

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25

and

DENISE AVALLON, An Individual

CASE 01-CB-010882

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE SUPPLEMENTAL DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (GC) files the following Brief in Support of Exceptions to the Supplemental Decision of Administrative Law Judge Michael A. Rosas [JD-09-14] (ALJD), issued on February 20, 2014, in the above -captioned case. In all respects, other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.¹ These include findings that: (1) the backpay period in this case extends from March 8, 2008, until August 24, 2011; (2) GC correctly calculated the net backpay owed by Respondent, International Brotherhood of Teamsters, Local 25 ("Local 25") to Charging Party Denise Avallon ("Avallon") (ALJD at p. 2); (3) GC correctly calculated the pension contributions that would have been made to the New England Teamsters & Trucking Industry Pension Fund (Pension Plan) on Avallon's behalf, but for Local 25's unlawful conduct (ALJD at p. 3); (4) Local 25 failed to carry its burden of proof that there were substantially equivalent jobs within the appropriate geographic area in 2011 (ALJD at p. 10); (5) Avallon reasonably left Tri Town Realty in April 2008 and this voluntary resignation does not warrant an offset to gross backpay (ALJD at p. 11); and (6) Avallon was qualified for the positions she applied to during the backpay period (ALJD at p.11 n.52).

¹ International Brotherhood of Teamsters, Local 25 will be referred to as "Respondent" or "Local 25." Charging Party Denise Avallon will be referred to as "Avallon." References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel and Respondent's Exhibits will be referred to as (GCX-) and (RX-), respectively with the appropriate exhibit number.

I. STATEMENT OF FACTS

A. The Board's Backpay Calculations

The backpay period in this case began on March 8, 2008, the date when Avallon was placed upon Local 25's referral list, and it ends on August 24, 2011, when Local 25 could have validly removed Avallon from its referral list for failure to acquire a commercial driver's license (CDL) (ALJD at p. 9-10). For that period, the GC seeks \$59,346.45 in total compensation for Avallon. This includes lost wages, vacation allowance, and meal allowance (\$47,320.88);² missed contributions to the New England Teamsters & Trucking Industry Pension Fund (\$11,010.86); and the *Latino Express*, 359 NLRB No. 44 (2012), remedy for excess tax liability (\$1,060.21) (ALJD at p. 2-4; GCX-1(d) & -1(i)).³ GC calculated these figures by determining the average number of hours worked per quarter by similarly situated members of Local 25 (ALJD at p. 2-3; GCX-1(i) at Am. Exh. 2). GC then multiplied the number of hours per quarter by the applicable wage or pension contribution rates (ALJD at p. 2-3; GCX-1(i) at Am. Exh. 1 and 3).

At trial, the parties stipulated that the calculations and figures contained in the GC's Amended Compliance Specification were correct (Tr. 7-9). However, Local 25 reserved the right to raise the affirmative defense that Avallon had unreasonably failed to mitigate her damages (Tr. 8-9; GCX-1(f) at p. 4).

² GC subsequently withdrew its request for contributions to the Teamsters Local 25 Health Services & Insurance Plan (ALJD at p. 2 n.5).

³ As provided in its Amended Compliance Specification, the GC also seeks interest for each of these liquidated amounts (GCX-1(i) at p. 6).

B. Background and Job Skills of Charging Party Denise Avallon

Avallon graduated from high school and completed some college coursework but has no terminal college degree (ALJD at p. 4; Tr. 29-30). She can operate a computer and is skilled at computer research but admits that she is not very adept with certain aspects of Microsoft Office (ALJD at p. 4; Tr. 30, 155, 158). She has no commercial driver's license (CDL) and cannot lift heavy objects (ALJD at p. 4; Tr. 30, 194).

When the backpay period began in March 2008, Avallon was 48 years old (Tr. 29). Throughout the backpay period, she lived in North Attleboro, Massachusetts, with her husband, a welder (ALJD at p. 4; Tr. 28, 119). Although Avallon was covered by her husband's health insurance during the backpay period, it came with a \$2,000 deductible⁴ (Tr. 203).

C. Avallon's Work and Remuneration While Employed Through Local 25's Hiring Hall: 1997-2003

From 1997 through 2003, Avallon worked as a chauffeur in the movie production industry. She was a member of Local 25 and worked on jobs that were covered by collective- bargaining agreements (CBAs) negotiated by Local 25 and that were referred to her through Local 25's hiring hall (ALJD at p.4; GCX-1(a) at p. 4).

As a chauffeur, Avallon would shuttle movie production personnel around Massachusetts. Normally, Avallon would drive a 15-person van. She did not have a commercial driver's license and never drove vehicles that required such a license. No heavy lifting of any sort was required. Her work was periodic; in a busy year, she worked as many as 8 months for movie production companies; in a slow year, she

⁴ As previously noted, the Region is not pursuing the claim for contributions on Avallon's behalf to the Teamsters Health Plan. Nevertheless, the availability of superior health benefits remains a relevant factor in Avallon's consideration of interim employment.

worked as few as ten days (ALJD at p. 4; Tr. 32-33). When not working for movie production companies, Avallon would collect unemployment compensation or work other jobs, including as a receptionist at a YMCA and as a park ranger (Tr. 33).

CBAs negotiated by Local 25 set the terms and conditions of Avallon's employment in the movie production industry (GCX-1(a) at pp. 4-5, 6). Under those CBAs, Avallon received roughly \$20/hour and was guaranteed 13-hour workdays with the opportunity for overtime for any hours worked above 65 per week (ALJD at p.4; Tr. 32, GCX-5, -6). When an extended movie shoot took place a long distance from her home, the movie production company would put Avallon up in a hotel (Tr. 140).

Those CBAs also provided that Avallon would receive health and pension benefits through the Teamsters Local 25 Health Services & Insurance Plan (Health Plan), and the New England Teamsters & Trucking Industry Pension Fund (Pension Plan), respectively (ALJD at p. 4; Tr. 32, GCX-5, -6). For every hour worked by Avallon, employers made contributions to the Pension Plan at a rate determined by the CBAs (ALJD at p. 3; GCX-5 at p. 2, GCX-6 at pp. 2-3; Tr. 100-101). Avallon was vested in the Pension Plan by the time she ceased working through Local 25's hiring hall in 2003 (ALJD at p. 3; Tr. 98, RX-1). Her monthly pension payments are scheduled to begin in 2023 (ALJD at p. 3; RX-1).

D. Avallon's Work History, 2003-2008; Avallon's Interim Work at Tri Town Realty; Avallon's Return to the Local 25 Referral List

In 2003, movie production work in New England became more scarce, Avallon's opportunities to work through Local 25's hiring hall began to decrease, and Avallon started to look for other work. Avallon first found work through The Alpha Group, a

temp agency, where she worked as a photographer, an inventory clerk, and a clerical (ALJD at p. 4-5; Tr. 33-34).

In March 2004, Avallon began work at Brown University as a mail driver clerk. The job paid \$11/hour, had good health benefits, and offered a retirement plan (ALJD at p. 5; Tr. 34, 185). But the job required that she continually lift heavy packages, including bulk junk mail and computer output, and eventually Avallon “just couldn’t keep up anymore.” (ALJD at p. 5; Tr. 35). Seeking less strenuous work, Avallon left Brown in August 2006 (ALJD at p. 5; Tr. 35-36).

Avallon next found work as a leasing agent for Tri Town Realty, a business located in North Attleboro, Massachusetts. Avallon would show apartments to potential lessees and handle the associated paperwork (ALJD at p. 5; Tr. 36). Tri Town Realty also paid \$11/hour, but did not provide health or retirement benefits or benefits of any other kind (ALJD at p. 5; Tr. 36).

In February 2008, while still working at Tri Town Realty, Avallon once more applied to become a member of Local 25’s hiring hall. Local 25 at first denied Avallon’s request, at which point Avallon filed a grievance (ALJD at p. 5; RX-12, Tr. 165-66). In response to that grievance, Local 25 announced on March 11, 2008 that it would include Avallon’s name on the “casual list” – i.e., the list of Local 25 members eligible for work once the “seniority list” has been exhausted (ALJD at p. 5; GCX-7, Tr. 166).

Consistent with the nature of the movie and television industry, Avallon expected to be called for movie production work at any time once she was placed on the casual list. Many movies were being filmed in New England, other Local 25 members were busy with movie work, and Avallon reasonably believed she had to be ready at “a

moment's notice."⁵ (ALJD at p. 6 & n. 25; Tr. 41, 175-77, 181; GCX-1(a) at 5-6).

Avallon consequently left her job at Tri Town Realty toward the end of April 2008, after taking the time to train her replacement. She also secured a card from the Department of Transportation, warranting her fitness to drive (ALJD at p. 6; Tr. 41, 181).

E. Avallon's Job Search

Despite being ready and available for work, for the next three-and-a-half years Avallon was never referred for work through Local 25's hiring hall (Tr. 41-42, GCX-1(a) at p. 1 n.3, 13-15). Local 25 never explained to Avallon why it was refusing to refer her for work (GCX-1(a) at p. 14). While remaining on the referral list, ready and available to work, Avallon began to search for other work in March 2008 (Tr. 42).

Avallon searched for full-time employment for which she was qualified and that paid "a decent wage." (Tr. 56). Given her residence in North Attleboro, she focused her search on jobs located in northeastern Rhode Island and southeastern Massachusetts. She testified that \$10/hr work did not justify commuting 86 miles round-trip to and from Boston (ALJD at p. 6; Tr. 56-57, 203, Joint Stipulation Regarding Driving Distances). She also preferred jobs that provided health and retirement benefits. For this reason, she concentrated her job search on colleges and universities, which, based on her experience, she believed to offer better benefits than other employers (ALJD at p. 6; Tr. 56-57).

⁵ Avallon's assessment of the necessity of being available if and when job openings occurred is well supported in the record. The referral rules governing the hiring hall at issue here *forbid* employees on the hiring hall's A and B referral lists from holding regular, full-time employment outside of the movie and television industry (GCX-3 at p. 2).

1. 2008

During her job search from April through December 2008, Avallon applied for at least ten jobs (see table below).⁶ The large majority of the jobs to which she applied consisted in basic office and clerical work. Avallon applied to all of these positions through the Internet, through formal on-line application forms.

Reflecting her generally positive impression of Brown University as a former employer, Avallon applied to ten jobs at Brown during this period, including two positions in Mail Services, where she had previously worked. In May 2008, Avallon advanced to the interview stage in her application to work as an office assistant in the Brown University Bio Med Neuroscience Department (GCX-11, -11(a), -32). Ultimately, she did not get the job.

Avallon applied on November 5 for a position as a mail clerk. Shortly thereafter, the manager in the Mail Services department called Avallon to tell her that the job requisition had been cancelled due to a hiring freeze (ALJD at p. 6-7; GCX-32, Tr. 186-88). This hiring “freeze” did not entirely bring hiring at Brown to a halt, however; Brown continued to hire employees on a limited basis until September 2010, when the freeze was formally lifted (Tr. 111; GCX-33).

Date	Employer Name	Job Description	Method of Application
April 8	Brown University, Mail Services	Coordinator	Submitted resume through on-line application process at careers.brown.edu.
May 6	Brown University,	Secretary/	Submitted resume through on-

⁶ Avallon testified that she applied to an additional three jobs at Wheaton College in 2008. But in the absence of corroboration for these applications, the ALJ found this testimony non-credible (ALJD at p. 6 & n.27; Tr. 60-65).

	College Admissions Office	Receptionist	line application process at careers.brown.edu.
May 9	Brown University, BioMed Neuroscience Graduate Program	Staff/Office assistant	Submitted resume through on-line application process at careers.brown.edu; interviewed in-person.
May 27	Brown University, Health Services	Administrative assistant	Submitted resume through on-line application process at careers.brown.edu.
June 17	Brown University, Sheridan Center for Teaching & Learning	Administrative assistant	Submitted resume through on-line application process at careers.brown.edu.
July 1	Brown University, Auxiliary Housing	Administrative office assistant	Submitted resume through on-line application process at careers.brown.edu.
July 23	Brown University, Division of Engineering	Stockroom assistant	Submitted resume through on-line application process at careers.brown.edu.
Sept. 26	Brown University, Neuroscience Department	Staff/Office assistant	Submitted resume through on-line application process at careers.brown.edu.
Sept. 26	Brown University, Bio Med Student Affairs Department	Staff assistant	Submitted resume through on-line application process at careers.brown.edu.
Nov. 5	Brown University, Mail Services	Mail clerk	Submitted resume through on-line application process at careers.brown.edu.

(ALJD at p. 6; GCX-9-19, Tr. 60-65).

2. 2009

As far as Avallon could discern, the hiring freeze at Brown University continued through June 2009, when she finally saw a job opening on the website for a Parking Officer position and applied for it (Tr. 188). In total, Avallon filed two job applications in 2009, both to Brown University via its website.

Avallon testified that she did not file more applications during this period because she did not see any job openings to apply to. As Avallon explained under cross-examination, “[t]here was nothing out there. You would go online for the newspaper thing on line and there was like nothing. Used to be five pages and then you look and there’s nothing.” (Tr. 189)⁷.

Date	Employer Name	Job Description	Method of Application
June 24	Brown University, Transportation Department	Parking officer	Submitted resume through on-line application process at careers.brown.edu.
Sept. 9	Brown University, Watson Institute for International Studies	Coordinator	Submitted resume through on-line application process at careers.brown.edu.

(ALJD at p. 7; GCX-21-22(a); Tr. 65-67).

⁷ Although the ALJ found non-credible Avallon’s assertion that “there was nothing out there” during 2009, the ALJ premised this determination on Jellenik’s testimony that “there were thousands of jobs available that fell within Avallon’s qualifications and experience.” (ALJD at p. 7 n.34). GC challenges this credibility determination, on the basis that Jellenik’s testimony fell well short of establishing the existence of “thousands” of jobs available for someone with Avallon’s qualifications. See pp. 15-17, *infra*.

3. 2010

Job hiring picked up slightly in 2010, and Avallon applied to at least three jobs that year, including positions as a library assistant, administrative assistant, and parking officer.⁸ Only two of these positions were at Brown University. Avallon applied to every position on-line with the exception of Boyden Library, which specifically requested that she apply in-person (GCX-26).

Date	Employer Name	Job Description	Method of Application
Feb. 3	Brown University, Transportation Department	Parking officer	Submitted resume through on-line application process at careers.brown.edu.
June 30	Boyden Library, Foxboro, MA	Library assistant	Applied in-person.
Aug. 25	Brown University, Center for Environmental Studies	Administrative assistant	Submitted resume through on-line application process at careers.brown.edu.

(ALJD at p. 7; GCX-24-27; Tr. 67-75).

⁸ Avallon testified that she applied to an additional seven jobs in 2008. But in the absence of written corroboration for these applications, the ALJ found this testimony non-credible (ALJD at p. 7 & n.38; GCX-24-27; Tr. 67-75).

4. 2011

During the final eight months of the backpay period, which ended on August 24, 2011, Avallon applied to two additional jobs, including positions as a mail clerk and as laundry and housekeeping help.⁹

Date	Employer Name	Job Description	Method of Application
March 1	Madonna Manor (nursing home)	Laundry/Housekeeping/Eden coordinator	Emailed resume.
May 5	Wheaton College ¹⁰	Mail clerk	Emailed resume.

(GCX-29-31; Tr. 75-80.)

F. Local 25 Adopts the Revised Referral Rules

On February 24, 2011, Local 25 adopted a revised set of referral rules for the operation of its hiring hall (ALJD at p. 2; GCX-2). These revised referral rules superseded the referral rules that had been in place since December 17, 2007 (ALJD at p. 2; GCX-3).

Among other changes, the revised referral rules required that registrants in its hiring hall possess a commercial driver's license (CDL) and instituted a six-month time limit for Local 25 members who did not possess a CDL to obtain one. Hiring hall registrants on the referral list who failed to acquire a license within six months of the

⁹ Avallon testified that she applied to an additional two jobs in 2008. But in the absence of written corroboration for these applications, the ALJ found this testimony non-credible (ALJD at p. 7 & n.42; Tr. 75-80).

¹⁰ On the grounds that it was uncorroborated, the ALJ found non-credible Avallon's testimony that she applied in 2011 to "Wheaton College [sic]" (ALJD at p. 7 n.42). This finding is in error. GC did introduce into evidence written corroboration of this application (GCX-31), and later on in his decision, the ALJ specifically found that Avallon "also applied in or around May 2011 to Wheaton College for a mailroom position." (ALJD at p. 8).

adoption of the revised referral rules would be removed from the list (ALJD at p. 2; GCX-2 at pp. 3-4, 6).

G. Local 25's Expert Witness

At trial, Local 25 called Rhonda Jellenik as a witness in support of their claim that substantially equivalent work was available to Avallon during the backpay period.

Jellenik is a certified vocational rehabilitation counselor, trained to “assist[] people who have been injured on the job obtain new jobs based on their current skills and abilities.”

(Tr. 209). Jellenik is paid to lend her special skills and resources to people reentering

the workforce and to motivate them in their job search (Tr. 265-66). Notwithstanding

Jellenik's certification as a vocational counselor, Jellenik has no formal training in

economics. Nothing in her education or training indicates the ability to interpret

economic data, assess economic trends, or evaluate labor market conditions (RX-16).

Local 25 entered into evidence a report by Jellenik purporting to survey substantially equivalent jobs available to Avallon during the backpay period (RX-17).

Most of Jellenik's report relied heavily upon the interpretation of economic statistics

culled from the website of the U.S. Bureau of Labor Statistics and semi-annual reports issued by the Massachusetts Department of Workforce Development (GCX-34-38; RX-

17). On page 2 of the report, the figure “2,153” should read “1,261,” and the figure

“2,279” should read “1,864” (RX-17 at p. 2; GCX-34 at Tables 2 & 5, GCX-35 at Tables

2 & 5). While analyzing labor statistics, Jellenik apparently conflated the BLS industry

category of “Transportation & Warehousing” with the BLS occupational category of

“Transportation & Material Moving,” believing the two categories to be “predominantly

the same thing.” (Tr. 246). In fact, there are half as many “Transportation &

Warehousing” employees in the United States as there are “Transportation & Material Moving” employees.¹¹

Unlike the rest of the document, the tables located on pages 3 and 16-17 of the report were based upon proprietary files of Jellenik that Local 25 did not produce in response to the subpoena of the GC (Tr. 253-55). Counsel for Local 25 warranted, however, that these tables were not “significant,” and Jellenik testified that her overall conclusions were independent of the data contained in those tables (Tr. 256, 272-73).

In preparing her report, Jellenik never spoke with Avallon (Tr. 258). Jellenik also never contacted any employer concerning Avallon or her prospects for any job opening. (Tr. 260-61). Jellenik’s report primarily focuses on the Massachusetts-wide and Boston-area labor markets. It does not mention Rhode Island, despite the fact that Avallon lived much closer to the Rhode Island labor market than the Boston-area labor market (Tr. 257, Joint Stipulation Regarding Driving Distances).

II. THE ALJ ERRED IN CONCLUDING THAT LOCAL 25 HAD CARRIED ITS BURDEN OF SHOWING THAT AVALLON WILLFULLY INCURRED A LOSS OF INCOME

“A discriminatee is entitled to backpay if he makes a reasonably diligent effort to obtain substantially equivalent employment.”¹² Consequently, “[t]he contention that a discriminatee has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area, and (2) the discriminatee unreasonably failed to apply for these jobs.” In *St. George Warehouse*,³³¹ NLRB 961, 961 (2007), the Board recently altered the burdens

¹¹ Compare <http://www.bls.gov/OES/current/oes530000.htm> with <http://www.bls.gov/iag/tgs/iag48-49.htm>.

¹² *Moran Printing Inc.*, 330 NLRB 376, 376 (1999).

of production applicable to these two elements, holding that the respondent has the burden of going forward with evidence on the first element, which, if established, imposes on the General Counsel the burden of going forward with evidence on the second element.¹³ But the Board “ma[d]e no change in the ultimate burden of persuasion on the issue of a discriminatee’s failure to mitigate,” and thus the ultimate burden of persuasion with respect to *both* elements continues to rest with the respondent.¹⁴

As shown below, Local 25 failed to carry this overall burden of persuasion, and the ALJ erred in finding to the contrary. In an attempt to carry the first half of its burden, Local 25 put forth two sets of statistics, which, when examined jointly, were supposed to show that substantially equivalent employment had been available to Avallon. But upon close examination, those statistics are fundamentally inadequate to the task, leaving numerous important questions unanswered. This failure to carry the first half of its burden led to Local 25 failing to carry the second half of its burden as well. Having been unable to prove the existence of substantially equivalent employment, Local 25 was naturally unable to show that Avallon had not put forth a good-faith effort to find such employment. The ALJ was thus incorrect to toll backpay for the years 2009 and 2010, and Avallon is due the full amount of compensation sought by the GC.

¹³ See *id.* at 963.

¹⁴ *Id.* at 961, 963.

A. Local 25 Failed to Establish the Existence of Substantially Equivalent Employment

1. General Principles

In order “[t]o satisfy her duty to mitigate, an employee is required to accept only substantially equivalent employment.”¹⁵ Accordingly, the first element of its burden requires the respondent to prove the availability of “substantially equivalent jobs in the relevant geographical area.”¹⁶ “[T]he question of what constitutes ‘regular and substantially equivalent employment’ is determined not by a ‘mechanistic application of the literal language of the statute,’ but rather through the objective appraisal of several factors, both tangible and intangible, including the desire and intent of the employee concerned.”¹⁷ Thus, in answering the question of what constitutes “substantially equivalent employment,” the Board has found that wages,¹⁸ fringe benefits,¹⁹ level of effort required,²⁰ and commuting distance²¹ can each be determinative.

¹⁵ *Fugazy Continental Corp.*, 276 NLRB at 1336. *S. Silk Mills*, 116 NLRB 769, 773 (1965) (“[I]n cases involving the issue of reasonable search, the obligation of a discriminatee to minimize his loss of earnings is satisfied if he makes reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience.”), *enf’d denied*, 242 F.2d 697 (6th Cir. 1957).

¹⁶ *St. George Warehouse*, 331 NLRB at 961.

¹⁷ *Associated Grocers*, 295 NLRB 806, 808-09 (1989) (quoting *Little Rock Airmotive*, 182 NLRB 666 (1970), *enf’d in relevant part* 455 F.2d 163 (8th Cir. 1972)). See also *Little Rock Airmotive, Inc.*, 182 NLRB 666, 667 (1970) (finding relevant to “substantially equivalent employment” inquiry “such factors as fringe benefits (retirement, health, seniority for purposes of vacation, retention, and promotion), location and distance between the location of the job and an employee’s home, differences in working conditions, et cetera”).

¹⁸ See, e.g., *Shopmen’s Local Union No. 455*, 313 NLRB 1022, 1030 (1994) (\$2.38/hr difference in wages rendered two positions not substantially equivalent).

¹⁹ See, e.g., *Pride Ambulance Co.*, 356 NLRB No. 128, slip op. at 8 (Apr. 5, 2011) (finding that offered positions were not substantially equivalent “due to the attendant condition that [discharged employees] must wait 90 days to requalify for health insurance coverage”).

²⁰ See, e.g., *KSM Indus., Inc.*, 353 NLRB 1124, 1167 (2009) (finding that position was not substantially equivalent because it was “more onerous, requiring work outside in the (Wisconsin) winter”), *aff’d* 355 NLRB 1344 (2010); *Seaport Manor, Inc.*, 249 NLRB 886, 892 (1980) (night-shift as opposed to day-shift rendered two positions not substantially equivalent).

As part of its burden of proving the availability of substantially equivalent employment, the respondent must prove that the discriminatee “refused a job offer . . . [or] would have been hired if they had applied at a particular company.”²² The mere “existence of job opportunities by no means compels a decision that the discriminatees would have been hired had they applied.”²³ Accordingly, “[t]he Board has held that the existence of advertisements for jobs does not establish that such jobs would have been available or that the claimant would have been selected had he applied.”²⁴

Finally, when considering any of the many aspects of a job search, “the backpay claimant should receive the benefit of any doubt rather than the Respondent.”²⁵ To carry its burden, a respondent must prove a number of complicated matters, including whether substantially equivalent jobs existed during the backpay period; whether the discriminatee would have been hired for those jobs if she had applied; and whether, under all the circumstances, the discriminatee made a good-faith effort in searching for work. Nevertheless, it is the respondent “against whom any uncertainty must be resolved,” because the respondent is “the wrongdoer responsible for the existence of

²¹ See *Big Three Industrial Gas*, 263 NLRB 1189, 1211 fn. 77 (1982) (50 mile one-way commute unreasonable); *WHLI Radio*, 233 NLRB 326 (1977) (35 mile one-way commute unreasonable); *Nickey Chevrolet Sales*, 160 NLRB 1279, 1280 (1966) (50 to 55 mile one-way commute unreasonable).

²² *Lundy Packing Co.*, 286 141, 142 (1987).

²³ *Delta Data Sys. Corp.*, 293 NLRB 736, 737 (1989).

²⁴ *Ernst & Young*, 304 NLRB 178, 179 (1991) (citing *Airport Service Lines*, 231 NLRB 1272 (1977)). See also *id.* (“[T]he existence of employment advertisements or a favorable job market does not meet the employer’s burden of proof that the backpay claimant failed to make a reasonable search.”) (citing *Associated Grocers*, 295 NLRB 806 (1989); *Groves Truck & Trailer*, 294 NLRB 1 (1989)).

²⁵ *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973). See also *Pope Concrete Products*, 312 NLRB 1171, 1172 (1993) (“It is well established that ‘any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible.’”) (quoting *Fibreboard Paper Products Corp.*, 180 NLRB 142, 143 (1969)).

any uncertainty.”²⁶ As reviewing courts have noted, this is wholly justified: “[T]he Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act.”²⁷

2. The ALJ Incorrectly Found that Local 25 Had Carried Its Burden of Proving the Availability of Substantially Equivalent Employment Through the Testimony of Ms. Rhonda Jellenik

At trial, it was Local 25’s burden to prove the availability of substantially equivalent employment during the backpay period. It sought to do this through the testimony of Ms. Rhonda Jellenik, who presented two sets of statistics: the first concerned the number of job openings in Massachusetts; the second, the wage distributions among existing jobs in Massachusetts. In reliance on those statistics, the Administrative Law Judge concluded that “Local 25 met its burden by [sic] of proving that vacancies existed for substantially equivalent jobs existed [sic] in 2008, 2009 and 2010 in the Greater Boston and Southeastern Massachusetts areas” (ALJD at p. 10, l. 36-38).

This finding by the ALJ misconstrues the burden that Local 25 bore and should be overturned. Voluminous though they are, the array of statistics introduced by Jellenik never cohere enough to demonstrate that even one substantially equivalent position existed in the southeastern Massachusetts area where Ms. Avallon lived during the backpay period.

²⁶ *United Aircraft Corp.*, 204 NLRB at 1068.

²⁷ *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 (3d Cir. 1968). See also *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972) (“[D]epriv[ing] an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy.”) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 541 (1943)); *id.* (noting that discriminatee searching for substantially equivalent employment is in a Catch-22 and “[u]nder these circumstances, we believe that it would not be unreasonable for the NLRB to resolve doubts in this area in favor of the innocent discriminatee”).

Driving work in the movie industry sets a high bar for substantially equivalent employment. Despite her lack of specialized skills, Avallon would have received a high hourly wage (\$22.75/hr), generous health and retirement benefits, guaranteed 13-hour workdays, the opportunity for overtime, and vacation and meal allowances. (GCX-1(d) & (i)). Avallon also had certain work limitations that were accommodated by work in the movie industry and that any future job would need to accommodate – namely, her lack of a CDL and inability to perform heavy lifting.²⁸ While working in the movie industry, Avallon had occasionally traveled to Boston or farther to perform work. But the lengthy commute involved – a round-trip from Avallon’s home to Boston is 86.2 miles – meant that Avallon was unwilling to travel those same distances unless her alternate employment paid as well as her work in the movie industry (Tr. 203-04). Taken together, these parameters define “substantially equivalent employment” for Avallon during the backpay period.²⁹

In her report, Jellenik concluded that such substantially equivalent employment was available during the backpay period, but in support of that conclusion she could only offer an unconvincing collection of statistics. First, she cited a set of statistics that indicated the number of job openings in “Transportation & Warehousing” in southeastern Massachusetts (RX-17 at p. 2), but no information concerning the wages or benefits that these job openings offered, no precise estimate as to how many of

²⁸ The ALJ stated that he “was not convinced by Avallon’s statement that she was forced to leave the Brown job because of the heavy lifting component of the work.” (ALJD at p. 5 n.18.) Regardless whether this finding is correct, the record establishes that Avallon left Brown University because the heavy lifting required by that job made “[e]verything hurt” (Tr. 147) and that Avallon’s work in the movie industry did not require any similar heavy lifting. The absence of heavy lifting therefore constitutes a relevant aspect of “substantially equivalent employment” for Avallon, and Avallon was justified in seeking jobs that did not require heavy lifting.

²⁹ See *Associated Grocers*, 295 NLRB at 808-09.

those jobs were in “Transportation” as opposed to “Warehousing,” and no estimation whatsoever concerning how many of those job openings required a CDL or heavy lifting.³⁰ A second set of statistics indicated the wage distribution (but no data concerning health or retirement benefits) for existing transportation jobs (not job openings) in southeastern Massachusetts (i.e., Taunton-Norton-Raynham), organized by percentiles (RX-17 at pp. 4-10). Like the first set of statistics, these figures did not differentiate among trucking jobs that required heavy lifting and those that did not. Nor did they identify job openings to which Avallon could have applied; they only indicated the wage distribution among existing jobs. And according to those statistics, only the 90th percentile of light truck drivers in southeastern Massachusetts earned a wage comparable to the wages offered in the movie industry (RX-17 at pp. 4-10).

These two sets of statistics are fundamentally inadequate to establish Jellenik’s conclusion that substantially equivalent employment existed in southeastern Massachusetts during the backpay period, and considering them in combination does nothing to address this inadequacy. The first set of statistics offers a very rough estimation of how many jobs openings there were in the transportation and warehousing industry in Massachusetts, with no information concerning wages or benefits; the second set of statistics gives a sense of the wage distribution among existing transportation jobs in southeastern Massachusetts, with no information concerning the wages offered by transportation job openings. Taken together, the statistics are no more helpful, since nothing indicates that the job openings described in the first set of

³⁰ The BLS Industry category of “Transportation and Warehousing” encompasses a large number of different transport industries, including air, rail, water, truck, transit and ground passenger, pipeline, scenic and sightseeing, as well as industries comprising the postal service, couriers and messengers, and warehousing and storage. See <http://www.bls.gov/iag/tgs/iag48-49.htm>.

statistics are for the high-wage jobs described in the second set of statistics. In fact, the natural assumption is that the opposite would be the case.

Crucially, Jellenik provided nothing beyond these statistics to support her conclusion. Jellenik has no background in economics and no qualifications to interpret labor market statistics. In fact, during her testimony, Jellenik confused the BLS industry category of “Transportation and Warehousing” with the BLS occupational category of “Transportation and Material Moving.” Jellenik claimed the two categories were “predominantly the same thing” (Tr. 246) despite the fact that in the United States there are twice as many employees in “Transportation and Material Moving” as there are in “Transportation and Warehousing.”³¹

Jellenik was thus unable to provide answers to several important questions, which could have been answered by an economist who was able to properly interpret these statistics and was independently knowledgeable about the Massachusetts labor market. These include:

- 1) What percentage of job openings in “Transportation and Warehousing” would Avallon be suited and qualified for?
- 2) What percentage of jobs in “Transportation and Warehousing” require heavy lifting?
- 3) What is the wage distribution among job openings in the transportation industry (or: how would the wage distribution among existing jobs specifically differ from the wage distribution among job openings)?
- 4) How many of the job openings listed would have been publicly advertised?
- 5) Where would those job openings have been advertised, and would Avallon have naturally come across those advertisements in her job search?

³¹ Compare <http://www.bls.gov/OES/current/oes530000.htm> with <http://www.bls.gov/iag/tgs/iag48-49.htm>.

- 6) How many persons would have applied to these job openings?
- 7) If Avallon applied to one of these job openings, what would be the probability that she would get the job – and how many job openings would she need to apply to before she could reasonably be assured of securing a job?

Jellenik answered none of these questions, nor did she possess the ability to do so.

Beyond introducing the two sets of statistics contained on pages 2 and 4-10 of her report, Jellenik contributed nothing to determining whether substantially equivalent employment was available to Avallon during the backpay period.³²

In this regard, the ALJ clearly erred when he stated that “[i]t is insignificant that Local 25’s [expert witness] did not interview Avallon or consult any employer regarding her prospects for any job opening (ALJD at p. 10, n.51). As the Board recently reiterated in *St. George’s Warehouse*, it is difficult if not impossible for a respondent to prove the availability of substantially equivalent employment if the respondent’s expert never contacts the discriminatee nor the employers who would have supposedly offered work to her.³³ Without such information, a respondent will rarely be able to carry its burden and show “whether the jobs would have been available had [the discriminates] applied, [or] whether [the discriminatees] would have been hired had [they] applied.”³⁴

³² Although the ALJ purported to also consider the job openings listed on the final two pages of Jellenik’s report (ALJD at p. 9 n.50; RX-17 at p. 16-17), these data did not figure into Jellenik’s conclusions and cannot serve as a basis for the ALJ’s finding of substantially equivalent employment. Jellenik never provided any documentation to support that list of job openings (Tr. 253-55), and she specifically disclaimed relying on those job openings in formulating her conclusions (Tr. 256, 272-73). For his part, the ALJ could not have relied on those job openings to support his finding that substantially equivalent employment was available to Avallon, since the list did not indicate where the job openings were within Massachusetts.

³³ *St. George Warehouse*, 353 NLRB 497, 503-04 (2008), *aff’d* 355 NLRB 474 (2010), *enf’d* 645 F.3d 666 (3d Cir. 2011).

³⁴ *Id.* (quoting *Bauer Group*, 337 NLRB 395, 398 (2002); *Groves Truck & Trailer*, 294 NLRB 1, 5 (1989)).

In *St. George*, the Board accordingly rejected the respondent's evidence as inadequate: the respondent's expert's "did not speak with [the discriminatees] and did not contact any of the employers who advertised for help"; consequently, the expert could "only refer[] to the probability of job opportunities."³⁵

According to well-settled Board precedent, Jellenik's two sets of statistics are thus fundamentally insufficient to carry Local 25's burden of proving the existence of substantially equivalent employment. The Board has repeatedly found testimony of this ilk inadequate, where a vocational expert did not contact any employer concerning actual job openings,³⁶ where the expert can only testify to the "possibility" or "probability" of the existence of substantially equivalent employment without identifying specific job openings,³⁷ where the expert relied on free-floating statistics, untethered to the discriminatee's particular situation³⁸, where the expert did not differentiate among

³⁵ See *St. George Warehouse*, 353 NLRB 497, 503-04 (2008).

³⁶ See *Id.* (giving "little weight" to testimony from vocational expert who did not "contact any of the employers who advertised for help").

³⁷ See, e.g., *Parts Depot, Inc.*, 348 NLRB 152, 152 n.6 (2006) ("[T]he Board, on numerous occasions, has refused to rely on expert testimony, similar to that offered here, where the expert is only "referring to the probability of job opportunities, not to a given individual's situation") (collecting cases); *In re Beta Steel Corp.*, 337 NLRB 1237, 1238 (2002) (rejecting as inadequate testimony of vocational expert since, despite locating 14 area employers, expert's testimony concerned "mere possibilities, insufficient to rebut the conclusion that Holland's search was reasonable").

³⁸ See, e.g., *United States Can Co.*, 328 NLRB 334, 343 (1999) ("[Respondent's vocational expert] based his testimony not on any actual knowledge of a particular discriminatee's circumstances surrounding his or her job search, but rather on statistical probabilities. As noted, [the vocational expert] never spoke with or interviewed any of the discriminatees. Thus, I reject Dr. Evans' testimony as not probative on the question of whether any of the discriminatees engaged in a reasonable job search during their respective backpay periods, and further find no probative value to the statistics used by him to support his conclusions."); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991) ("[T]he Board has refused to rely on expert testimony, similar to that offered in the instant case, where a professor of economics was unable to relate general conditions in a segment of the job market to the particular circumstances affecting the claimant's success or lack thereof.").

job openings geographically,³⁹ where the expert failed to determine the wages offered by the job openings,⁴⁰ where the expert did not differentiate among different job categories within a broad industry,⁴¹ and where the expert could not credibly testify as to whether the position was available and the discriminatee would have secured the position had she applied.⁴²

In finding that Local 25 successfully carried its burden of proving substantially equivalent employment, the ALJ generally failed to follow the principle that “the backpay claimant should receive the benefit of any doubt rather than the Respondent.”⁴³ The

³⁹ *Midwestern Personnel Servs., Inc.*, 346 NLRB 624, 625-26 (2006) (finding inadequate vocational expert’s testimony that other trucking jobs were available during the backpay period because it “focused on the number of trucking positions statewide”).

⁴⁰ See, e.g., *Midwestern Personnel Servs., Inc.*, 346 NLRB 624, 625-26 (2006) (finding inadequate vocational expert’s testimony that “made no mention of whether the jobs would be comparable to the wages and hours of the discriminatees’ former positions”); *Delta Data Sys.*, 293 NLRB 736, 737 (1989); *Murbro Parking*, 276 NLRB 52, 56-57 (1985) (“[T]here is no evidence that the terms and conditions of employment at these allegedly available jobs were such that [the discriminatee] would have failed in his duty to mitigate his losses had he refused these jobs. For these reasons I do not feel that Panacci’s expert testimony is of particular value.”).

⁴¹ *Delta Data Sys.*, 293 NLRB 736, 737 (1989).

⁴² See, e.g., *J.J. Cassone Bakery, Inc.*, 356 NLRB No. 122 (2011), Slip Op at p. 12 (finding testimony of non-labor economist “essentially useless” because “[s]he could not say if any of the listed jobs during the periods of time of their listing were actually available or would have been suitable for or offered to Macua or the other discriminates”); *Midwestern Personnel Servs., Inc.*, 346 NLRB 624, 625-26 (2006) (finding inadequate vocational expert’s testimony that other trucking jobs were available during the backpay period because “he did not include data as to the pool of applicants, nor analysis regarding the ability of the discriminatees to secure the trucking positions he identified”); *Groves Truck & Trailer*, 294 NLRB 1, 5 (1989) (“The Board has frequently held the existence of available jobs during a backpay period fails to meet the Respondents’ burden of establishing Buchanan could have secured the jobs in question had he applied.”) (collecting cases); *Lundy Packing Co.*, 286 NLRB 141 (1987) (“[N]o showing has been made that a specific discriminatee refused a job offer. Nor does the Respondent’s evidence establish that the discriminatees would have been hired if they had applied at a particular company. Absent any such showing, testimony describing available job opportunities is of limited significance.”); *Murbro Parking*, 276 NLRB 52, 56-57 (1985) (“[T]here is no evidence in the record that [the discriminatee] was aware of the existence of these openings nor, as admitted by [the expert], is there any guarantee that if [the discriminatee] had applied, he would necessarily have been hired. . . . For these reasons I do not feel that [the] expert testimony is of particular value.”).

⁴³ *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973). See also *Pope Concrete Products*, 312 NLRB 1171, 1172 (1993) (“It is well established that ‘any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible.’”) (quoting *Fibreboard Paper Products Corp.*, 180 NLRB 142, 143 (1969)).

ALJ overlooked numerous evidentiary gaps in Local 25's presentation, all of which should have been resolved in Avallon's favor. Local 25 never introduced any evidence showing that:

- (1) Avallon would have or should have seen even a single job advertisement in her geographical area;
- (2) Avallon saw a job advertised to which she did not apply;
- (3) any job advertised in her area would have provided an hourly wage and benefits comparable to what she would have earned working in the movie industry; and
- (4) that, if Avallon had applied for any job opening in her area, she would have been hired.

Although proving these matters is not easy for a respondent, other respondents have proven them by presenting better, more probative evidence than Local 25 did here.⁴⁴

The ALJ accordingly should not have overlooked the fundamental deficiencies in Local 25's proof. The evidence proffered by Local 25 fell well short of proving the availability of substantially equivalent employment, and the ALJ's finding to the contrary should be overturned.

3. The ALJ Erred in Finding that a Full-Time Job Is Substantially Equivalent to a Part-Time Job Paying a Considerably Higher Hourly Wage

As part of his conclusion that substantially equivalent employment was available to Avallon during the backpay period, the ALJ found that part-time work in the movie industry paying \$22.75/hour was equivalent to full-time work paying half as much per

⁴⁴ See, e.g., *Wright Elec., Inc.*, 334 NLRB 1031, 1033 (2001) (finding that respondent had shown that a discriminatee had a "reasonable expectation of success" in securing job with two employers, where respondent presented testimony from two employers who credibly testified that they would have hired the discriminatee during the backpay period given his skills and the demand for electricians at the time).

hour. The Board should overturn this finding, which defies commonsense, contradicts the record evidence, and is entirely unsupported by Board precedent.

In her report, Local 25's expert tacitly conceded that there were no substantially equivalent jobs to those available through Local 25's hiring hall. Only by annualizing earnings and ignoring benefits was Jellenik able to contend that substantially equivalent work was available to Avallon (RX-17 at p. 10), but the nature of the job opportunities identified by Jellenik as a result bore no resemblance to the employment available to Avallon through the hiring hall. Jellenik argued that working constantly at a modest (or less than modest) wage is comparable to working intermittently at a high wage. Ms. Jellenik would thereby erase the somewhat exotic nature of the employment Ms. Avallon was unlawfully denied, in order to make the argument that by accepting a very different employment situation, Ms. Avallon could have obtained employment yielding roughly the same annual earnings.

In his decision, the ALJ adopted Jellenik's dubious reasoning. The ALJ acknowledged that nearly every job identified by Jellenik² "paid considerably less per hour than driving in the movie industry;" nevertheless, the ALJ concluded that the jobs identified by Local 25's expert "are comparable when considering that work in these areas is general steady work and not intermittent." (ALJD p. 8, l. 9-11).

By hinging his finding of substantially equivalent employment upon this conclusion, the ALJ committed error. No Board precedent supports the novel contention that work paying a considerably higher hourly rate is equivalent to work paying a considerably lower one. To the contrary, the Board has found even small wage differentials, such as \$2.38/hour, to render one job not substantially equivalent to

the other.⁴⁵ The ALJ's conclusion also entirely fails to consider that, in addition to a \$22.75/hour wage, Avallon's work in the movie industry offered generous pension, health, and meal benefits.⁴⁶ Taking these fringe benefits into consideration, the difference in compensation between Avallon's work in the movie industry and the jobs identified by Local 25's expert is \$10/hour or more.⁴⁷

Nor is there Board precedent to support the ALJ's reasoning that the "steady" nature of full-time employment compensated Avallon for the "intermittent" nature of her part-time work in the movie industry. In any event, the record contradicts this claim and shows that the part-time nature of movie industry work was not a problem for Avallon. Avallon testified that her part-time work in the movie industry permitted her to work other jobs and apply for unemployment benefits, generating additional income for her (Tr. 33). And Avallon proved that she preferred the intermittent work available in the movie industry by leaving her "steady" employment at Tri-Town Realty in April 2008 so that she could return to movie industry work. In this regard, Avallon cannot be blamed for the natural preference to work fewer hours for a substantially higher wage.

"[T]he question of what constitutes 'regular and substantially equivalent employment' is determined not by a 'mechanistic application of the literal language of

⁴⁵ See, e.g., *Shopmen's Local Union No. 455*, 313 NLRB 1022, 1030 (1994) (\$2.38/hr difference in wages rendered two positions not substantially equivalent).

⁴⁶ Local 25 presented no evidence that any of the job opening during the backpay period offered retirement or health benefits.

⁴⁷ In fact, Avallon's real compensation per hour in the movie industry would have been substantially in excess of \$22.75/hour, owing to opportunities for overtime, meal allowances, and vacation benefits. Had she not been the victim of unlawful discrimination, in 2008 Avallon would have earned \$25,952.03 of taxable income for roughly 962.79 hours of work (GCX-1(d) & (i)). Not including the pension and retirement benefits she would have received, this averages out to \$26.96/hour. In order to receive this much income working full-time (40 hours per week for fifty weeks a year, plus two weeks of vacation), Avallon would have needed to earn \$13.48/hour.

the statute,' but rather through the objective appraisal of several factors, both tangible and intangible, including the desire and intent of the employee concerned."⁴⁸ The ALJ ignored this principle in his decision, presuming Avallon would have preferred to work more hours at a lower wage. In doing so, the ALJ acted without legal support and in contradiction to the record evidence. This finding—upon which depends the ALJ's conclusion that substantially equivalent work was available during the backpay period—should be overturned.

4. The ALJ Erred in Finding that Jobs in the Greater Boston Area Constitute Substantially Equivalent Employment

Among the jobs the ALJ considered to be substantially equivalent, the ALJ included jobs in the Greater Boston area as well as jobs in Southeastern Massachusetts, where Avallon lived (ALJD at p. 10, l. 36-39). This was error as well.

The substantial commuting distance between Boston and Avallon's home rendered jobs in Boston substantially nonequivalent. Avallon lived in a town very close to the Massachusetts-Rhode Island border, and she reasonably testified that she did not want to drive more than 50 or 60 miles daily to attend her job (Tr. 203-04). Since jobs in Boston entailed a 86.2 mile commute, those jobs were therefore outside Avallon's search radius (Joint Stipulation Regarding Driving Distances). Unless those jobs paid exceptional wages, they were not worth her while owing to the lengthy commute (Tr. 203-04).

The ALJ thus erred when he included jobs located in the Greater Boston area among those jobs he considered substantially equivalent. Avallon's preference for work

⁴⁸ *Associated Grocers*, 295 NLRB 806, 808-09 (1989) (quoting *Little Rock Airmotive*, 182 NLRB 666 (1970), enf'd in relevant part 455 F.2d 163 (8th Cir. 1972)).

that would require less than a 50-mile commute was reasonable and is consistent with the Board's definition of what constitutes substantially equivalent employment.⁴⁹ Especially given prevalent gas prices, an 86-mile daily commute would have caused Avallon substantial inconvenience and severely eaten into her earnings.⁵⁰ And although it might be argued that the Greater Boston area encompasses locations closer to Avallon's home than Boston proper, the Greater Boston area also encompasses locations *farther* from Avallon's home than Boston, and the statistics relied upon by the ALJ do not specify just where the job openings existed within the Greater Boston area. The ALJ was therefore unjustified in considering jobs in the Greater Boston area in his analysis, and his finding that substantially equivalent work existed during the backpay period should be overturned insofar as it relies upon them.

B. Local 25 Failed to Prove that Avallon Did Not Make a Good-Faith Effort in Her Search for Alternate Employment

1. General Principles

To prove the second element of its burden, the respondent bears the burden of showing that "the [claimant's] job search efforts were unreasonable."⁵¹ "In determining the reasonableness of any claimant's efforts, factors such as age, skills, qualifications, and the labor conditions in the area are appropriate for consideration."⁵² "It is well

⁴⁹ See *WHLI Radio*, 233 NLRB 326, 329 (1977) (finding that it was unreasonable to place obligation on discriminatee to commute 60-70 miles round-trip from Long Island to Manhattan, given time and expense involved in commute).

⁵⁰ During the backpay period, the Internal Revenue Service permitted deductions up to 58.5 cents for every mile traveled during business. See <http://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates>.

⁵¹ *Essex Valley*, 352 NLRB 427, 429 (2008) (citing *Black Magic Resources, Inc.*, 317 NLRB 721 (1995); and *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217, 218 (1974)).

⁵² *Essex Valley* (citing *Mastro Plastics*, 136 NLRB 1342, 1359 (1962); *Alaska Pulp Corp.*, 326 NLRB 522, 535 (1998); and *Laredo Packing Co.*, 271 NLRB 553, 556 (1984)). See also *Woonsocket Health*

settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence, i.e., he or she need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort.”⁵³

An employee’s obligation “to make a reasonable effort to mitigate damages . . . is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage.”⁵⁴ “[A] backpay claimant need only follow his regular method for obtaining work,”⁵⁵ and “[t]he Board has traditionally held that employees who seek work through a union hiring hall have engaged in a reasonable search for employment.”⁵⁶ Success is not a test of a reasonable job search.⁵⁷ A respondent does not meet its burden “by a showing of lack of employee success in obtaining interim employment.”⁵⁸

Centre, 263 NLRB 1367, 1373 (1982) (“When an employer commits an unfair labor practice by discharging a woman 60 years old, it runs the risk that she may not be able to find another job as easily as a younger person in her heyday.”)

⁵³ *Lundy Packing Co.*, 286 141, 142 (1987) (noting that unlawfully discharged printer did not willfully incur loss of income “by not making an inquiry or application for each and every possible job that might have existed within the printing industry”).

⁵⁴ *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

⁵⁵ *Ferguson Electric Co.*, 330 NLRB 514 (2000), *enfd.* 242 F.3d 426 (2d Cir. 2001).

⁵⁶ *Evans Plumbing Co.*, 278 NLRB 67, 69 (1986). See also *Iron Workers Local 15*, 298 NLRB 445, 468 (1990) (“There is no question that Gilbert registered timely with the Union's hiring hall and remained on the Union's out-of-work list throughout the backpay period. By registering and thereafter remaining on the list, Gilbert satisfied his duty to make reasonable efforts to seek interim employment.”); *Seafarers Int'l Union*, 220 NLRB 698, 699 (1975) (finding that merchant seaman conducted a reasonable search for work during the backpay period by daily reporting to the union hiring hall, despite the fact that the seaman was never referred for work and the unfair labor practice found consisted in assigning the seaman a referral list classification that all but ensured he would never be referred).

⁵⁷ *Bauer Group*, 337 NLRB 395, 396 (2002) (quoting *Minette Mills, Inc.*, 316 NLRB 1009, 1010-1011 (1995)).

⁵⁸ *Arthur Young & Co.*, 304 NLRB 178 (1991). See also *Parts Depot, Inc.*, 348 NLRB 152, 152 n.6 (2006) (“It is well established that the respondent’s burden is not met by presenting evidence of a lack of employee success in getting interim employment or low interim earnings.”); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991).

2. The ALJ Erred in Concluding that Avallon’s Registration with the Local 25 Hiring Hall Did Not Constitute a Reasonable Search for Work

After leaving Tri Town Realty, Avallon registered with Local 25’s hiring hall, where she remained on the Local 25 referral list — ready and willing to accept work — throughout the backpay period. By doing so, Avallon fulfilled her obligation under the Act to mitigate damages, in keeping with Board precedent that discriminatees “who seek work through a union hiring hall have engaged in a reasonable search for employment.”⁵⁹

The ALJ thus committed error when he concluded that Avallon’s registration with the hiring hall did not constitute a reasonable search for employment because “Avallon recognized as far back as March 2008 that she would not be able to rely on her referral from Local 25.” (ALJD, p. 13 l. 5-7). First, the record does not support the ALJ’s finding that “Avallon recognized as far back as March 2008 that she would not be able to rely on her referral work from Local 25.” To the contrary, the record evidence indicates that Avallon reasonably believed that similarly situated Local 25 members on the casual or “C” list were receiving work through the hiring hall during the backpay period (Tr. 41, 175-77, 181). And, in fact, similarly situated members of Local 25 did receive work throughout the backpay period, as Judge Rubin found in the underlying unfair labor practice case (GCX-1(a) at p. 5-6) and as the GC found in preparing the Amended Compliance Specification. More specifically, after reviewing Local 25’s records the GC determined that similarly situated Local 25 members worked on average 1809.94 hours

⁵⁹ *Evans Plumbing Co.*, 278 NLRB 67, 69 (1986). See also *Iron Workers Local 15*, 298 NLRB 445, 468 (1990); *Seafarers Int’l Union*, 220 NLRB 698, 699 (1975).

during the backpay period for a total compensation of \$47,320.88.⁶⁰ In the present proceeding, the GC seeks the same amount on Avallon's behalf – no more, no less.

Second, the Union is estopped from arguing that its own unfair labor practices made it unreasonable for Avallon to seek work through its hiring hall. The Board rejected just such a bad-faith defense in *Seafarers International Union*, 220 NLRB 698 (1975). In *Seafarers*, a union operating an exclusive hiring hall discriminatorily classified a merchant seaman as a "C" seaman – the classification in the hiring hall system with the lowest priority for job referrals.⁶¹ As the Board found, "the sparsity of 'C' assignments rendered almost futile a seaman's appearance at the hall for a 'C' job assignment."⁶² Nevertheless, the discriminatee regularly appeared at the hiring hall during the backpay period, where he never once was referred for work. Like Local 25, the respondent-union in *Seafarers* argued that making himself available for work through the hiring hall was futile and the discriminatee should have engaged in a far different, more elaborate, and vigorous search for work. The Board firmly rejected the respondent's defense: "[w]hen the Respondent chose to discriminate against [the discriminatee] it did so with knowledge of the work search habits of its members and it ought not now be heard to complain that [the discriminatee's] habits bar him from backpay since it is clear that he fulfilled his job search responsibilities as any seaman normally would."⁶³

⁶⁰ At trial, Local 25 did not object to these figures or calculations, which were subsequently adopted by the ALJ.

⁶¹ *Id.* at 698.

⁶² *Id.* at 699.

⁶³ *Id.* at 699.

The same reasoning applies to the instant case. The backpay specification in this case entitles Avallon to no more money than similarly situated Local 25 members would have earned on average during the backpay period; and during the backpay period, that average Local 25 member did nothing more to search for work than register with the hiring hall and then answer his phone whenever Local 25 referred him for a job. Avallon did the same, except that as the victim of unlawful discrimination, she never received any phone calls. Avallon's job search efforts were therefore reasonable, as measured against those of her fellow Local 25 members. Although Local 25 will surely object to this state of affairs, it is of Local 25's own making. Local 25 covertly discriminated against Avallon, refusing to refer her for work without ever disclosing to Avallon that it was doing so, and it should not be permitted to profit from that behavior.

For this reason, the ALJ was wrong to rely upon *Moran Printing*, 330 NLRB 376, 376 (1999). In *Moran Printing*, a wrongfully discharged employee signed the union's out-of-work book but did so only twice over the course of a twenty-month period of unemployment, despite the fact that he had to sign the out-of-work book every month in order to maintain his priority. Under the circumstances, the Board ruled that signing the out-of-work book did not constitute a per se reasonable search for work.⁶⁴ *Moran Printing* is thus distinguishable not only because Avallon did everything necessary to maintain her priority in Local 25's hiring hall, in contrast to the discriminatee in *Moran*, but also because Avallon sought work as she normally would by registering with Local 25's hiring hall and would have earned \$47,320.88 doing so, but for the covert and unlawful discrimination she suffered.

⁶⁴ *Id.* at 376 n.5.

As a victim of unlawful discrimination, Avallon should not be subjected to a higher standard of job search efforts than her Local 25 peers, but the ALJ's decision does exactly that. The ALJ's finding should therefore be overturned, and the Board should find that Avallon's registration with the hiring hall and continued presence on the referral list during the backpay period constituted a reasonable search for work.

3. The ALJ Should Not Have Given Any Weight to Jellenik's Opinions Concerning Avallon's Job Search Efforts, Since Those Opinions Were Disconnected from Avallon's Individual Situation and from the Relevant Legal Standards

In his decision, the ALJ incorrectly relied upon the opinion of Local 25's expert, Rhonda Jellenik, in evaluating Avallon's job search efforts during the backpay period (ALJD at p. 7 n.35). Jellenik's testimony was oblivious to Avallon's individual situation and generic in its conclusions; it also purported to replace the Board's standard for a reasonable job search with her own. By adopting Jellenik's opinion concerning Avallon's job search efforts as his own, the ALJ deviated from the Board's standard for reasonable job searches and committed error.

Being unfamiliar with Avallon's individual situation and the labor market in southeastern Massachusetts, Jellenik's testimony was necessarily speculative. In preparing her report, Jellenik neither spoke with Avallon nor contacted any employer about Avallon and her job prospects (Tr. 258, 260-61).⁶⁵ Jellenik therefore could only testify as to what an average job seeker should do, not what Avallon should or could

⁶⁵ As a result, Jellenik only had a cursory knowledge of Avallon's education and job history (RX-17 at p. 1-2) and was unaware that Avallon's job search was limited to positions that did not require heavy lifting (CITE?).

have done.⁶⁶ In this vein, Jellenik testified that Avallon should have attended job fairs and career centers but never identified a single job fair held in southeastern Massachusetts during the backpay period or identified a single career center.⁶⁷ Jellenik further testified that it was unreasonable for Avallon to not apply for positions at hospitals during the backpay period but, again, did not identify a single hospital in southeastern Massachusetts that was hiring during the backpay period (Tr. 234-36). Similarly, Jellenik testified that a job seeker should send out five to ten resumes per week but never established that even one substantially equivalent job opening in southeastern Massachusetts, let alone five to ten per week, was available to Avallon during the backpay period (Tr. 234).

In sum, Jellenik's conclusions do not reflect any consideration of Avallon's individual situation, including Avallon's work limitations, the availability of suitable jobs, the resources available to her, or comparability to the actual employment from which she was unlawfully excluded. The Board has repeatedly found such generic opinions inadequate to carry a respondent's burden of proving that a discriminatee's job search efforts were unreasonable.⁶⁸

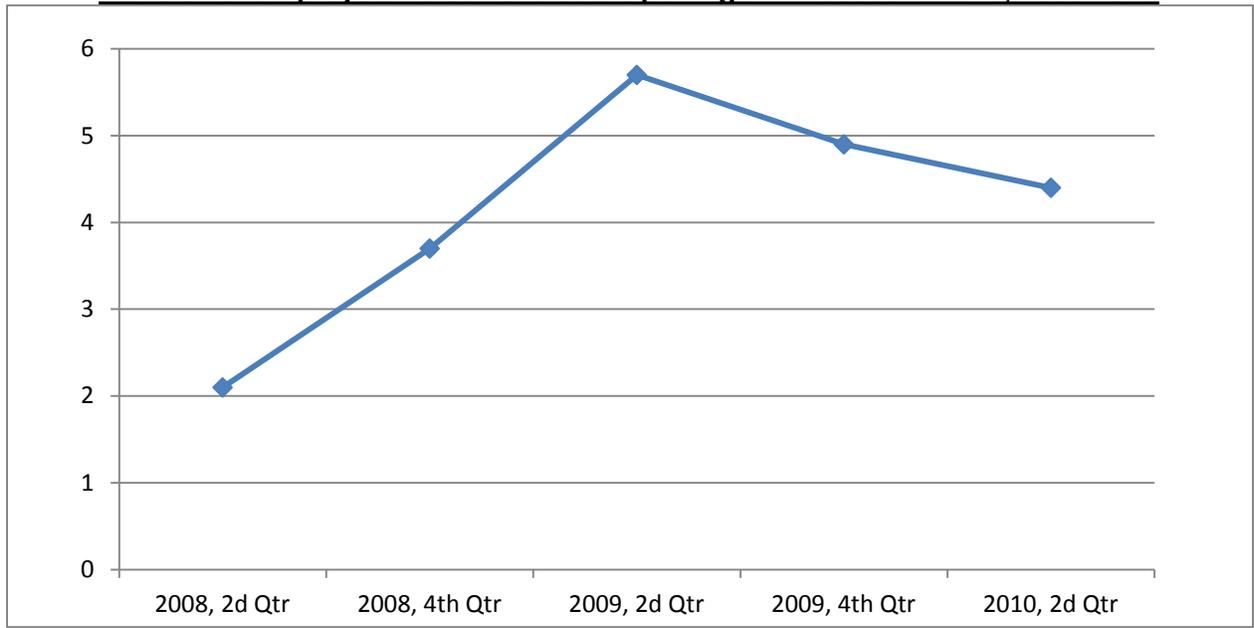
⁶⁶ See Tr. 240 ("I believe three months would have been sufficient [for Avallon to find a job]. That's the amount of time that I typically work with people to find a job.") (testimony of Ms. Rhonda Jellenik).

⁶⁷ Ms. Jellenik insisted that Avallon failed to take advantage of the services offered by Massachusetts unemployment centers (Tr. 234). Ms. Jellenik's testimony revealed, however, that she had no direct knowledge or experience of Massachusetts unemployment centers, only of those in Maryland (Tr. 234).

⁶⁸ See *Parts Depot, Inc.*, 348 NLRB 152, 152 n.6 (2006) ("[T]he Board has repeatedly refused to rely on expert testimony where the expert is only 'referring to the probability of job opportunities, not to a given individual's situation' and he 'forms his opinions' about the claimant without having any personal knowledge of the latter's particular circumstances.") (collecting cases); *Bauer Group*, 337 NLRB 395, 398-99 (2002) ("[The expert witness] simply points to a good economy, with plentiful jobs, and opines that, had [the discriminatee] hustled (and particularly had she sought [the expert witness's] assistance), jobs were there for the taking. Thus, [the expert witness] describes the market potential, and speculates on [the discriminatee's] chances. Such evidence by vocational experts is meaningless."); *United States Can*

Furthermore, to the extent Jellenik introduced evidence as to the actual conditions in the Massachusetts labor market, that evidence sharply conflicted with Jellenik’s rosy conclusions about Avallon’s job prospects. In formulating her conclusions, Jellenik relied upon the reports of the Massachusetts Department of Workforce Development for 2008-2010 (RX-17, 34-38), which paint a bleak picture of the Massachusetts labor market during the backpay period. According to those reports, in 2008 there were already 2.1 unemployed persons for every job opening in Massachusetts – the highest ratio recorded since 2005 (GCX-34). During the backpay period, this ratio dramatically increased, reaching a peak of 5.7 unemployed persons per job opening in the second quarter of 2009⁶⁹:

Ratio of Unemployed Persons to Job Openings in Massachusetts, 2008-2010



Co., 328 NLRB 334, 343 (1999) (“Dr. Evans likewise based his testimony not on any actual knowledge of a particular discriminatee’s circumstances surrounding his or her job search . . . Thus, I reject Dr. Evans’ testimony as not probative on the question of whether any of the discriminatees engaged in a reasonable job search.”)

⁶⁹ Unemployment rates within the nearby labor market of northern Rhode Island were still higher (ALJD at p. 8; Tr. 256-58).

(GCX-34-38).

The Board has questioned the soundness of expert testimony where, as here, the statistics relied upon by the expert undermine the expert's optimistic conclusions.⁷⁰

And finally, the ALJ should not have relied upon Jellenik's opinions because she purported to establish a standard for job search efforts that is far in excess of reasonable diligence. In her testimony, Jellenik criticized Avallon's job search efforts because, in Jellenik's opinion, every job seeker should apply to five jobs per week and no job search should last longer than three months (Tr. 234-35, 240). But it is well-settled that "a backpay claimant is held only to reasonable exertions and not to the highest standard of diligence in seeking interim employment."⁷¹ By demanding that Avallon apply to five jobs per week, Jellenik disregarded this principle and established a standard for job search efforts far above any the Board has ever set.⁷² By concluding that any reasonable job seeker should find employment within three months, Jellenik also effectively equated lack of success with a failure to expend reasonable efforts – a violation of another cardinal principle in backpay proceedings.⁷³

⁷⁰ See *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991) (discounting expert's optimistic conclusion regarding discriminatee's job search prospects when data relied upon by expert showed a contraction of the job market); *C-F Air Freight*, 276 NLRB 481, 484-85 (1985) ("I fail to see how any of the figures present aided Respondent's position in this case. To the contrary, it appears to me that there was a declining labor market during the 10-year period thereby making it harder for the discriminatees to get jobs.").

⁷¹ *SE Nichols of Ohio, Inc.*, 258 NLRB 1, 16 (1981).

⁷² See, e.g., *Bauer Group*, 337 NLRB 395, 398-99 (2002) (attaching no weight to expert witness's testimony because "[c]ontrary to the law's standard of reasonable diligence, she espouses a standard of high, even highest, diligence"); *Cornwell Co., Inc.*, 171 NLRB 342, 343 (1968) ("From the fact alone that in a given quarter a discriminatee has made no specific job application, it does not necessarily follow that the discriminatee during that particular quarter has abandoned efforts to find suitable employment and in effect has withdrawn from the labor market."); *S. Silk Mills*, 116 NLRB 769, 771-72 (1956) (finding that discriminatees conducted reasonable job search by applying to factories once a month).

⁷³ See, e.g., *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991) ("This attempt to equate [the discriminatee's] lack of success with a lack of trying is a bootstrap argument that runs counter

In light of its many deficiencies, the ALJ should have disregarded Jellenik's testimony concerning Avallon's search efforts. Jellenik based her harsh appraisal of Avallon's search efforts on assumptions about the resources and job openings available to Avallon, but neither Jellenik nor Local 25 ever provided any evidence to show that those assumptions actually applied in Avallon's case. Similarly, Jellenik's generic opinion that every job seeker should submit five applications per week bore no relationship to Avallon's individual circumstances and purported to establish an absolute standard for reasonable diligence. The ALJ departed from Board precedent by crediting these opinions, and his finding that Local 25 carried its burden of showing that Avallon willfully incurred a loss of income should be reversed.

4. Throughout the Backpay Period, Avallon Carried Out a Reasonably Diligent Search for Alternate Work

Although the number of job applications made by Avallon in 2009-2011 may be less than overwhelming,⁷⁴ this does not mitigate Local 25's failure to carry its burden of showing that Avallon's search for work was less than diligent. As shown above, Local 25 failed to prove that substantially equivalent work existed during the backpay period.⁷⁵ Since a discriminatee need only engage in a reasonable search for substantially equivalent work,⁷⁶ this precluded Local 25 from proving Avallon's search unreasonable.

to Board and court precedent. It is well settled that '[r]espondent's burden is not met by presenting evidence of a lack of employee success in getting interim employment or low interim earnings; rather, Respondent must affirmatively demonstrate that the employee neglected to make a reasonable effort to find interim work.'").

⁷⁴ Owing to a lack of documentation, the ALJ discredited Avallon's testimony that she filed an additional thirteen applications during the backpay period. This left Avallon with seventeen applications during the backpay period.

⁷⁵ See pp. 15-17, *supra*.

⁷⁶ *Fugazy Continental Corp.*, 276 NLRB at 1336.

And, in fact, at trial Local 25 never managed to establish that Avallon ever failed to apply to any job of which she should have been aware, let alone refused to apply for a position for which she likely would have been accepted.

To the contrary, Avallon undertook a good-faith job search during the backpay period. From 2009-2011, Avallon maintained her place on the Local 25 hiring hall registry, ready and willing to work, where she would have received regular driving work but for the covert discrimination practiced by Local 25. She also made nine applications to employers in southeastern Massachusetts, interspersed through the years.

Avallon's situation is therefore easily distinguishable from that of the discriminatee in *Glenn's Trucking*, 344 NLRB 377, 377 (2005), upon which the ALJ relied in his decision (ALJD at p. 12). The discriminatee in that case suffered a debilitating stroke during the backpay period, with the result that his job search ended abruptly and entirely in November 1997. Under those circumstances, the Board found that the backpay period should be tolled from that point forward, regardless of the respondent's ability to show the existence of substantially equivalent employment. In sharp distinction, Avallon searched for work throughout the backpay period and explained that whatever gaps there were in her job search history were owing to a lack of advertised jobs. Local 25 therefore cannot be excused from its burden of proving the existence of substantially equivalent jobs during the backpay period.

The record makes clear that Local 25 has failed to carry this burden of showing that Avallon did not undertake a reasonable search for substantially equivalent employment during the backpay period. Although the record may not disclose a job

search of herculean proportions on Avallon's part, Local 25's failure to carry its burden is determinative .

III. THE ALJ ERRED IN FAILING TO INCLUDE INTEREST ON THE CONTRIBUTIONS OWED TO THE PENSION PLAN BY LOCAL 25

Finally, the ALJ erred in excluding from the remedy any interest on the contributions that should have been made on Avallon's behalf to the Pension Plan (ALJD at p. 13 n.54). The ALJ observed that a CBA between Local 25 and a movie production company provided for the assessment of interest against the employer for missed contributions but was silent regarding the remedies available against Local 25 itself; therefore, interest could not be assessed on the missed contributions arising as a result of Local 25's unfair labor practices (ALJD p. 3, l. 23 – p. 4, l. 7).

By excluding interest on the amounts owed the Pension Plan on Avallon's behalf, the ALJ failed to make the Pension Plan whole and thereby committed error. Although it is true that the Board will enforce specific remedial provisions in benefit plan documents where they exist,⁷⁷ there was no provision in the parties' CBA that purported to cover missed contributions arising from Local 25's wrongful behavior.⁷⁸ The ALJ should therefore have followed the Board's normal objective when fashioning backpay remedies: namely, to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."⁷⁹ The contributions that should have

⁷⁷ *Triple A Fire Protection, Inc.*, 357 NLRB No. 68 (2011), Slip Op. at p. 2-3 (awarding interest on missed fund contributions "based solely on the parties' agreement concerning how this specific form of breach should be remedied").

⁷⁸ It is, of course, unsurprising that the CBA between a union and employer that provides for fund contributions by the employer should not anticipate the situation where the union becomes liable to the fund.

⁷⁹ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

been made on Avallon's behalf are in liquidated form; consequently, without the addition of interest, they naturally decrease in value over time, depriving the Pension Plan of the full present value of those missed contributions. The ALJ should therefore have provided for interest on the contributions owed the Pension Plan.⁸⁰ Having done otherwise, the ALJ's remedy left the Pension Plan and Avallon less than whole.⁸¹

IV. CONCLUSION

The GC respectfully requests that the Board reject the ALJ's finding that Avallon willfully incurred a loss of income in the years 2010 and 2011. That finding by the judge is based on the erroneous conclusion that Local 25 carried its burden of establishing the availability of substantially equivalent employment, which Local 25 most certainly did not do. In fact, the two sets of statistics introduced into the record by Local 25 do not establish the existence of even a single substantially equivalent job that Avallon could have secured, had she applied. Local 25's evidence left great uncertainty as to whether substantially equivalent employment was available to Avallon during the backpay period, and that uncertainty should have been resolved against Local 25, the wrongdoer in this case. Instead, the ALJ resolved that uncertainty against Avallon and thereby committed error. The ALJ also committed error by finding, contrary to Board precedent, that (1) one job is substantially equivalent to another paying a considerably lower wage,

⁸⁰ Alternatively, the ALJ should have awarded interest since Local 25's liability to the Pension Plan is derivative of the liability of those employers who would have employed Avallon but for Local 25's unfair labor practices. Thus, the remedial provision contained in the parties' CBA should be applied against Local 25, just as it would have been applied against employers who made delinquent contributions.

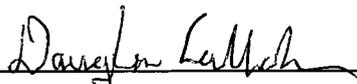
⁸¹ The ALJ provided for interest on the backpay and *Latino Express* amounts he awarded Avallon (ALJD at p. 14, l. 28 – p.15, l.2). This was proper, since these amounts too were liquidated and thus decrease in value over time if interest is not awarded.

and (2) that Avallon was required to consider jobs that entailed an 86 mile commute from her home.

Having failed to prove the existence of substantially equivalent employment, Local 25 could not and did not prove that Avallon's job search efforts were less than reasonably diligent. Avallon maintained her name on the registry of Local 25's hiring hall and submitted job applications to employers throughout the backpay period. Local 25's evidence, deficient as it is, does not rebut the reasonableness of these job efforts.

Finally, the Board should attach interest to the pension fund contributions that would have been made on Avallon's behalf but for the unlawful acts of Local 25. Without interest, the pension fund will be deprived of the full present value of those contributions, and both the pension fund and Avallon will not receive a full make-whole remedy.

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