

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**EAST VILLAGE GRAND SICHUAN INC. D/B/A
GRAND SICHUAN RESTAURANT**

And

Case 02-CA-143468

CHINESE STAFF & WORKERS ASSOCIATION

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

Dated at New York, New York
This 8th Day of April 2016.

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Region 2
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I. STATEMENT OF THE CASE

The Administrative Law Judge Steven Davis accurately set forth the Statement of the Case in his Decision dated January 14, 2016. (the “ALJD”) except that he inadvertently stated that the first day of the trial was on Sunday, November 8, 2015, when the trial actually commenced on Monday, November 9, 2015.

It is the position of Counsel for General Counsel (“General Counsel”) that the ALJD was correct as to the conclusions of fact and law except to some inadvertent mistakes of facts in the record; and except to the General Counsel’s argument that the Board’s remedy should require the filing of the SSA report with the Region rather than the SSA, and ought to include interim search-for-work and work-related expenses. The General Counsel believes that the inadvertent mistakes of facts in the record have been sufficiently addressed in the Limited Cross Exceptions Nos. 1 through 5, which details the errors and cites to the ALJD and transcript pages. This brief will specifically address the Board’s remedy.

The General Counsel urges the Board to modify the ALJD as argued in the General Counsel’s Limited Cross Exceptions and this brief in support of the Limited Cross Exceptions.

II. STATEMENT OF THE ISSUES

Whether the Board Should Award Search-For-Work And Work-Related Expenses Regardless of Whether These Amounts Exceed Interim Earnings. (Limited Cross Exception No. 6)

III. STATEMENT OF THE FACTS¹

The facts have been completely and accurately set forth in the ALJD with the exception of some inadvertent mistakes, which have been addressed in the General Counsel's limited cross exceptions. It is important to note that Respondent presented no witnesses or evidence to challenge General Counsel's prima facie case. Respondent simply did not present a defense to the Complaint other than making assertions based on evidence entered into the record during General Counsel's case in chief. Therefore, the record evidence and factual findings by ALJ Davis are undisputed.

IV. ARGUMENT

The Board Should Award Search-For-Work And Work-Related Expenses Regardless of Whether These Amounts Exceed Interim Earnings (Limited Cross Exception No. 6)

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent.² These expenses might include: increased transportation costs in seeking or commuting to interim employment³; the cost of tools or uniforms required by an interim employer⁴; room and board when seeking employment and/or working away from home⁵;

¹ The Administrative Law Judge's Decision will be referenced as "ALJD page(s): line(s)". The hearing transcript will be referenced as "Tr. ____." General Counsel's and Respondent's exhibits will be referenced as "GC Exh. ____" and as "R Exh. ____", respectively.

² *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938).

³ *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

⁴ *Cibao Meat Products*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

⁵ *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

contractually required union dues and/or initiation fees, if not previously required while working for Respondent⁶; and/or the cost of moving if required to assume interim employment.⁷

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings.⁸ Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work⁹, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole."¹⁰ This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have

⁶ *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

⁷ *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

⁸ *See W. Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter; as such expenses are in no event charged to the Respondent."); *see also N. Slope Mech.*, 286 NLRB 633, 641 n.19 (1987).

⁹ *Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

¹⁰ *Jackson Hosp. Corp.*, 356 NLRB No. 8 at *3 (Oct. 22, 2010).

[occurred] but for the illegal discrimination.”¹¹ The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work. It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor.¹² In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. ”¹³ In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.¹⁴ These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts.¹⁵

¹¹ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners*, 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge*).

¹² See *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

¹³ *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014).

¹⁴ Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co.*, 104 NLRB 514, 516 at *2 (1953).

¹⁵ See *Jackson Hosp. Corp.*, 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

V. CONCLUSION AND REMEDY

For the foregoing reasons, the General Counsel urges finding the ALJ's decision, findings, and conclusions of law and recommended remedy should be adopted, except as to the corrections and modifications urged in General Counsel's Limited Cross Exceptions and as the argument advanced in this brief in support of General Counsel's Limited Cross Exceptions.

Dated at New York, New York,
This 8th day of April 2016.

Respectfully submitted,



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AFFIDAVIT OF SERVICE

I, the undersigned, certify that the *Counsel for General Counsel's Limited Cross Exceptions to the ALJD, Brief in Support of Limited Cross Exceptions to the ALJD, and Answering Brief to Respondent's Exceptions to the ALJD* were served on the parties on Friday, April 08, 2016, as follows:

By E-filing

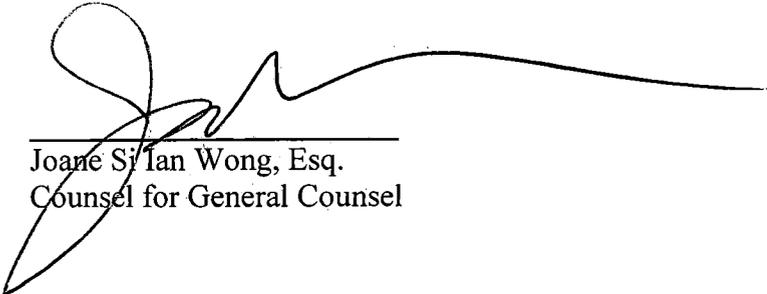
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