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

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 727

and Case 13-CB-060708

RON MAXWELL

Renee D. McKinney
for the General Counsel.
Stephanie K. Brinson
Park Ridge, Illinois
for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This compliance matter was tried before me in Chicago, Illinois, on February 4, 2013, pursuant to a compliance specification and notice of hearing initially issued by the Regional Director for Region 13 of the National Labor Relations Board (the Board) on November 30, 2012, and amended on December 14, 2012, and again at the start of the trial. The compliance specification alleges the amount of backpay and pension contributions due to, and on behalf of, Ron Maxwell from the International Brotherhood of Teamsters, Local 727 (the Respondent or Local 727), under the terms of the Board's decision and order dated July 13, 2012. The Respondent filed a timely answer to the compliance specification in which it denied that it owed any backpay or pension contributions. On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

I. UNDERLYING UNFAIR LABOR PRACTICES DECISION

On March 5, 2012, Administrative Law Judge Jeffrey D. Wedekind issued a decision finding that Local 727 violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act by operating exclusive hiring halls for trade show and movie production work in the Chicago metropolitan area in an arbitrary and discriminatory manner. Judge Wedekind found, inter alia, that Local 727 violated its duties under the Act by failing to adequately notify workers of a new rule providing that they would be suspended from the exclusive trade show referral list if they remained on "will-call" status for a period of 12 months, and by suspending charging party

[1] I also rely on the findings that were upheld in the underlying unfair labor practices decision. 358 NLRB No. 86 (2012).

Maxwell pursuant to that rule. "Will call" refers to the status of an individual who notifies the union referral office that he or she is unavailable to accept trade show referrals, but "will call" the Union when again available to accept such referrals. The record showed that Maxwell went on will-call status in May 2010 when he accepted movie and television work through Local 727. In late March 2011, Maxwell heard that the Union had suspended him from the trade show referral list. Maxwell contacted Local 727, which confirmed the suspension. In his decision, Judge Wedekind did not specify a date when Maxwell was suspended, but he stated that the backpay period started with any referrals that Maxwell was denied in April 2011, and he rejected Local 727's claim that the suspension did not occur until April 28, 2011.

On July 13, 2012, the Board issued a decision affirming Judge Wedekind's ruling, findings and conclusions. 358 NLRB No. 86 (2012). The Board ordered Local 727 to "[m]ake Ron Maxwell whole for any loss of earnings or benefits he suffered as a result of being suspended and denied referrals to any trade shows since April 2011, with interest." Slip op. at 1. The Board addressed Local 727's contention that Maxwell would have remained on will-call status during the period of his suspension and, therefore, should not be awarded a make whole remedy. Slip op. at 1 fn.3. The Board rejected that argument, stating "that awarding the standard make-whole remedy is appropriate and that determining whether Maxwell actually suffered any loss is properly left to the compliance stage of this proceeding." Id. "At that stage," the Board said, "the parties may litigate whether, even if the Respondent had adequately and timely notified Maxwell of the rule change, he would not have removed himself from 'will call' or that, even if he had done so, his position on the referral list would not have entitled him to a job." Id. In partial satisfaction of the Board's July 13 order, Local 727 ended Maxwell's suspension on July 26, 2012. All told, the suspension lasted for a period of approximately 16 months.

In a written stipulation entered into by the parties in November 2012, the Respondent waived its right to contest "either the propriety of the Board's July 13, 2012 Order or the findings of fact and conclusions of law underlying that Order." However, the Respondent reserved the right to challenge the Region's calculation of the backpay due to Maxwell. General Counsel's Exhibit (GC Exh.) 1(c).

II. Compliance Proceeding

A. Overview of Disputes Regarding Monetary Award

Thomas Porter, the compliance officer who calculated the backpay and pension contributions sought for Maxwell in the compliance specification, testified that he based his calculation on a "replacement employee" formula. When a worker who had lower seniority rank than Maxwell on the trade show referral list received a referral during the period of Maxwell's suspension, the compliance officer assumed that Maxwell would have been offered and accepted that referral unless it was for concert work – a type of work that Maxwell had informed Local 727 that he would not accept. The compliance officer assumed that Maxwell would work 8 hours on each day that he was referred. To arrive at a gross figure for lost wages, the compliance officer multiplied the number of referrals by the number of hours by an hourly wage rate. The compliance officer also adjusted the number of hours to reflect the fact that Saturday work and Sunday work were paid at premium rates. Interim earnings were calculated based on information provided by Maxwell, and were deducted from the gross back wages figure for each calendar quarter. A similar calculation was made regarding the pension contributions. Under the applicable union contract, an employer would contribute a fixed amount to an employee's pension for each hour worked, without any adjustment for hours worked on Saturdays or Sundays. Pension contributions that were made on Maxwell's behalf by interim employers were subtracted from the back pension contribution figures.

Local 727 raises a number of objections to the Region's methodology for calculating backpay. It argues that backpay should be calculated using a formula based on the work offered to, and accepted by, Maxwell during a period after his unlawful suspension ended, rather than a formula based on the referrals actually denied to Maxwell during the backpay period. In addition, Local 727 argues that because Maxwell had voluntarily placed himself on will-call status at the time the Union suspended him, and did not advise the Union of a change in that status during his suspension, he is not entitled to any backpay at all. Local 727 also contends that the compliance calculation erroneously assumes that Maxwell would have accepted referrals for Audio Visual (AV) work and also erroneously gives Maxwell credit for a number of referrals that went to Michael Hansen under a special arrangement with an employer. Local 727 contends that the calculations in the compliance specification improperly assume that each referral would have resulted in 8 hours of work, and that Maxwell would have been paid at the highest wage rate available under the contract. Finally, the Respondent argues that the compliance specification understates the extent of Maxwell's interim earnings.[2]

B. Evidentiary Issues

During a pre-trial conference, the parties raised the possibility of introducing summary exhibits into evidence. I informed the parties that I would not admit a summary exhibit unless the party offering it made any underlying documents available to the other parties. See Rule 1006, Federal Rules of Evidence. At trial, Local 727 offered two summary exhibits. One of those documents, identified as Respondent's Exhibit 2, was represented to be a summary of various referral and time records showing Maxwell's pattern of accepting referrals during the period from August 8, 2012, to January 23, 2013. This was the period after Local 727 restored Maxwell to the referral list pursuant to the Board's order, and, therefore, after the period for which the General Counsel is seeking backpay. The second exhibit, identified as Respondent's Exhibit 5, was represented to be a summary of records showing the referrals that the Respondent would have offered to someone in Maxwell's position on the referral list during the backpay period, including the nature of the work, the location and client involved, and the number of hours of work. During the hearing it came to light that although Local 727 had provided certain documents underlying these summary exhibits, it had inadvertently failed to provide (or have available at trial) time sheets that employers provide to Local 727. Discussions at trial suggested that the summary exhibits either relied directly on those timesheets, or relied on records of Local 727 that incorporated the timesheet information. The General Counsel objected to the admission of both exhibits based on Local 727's failure to make the timesheets available, and I reserved ruling, directing that the timesheets be provided to the General Counsel after the close of the trial, and setting a time period for the General Counsel to make written objections, if any, to the admission of the summary exhibits after reviewing the timesheets.

Subsequently, the General Counsel filed written objections to Respondent's Exhibits 2 and 5, and Local 727 filed a written response. The General Counsel argued that Exhibit 2

[2] In its answers to the compliance specification, Local 727 denied that the backpay period should begin on April 1, 2011, and asserted that it should instead begin no sooner than April 28, 2011. Local 727 does not discuss this contention in any meaningful way in its brief, but presumably it is relying on its contention, rejected in the underlying unfair labor practices decision, that Maxwell was not suspended until April 28, 2011. 358 NLRB No. 86, slip op. at 8-9. Because that contention has already been rejected, and because Local 727 has stipulated that it is not disputing the findings of fact and conclusions of law underlying the Board's order, I find that the backpay period runs from April 1, 2011, until July 25, 2012, the day before Local 727 informed Maxwell that he had been reinstated to the referral list.

should be excluded because the timesheets on which it was based were inadmissible hearsay, and that Exhibit 5 should be excluded for that same reason and also because it was more prejudicial than it was probative. I overrule these objections and hereby admit Respondent's Exhibit 2 and Respondent's Exhibit 5 into evidence.

Regarding the hearsay objection, I note that a document prepared by a third party may qualify as a business record, and therefore not be excluded as hearsay, if the business integrated the outside document into its own records and relied upon it, provided that the circumstances support the trustworthiness of the document. *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007); *United States v. Grant*, 56 M.J. 410, 414-415 (U.S.C.A.A.F. 2002). In the instant case, Michael McManus, Local 727's director of referrals, gave credible, unrebutted, testimony that the Union enters the time sheet information into its own records and then relies on that information to calculate the referral fees that the Union charges to employers. Based on that, I conclude that the timesheet information was incorporated into the Local 727's records and that Local 727's reliance on that information supports its trustworthiness. See also *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997) (in Board proceeding hearsay evidence may be admitted "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence"). Thus the hearsay objection is overruled.

With respect to Respondent's Exhibit 5, the General Counsel also argues that the document should be excluded because: the document improperly identifies many of the referrals as "concert" work (a type of work that Maxwell declined to perform); the document lists the number of hours of work for each referral without designating which were compensated at a premium rate; and some of the information in the summary document is not consistent with the underlying records supplied by Local 727. Regarding the "concert" designation, I note that the referral documents do not always expressly note when a referral is for concert work, but McManus credibly testified that he was able to definitively identify concert referrals based on the venue where the work was to be performed and/or the identity of the client. He testified that Respondent's Exhibit 5 accurately identified when referrals were for concert work. Neither Maxwell nor any witness with personal knowledge contradicted McManus' testimony on this point, or identified a single referral that Respondent's Exhibit 5 incorrectly listed as "concert work." With respect to the identification of concert work, I conclude that Respondent's Exhibit 5 is probative, and sufficiently so that its use is preferable to the method employed by the Region's compliance officer – i.e., to assume that the only referrals which were for concert work were those that the referral records either identified expressly as concerts or described using the name of a performer that the Region's staff recognized.

I am also not persuaded by the General Counsel's argument that Respondent's Exhibit 5 should be excluded because it does not identify when hours were paid at the premium rates for Saturday and Sunday work. It was not incumbent upon Local 727 to use this exhibit to set forth that information. Indeed, Local 727 freely admits that the exhibit does not do so. While I appreciate the General Counsel clarifying that Respondent's Exhibit 5 does not contain all of the information necessary to calculate backpay, that is not a basis for excluding relevant information that the exhibit does contain.

Regarding the General Counsel's argument that Respondent's Exhibit 5 is at times inconsistent with one of the underlying documents, the Respondent answers that McManus' testimony shows that in the exhibit he was simply clarifying ambiguities or inconsistencies within the underlying documents based on his knowledge of those documents and the referral operation. I find that the General Counsel has not shown that Respondent's Exhibit 5 contains substantial inaccuracies that would warrant excluding it from evidence. Under the circumstances present here, I consider the shortcomings as going to the weight to be accorded to the exhibit,

not to its admissibility. Cf. *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999), cert. denied, 528 U.S. 873 (1999) (Generally objections that business records contain inaccuracies, ambiguities, or omissions go to weight rather than admissibility.).

The General Counsel also argues that I should find the Region's calculation reasonable because Local 727 did not cooperate fully in the compliance proceeding and the compliance officer properly resolved the resulting ambiguities against Local 727, the proven wrongdoer. See Brief of General Counsel at Pages 12–15. As I understand the argument, the General Counsel is not just asking that I resolve ambiguities against Local 727, but asking that I do so without considering evidence that Local 727 did not produce until at, or shortly before, the compliance trial. Under the circumstances present here, I conclude that it is appropriate to consider all the record evidence, including that which was presented for the first time at trial. The communications between the Region and Local 727 that have been made part of the record do not show that the Region made sufficiently determined and specific demands for information to require imposition of the draconian sanction it seeks. The General Counsel cites a case, *Reliable Electric Co.*, 330 NLRB 714, 723-724 (2000), enfd. 12 Fed. Appx. 888 (10th Cir. 2001), to support its argument that backpay evidence first produced at a compliance trial should not be considered. In *Reliable Electric*, the Board upheld the Administrative Law Judge's ruling that since the Court of Appeals had enforced the Board's order and the employer still refused the Region's repeated demands for necessary backpay records until shortly before the compliance trial, "neither [the judge] nor the Acting Regional Director ha[d] a legal obligation to further delay this matter in order to revise the entire 2-inch thick backpay computation" based on the belatedly produced records. 330 NLRB 714, 723-724 (2000). Even there, however, the Judge did not exclude the belatedly produced evidence. Indeed, he stated that he used that evidence to make "certain recalculations," but exercised his discretion by declining to require a more burdensome revision of the "entire 2-inch thick backpay computation." Unlike in *Reliable*, revising the backpay computation in the instant case based on the information that Local 727 provided at, or shortly before, trial will not result in a massive recalculation or unreasonable delay. In this case, the entire compliance specification is a mere five pages long and the chart included with the specification to set forth the quarterly backpay calculation is a single page. Thus the potential revisions at-issue here appear to be more on the scale of the "recalculations" that the Judge performed in *Reliable Electric*, than of the extensive revisions that he declined to require. Moreover, Local 727, unlike the employer in *Reliable Electric*, did not delay compliance until a court of appeals enforced the Board's order, but rather executed a stipulation accepting the Board's order and making clear that it was only disputing the Region's calculation of backpay under the order. Thus Local 727's overall conduct has not occasioned the degree of delay that concerned the Judge in *Reliable Electric.*

C. General Standards in Compliance Proceedings

The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Beverly California Corp.*, 329 NLRB 977, 978 (1999). The General Counsel's burden in backpay cases is to show the amount of gross backpay due the claimant. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993); *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962). In demonstrating the gross amounts owed, the General Counsel need not show an exact amount; a reasonable approximation is sufficient. *Laborers Local 158 (Worthy Bros.),* 301 NLRB 35, 36 (1992), enfd. sub nom. *NLRB v. Heavy and Highway Const. Workers Local Union No. 158,* 952 F.2d 1393 (3d Cir. 1991) (Table). Once the General Counsel shows the gross amounts owed, the burden shifts to the Respondent to show interim earnings or other facts that negate or mitigate its liability. *Hansen Bros. Enterprises*, supra; *Mastro Plastics Corp.*, supra. In this process, the backpay claimant should receive the benefit of any doubt rather than the respondent, the wrongdoer responsible for the existence of any uncertainty and against whom

any uncertainty must be resolved. *Performance Friction Corp.*, 335 NLRB 1117, 1131 (2001); *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995) (Table); *WHLI Radio*, 233 NLRB 326, 330-331 (1977).

D. Gross Backpay Formula

The Board has broad discretion in selecting a backpay formula. *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970); see also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (Board has broad discretion in fashioning a remedy). Any formula that approximates what the wronged party would have earned if not for the unlawful action is acceptable if that formula is not unreasonable or arbitrary given the circumstances. *Laborers Local 158*, 301 NLRB at 36; *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982). When the General Counsel and the Respondent offer alternative formulas, the administrative law judge must determine the most accurate formula. *Atlantic Veal & Lamb, Inc.*, 355 NLRB No. 38, slip op. at 1 fn.5 (2010); *Regional Import and Export Trucking Co., Inc.*, 318 NLRB 816, 820 (1995).

As stated above, the Regional Office calculated gross backpay using a "replacement employee" formula – i.e., Maxwell was credited with backpay based on each work referral that went to an individual with lower seniority than Maxwell during the period of Maxwell's suspension, unless the referral was for a type of work that Maxwell had indicated he would not accept. Local 727 argues that I should instead rely on a formula that calculates the amounts owing for the period of Maxwell's unlawful suspension based on the referrals available to, and accepted by, Maxwell *after* Local 727 ended the suspension. According to Respondent's Exhibit 2, Maxwell accepted referrals totaling 39 hours over the 6 months following the end of his unlawful suspension. Based on that, Local 727 contends, Maxwell's appropriate award should be 19.5 hours per calendar quarter times the applicable wage rage, less interim earnings – a calculation that, according to Local 727, results in a net backpay award of "zero."

I find that the Region's replacement employee method of calculating backpay is neither unreasonable nor arbitrary under the circumstances, and is more accurate than the formula proposed by Local 727. As the General Counsel points out, the replacement employee method of calculating backpay has been consistently recognized by the Board as an acceptable method of measuring how much gross backpay is due a discriminatee. *Carpenters Local Union 1456 (Underpinning Constructors)*, 316 NLRB 257, 258 (1995); *3 States Trucking*, 252 NLRB 1088 (1980). The Board has relied on this method of calculating backpay even when it concluded that the evidence might show that one of the replacement employees used in the compliance specification was improperly included and should be excluded from the final calculation. *A&A Insulation Services*, 344 NLRB 322, 323 (2005). On the other hand, I am aware of no authority showing that the Board has granted such acceptance to a backpay formula that, like Local 727's, relies entirely on what happened subsequent to the backpay period. Indeed, as the General Counsel indicates in its brief, a number of gross backpay formulas have regularly been used by the Board and approved by courts, and none of those formulas employs Local 727's suggested method of basing the calculations on what transpired subsequent to the backpay period. Brief of General Counsel at Page 22, citing *Rikal West, Inc.*, 274 NLRB 1136, 1137-1138 (1985) and National Labor Relations Board's Casehandling Manual, Part Three: Compliance Proceedings, Sec. 10540. Local 727 has not shown that the post-backpay period work history is a reasonable basis for approximating Maxwell's losses, much less that it is so superior a basis as to overcome the precedent favoring a calculation based on the referrals received by replacement employees during the backpay period. Indeed, Local 727 has not shown that the amount and types of trade show work available during the 6-month post-backpay

period it relies upon were comparable to what was available during the prior 16-month period when Maxwell was actually being denied such work. In this connection, I note that the months of April through July occurred twice during the unlawful suspension, but did not occur at all during the post-backpay period that the Respondent asks me to rely on, a fact that is significant given Maxwell's testimony that trade show work is seasonal. 358 NLRB No. 86, slip op. at 7 fn.10. The Region's formula more accurately approximates the number and types of referrals that would have been available to Maxwell if not for his unlawful suspension since that formula is based on the referrals that were actually made during that suspension. In addition, Maxwell, as the victim of an unlawful suspension lasting well over a year, could reasonably come to rely more heavily on sources of income other than the perpetrator of the unlawful suspension. Cf. *Kansas Refined Helium Co.*, 230 NLRB 662, 666-667 (1977) (in discussing the reasonableness of discriminatees' refusals of reinstatement, Board mentions that employee can reasonably weigh the employer's prior discrimination against him). Although I approve the "replacement employee" methodology relied on by the Region, I also find that the Respondent has made showings that reduce the backpay calculation from the level set forth in the compliance specification.

E. Respondent's Argument
Based on "Will-Call" Status

Facts: When Maxwell was added to the trade show referral list in May 2010, he was already performing ongoing movie and television work, apparently under contracts that Local 727 had with various production companies. At that time, a union steward told Maxwell that he would be put on will-call status for trade show referrals while working on the movie and television assignments. Maxwell continued performing movie and television work for the next 6-7 months. When that work ended, he did not immediately contact the Union to state that he was available for trade show work. In the unfair labor practices trial, Maxwell stated that he remained on will-call status because: he was out-of-town for two weeks in December; he did not believe he would obtain any referrals in January and February given the limited trade show work during those months and his poor position on the referral list; and he was hoping to be called back for more television work.

In late March 2011, Maxwell first heard a rumor that Local 727 had suspended him from the trade show referral list. He contacted Local 727 to inquire about the rumor and after some initial difficulty obtaining an answer, Maxwell received confirmation from the Union that he had, in fact, been suspended. Maxwell subsequently filed the unfair labor practices charge that gives rise to this proceeding. During the period of his suspension, Maxwell did not contact Local 727 to remove himself from will-call status. In his testimony, Maxwell indicated that his understanding was that because Local 727 had suspended him from the referral list and he could not work he had no referral list status that it was within his power to change. Transcript at Page (Tr.) 140. Local 727 has not shown, or even claimed, that it would have reinstated Maxwell to the referral list during the backpay period if Maxwell had called to say that he was available for trade show referrals and no longer wished to be on will-call status. In fact, Local 727 did not lift its suspension of Maxwell until July 26, 2012, when, in partial compliance with the Board's order, the Respondent notified Maxwell that he was being reinstated to the referral list, but that once reinstated he would be considered to be on will-call status. On July 28, Maxwell notified Local 727 that he was available for trade show referrals and was taking himself off will-call status.

As discussed above, the Respondent has introduced evidence regarding Maxwell's work history *subsequent to* the backpay period – i.e., after he was reinstated to Local 727's referral

list – and argues that this evidence shows that Maxwell would not have accepted many of the available referrals during the backpay period because he had a propensity to go on "will-call" status.

Analysis: When it affirmed Judge Wedekind's decision in the underlying unfair labor practices proceeding, the Board stated that, during the compliance stage, the parties would be permitted to litigate whether, even if not for Local 727's unlawful action, Maxwell would have remained on will-call status during the backpay period. I find that the evidence does not show that Maxwell would have remained on will-call status regarding trade show referrals during the backpay period if he had not been unlawfully suspended. If anything the evidence indicates that Maxwell was interested in trade show referrals during that period. When he heard a rumor that he had been suspended from the referral list for that work, Maxwell contacted Local 727 to find out if the rumor was true and in the face of some lack of cooperation from the Union, he persisted until he received an answer. Then he filed a charge challenging his suspension from trade show work. When Local 727 informed Maxwell that he was being reinstated to the referral list but would be treated as being on will-call status, Maxwell contacted the referral office to say that he was available for referrals and was ending his will-call status. Maxwell's actions are hard to explain absent a desire on his part to obtain and accept referrals for trade show work during the time period at-issue.

The Respondent attempts to rebut this evidence based on records regarding Maxwell's actions after he was reinstated to the referral list and the backpay period ended. I find that the post-backpay period evidence is entitled to very little, if any, weight. The situation is analogous in my view to that which exists when an employee who was unlawfully terminated refuses an unconditional offer of reinstatement. Board law shows that refusal of such an offer ends the employer's backpay liability as of the time of the refusal, *Southern Household Products Co.*, 203 NLRB 881, 882 (1973), not that the refusal ends backpay liability as of some earlier date based on the notion that the individual must have previously lost interest in reinstatement. Indeed, an employer is still "responsible for all backpay from the date of [the] unlawful termination until its unconditional offer of reinstatement" even if there is after-acquired evidence that the employee became ineligible for rehire and/or more expensive to rehire as of an earlier date. *Alton H. Piester, LLC*, 357 NLRB No. 116, slip op. at 3-4 (2011). The Board's unwillingness to reduce backpay liability based on the victim's behavior after the backpay period ends is also shown in *Ohio Hoist Manufacturing Co.*, 202 NLRB 472, 474-475 (1973), enfd. 496 F.2d 14 (6th Cir. 1974). In that case, the respondent argued that the discriminatee's high rate of post-reinstatement absenteeism showed an unwillingness to work during the backpay period and should limit the monetary award. The administrative law judge rejected the respondent's contention, and the Board affirmed. Id. Local 727 does not cite any authority in which the Board relied on evidence regarding the work that was available to, or accepted by, a victim during the post-backpay period to determine what work would have been available or accepted during the backpay period. After considering the authority and circumstances cited above, I conclude that such evidence is not a reliable indicator of whether Maxwell would have remained on will-call status if not for the unlawful suspension, or regarding any other question presented in this compliance proceeding. This is especially true since the backpay period here was rather lengthy – approximately 16 months – and the post-backpay period is therefore quite remote in time from when Maxwell was initially suspended. To the extent that giving some weight to the post-backpay period evidence is warranted, I find that that evidence is insufficient to show that Maxwell would have remained on will-call status during the backpay period if Local 727 had not unlawfully suspended him and/or had given him adequate and timely notice of the change in referral policy. Even assuming that such evidence created some ambiguity regarding the issue, I resolve that ambiguity against Local 727, whose unlawful action created the ambiguity, not

against Maxwell, the wronged party. *Performance Friction Corp.*, 335 NLRB at 1131; *La Favorita, Inc.*, 313 NLRB at 903; *WHLI Radio*, 233 NLRB at 330-331.

I reject the Respondent's argument for the further reason that, under Board law, Maxwell's entitlement to backpay cannot be conditioned on his engaging in the futile act of removing himself from will-call status at a time when Local 727 had suspended him from the referral list and he would not have received referrals regardless of his will-call status. The Board has held that wronged parties are not required to engage in futile acts to preserve their eligibility for backpay, *Laborers Local 158*, 301 NLRB at 37, *J.H. Rutter-Rex Mfg.*, 194 NLRB 19, 24 (1971), and Maxwell was not required to do so here.

For the reasons discussed above, I reject Local 727's contention that Maxwell should be denied backpay because he did not contact the referral officials to remove himself from will-call status during the period of his unlawful suspension.

F. Respondent's Contention that Maxwell Was Unwilling to Accept Audio Visual Work

The compliance specification does not award Maxwell backpay based on referrals for concert work since Maxwell had informed Local 727 that he was unwilling to accept such referrals. Local 727 contends that Maxwell should also be denied backpay for referrals of AV work. I find that Local 727 has failed to show that Maxwell would have declined AV work during the backpay period. Maxwell testified credibly, and without contradiction, that he informed Local 727 that he was unwilling to accept concert work, but that he did not indicate any unwillingness to accept audio visual and freight work. In an attempt to show that Maxwell should be denied backpay for AV referrals made during the period of his suspension, the Respondent relies on Maxwell's actions after his suspension and after the end of the backpay period. As discussed above, I give the Respondent's post-backpay period evidence little, if any, weight, and find that it does not outweigh Maxwell's testimony indicating a willingness to accept AV referrals. Indeed, even the post-backpay period evidence relied on by Local 727 shows that Maxwell did not decline all AV work referrals that were offered to him during that time frame. Given the above, and the general rule requiring that ambiguities in calculating backpay be resolved in favor of the wronged individual, not the wrong doer, I reject Local 727's argument that the backpay calculations should not include referrals for AV work.

G. Respondent's Contention Regarding Referrals Received by Michael Hansen

Local 727 contends that the Region improperly awarded backpay to Maxwell based on multiple referrals that were received by Michael Hansen. The record shows that Hansen, who had a less desirable position on the referral list than either Maxwell or the comparator employees who received most of the referrals denied to Maxwell, was referred for work at the same location on 15 days in February 2012. McManus, the Respondent's director of referrals, testified that the referrals received by Hansen were for non-bargaining unit work and that the employer had specifically called the referral office and requested Hansen "by name." McManus further testified that Hansen's work for this employer was only included in the referral records so that the office would know that Hansen was already working. According to McManus' testimony, the non-bargaining unit work performed by Hansen was not work for which Maxwell could have been referred, regardless of whether he had been suspended or not. Thus Local 727 contends that Hansen's referrals should not be used in calculating Maxwell's backpay. The

record contains no evidence contradicting McManus' testimony on this point. The compliance officer who prepared the compliance specification conceded that he did not know why Hansen received so much work at a single location in February 2012. I find that the evidence shows that Maxwell would not have received the referrals that went to Hansen in February 2012, and therefore agree with Local 727 that those referrals should not be included in the backpay calculation.

H. 8-Hour Workday Presumption

Porter, the compliance officer, testified that his presumption that a referral would have resulted in 8 hours of work per day was based on "a presumption of a regular work day" and "[n]othing more." Local 727 contends that this presumption is unfounded here. The testimony of McManus, and the information in Respondent's Exhibit 5, show that, in fact, the average non-concert referral resulted in approximately 6.1 hours of work per day. This evidence was not contradicted. Therefore, I conclude that backpay should be calculated at the rate of 6.1 hours per day, and that where necessary this rate should be adjusted to reflect the applicable contractual overtime rate of time and half for work on Saturdays and double time for work on Sundays. Thus the calculations should credit Maxwell with 6.1 hours for each workweek referral, 9.2 hours for each Saturday referral, and 12.2 hours for each Sunday referral.[3]

The General Counsel contends that since Local 727, in its answers to the compliance specification, failed to specifically deny that the 8-hour presumption was correct for weekday work, I should deem that allegation admitted for purposes of this proceeding. Brief of General Counsel at Page 11, citing Rules and Regulations of the National Labor Relations Board Section 102.56(c). That contention is not persuasive. In its first amended answer, Local 727 generally denied paragraph III(b) of the compliance specification, which stated, inter alia, that "each job referral is assumed to equal eight (8) hours." Moreover, in its answer to that paragraph, Local 727 contended that the calculation should be based on the number of hours that actually resulted from the referrals accepted by Maxwell during the post-backpay period. Local 727 set forth a calculation based on that argument, implicitly denying the compliance specification presumption that each referral generated 8 hours of work per day. Given this, I find that Local 727's answer contested the issue and that the 8-hour presumption should not be deemed admitted.

I. Wage Rate

The compliance specification states that "[t]he appropriate wage rate is assumed to be based on the position of 'dockmen,'" which had a contractual rate of $30.95 per hour during the first part of the backpay period and increased to $36.70 per hour from November 1, 2011, until the end of the backpay period. Porter, the compliance officer, testified that he did not have information showing the appropriate job classification for the referrals that were denied to Maxwell and therefore resolved the ambiguity against the wrongdoer and assumed that Maxwell would have been working in the classification that commanded the highest contractual wage rate. At trial, McManus provided credible testimony that the referrals at issue were not for the dockman position, but rather for the positions of loader/unloader, checker, crew foreman, forklift

[3] That being said, given my conclusions regarding which referrals should be used in the calculation, I found only a single eligible Saturday referral (the one occurring on May 5, 2012) and no eligible Sunday referrals.

driver, power truck driver, and freight handler. The wage rate for these positions was $29.80 per hour for the first part of the backpay period, and increased to $35.70 per hour from November 1, 2011, until the end of the backpay period. Neither Maxwell, nor any other witness with personal knowledge, contradicted McManus' testimony regarding the applicable job classification and pay rate for the work that Maxwell would have received if not for his unlawful suspension. I therefore credit McManus' credible and unrebutted testimony on this issue, and conclude that Maxwell's backpay should be calculated at the rate of $29.80 per hour for the period from April 1, 2011, until October 31, 2011, and at the rate of $35.70 per hour for the period from November 1, 2011, until July 25, 2012.

Regarding pension contributions, Local 727 states in its brief that the rate of contribution set by the applicable bargaining agreement was $6.50 per hour from April 2011 until December 31, 2011, and $7.00 per hour from January 1, 2012 onward. Brief of Respondent at Page 6, and Joint Exhibit (J Exh.) 1 at Page 9 (Article 16). The General Counsel states that the increase in pension contribution rate actually occurred as of November 1, 2011, not as of January 1, 2012. The General Counsel's position is supported by a letter from Local 727's Secretary Treasurer, stating that the increase in pension contribution level to $7.00 per hour was in effect as of November 1, 2011. Brief of General Counsel at Page 10 and J Exh. 3. Based on that letter, which Local 727 does not rebut or explain, I find that November 1, 2011, is the appropriate date to increase the pension contribution rate to $7.00 per hour for purposes of calculating Local 727's liability for lost pension contributions.

J. Interim Earnings

As discussed above, the Respondent has the burden of showing interim earnings. *Hansen Bros. Enterprises*, 313 NLRB at 600; *Mastro Plastics Corp.*, 136 NLRB at 1346. In this case, the compliance specification sets forth interim earnings and pension contributions totaling $28,015 during the backpay period. Local 727 has produced no evidence showing interim earnings or pension contributions in excess of those included in the compliance specification. Local 727 argues, however, that the interim earnings included in the compliance specification are suspect because they include amounts for which Maxwell, in response to Local 727's subpoena, did not provide documentation. In response to that subpoena, Maxwell provided Local 727 with his 2011 tax return, and three W-2 earnings summaries, but the Respondent states that the amounts appearing on those documents do not reach the amount that is included as interim earnings in the compliance specification.

The fact that the compliance specification uses interim earnings figures that exceed those for which Maxwell provided documentation in no way proves that Maxwell had interim earnings that exceeded the higher amount relied on in the compliance specification. The mere existence of discrepancies in the evidence regarding interim earnings does not suggest willful concealment on Maxwell's part. *Cibao Meat Products*, 348 NLRB 47, 48 (2006)). Indeed, the fact that the compliance specification decreases Local 727's liability by interim earnings beyond those for which Maxwell produced documentation is more plausibly seen as suggesting that Maxwell was forthcoming about his interim employment and revealed earnings in excess of those for which documentation exists. At any rate, Local 727's "unresolved doubt" as to whether Maxwell "concealed earnings" from the Board does "not suffice to satisfy the Respondent's burden" of showing additional interim earnings. *Atlantic Veal & Lamb*, 358 NLRB No. 74, slip op. at 1 (2012); see also *Sioux Falls Stock Yards*, 236 NLRB 543, 560 (1978) ("a discriminatee's poor recordkeeping and bad memory do not in themselves constitute grounds for disqualifying him from backpay"). Local 727 has the burden of establishing that Maxwell had interim earnings beyond those set forth in the compliance specification, and it has not done so.

CONCLUSION

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order[4].

ORDER

The Respondent, its officers, agents, successors, and assigns, shall make whole Ron Maxwell by: payment to him of the net backpay amount set forth in Table I below, plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enfd. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), minus the withholding tax required by Federal and State laws; and by making on behalf of Maxwell the net pension contribution amounts set forth in Table II to the Central States Southeast and Southwest Areas Pension Fund, plus any penalties and interest in accordance with the requirements of the collective bargaining agreement.

Table I
Back Pay Calculations for Ron Maxwell

Year	Quarter	Hours[5]	Rate	Gross Backpay	Interim Earnings	Net Backpay
2011	Q2	91.5	$29.80	$ 2,726.70	$ 3,536.00	$ -
2011	Q3	85.4	$29.80	$ 2,544.92	$ 1,536.00	$ 1,008.92
2011	Q4	61.0	$29.80			
2011	Q4	42.7	$35.70	$ 3,342.19	$ 3,536.00	$ -
2012	Q1	48.8	$35.70	$ 1,742.16	$ 11,652.00	$ -
2012	Q2	106.8[6]	$35.70	$ 3,812.76	$ 6,000.00	$ -
2012	Q3	-	$35.70	-	-	$ -
Total				$ 14,168.73		$ 1,008.92

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

[5] The hours used in these calculations are based on referrals appearing in Respondent's Exhibit 5 and/or General Counsel's Exhibit 4. For the reasons discussed above, I have excluded from the calculation those referrals identified by Respondent's Exhibit 5 as being for concert work, and those identified by General Counsel's Exhibit 4 as having been made to Michael Hansen based on a special arrangement with the employer.

[6] This figure includes an adjustment (time and a half) for Saturday work on May 5, 2012.

Table II
Pension Contributions Owed on Behalf of Ron Maxwell

Year	Quarter	Hours	Rate	Gross Pension Contributions	Interim Pension Contributions	Net Pension Contributions
2011	Q2	91.5	$6.50	$ 594.75	$ 845.00	-
2011	Q3	85.4	$6.50	$ 555.10	-	$ 555.10
2011	Q4	61.0	$6.50			
2011	Q4	42.7	$7.00	$ 695.40	-	$ 695.40
2012	Q1	48.8	$7.00	$ 341.60	$ 910.00	-
2012	Q2	103.7	$7.00	$ 725.90	-	$ 725.90
2012	Q3	-	$7.00	-	-	-
Total				$ 2,912.75		$ 1,976.40

Dated, Washington, D.C. July 8, 2013.

Paul Bogas
Administrative Law Judge