UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ART'S WAY VESSELS, INC.

and **Case 33-CA-15771**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted by:

Nathaniel E. Strickler
Counsel for the Acting General Counsel
National Labor Relations Board
Subregion Thirty-Three
300 Hamilton Blvd., Suite 200
Peoria, IL 61602
Tel: (309) 671-7080
Fax: (309) 671-7095
E-mail: Nathaniel.Strickler@nlrb.gov

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ART'S WAY VESSELS, INC.

and **Case 33-CA-15771**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Statement of the Case

On February 10, 2012, Administrative Law Judge Earl E. Shamwell, Jr. (ALJ) issued his Supplemental Decision (Decision) in which he found that the Compliance Specification (GC Ex. 1(c)) (Specification) issued by the Regional Director should be offset by: a monetary amount equal to the amount of vacation time benefits granted during collective bargaining and a signed release that purportedly settled the claims of two discriminatees who were the main witnesses in a subsequent charge filed by the Union against the Respondent. The ALJ also, despite claiming to find that the Specification's calculations were "properly made," used Respondent's backpay figures that were unsupported by any explanation of how those calculations were made. Counsel for the Acting General Counsel ("General Counsel") excepts to the ALJ's findings and conclusions and submits that they are contrary to the facts established by the record as well as extant Board law.

I. STATEMENT OF FACTS

A. Background of Underlying Unfair Labor Practice Charge

In *Art's Way Vessels, Inc.*, 355 NLRB No. 192 (2010), the National Labor Relations Board (Board) found that Art's Way Vessels, Inc. (Respondent) unlawfully withdrew recognition from the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), repudiated the collective bargaining agreement with the Union, and made unilateral changes to the wages, hours, and terms and conditions of employment for bargaining unit employees in violation of Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (Act). As a remedy, the Board ordered the Respondent to make all bargaining unit employees whole, reinstate all terms of the collective bargaining agreement, reimburse the Union for all dues that the Respondent failed to withhold and remit to the Union, and rescind, at the Union's request, all unilateral changes to the wages, hours, and other terms and conditions of employment, including vacation entitlement. *Art's Way Vessels, Inc.*, 355 NLRB No. 192, *slip op. at* *10 (2010) (GC Ex. 1(a)) The Eighth Circuit Court of Appeals enforced the Board's Order in *Art's Way Vessels, Inc.*, 355 NLRB No. 192 (2010) by way of a Consent Judgment. (GC Ex. 1(b)) After Respondent agreed to the Eighth's Circuit enforcement of the Board Order, Respondent, while generally agreeing to the backpay computation, disputed the total amount of backpay, claiming in the compliance proceeding that it was allowed to certain deductions. Although the ALJ rejected one of Respondent's asserted deductions, he erroneously allowed two others and miscalculated backpay. The erroneous deductions and miscalculations are more fully discussed below.

B. The Compliance Specification's Accurate Calculation of Gross Backpay

Compliance Officer Greg Ramsay testified as to the backpay and fringe benefits due the discriminatees as set forth in the Compliance Specification (Specification). (GC Ex. 1(c)) He testified that he calculated the wage rate according to the collective bargaining agreement (CBA) in effect from August 16, 2006, to August 15, 2009. (GC Ex. 7; TR 54-56) The calculations for each individual employee are set forth in Appendix B1-B25 of the Specification. The "Contractual Wage Rate" column reflects what the employee should have been paid under the CBA while the "Wage Rate" column reflects the amount the employee was actually paid. The difference between those amounts is the "Wage Rate Shortage" column. The shortage is then multiplied by the number of hours the employee worked to determine the total backpay figure. (GC Ex. 1(c); TR 54-57)[1] Compliance Officer Ramsay also subtracted amounts the Respondent paid to employees that are not in dispute here and that Respondent previously paid. (TR 61-62) The net amount appropriately due to each of the employees is listed on page Appendix B-25 of the Compliance Specification. (GC Ex. 1(c))

C. The ALJ Erred by Adopting Respondent's Claimed Deductions for Vacation Time and Employees' Settlement Agreements and then Compounded the Error By Failing to Use the Compliance Specification's Calculation of Backpay

1. The ALJ Erred by Finding that the Grant of Additional Vacation Benefit During Collective Bargaining Should Reduce Backpay Liability

The ALJ erred by finding that the Union and the Respondent negotiated a reduction in backpay by agreeing to "bridge time" and, despite extant Board law to the contrary, using "equitable" principles in deciding that Respondent was entitled to a reduction in backpay liability. Moreover, by ignoring a subsequent Union-filed charge and the negotiations

[1] Compliance Officer Ramsay also computed overtime backpay. Respondent has paid the overtime backpay as computed by Compliance Officer Ramsay and it is not in dispute here. (TR 15; 61-62)

concerning a collective bargaining contract, the ALJ failed to find that the "bridge time" was intended to settle a charge in which a complaint had been issued and settle on a final collective bargaining agreement. (ALJ Decision pp. 8-10) (Exception 1)

At hearing and in its Post-Compliance Hearing Brief, Respondent states that in 2009 it granted employees two weeks of vacation time annually before the entry of the Board order in this case. The Board subsequently held that Respondent had unilaterally changed the terms and conditions of employment by, among other things, providing a more generous vacation benefit than in the existing collective bargaining agreement. After the Board order issued in 2010, the Union requested that Respondent rescind all unilateral changes. The Respondent rescinded the changes, including the vacation benefit, and put employees who had taken the extra vacation into negative leave balances, in essence, pocketing the effect of its unlawful conduct. Put another way, the Respondent made itself whole by putting many employees into negative balances. (TR 145) This led to the Union filing a charge against the Employer in Case 33-CA-16196. (TR 146; 201)

In 2011, while the charge was pending and while the parties were negotiating the collective bargaining agreement, Respondent granted employees additional vacation time (aka "bridge time") to allow them to have some days off before their anniversary date. Respondent admits that this "bridge time," negotiated during collective bargaining, was to "get a resolution of the contract." (TR 137-138, 142) In his decision, the ALJ permits Respondent to offset this bridge time against the backpay owed in this proceeding pursuant to the Eighth Circuit-enforced Board Order. (ALJD p. 9-10). As will be discussed more fully in the Argument Section, below, the General Counsel excepts to this as there is no evidence to show the Union ever agreed to this offset (TR 144; 147; 159) and the offset is improper as a matter of law. (Exception 1)

2. The ALJ Erred by Deducting Amounts Set Forth in Settlement Agreements Intended to Settle Unrelated Unfair Labor Practice Charges that Were Pending Hearing

The ALJ also erred by finding that settlement agreements signed by three employees were intended to settle the amounts due to those employees in the Specification. No evidence supports this finding. Moreover, the ALJ erred by finding that the employees individually could compromise the backpay owed to them as a remedy for Respondent's Section 8(a)(5) violation of its obligation to bargain with the Union. Only the Union could negotiate the remedy for that violation and the employees could not release the Respondent from that backpay liability. The ALJ adopted the Respondent's attempt to double count the settlement agreements by applying amounts paid pursuant to those agreements to both backpay owed in the compliance proceeding as well as that owed in another unfair labor practice charge. (ALJ Decision, pp.11-14) The General Counsel excepts to this finding. (Exception 2)

3. The ALJ Failed to Use the Compliance Specification as a Starting Point for any of Respondent's Deductions Despite Finding the Calculations in the Specification Were "Properly Made"

The ALJ also erred by using Respondent's Backpay Calculations from Respondent's Post-Compliance Hearing Brief despite having specifically found that the Specification's calculations were properly made and based upon the parties' stipulation that the formula, computation, and methodology in the Specification were correct. (ALJ Decision p. 5, 19) The General Counsel excepts to the ALJ's reliance on Respondent's backpay calculations. (Exception 3)

II. ARGUMENT

A. The ALJ Erred in Allowing Respondent a Monetary Deduction for Respondent's Granting of Vacation Time and for Deducting Amounts Related to Settlement Agreements Not Intended to Reduce Backpay Liability

1. Background

The objective in a compliance proceeding is to restore, to the extent that it is feasible, the status quo-ante by reconstituting the circumstances that would have existed had Respondent not engaged in unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 8 LRRM 439, 446 (1941). If it is not possible to reconstruct with certainty what would have occurred had a respondent not committed unfair labor practices, the uncertainty must be resolved against the respondent whose wrongdoing created the uncertainty. *Alfred M. Lewis, Inc. v. NLRB*, 681 F.2d 1154, 1157, 110 LRRM 3280, 3282 (9th Cir. 1982) ("the employer should not be allowed to benefit from the uncertainty caused by its discrimination"); *United Aircraft Corp.*, 204 NLRB 1068, 1069 (1973). After all, backpay is not a windfall; it is an effort by the Board to restore the *status quo ante* that would have existed but for the Respondent's unlawful conduct. *Laidlaw Corp.*, 207 NLRB 591, 593 (1973).

In a compliance specification proceeding, the General Counsel's sole burden is to show the gross amounts of backpay due employees, that is, the amounts that the employees would have received but for the employer's illegal conduct. Mathematical precision in the formula used by the Counsel for the Acting General Counsel for determining gross backpay is not required. *Intermountain Rural Electric Assn.*, 317 NLRB 588, 593 (1995), *enf'd* 83 F.3d 432, 152 LRRM 2320 (10th Cir. 1996). Any formula approximating what a discriminatee could have earned if he had not been the object of discrimination is acceptable if it is not unreasonable or arbitrary. *Boyer Ford Trucks*, 270 NLRB 1133, 1138 (1984), *enf'd. as modified* 757 F.2d 961,

118 LRRM 3171 (8th Cir. 1985); *Am Del Co., Inc.,* 234 NLRB 1040 (1978); *Laborers Local 158 (Worthy Bros.),* 301 NLRB 35 (1991). The formula only need be reasonably designed to arrive at as close an approximation of the amount of backpay due as possible. *See NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452, 52 LRRM 2115, 2119 (8th Cir. 1963); *Mastell Trailer Corp.*, 273 NLRB 1190 (1984), enf'd. 782 F.2d 1047 (8th Cir. 1985); *Intermountain Rural Electric Assn.*, 317 NLRB at 593. In evaluating formulas used by the General Counsel, all ambiguities, doubts, and uncertainties are resolved against the wrongdoer respondent. See *Intermountain Rural Electric Assn.*, 317 NLRB at 593; *Florida Tile Co.*, 310 NLRB 609, 610 (1993), affd. 19 F.3d 36 (11th Cir. 1994); *Ryder Systems*, 302 NLRB 608 fn. 4 (1991), enf'd. 983 F.2d 705, 142 LRRM 2290 (6th Cir. 1993).

Significant in this case, Respondent has the burden of proof on all claimed deductions to gross backpay. All elements of a backpay case that diminish the respondent's gross backpay liability, such as whether the discriminatee met his or her obligation to mitigate, are the respondent's burden to establish. *See Colorado Forge Corp.*, 285 NLRB 530, 538 (1987); *Rainbow Coaches*, 280 NLRB 166, 179-80 (1986). Once Counsel for the General Counsel has established a maximum backpay figure based on the amount a discriminatee would have earned in the absence of respondent's discriminatory conduct, respondent then has the burden of proof to demonstrate that the backpay liability should be an amount less than the maximum backpay. *Woonsocket Health Centre*, 263 NLRB 1367 (1982); *Great Lakes Chemical Corp.*, 323 NLRB 749, 756 (1997).

2. The ALJ Erred by Allowing Vacation Time to Reduce Respondent's Backpay Liability Under the Eighth Circuit-Enforced Board Order

The ALJ erred by ignoring the Respondent's admission that the "bridge time" was intended to resolve the collective bargaining agreement. Instead, the ALJ erroneously relied on

purported "equitable" principles to reduce the amount of backpay due to certain employees by the amount of bridge time they received in negotiations. There is no evidence the parties intended to use "bridge time" to resolve backpay liability. The evidence showed that the parties discussed vacation time during negotiations (and while the vacation benefit unilateral change charge – 33-CA-16196 was pending). No evidence was adduced showing that the Union agreed to any deductions in the amount due under the Eighth Circuit-enforced Board Order. (TR 141-142) When asked whether the bridge time had anything to do with the Eighth Circuit enforced Board Order, Respondent's sole witness, General Manager Patrick O'Neill, admitted:

> [The bridge time] wasn't anything directed by the Board. It was something we used in the negotiation process to try to get a resolution of the contract. I don't believe it's anything we had to offer. Based on the program we had prior to any contract negotiations or getting back to the 2006 agreement, in transitioning into the new vacation program, it was what it says. It's a bridge. It's just something we were able to give employees to show them that we do have a heart too. I think overall it was good, I think everybody was happy about it. [TR 142]

O'Neill later testified that in collective bargaining negotiations he never told the Union that if it agreed to the bridge time, Respondent would view the agreement as a waiver of the Union's rights under an Eighth Circuit enforced Board Order. [TR 147] Indeed, as O'Neill testified, Respondent offered "bridge time" solely to provide employees with some time off before their anniversary date and to be sure employees "were treated fair [*sic*]". [TR 146]

Union Business Representative Gary Pappenheim's testimony also makes clear that the bridge time was not meant to settle the issues raised within the Eighth Circuit enforced Board Order. [TR 167] He testified that he refused to discuss that case (as well as other pending unfair labor practice charges) because he did not know anything about them. [TR 173] Thus, as a factual matter, Respondent failed to prove that the parties reached any agreement that "bridge time" should be credited against the total amount of backpay due in this compliance proceeding.

Not only was there no intent to offset backpay with "bridge time" as a factual matter, but also such an offset is erroneous as a matter of law. Although the ALJ referenced undefined "equitable principles," allowing Respondent to offset the bridge time against backpay, extant Board law holds that the offset of vacation benefits is not an appropriate deduction from total gross backpay. *Laidlaw Corp.* 207 NLRB 591, 593 (1973); *Schwickert's of Rochester, Inc.*, 349 NLRB 687, 690 (2007).

In *Laidlaw*, the Board, in adopting the administrative law judge's Order without comment, held that the Employer was not entitled to a reduction of its backpay liability by function of its severance pay to employees for closing its plant. 207 NLRB at 592. Both parties agreed there was no evidence that the Employer and the Union agreed to use the severance pay as an offset to backpay. Nevertheless, the Employer contended that the backpay represented a windfall to employees. *Laidlaw Corp.*, 207 NLRB at 592. The administrative law judge in *Laidlaw* rejected the Employer's argument and held that backpay is not a windfall to employees. Rather, backpay is designed to:

> effectuate the public purpose of ensuring to employees that they shall be made whole for the financial harm resulting from an employer's unfair labor practices. The only extent to which payment could be called a windfall is that the employees, having somehow managed to tighten their belts and survive the discrimination practiced against them, now may have an opportunity to recoup therefrom.

Laidlaw Corp., 207 NLRB at 593. The *Laidlaw* judge concluded that there was no authority for the Employer's proposition that it was entitled to offset the total backpay liability and granted no deduction to the total amount of backpay due to employees. *Id.*

Similarly, in *Schwickert's of Rochester*, the Board found that after the Employer repudiated a collective bargaining agreement, the Employer's substitution of a 401(k) plan for a pension plan provided by the collective bargaining agreement would fail to remedy the unfair

labor practice and "would not restore the affected employees to the status quo ante." *Schwickert's of Rochester*, 349 NLRB at 690 (citations omitted); *accord Manhattan Eye, Ear and Throat Hosp.*, 300 NLRB 201 (1990). Put another way, the Employer could not substitute one type of benefits for another.

Here, the ALJ erroneously allowed Respondent, under "equitable principles," to use fringe benefits it granted employees in contract negotiations as an offset against the total backpay computation due under the Eighth Circuit Order. While vacation time benefits are valuable, they are an amorphous future benefit, and therefore, not a substantially equivalent benefit to the lost wages employees suffered as a result of the previous unfair labor practices. Moreover, like *Laidlaw*, these vacation benefits were a part of collective bargaining and cannot be counted against the total backpay owed. Indeed, if Respondent's deduction for vacation time were allowed, "it would leave the unfair labor practice unremedied, [and] would, in effect, underwrite the respondent's unlawful acts." *Manhattan Eye, Ear and Throat Hosp.*, 300 NLRB at 201. The Board should reverse the ALJ and make the employees whole for the financial harm resulting from the Employer's unfair labor practices.

3. The ALJ Erred in Finding the Employees Had the Authority to Compromise Their Backpay by Signing Settlement Agreements that Are Silent as to Settlement of the Compliance Specification

The ALJ erred in finding that the settlement agreements signed by three employees were intended to compromise the backpay due to them the Eighth Circuit-enforced Board Order. Despite the Union's Grand Lodge Representative Gary Schmidt's specific and unambiguous refusal to discuss or settle anything but the two unfair labor practices in Case 33-CA-16196 and Case 33-CA-16220 (GC Ex. 11), Respondent's counsel drafted what he now calls "global" settlement agreements and argues that the settlement agreements reduce backpay in this case.

(TR 198-199)[2] The parties' intention to settle only Cases 33-CA-16196 and 33-CA-16220 is evident by the fact that the parties entered into the settlement agreements just three days before a hearing in those two pending cases. (TR 202) Respondent's counsel transmitted the four separate agreements for signature by it and the Union as part of a package. (TR 198) These four separate agreements were signed by the Union, Jesse Maas, Robert Dolter, and Cody Walen.

The agreements, executed in Iowa, provide that they are to be interpreted according to Iowa law. (TR 171; R Ex. 1, ¶ 11). In Iowa, the cardinal rule of contract interpretation is to ascertain and give effect to the parties' true intent. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. Of Regents*, 471 N.W.2d 859, 862 (Iowa 1991). When the contract is ambiguous, it is construed against the drafter. *Id.* at 862-63. If there are general and specific provisions in a contract, the specific provision controls. *Mopper v. Circle Key Life Ins. Co.*, 172 N.W.2d 118 (Iowa 1969). In addition, a contract is to be interpreted as a whole and all terms must be given effect. *Iowa Fuel & Minerals, Inc.*, 471 N.W.2d at 863.

Where there is ambiguity, the Iowa Supreme Court has held:

> Contract interpretation involves ascertaining the meaning of contractual words, and extrinsic evidence is admissible as an aid to interpretation when it sheds light on the situation of the parties, antecedent negotiations, the attendant circumstances, and the objects they were striving to attain.

Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 433 (Iowa 1984). In *Kroblin*, the Iowa Supreme Court construed the parol evidence rule narrowly; that is, the court allows testimony beyond the four corners of the document. "[E]xtrinsic evidence may be admitted" to show that a document is "not completely clear and unambiguous" or "ambiguous with respect to the subject of the lawsuit." *Id.* at 433 In Iowa, the parol evidence rule merely forbids the use of "extrinsic

[2] As discussed above, Case 33-CA-16196 involved Respondent deducting leave unilaterally granted, thus putting employees into negative leave balances. Case 33-CA-16220 involved the termination of employee Jesse Maas based on the Employer's unilateral change. (GC Ex. 8(a)-(b); 9(a)-(c))

evidence to vary, add to, or subtract from a written agreement." *Montgomery Properties Corp. v. Economy Forms Corp.*, 305 N.W.2d 470 (Iowa 1981).

Applying these tenants of Iowa contract law to the agreements at issue here compels a finding that the parties intended to settle only Cases 33-CA-16196 and 33-CA-16220. Respondent's counsel drafted a group of contracts designed to settle two cases that were to go to a hearing within days before an administrative law judge. (TR 202) Because all four contracts were negotiated and drafted at the same time, they should be construed together. As demonstrated in the agreement the Union signed, the parties were only settling Cases 33-CA-16196 and 33-CA-16220 and the related grievances. (R Ex. 1; Fourth contract, third unnumbered paragraph) *In fact, the ALJ specifically found that the Union's agreement settled only the two related unfair labor practice charges, 33-CA-16196 and 33-CA-16220* — not the instant case, 33-CA-15771. (ALJ Decision, p.13, n.16) It was error for the ALJ to proceed to find that the employees, in signing their individual agreements, were settling not only their grievances, but also all three charges.

In the first instance, the individual employees did not have standing to settle these unfair labor practice charges. Cases 33-CA-16196 and 33-CA-16220 both alleged a violation of the Act under Section 8(a)(5). Similarly, the instant case is also based on Section 8(a)(5). Section 8(a)(5) charges allege that the Employer has been remiss in its bargaining obligation owed to the Union. As a result, only the Union could release any claims it had on behalf of its members and, by signing the settlement agreement, it did not signal any intention to release any claims it had to employees' backpay under the Eighth Circuit enforced Board Order in the instant case.

In addition, an agreement was necessary to settle each of the claims of the three individual discriminatees and the Union. Jesse Maas, Robert Dolter, and Cody Walen had

grievances pending. Because their cases involved individual grievances, they only had the power to settle those grievances. Thus, in signing their settlement agreements, they did not have authority to settle any of the unfair labor practice charges including claims under the Eighth Circuit-enforced Board Order.

Indeed, by arguing that the releases signed by the employees released their claims under Section 8(a)(5) of the Act, the Respondent's conduct has the air of direct dealing. *See Bridgestone/Firestone, Inc.*, 332 NLRB 575 (2000). Direct dealing occurs where an Employer bypasses bargaining unit employees' chosen collective bargaining representative and attempts to negotiate wages, hours, or other terms and conditions of employment with individual employees. For example, if an Employer negotiates wage rates directly with Union-represented employees, it violates Section 8(a)(5) of the Act. *Insta-Print*, 343 NLRB 368, 368 n.2 (2004) In this case, the ALJ erred by ruling that three employees were "free to work their own deals." (ALJ Decision, p. 15) If that were true and the Employer attempted to negotiate with the employees rather than the Union, it would have the appearance of direct dealing and could be a further violation of Section 8(a)(5) of the Act. Therefore, contrary to what the ALJ found, the Union was the only party with the power to compromise the backpay owed to employees in the Compliance Specification.

Because only the Union had the power to compromise the backpay owed to the employees in this proceeding, it is immaterial as to what the three employees believed at the time they were executing the releases. (*See* ALJD, p. 14, lines 28-30*)*. By his finding that the three employees were free to work their own deals to compromise their claim to backpay, the ALJ implies that the Respondent was free to engage in direct dealing. However, as the evidence shows, the Respondent dealt solely with the Union. Thus, only the Union's and the Respondent's intentions at the time of the drafting of the settlement agreements are relevant.

To explain the parties' intent in signing the agreements, Union Grand Lodge Representative Gary Schmidt, who negotiated the agreements, sent a contemporaneous e-mail on June 1, 2011 to Respondent's counsel indicating what the Union was willing to settle. (GC Ex 11; TR 201-203) The e-mail stated, "In response to our conference call this morning regarding cases 33-CA-16196 and 33-16220 [*sic*] we are not interested in any 'global settlement' regarding any issues not mentioned within the above mentioned charges. As we discussed the issues are vacation/time off benefits and the termination of Jesse Maas." (GC Ex. 11) As Schmidt later explained at the hearing, it was the Union's intent to settle only Cases 33-CA-16196 and 33-CA-16220 — not anything related to the compliance case. (TR 203-204) In fact, the ALJ specifically made that finding in his Supplemental Decision. (ALJ Decision, p. 13, n.16) In considering this evidence, it is important to note that it does not run afoul of the parol evidence rule because none of Schmidt's testimony varies what is contained in the settlement agreements. Schmidt simply reiterates what the parties intended at the time the agreements were signed. Indeed, in responding to Schmidt's e-mail, Respondent's counsel ***never*** states that it is settling the compliance case as well. The e-mail addresses different matters and states that he is waiting for his client's "response on the Maas thing." (GC Ex. 11) In fact, the compliance case is never mentioned. Clearly, the parties did not intend to settle any aspect of this compliance proceeding. By construing the settlement agreements as also settling the Compliance Specification, the ALJ leaves the underlying unfair labor practice charges unremedied and potentially implicates the Respondent in yet another unfair labor practice charge. Accordingly, Respondent has failed to prove that it is entitled to a deduction for Jesse Maas, Cody Walen, or Robert Dolter by virtue of their having signed settlements resolving their grievances.

B. The ALJ Erred in Calculating the Total Amount of Backpay Due to Employees

Even if the Board were to accept all of Respondent's claimed deductions, the ALJ made significant errors in calculating the total amount of backpay. (ALJD, pp. 19) It appears the ALJ, although purporting to start his calculation from the Compliance Specification as outlined in Appendix B-25 of the Compliance Specification, actually started with Respondent's spreadsheet. (*Compare* ALJD, pp. 19 and Respondent's Backpay Calculation Summary provided with its Post-Compliance Hearing Brief *to* GC Ex. 1(c), Appendix B-25). The ALJ's reliance on Respondent's Backpay Calculation Summary is even more puzzling given that the parties stipulated to the formula and computation of gross backpay in the Subregion's Compliance Specification. (TR 17-18)

The Compliance Specification and Compliance Officer Greg Ramsay's testimony accurately identified backpay due to each employee, explained the methodology for the calculations, and accurately deducted amounts the Respondent already paid. (GC Ex. 1(c); TR 61-62) Because this formula approximates what a discriminatee could have earned if he had not been the object of discrimination and is neither unreasonable nor arbitrary, it should be adopted. *Boyer Ford Trucks*, 270 NLRB 1133, 1138 (1984), *enf'd as modified* 757 F.2d 961 (8th Cir. 1985).

In contrast, Respondent's spreadsheet contains several errors, fails to explain its methodology for the calculation of backpay, double counts its claimed deductions, and uses incorrect wage rates. Accordingly, the Respondent's spreadsheet should be rejected. *See, e.g. Intermountain Rural Electric Assn.,* 317 NLRB 588, 590-591 (1995), *enf'd* 83 F.3d 432, 152 LRRM 2320 (10th Cir. 1996) (finding that any ambiguities, doubts, or uncertainties are resolved against the wrongdoer). Because the ALJ relied almost exclusively on the Respondent's

spreadsheet, the ALJ's calculations should also be rejected. In contrast to the Compliance Specification, Respondent failed to offer any evidence at the Compliance Hearing or in its Post-Compliance Hearing Brief as to how it calculated backpay as found in its Backpay Calculation Summary attached to its Post-Hearing Compliance Brief. For that reason alone, its deductions should be disregarded. *See, e.g. Colorado Forge Corp.*, 285 NLRB 530, 538 (1987).

Not only does Respondent fail to show how it calculated backpay, but it also uses a formula to double count deductions. The Respondent's Backpay Calculation Summary has a column titled "Less Overtime/Holiday/Vacation Backpay" in which it subtracts all of the Overtime Backpay, Holiday Backpay, and Vacation Backpay set forth on Appendix B-25 of the Compliance Specification. No explanation is given for this column other than subtracting the "bridge time," which as explained above is an invalid deduction. The Respondent then subtracts Holiday Backpay for employees who did not receive any bridge time. No explanation is given for why Holiday Backpay should be deducted at all. Then to double count the "bridge time," Respondent adds a column entitled "Less Value of Bridge Pay in Excess of CBA." No explanation is given for the calculations contained in this column.

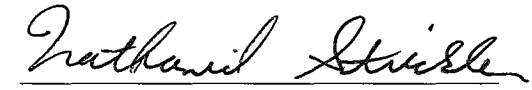
Compounding the error, it appears Respondent, rather than using wage rates as required by the collective bargaining agreement, instead used $15 an hour for all employees, but failed to explain why or how it used that amount. In addition, inexplicably, Respondent included "Total Backpay and Interest Owed per NLRB." Interest on a backpay award continues to run until the day backpay is paid. *New Horizons for the Retarded*, 283 NLRB 1173, 1174 (1987); *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). As a result, the figures in this column are not current.

Despite the errors and Respondent's utter failure to prove why its calculations should be used, the ALJ adopted the Respondent's calculations. As a result, the ALJ's recommendation is should be rejected and the Subregion's Compliance Specification should be adopted as modified.[3]

III. CONCLUSION

The evidence demonstrates that Respondent has failed to meet its burden of establishing – factually or legally – any proper deduction to the stipulated total backpay due under the Eighth Circuit enforced Board Order. For all the reasons stated above, General Counsel submits that the exceptions to the ALJ's Supplemental Decision are meritorious and urges the Board to sustain the exceptions, to so modify the ALJ's backpay calculation, adopt the amounts due employees are set forth in Appendix B-25 of the Compliance Specification, and order any such other relief as may be just and proper under the circumstances. (GC Ex. 1(c))

Dated at Peoria, Illinois this 27th day of April 2012.



Nathaniel E. Strickler
Counsel for the Acting General Counsel
National Labor Relations Board
Subregion Thirty-Three
300 Hamilton Square, Suite 200
Peoria, Illinois 61602

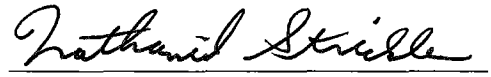
[3] Although General Counsel is not excepting to the ALJ's finding that backpay continues to run for four employees, Brandon Yutzy, Jesse Mumm, Dustin Kopp, and Toby Hicks, it is excepting to the reduction of their backpay due to "bridge time." General Counsel submits that backpay for those four employees should be calculated to the date Respondent pays backpay due, based on the average number of hours worked in the previous quarter as outlined in pages 17-18 of the ALJ Decision.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2012 I electronically filed the foregoing ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION with the National Labor Relations Board using the NLRB; E-Filing System.

I hereby certify that a copy of the foregoing ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was served by e-mail to the following parties:

Kevin Visser
kvisser@simmonsperrine.com
Simmons Perrine Moyer & Bergman, PLC
115 Third Street, S.E.
Suite 1200
Cedar Rapids, IA 52401
(319) 366-7641



Nathaniel E. Strickler
Counsel for the Acting General Counsel
National Labor Relations Board
Subregion Thirty-Three
300 Hamilton Square, Suite 200
Peoria, Illinois 61602