board's brief filed with the Court and

served on respondent, and was scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (1/21/2009 rev. 3), and according to that program, is free of viruses.

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Dated at Washington, DC
this 26th day of January 2009

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

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| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
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| |) | |
| JOHN T. JONES CONSTRUCTION CO., INC. |) | |
| |) | |
| Respondent/Cross-Petitioner |) | |
| |) | |

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
this 26th day of January, 2009