

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

SALEM HOSPITAL CORPORATION, a/k/a
THE MEMORIAL HOSPITAL OF SALEM
COUNTY

and

Case 04-CA-130032

HEALTH PROFESSIONALS AND ALLIED
EMPLOYEES, AFT/AFL-CIO

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE
LAW JUDGE AFTER THE COMPLIANCE HEARING**

Dated February 2, 2018

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I. INTRODUCTION

The purpose of this compliance proceeding is to determine the amount of backpay owed by Salem Hospital Corporation a/k/a the Memorial Hospital of Salem County (“Respondent” or “Salem Hospital”) to twelve nurse claimants (herein, collectively “Claimants”) who lost their jobs when Respondent closed its inpatient obstetrics unit and HealthStart program (hereinafter “OB unit”) on June 1, 2014. The Board, with approval from the Third Circuit Court of Appeals, found that Respondent failed and refused to bargain with Health Professionals and Allied Employees (“Union”) over the effects of the closure of the OB unit, and ordered Respondent to pay the Claimants in accordance with *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). More than two and a half years after Respondent closed the OB unit, and more than two years after the Board’s Order, Respondent finally agreed to bargain with the Union over the effects of the closure of the OB unit, and an agreement was signed. Now, Respondent seeks to limit its backpay obligation to the Claimants. However, after a six-day hearing, it is clear that Respondent’s asserted defenses designed to limit its backpay liability are without merit. It is also amply clear that the Claimants engaged in a diligent job search. As such, Respondent should be ordered to pay the Claimants the backpay amounts identified in the Amended Compliance Specification, plus interest.

II. PROCEDURAL HISTORY

On February 27, 2015, an administrative law judge found that Respondent violated Section 8(a)(1) and (5) of the Act by failing to timely notify the Union and afford it an opportunity to bargain over the effects of Respondent’s decision to close the OB unit, and by failing to provide the Union with information it requested on January 15 and May 9, 2014. GC 1(a). Respondent filed exceptions to the judge’s decision.

On December 2, 2015, the Board issued a Decision and Order in *Salem Hospital Corp.*, 363 NLRB No. 56, adopting the recommended order of the administrative law judge. GC 1(b). The Board ordered Respondent, among other things, to bargain with the Union over the effects of its decision to close the OB unit, and pay the Claimants backpay in accordance with *Transmarine Navigation Corp.*, *supra*, as a result of the closure. Just as Respondent refused to comply with the judge’s order, it similarly refused to comply with the Board’s Order and implored the United States Court of Appeals for the Third Circuit not to enforce the Board’s Order. Despite Respondent’s request, on January 19, 2017, the Third Circuit issued a judgment fully enforcing the Board’s Order and directed Respondent to comply with the Order. GC 1(c).

On June 30, 2017, the Acting Regional Director of Region 4 of the NLRB issued a Compliance Specification and Notice of Hearing alleging that Respondent failed to comply with

the Board's Enforced Order. GC 1(d).¹ On August 4, 2017, Respondent filed its Answer to the Compliance Specification and Notice of Hearing and on November 28, 2017, Respondent filed an Amended Answer. GC 1(k) and (l).

The hearing in this matter was held before Deputy Chief Administrative Law Judge Arthur Amchan in Philadelphia, Pennsylvania on December 5-7 and December 12-14, 2017.

III. THE UNION PROPERLY REQUESTED TO BARGAIN FOLLOWING THE ISSUANCE OF THE BOARD ORDER BUT RESPONDENT IGNORED THE UNION

A. Facts

The Union represents a unit of approximately 117 registered nurses at Respondent's Hospital. Tr. 139: 10-12. In 2010, the Board conducted an election and certified the Union as the collective-bargaining agent of the unit. On June 1, 2014, Respondent closed its OB unit without notice and without bargaining over the effects of the closure with the Union. As discussed above, on December 2, 2015, the Board issued a Decision and Order (363 NLRB No. 56) in the instant case, ordering Respondent to bargain and make whole the Claimants.

On December 4, 2015 – two days after the Board issued its Order – Union Staff Representative Teresa Leone sent a letter to Respondent via certified mail, return receipt requested, demanding to bargain over the effects of the OB unit closure. Tr. 140: 23-25; Tr. 140: 22-23; GC 12; GC 13. Respondent ignored Leone's request for effects bargaining. Tr. 150: 1; Tr. 166: 14; Tr. 194: 24.

The Union viewed Respondent's lack of response to its demand to bargain as part of Respondent's typical pattern of behavior. For years, Respondent's modus operandi had been to ignore the Union's requests to bargain and requests for information and to refuse to comply with decisions by administrative law judges and the Board, until ordered to comply by a circuit court of appeals. Tr. 168-69; Tr. 202: 6-8. It is undisputed that the Union had at least three other charges pending against Respondent related to the bargaining unit at Salem Hospital since the Union was certified in 2010. Those charges related to refusals to bargain, refusals to provide information, and unilateral changes by Respondent. All of those cases proceeded through hearings before administrative law judges, decisions by the Board, and appeals to circuit courts of appeals, and in all cases, the Board's decisions that Respondent violated the Act were affirmed. *See Salem Hosp. Corp., a/k/a the Mem'l Hosp. of Salem Cty.*, 2015 WL 852009 (Feb. 27, 2015) (judge's recitation of the Union's charges against Respondent and the subsequent decisions and appeals that followed). Respondent continued to challenge the Board's 2015

¹ Prior to commencing testimony at the hearing on December 5, 2017, the General Counsel amended the Compliance Specification to reflect updated interim earnings and mitigation information. GC 2.

decision in the instant case even in late September of 2016, when it filed an Answer to the NLRB's application for enforcement to the Third Circuit.² To date, Respondent still has not signed a collective-bargaining agreement with the Union.

Respondent did not respond to the Union's December 4, 2015 demand to bargain for nearly six months. Tr. 150: 9. In fact, in the interim, on December 22, 2015, Respondent filed a motion for reconsideration of portions of the Board's Decision and Order in the instant matter. GC 22; Tr. 202: 6-8, 17-19. It was not until June 9, 2016 that Respondent made any mention of bargaining over the OB unit closure. In particular, on June 9, 2016, Community Health Systems (CHS)³ Human Resources Representative Angela Beaudry emailed Terry Leone and said she was recently made aware of an outstanding matter related to the OB unit closure and asked the Union if it wanted to bargain over this matter. GC 17. The following day, Leone sent an email to Beaudry confirming the Union's desire to bargain over the effects of the OB unit closure and said an information request would be forthcoming. GC 17. On Monday, June 13, 2016, Leone forwarded this email chain with Beaudry to Union Representative Marcus Presley so he could compose the information request. GC 17.

On June 22, 2016, per Beaudry's request, Presley sent her an information request. GC 18(a); Tr. 205: 19-22. However, Beaudry did not respond to Presley. Tr. 156: 13. On July 8, 2016, Presley sent a follow up email to Beaudry, requesting an update as to the status of the June 22, 2016 request for information and request to bargain. GC 19; Tr. 206: 15-19. Again, Presley received no response from Beaudry. Tr. 206: 15-19.

On July 11, 2016, per the order of the United States Court of Appeals of the District of Columbia in 808 F.3d 59 (D.C. Cir. 2015), the parties met to bargain a first collective-bargaining agreement. GC 1(b). Respondent had been contesting the Union's certification for six years at that point and was finally ordered to bargain. Respondent did not offer to bargain over the closure of the OB unit during this bargaining session because the instant case had not been decided by the D.C. Circuit. Tr. 208: 16-18. During a break in negotiations on July 11, Presley approached Beaudry in the hallway to ask her about the status of effects bargaining over the OB unit closure. Tr. 208: 23-25. Presley asked Beaudry if there was any response to the emails he sent her on June 22 and July 8, and when he could expect the information. Tr. 209: 3-4. Beaudry responded that the matter was the subject of ongoing litigation, and she would not be discussing it at that time. Tr. 209: 4-6.

Presley informed Leone and Union Director of Membership Representation Fred DeLuca of his July 11 conversation with Beaudry shortly after he spoke to her. He told them he asked about the status of OB unit closure bargaining, but that Beaudry stated that she was not going to discuss it because it was the subject of ongoing litigation. Tr. 209: 11-21. Leone and DeLuca corroborated Presley's testimony about his conversation with Beaudry. Tr. 160: 17-22; Tr. 174,

² Docket No. 16-3492.

³ CHS is Respondent's parent corporation.

6-11. Additionally, none of the Union representatives were surprised by Beaudry's response. DeLuca and Presley testified that Respondent had ignored their requests to bargain in the past while challenging the Union's certification, so they viewed this as typical behavior. Tr. 168-69; Tr. 200; Tr. 240: 11-19.

On July 14, 2016, Presley sent an email to Beaudry putting her on notice that if Respondent did not answer to the Union's June 22 information request (and follow-up request on July 8) by July 22, 2016, the Union would exercise its rights under the National Labor Relations Act (NLRA). Tr. 210: 5-8; GC 20. Nevertheless, Respondent did not respond to Presley nor did it offer to bargain over the effects of the OB unit closure until January of 2017 – nearly six months later. Tr. 161: 17; Tr. 210: 9-14.

On or about December 15, 2016, NLRB Compliance Officer Shane Thurman informed the Union that he learned Respondent was going to comply with the Board's December 2, 2015 Decision and Order.⁴ GC 21; Tr. 4-8; Tr. 191: 9; Tr. 192: 1-2. On December 20, in response to this information, Presley sent Respondent a letter renewing the Union's request to bargain over the closure of the OB unit. GC 21; Tr. 211: 21-23.

On January 4, 2017, Beaudry responded to Presley's December 20 demand to bargain and asked the Union for updated requests for information and proposed some dates to meet. GC 23. On January 9, 2017, Presley responded to Beaudry's email. GC 24. The parties met for their first bargaining session over the effects of the OB closure on January 26, 2017. Tr. 176: 5-11; Tr. 214: 22-24. Presley and DeLuca were the negotiators for the Union, and Beaudry was the chief negotiator for Respondent. Tr. 215: 8-15. Throughout February 2017, the Union and Respondent were in frequent contact regarding bargaining over the effects of the OB unit closure. GC 32-48. On March 9, 2017, the Union made an effects bargaining proposal. Tr. 23-25; GC 48. Respondent did not respond to the proposal until March 24, 2017. GC. 50. On April 18, 2017, the parties finalized the effects bargaining agreement. Tr. 215: 25; Tr. 216: 1-4; GC 4.

B. Applicable Legal Standard

The backpay period in this case is governed by *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), which is the remedy ordered by the Board and enforced by the Third Circuit. GC 1(b). *Transmarine* requires a respondent to make whole employees from five (5) days after the date the Board's decision issues, until the first of four occurrences: 1) the date respondent bargains for agreement with the union on the subjects pertaining to the effects of the closure; 2) the parties reach a bona fide impasse in bargaining; 3) the union fails to request bargaining

⁴ Notably, a couple months prior, more cases involving the Union's charges against Respondent were decided in the Union's favor. *See, e.g., Nat'l Labor Relations Bd. v. Salem Hosp. Corp.*, 669 Fed.Appx. 80 (3d Cir. 2016) (affirming the Board's Order finding Respondent violated 8(a)(1) and (5) by failing to provide information, bargain, and by making unilateral changes. By December 2016, Respondent must have realized it was not going to win the instant case in the Third Circuit.

within five days of the Board's decision, or to commence negotiations within five days of the respondent's notice of its desire to bargain with the union; or 4) the subsequent failure of the union to bargain in good faith. *Id.* at 390.

Based on *Transmarine*, the Acting Regional Director determined that the backpay period commenced on December 7, 2015, which is five days after the Board's December 2, 2015 Decision and Order, and that it continued until the parties reached an effects bargaining agreement on April 19, 2017. Tr. 33: 15-19; GC 1. The Acting Regional Director determined that none of the other *Transmarine* occurrences were triggered earlier.

In its Answer and at the hearing, Respondent argued that two of the *Transmarine* occurrences were triggered earlier. Specifically, Respondent asserted that: 1) the Union failed to commence negotiations within five days of its receipt of Respondent's notice of its desire to bargain with the Union (Second Affirmative Defense), and 2) the Union failed to bargain in good faith (Third Affirmative Defense). GC 1(l).⁵ The Respondent did not meet its burden to prove these *Transmarine* occurrences were triggered, and accordingly, the backpay period in the Compliance Specification must be affirmed.

1. Respondent did not establish that the Union failed to commence negotiations within five days after receipt of Respondent's notice of its desire to bargain with the Union.

Respondent fell short of establishing its second affirmative defense that the Union failed to commence negotiations within five days after receipt of Respondent's notice of its desire to bargain with the Union. The credible record evidence established that the Union promptly requested bargaining, but was ignored. In particular, the Union requested bargaining on December 4, 2015 – two days after the Board issued its Decision and Order – but was ignored by Respondent for more than six months. Then, for the first time, on June 9, 2016, Angela Beaudry emailed Terry Leone and said she had recently been made aware of an outstanding issue regarding effects bargaining over the closure of the OB unit, and asked if the Union wanted to bargain. Leone responded to Beaudry the following day and said the Union wanted to bargain. On June 22, 2016, Marcus Presley sent an information request to Beaudry and proposed to meet to bargain on August 29, 2016. After receiving no response, Presley followed up with Beaudry on July 8 via email, and again, in person, on July 11. On July 11, Presley asked Beaudry about the status of the OB unit closure negotiations, and Beaudry replied that the OB unit closure was the subject of ongoing litigation and she would not be discussing it. Presley even followed up a third time – on July 14 via email – and put Respondent on notice that the Union would be exercising its rights under the NLRA if Respondent refused to bargain.

⁵ At hearing, Respondent withdrew its First Affirmative Defense that the Union failed to request bargaining within five days of its receipt of the Board's Decision and Order. Respondent withdrew this defense because, in complying with the General Counsel's subpoena, it found conclusive evidence that the Union made a timely demand to bargain.

Based on the record evidence, the Union without a doubt attempted to commence bargaining within five days after receipt of Respondent's June 9 notice, if Beaudry's June 9 email can even be considered notice of Respondent's desire to bargain. Certainly, the sincerity of Respondent's expressed desire to bargain on June 9 is belied by Beaudry's subsequent statements and conduct.⁶

Beaudry's testimony that she did not receive Leone and Presley's emails was not credible. She conveniently testified that she did not receive any of the emails from Leone or Presley in June and July of 2016 regarding the effects of the OB unit closure, though she did receive other emails from them regarding first contract bargaining. Tr. 787. Though Respondent presented evidence that Beaudry was having trouble receiving emails from Presley in December of 2016, the record is devoid of evidence suggesting that she had any email problems in June and July of 2016, nearly six months prior. Moreover, Beaudry said she was not aware of any issues receiving emails from Leone, yet, she claims not to have received Leone's June 10 email. It stands to reason that Beaudry was not telling the truth, as these missed communications were only on topics she soon learned she was not supposed to be discussing with the Union. Moreover, Beaudry's statement to Presley on July 11 that she would not discuss topics of ongoing litigation was consistent with Respondent's demonstrated practice of ignoring all of the Union's bargaining requests until ordered to bargain by a circuit court of appeals.

Furthermore, Beaudry should be discredited due to her argumentative demeanor. She was overtly hostile toward the General Counsel and her tone of voice reflected an aggressive stance when answering the General Counsel's questions.⁷ *Local Joint Executive Board of Las Vegas*, 318 NLRB 829, 834 (1995) (discrediting employer witness for being "partisan, combative, and glaringly opinionated"); *Champ Corp.*, 291 NLRB 803 (1988) (discrediting witness that exhibited hostility toward the union and General Counsel). By contrast to Beaudry, Presley testified credibly. He spoke honestly and consistently about his conversation with Beaudry on July 11, and his testimony was corroborated by Leone and DeLuca, who said Presley told them about the conversation at the time it happened.

Even if Beaudry was telling the truth and did not receive Leone and Presley's emails in response to her June 9, 2016 email, Respondent's defense falls short. In particular, the

⁶ It is impossible to know why Beaudry sent the email on June 9 and then retracted. One possible explanation is that Beaudry sent the June 9 email without authorization. She testified that she was new to the Salem account in early 2016. It appears Beaudry was sorting through issues involving Salem and was complying with the Board's recent decision in *Salem Hospital Corp. v. NLRB*, 808 F.3d 59 (Dec. 15, 2015) ordering Respondent to bargain for a first collective-bargaining agreement, and that she spoke without authorization regarding the OB unit closure bargaining. When she learned of her mistake from in-house and/or outside counsel, she ceased communications on the matter entirely, did not respond to Presley's emails, and informed him on July 11 that she was not going to bargain over a matter that was the subject of ongoing litigation.

⁷ It must be noted that Beaudry no longer works for Respondent, but testified on behalf of Respondent *without* a subpoena.

Transmarine occurrence is triggered only if the Union fails to commence bargaining within five days of receipt of Respondent's notice of its desire to bargain. In this case, Beaudry testified that the Union may have responded to her June 9 email, thereby admitting that the Union attempted to commence bargaining. Tr. 815: 16-19. Regardless of whether deficiencies in Respondent's email system prevented Beaudry from receiving these emails, the Union still met its burden under *Transmarine* to commence bargaining in a timely manner.

Respondent made additional arguments regarding times it believed the Union should have demanded to bargain on this subject. Respondent argued throughout the hearing that the Union should have persistently requested that Respondent bargain over the effects of the closure of the OB unit throughout 2016 when the parties met to bargain a first collective-bargaining agreement. Respondent's argument, however, is misguided. In particular, *Transmarine* does not require that the Union repeatedly demand to bargain. Quite the opposite, the Union is only required to demand to bargain within five days of the Board's Decision, and to commence negotiations within five days after receipt of Respondent's notice of its desire to bargain. In this case, the Union met both requirements. First, it demanded to bargain on December 4, 2015 – within five days of the Board's Decision – and it tried to commence bargaining with Respondent one day after learning of Respondent's ostensible willingness to bargain on June 9, 2016. In fact, the Union tried to commence bargaining on June 10, June 22, July 8, July 11, and July 14, but after Respondent told the Union it would not bargain over a subject of ongoing litigation, it gave up its attempts to commence bargaining on the matter.

2. Respondent did not establish that the Union bargained in bad faith.

Respondent did not prove its third affirmative defense that the Union failed to bargain in good faith. Indeed, Respondent presented no evidence at the hearing which would support such a defense. The General Counsel can speculate that Respondent will argue that the Union made unnecessary information requests and delayed making proposals in 2017, but that could not be further from the truth. The record shows that on January 4, 2017 – the earliest date Respondent indicated a true willingness to bargain on this subject – the Union engaged in swift and frequent bargaining.

On December 15, 2016, the Union learned from Region 4 Compliance Officer Shane Thurman that Respondent was finally willing to bargain over the effects of the closure of the OB unit. On December 20, 2016, Marcus Presley sent Respondent yet another demand to bargain, and Respondent replied on January 4, 2017. Thereafter, the Union made an information request and Respondent replied. The parties met for their first bargaining session on January 26, 2017. Thereafter, the Union made some additional information requests and Presley testified at the hearing about the reason for the requests. Throughout February, the Union worked on a proposal and communicated nearly every week with Respondent via email and phone to schedule their next bargaining session. On March 9, 2017, the Union emailed Respondent a proposal. If there

was any delay, it was by Respondent, who did not respond to the Union's proposal until March 24. The parties finalized the effects bargaining agreement on April 17.

Respondent never objected to the Union's requests for information in early 2017, nor any of its follow-up requests. Likewise, Respondent did not accuse the Union of bad faith bargaining or delaying negotiations in 2017 nor did it file charges to this effect with the Board. Rather, it was not until Respondent filed its amended Answer on the eve of the hearing, that Respondent asserted this new defense. The General Counsel respectfully urges that this defense be summarily dismissed for lack of support and that the General Counsel's asserted backpay period be accepted.

IV. THE GENERAL COUNSEL'S GROSS BACKPAY CALCULATIONS ARE REASONABLE

A. Applicable Legal Standard

It is well settled that where there has been a finding of an unfair labor practice, it is presumptive proof that some backpay is owed. *See NLRB v. Mastro Plastics Corp.*, 354 F. 3d 170, 178 (2d Cir. 1975). The General Counsel's burden in a compliance proceeding is limited to showing the gross backpay due to each discriminatee. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943); *Pessoa Construction Company*, 361 NLRB No. 138 (2014). The General Counsel's methodology for calculating gross backpay need only be reasonable and not arbitrary. *Midwestern Personnel Services*, 346 NLRB 624, 631 (2006), *enf'd* 508 F.3d 418 (7th Cir. 2007). If the General Counsel meets this initial burden, the burden then shifts to the respondent that committed the unfair labor practice to establish affirmative defenses to mitigate its liability. *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2004). Any ambiguities, doubts, or uncertainties are resolved against the wrongdoing respondent and in favor of the wronged party, because the wrongdoer is not allowed to profit from any uncertainty its discrimination caused. *See, e.g., Minette Mills, Inc.*, 316 NLRB 1009, 1010-11 (1995).

B. The General Counsel's calculation of gross backpay is reasonable and not in dispute.

The General Counsel met its burden to establish gross backpay owed to each Claimant in this case. In its Answer, Respondent admitted that the General Counsel's gross backpay formula and identification of the Claimants is reasonable. GC 1(l), para. 8-11.

Region Four Compliance Officer Shane Thurman prepared the Compliance Specification and its amendment. GC 1(d); GC 2; Tr. 25: 15-16; Tr. 26: 4-5. The Amended to the

Specification seeks backpay as follows for the twelve Claimants who lost their positions upon the closure of the OB unit:⁸

Claimant	Gross Backpay Total	Net Backpay Total	Excess Tax on Backpay	Incremental Tax on Backpay	Total Owed
<i>Former Employees</i>					
Linda Carr-Sibley	\$96,697.73	\$47,670.88	--	--	\$47,670.88
Jill Cottrell	\$39,554.64	\$30,545.63	\$11.00	\$3.00	\$30,559.63
Renee Garrison	\$145,911.06	\$61,823.56	\$115.00	\$28.00	\$61,966.56
Betty Moore	\$159,227.87	\$116,395.66	\$429.00	\$180.00	\$117,004.66
Michele Newsome*	\$3,647.38	\$3,647.38	--	--	\$3,647.38
Maria Soone	\$41,212.58	\$20,403.07	\$45.00	\$11.00	\$20,459.07
Jacqueline Engle*	\$367.63	\$367.63	--	--	\$367.63
Jacqueline Wood*	\$696.07	\$696.07	--	--	\$696.07
<i>Reassigned Employees</i>	Expected Earnings	Economic Losses			
Sylvia Drennan**		\$672.11	--	--	\$672.11
Esperanza Driver	\$68,086.28	\$34,005.78	\$29.00	\$7.00	\$34,041.78
Tina Kille**		\$923.23	--	--	\$923.23
Gail Kirkwood	\$13,915.00	\$4,599.50	--	--	\$4,599.50
Total					\$322,608.50

*Owed two weeks of backpay only

⁸ The Specification divides the above-named Claimants into two classifications: 1) former employees and 2) reassigned employees. GC 1(d). Respondent admitted these classifications to be correct in its Answer. GC 1(l).

**Owed two weeks of economic losses only

C. The General Counsel's asserted backpay and interim earnings periods are reasonable.

Per *Transmarine*, the backpay period ran from the 4th quarter of 2015 (five days after the Board order issued), through the 2nd quarter of 2017 (the quarter during which the parties reached an effects bargaining agreement). GC1(d) at 10. See *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968) (requiring payment to the employees from five days after the date of the Board's decision until the occurrence of the earliest of four enumerated occurrences).

Compliance Officer Thurman testified that he relied on *W.R. Grace*, 247 NLRB 698 (1980) to determine the interim earnings period. Tr. 40: 19; GC 1(d), para. 12. According to *W.R. Grace*, a *Transmarine* remedy establishes a set number of weeks of backpay liability based upon a period from five days after the Board's Decision until the first of the four specified occurrences. The Board in *W.R. Grace* explained that the number of weeks in the *Transmarine* backpay period is "then applied in full to the time period following termination of employment..." *Id.* at 699. Thurman explained that the method of "superimposing" the backpay period over the time period immediately following the closure of the OB unit made sense because the backpay period in the instant case only began running after the Board's Order issued on December 7, 2015 – nearly one and a half years after the Claimants lost their jobs. Thurman explained that he utilized the *W.R. Grace* method successfully in a prior case. Tr. 14: 12-14. See *Pennsylvania State Corrections Officers Association*, 364 NLRB No. 108, 207 (Aug. 26, 2016).

Applying *W.R. Grace*, the interims earnings period in the instant case runs from June 4, 2014 through October 16, 2015. GC 1(d). Thurman explained that he took the 500-day backpay period (described above as from December 7, 2015 through April 19, 2017) and applied it beginning June 4, 2014 (the first day of the pay period during which the Claimants did not work due to the closure of the OB unit) until 500 days later on October 16, 2015. GC 1(d); Tr. 40: 19-25; Tr. 41: 1-9.⁹ Many of the Claimants fully offset their losses well before the end of this period.

The Acting Regional Director's method of calculation according to *W.R. Grace* should be affirmed. Notably, though Respondent contested the use of *W.R. Grace* in its Answer, it failed to present any alternative calculation, or evidence that this formulation was improper, as it is required to do in an answer to a compliance specification. See *Paint America Services, Inc.*, 352 NLRB 185, 186 (2008); *Ybarra Constr. Co.*, 346 NLRB 856 (2006). To the contrary, Respondent has asserted that severance payments must be deducted from the Claimants' gross backpay, and the General Counsel has agreed. However, the severance payments were made in June of 2014 and must be applied in the pay period in which they are paid. See *W.R. Grace*, 247 NLRB at 699 n.5 (severance pay is properly considered as interim earnings and is applied in the

⁹ Respondent admitted in its Answer that the June 4, 2014 date is accurate.

quarter in which it is received, just as other interim earnings). Thus, Respondent should not get the benefit of this severance reduction while arguing that the interim earnings period does not encompass the period in which severance was paid. Likewise, Respondent has argued that the Claimants failed to immediately mitigate damages after the closure of the OB unit, which is inconsistent with its argument that the appropriate backpay period or period during which interim earnings should be considered is much later. It would not make sense to begin the interim earnings period one and a half years after the closure of the OB unit because the Claimants were all gainfully employed by that time and the remedy would be wholly ineffective. The loss the Claimants suffered was immediately after the closure of the OB unit, when they were first seeking new jobs, and they must be made whole for losses incurred during this time period.

The General Counsel has discretion in selecting any formula that will approximate what the discriminatee would have earned absent the discrimination, as long as the formula is not unreasonable or arbitrary under the circumstances. *The Lorge School*, 355 NLRB 558, 360 (2010); *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001). Based on the above, the General Counsel's application of *W.R. Grace* to the Compliance Specification is reasonable and should be affirmed.¹⁰

V. RESPONDENT DID NOT PROVE THAT THE CLAIMANTS FAILED TO MITIGATE

A. Applicable legal standard

An argument that a claimant failed to mitigate damages is an affirmative defense for which the respondent bears the ultimate burden of proof. *St. George Warehouse*, 351 NLRB 961, 967 (2007). The contention that a claimant 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 claimant unreasonably failed to apply for these jobs. *M.D. Miller Trucking & Topsoil, Inc.*, 365 NLRB No. 57 (April 12, 2017). The respondent has the burden of going forward with the evidence to show there were substantially equivalent jobs within the geographic area. *Id.*; *St. George Warehouse, supra*.

If the respondent satisfies this burden, then the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search. *St. George Warehouse*, 351 NLRB at 967. The General Counsel may meet this burden by producing the claimants to testify as to their efforts at seeking employment, or by introducing other competent evidence regarding the claimant's job search. *Id.* at 964. The standard is one of "reasonable" diligence, not the highest diligence, and sufficiency of the claimant's efforts to mitigate are

¹⁰ Additionally, Your Honor granted the General Counsel's motion at the hearing to limit Respondent's subpoena to the Claimants (and also to the third party hospitals) to the time period in question – June 4, 2014 to October 16, 2015.

determined with respect to the backpay period as a whole and not based on isolated portions. *Basin Frozen Foods, Inc.*, 320 NLRB 1072 (1996). A claimant is not required to apply for “each and every possible job that might have existed.” *The Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *see also Lundy Packing Co.*, 286 NLRB 141, 142 (1987) (reasonable diligence standard does not require claimant to exhaust all possible job leads). Still, the ultimate burden of persuasion on the issue of a claimant’s failure to mitigate remains with the respondent to show that the claimant did not mitigate damages “by using reasonable diligence in seeking alternate employment.” *St. George Warehouse, supra* (citing *Mastro Plastics*, 354 F.2d 170, 175 (2d Cir. 1965)).

Even where the evidence raises doubt as to the diligence of the claimant’s efforts to obtain employment, it is the claimant who must receive the benefit of the doubt rather than the respondent wrongdoer whose conduct has caused the uncertainty. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-73 (5th Cir. 1966); *Neely’s Car Clinic*, 255 NLRB 1420, 1421 (1981); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), *enfd* 683 F.2d 1296 (10th Cir. 1982); *United Aircraft Corporation*, 204 NLRB 1068 (1973).

B. All nursing jobs are not created equal.

Respondent produced witnesses from Inspira Hospital, Jefferson Hospital, Cape Regional Medical Center, Virtua Hospital, and Genesis to show there were available nursing jobs in 2014 and 2015 to which the Claimants should have applied. Respondent also claimed it offered the Claimants positions in other departments within Salem Hospital after the closure of the OB unit and that the Claimants should have accepted these offers. Respondent’s argument boils down to the following: the Claimants should have taken any nursing job available because “a nurse is a nurse.” This argument ignores reality and must be rejected.

Claimants are not required to take any job that is offered to them in order to mitigate. Nor do nurses have to take any nursing job offered to them. For example, in *Essex Valley Visiting Nurses Association*, 352 NLRB 427, 429 (2008), the respondent argued that discharged utilization management nurses were qualified to perform any type of registered nursing position. However, the record evidence showed that utilization management nurses performed mostly administrative functions and had not been engaged in direct patient care. *Id.* In affirming the judge’s decision to grant backpay to the claimant nurses, the Board determined that utilization management nurse positions were not substantially similar to all other nursing positions, because the claimants had not handled patients or performed direct care in the positions they had before respondent eliminated their jobs, and that they could not be required to seek employment in any nursing field just because they were nurses. *Id.* at 437. Likewise, in *The Lorge School*, 355 NLRB 558, 561 (2010), the Board held that the claimant engaged in a reasonable job search within her specialty area. There, the claimant was effectively performing the duties of a school principal when she was unlawfully discharged. *Id.* at 559. In a compliance proceeding, respondent took issue with the fact that she did not apply to teaching or tutoring positions. *Id.* at

561. The Board said that the claimant was justified in limiting her job search to principal and assistant principal positions, noting that a claimant is not required to accept employment that is not at least the same or better than the work from which he or she had been discriminatorily discharged. *Id.* The Board held that just because she was qualified to teach, she was not required to look for jobs as a teacher. Likewise, in *Teamsters Local 802*, 120 NLRB 772 (1958), the Board held that in view of the claimant's long-time experience as a bakery route salesman, that he "was reasonable in wishing to concentrate most of his search for work, at least initially, within that field." *Id.* at 778; *see also United Aircraft Cor.*, 204 NLRB 1068, 1071 (1973) (finding it reasonable for claimant to seek jobs comparable to the work he did for Respondent, and when he was unsuccessful, to look in other fields).

Similarly here, Respondent has argued that "a nurse is a nurse" and that the Claimants who had worked their entire careers as OB nurses, should accept jobs as any type of nurse, both in other departments at Salem, and in other departments at other area hospitals. Respondent's argument must fail.

There are specialty areas within nursing and the Claimants should not be required to seek employment – at least not immediately – outside of their specialty area. Neutral witnesses, like Jefferson Hospital's Julie Ellis and Virtua Hospital's Wanda Smith, testified that there are specialty areas within nursing and that it is not surprising for a nurse to specialize in OB and to stay in OB her entire career. Specifically, Ellis said many nurses go into a specialty practice area such as med/surg, critical care, OB, and emergency medicine. Tr. 653: 17-25. Ellis said that a med/surg nurse requires different skills and experience than an OB nurse, and an OB nurse would require different experience and skills than an occupational health nurse. Tr. 656: 10-22. Likewise, Smith testified that "women and children" is a specialty area, and that within that, pediatrics and labor and delivery were further specialty areas. Tr. 990: 17. Even Respondent's own witness agreed that there are specialty areas in nursing. In particular, Respondent Director Nancy Hampton initially tried to draw similarities between OB nurse work and nurse work in other departments, but on cross examination, she identified the vast differences between OB nurses and nurses in other departments.¹¹ Tr. 1083-90.

Most of the Claimants testified that OB was their chosen career and that OB was all they knew. Hampton corroborated, testifying that the Claimants were upset when they learned the OB unit would close, and that "they were losing something that they loved." Tr. 1100: 13-14. Claimant Maria Soone testified that she loved being an OB nurse and that it was her "heart" and

¹¹ Hampton's testimony was obviously biased and geared to support Respondent's case. She testified that she made a list for the hearing, at Respondent counsel's request, comparing OB nurse work with the work of non-OB nurses. She argued that when a pregnant woman broke her leg, she would come to the OB unit, and that therefore, the OB nurses, knew how to care for the broken leg. However, on cross examination, she admitted that a pregnant woman with a broken leg would be transferred to the OR for surgery by non-OB nurses. Tr. 1090. Hampton unsuccessfully tried to stretch the responsibilities of the OB nurses to suit Respondent's case.

“passion.” Linda Carr-Sibley said OB was an incredibly specialized field and that it was her chosen field. Tr. 318: 4-6. Renee Garrison said she always loved OB and she went straight into that specialty after she finished school. Tr. 414: 23-25; Tr. 415: 1-2. OB nurses are a highly-sought after position. OB nurses work with mothers and babies and quite literally deliver the “miracle of life.” They have very specific skills and work with a specific population. By contrast, some other nursing jobs that Respondent argued the Claimants should have taken are not as desirable. Tr. 620 (testifying that Jefferson Health System does not get many applicants for nursing home positions); Tr. 991: 16-19 (Virtua’s Wanda Smith testifying that nursing home jobs are much different than acute care/hospital jobs). Likewise, medical/surgical nurses are often entry-level positions for new graduates, rather than experienced nurses. Tr. 665: 15-25

The General Counsel urges Your Honor to see through Respondent’s argument that a “nurse is a nurse” and recognize that specialty areas exist within nursing and that the Claimants were entitled to at least initially search for work in their specialty area. Like the principal in *The Lorge School* who was certified to teach but was not required to apply to teacher positions, the Claimants should similarly not be required to apply to nursing jobs in non-OB specialties simply because they may carry the general certifications to perform the job.

Most of the Claimants searched diligently for OB nurse positions immediately following the closure of the OB unit. Some were successful in obtaining jobs in this field, and some were not. After a few months of diligent searching, when some Claimants did not find OB positions, they “lowered their sights” and took jobs outside of the OB specialty. *See, e.g., Gen. Teamsters, Local 439*, 194 NLRB 446, 451 (1971); *Moss Planing Mill Co.*, 119 NLRB 1733, 1744 (1958) (discriminatee not required to “lower his sights” immediately following discharge). This was a reasonable course of conduct.

From a policy standpoint, Respondent cannot be permitted to commit an unfair labor practice that caused significant financial loss to the Claimants, and at the same time demand that the Claimants go find new careers in specialty areas they have never worked in, have not worked in for decades, or which they do not desire to work in. As Renee Garrison testified, it would be like telling a labor lawyer who was laid off to go find a job in corporate law. Tr. 401. True, both positions require a law degree, but that is the extent of the similarities. This is not a reasonable or realistic demand.

There should be little question that the Claimants in this case were justified in first seeking opportunities within OB nursing and the General Counsel urges Your Honor not to impose Respondent’s unreasonable expectations upon the Claimants.

C. Respondent proffered unreliable evidence of the available job market.

Respondent subpoenaed documents from area hospitals in an attempt to prove that the Claimants failed to mitigate. However, Respondent’s documentary evidence was fraught with errors that made them unreliable.

1. Most jobs were posted for a brief period of time or were never actually posted to the public.

Many of Respondent's witnesses testified that the job postings, if they were posted at all, were only posted for a short period of time. The evidence was as follows:

- a. Inspira: Until May 31, 2016, Inspira's jobs were only posted for five consecutive days on the Inspira website. Tr. 586: 22-25; Tr. 587: 24-25; Tr. 588: 1-5.¹²
- b. Jefferson Health: Jefferson only posted its jobs to its website for five consecutive days. Tr. 607: 20-21. Jefferson's Julie Ellis testified that in some cases, the posting period may be even shorter if a recruiter decided to remove a posting early. Tr. 616. Furthermore, the posting date listed on Respondent's Exhibit 4, which is the document for Jefferson Health, is for internal recruiter use, and does not depict how long the position was open and accepting applications. Tr. 616: 9-18. In many cases, jobs at Jefferson were posted for less than five days. For example, Ellis testified that Job 10988 (clinical nurse) was posted on January 9 and taken down four days later and that another job in Respondent Exhibit 4 was posted for only two days. Tr. 645: 23-25; Tr. 646: 1-6; Tr. 647: 8-19; R. 4. Furthermore, if Jefferson knows there is internal candidate for a position, Ellis said the job may never be posted externally. Tr. 660: 22-25; Tr. 661:1-3. Ellis said there was no way to tell from Respondent's Exhibit 4 whether a job was posted internally only and that it is possible that jobs in that document were only posted internally. Tr. 661: 7.
- c. Cape Regional Medical Center: Cape Regional Medical Center posts jobs for seven consecutive days on Cape Regional's website, pursuant to the union contract. Tr. 880: 12-15. Sometimes, Cape Regional will not post a job externally if it knows it has an internal candidate. Tr. 881: 1-4. Cape Regional's Ed Moylett testified that one cannot tell from R. 24 and 25 – a purported list of open positions – which postings were actually available to the public. In fact, Moylett admitted that it is possible that some of the purportedly available jobs in R. 24 and 25 were never posted externally at all. Tr. 894: 6-16. Further, Moylett testified that Cape Regional has a contract with Careerbuilder.com. Careerbuilder will post Cape Regional's jobs to the public, but the contract provides that only eleven jobs can be posted at once. Tr. 906: 12-25. Therefore, if Cape Regional has eleven jobs posted, it must take one job down in order to post the new job. Moylett could not say which jobs in R. 24 and 25 were posted to Careerbuilder.com. Moylett said that the seven-day posting requirement in the Union contract applies only to jobs posted to Cape Regional's website and not to Careerbuilder, so jobs on Careerbuilder may be posted for even less time. Tr. 908: 23-

¹² The posting period was later extended to seven days, but long after the relevant backpay period in question.

25; Tr. 909: 1-7. Moylett said he is sure that all of the jobs in R. 24 and 25 were *not* posted to Careerbuilder, but he could not identify which were posted and which were not. Tr. 906: 12-25. Due to Cape Regional's distance from the homes of the Claimants (nearly 60 miles), it is unlikely that many of the Claimants were searching Cape Regional's website, so the only other way they would see these jobs was on a site like Careerbuilder. Because of the constantly rotating nature of the postings on that site, the Claimants may not have seen an appropriate job at the time they looked. Finally, Moylett disclosed that during the relevant time period,¹³ Cape Regional may not have been accepting online applications, meaning applicants had to travel to the hospital to apply. Claimants applying to Cape Regional, therefore, would have needed to perform a more diligent job search than is required by law. In particular, in seeking interim employment, a claimant need only follow his regular method for obtaining work. *Midwestern Personnel Services*, 346 NLRB No. 58 (2006); *The Bauer Group, Inc.*, 337 NLRB 395 (2002) (claimant need only exercise reasonable diligence in job search). For most Claimants, the regular method was searching for jobs online, applying online, and making phone calls – not driving hours to submit an application.

- d. Virtua: Virtua's nurses are represented by different unions. The JNESO contract requires jobs to be posted on Virtua's website for five consecutive days and the HPAE contract requires the jobs to be posted for ten. Tr. 934: 7-10; Tr. 996: 17-2. Positions that are not in a bargaining unit may be posted for even less than five days. Tr. 997: 7-9.¹⁴
- e. Genesis: Respondent introduced R. 39, which showed the allegedly open jobs. The Genesis witness could not say how long the jobs remained posted on the website. Tr. 1165: 21.

Based upon these short posting periods, it is possible the Claimants did not have the opportunity to see many of these job postings. Certainly, many of the Claimants testified that they were often looking for work, but that they did not see many available jobs in their field. To be sure, claimants are not required to apply to jobs every day, or even every quarter. *See United States Can Co.*, 328 NLRB 334 (1999) enfd. 254 F.3d 626 (7th Cir. 2001) (respondent does not satisfy burden to show no mitigation by showing an absence of a job application by the claimant during a particular quarter or quarters of the backpay period); *Sioux Falls Stock Yards*, 236 NLRB 543, 551 (1978) (backpay claimant will not incur "willful loss of earnings merely because the search for interim employment was not made in each and every quarter of the backpay

¹³ Moylett was unsure whether the hospital moved to online applications in 2014 or 2015, but reasoned aloud that it is possible that the switch to online applications did not occur until 2015 because Claimant Linda Carr-Sibley applied by paper in 2014. Tr. 881: 13-14.

¹⁴ There are some nurse jobs outside the bargaining unit.

period.”); *Champa Linen Service*, 222 NLRB 940, 942 (1976); *Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *Cornwell Co.*, 171 NLRB 342, 343 (1968). Moreover, many of the Claimants found employment soon after Respondent laid them off, and therefore, all of these ostensive job postings after a certain time period are immaterial. Specifically, Betty Moore found employment in September of 2014, Soone in October of 2014, Garrison in November of 2014, Cottrell in January of 2015, and Carr-Sibley in February of 2015. Therefore, Respondent’s introduction of ostensibly available jobs outside of this short time period is immaterial to these Claimants who, with diligent effort, were employed shortly after Respondent laid them off.

In addition to the short online posting periods, some of Respondent’s documentary evidence cannot be relied on to show that jobs were posted to the public at all. For example, Respondent Exhibit 2 – a summary of nursing jobs purportedly available at Inspira during the relevant time period – indicates that most of the positions were internal transfers and not job openings. For example, of the approximately 90 OB-related jobs posted during the relevant time period, about half were internal transfers from part-time to full-time, full-time to per diem, or between departments.¹⁵ Additional positions were not filled (meaning the job could have been taken down or cancelled) or were supervisory positions. As such, Respondent Exhibit 2 suggests that there were a plethora of available jobs, but this is not the case. Likewise, Respondent introduced Exhibits 24 and 25 to show available jobs at Cape Regional during the relevant time period. However, Cape Regional’s Moylett testified that R. 24 and 25 were Excel spreadsheets maintained by the HR generalists and did not necessarily reflect actual job postings. Tr. 886: 13-17. Moylett also admitted that there were errors in R. 24 and 25. For example, a purportedly available maternity job on page 60 of R. 24 (heading 11-24-14) was not actually available on the date shown.¹⁶ Thus, much of Respondent’s evidence cannot be relied on to show that there were available jobs.

Further, many of the purportedly available job postings in Respondent’s exhibits were managerial positions, nurse practitioner positions, or positions that did not involve direct patient care.¹⁷ Nurse practitioner positions require a master’s degree in nursing, which none of the

¹⁵ One can see who transferred by looking at the exhibit under the columns, “Who Left” and “Filled By.” Many times you will see that the name in the “Filled By” column is also reflected in the “Who Left” column, indicating that person left a prior position to fill a different spot. For example, Andrea Nastarowicz-Bradshaw filled req. 20013528, a per diem position, on 7/18/14. Previously, she worked as a full-time night shift nurse in the delivery room. Likewise, Danielle H. Robbins filled req. 20013765 on 9/5/14, which is a full-time day shift position. She had previously been working a full-time night shift position.

¹⁶ Page 60 of 65 on the pdf version of the exhibit. Tr. 904-05 (testifying about a job posting supposedly available on October 31, 2014, shown on the heading page “1-24-14,” but not reflected in the prior weeks as it should be because jobs at Cape Regional repeat in this sheet from the date they are available until they are filled).

¹⁷ R. 24 and 25 also contained much irrelevant information, such as management positions and administrative positions such as unit secretary/nurse aide, which Moylett admitted were not nurse positions. Tr. 895: 6-19; R. 24 and 25.

Claimants had.¹⁸ Therefore, the inclusion of these extraneous positions in Respondent's documentary evidence is misleading as to the number of available jobs during the time period in question.

Based on the above, the universe of available jobs is much smaller than Respondent argues. As will be shown below, the Claimants engaged in a reasonable search for work in this smaller universe of available positions.

2. Respondent did not show that the jobs were substantially similar.

The Board has long held that interim employment must be "substantially equivalent to the position from which [the claimant] was discharged and is suitable to a person of [their] background and experience." *Essex Valley Visiting Nurses Ass'n*, 352 NLRB 427, 437 (2008) (citing *Southern Silk Mills*, 116 NLRB 769, 773 (1965)). To determine whether interim employment is substantially equivalent to a claimant's former employment, the Board compares various criteria, such as pay, working conditions, job duties, commuting time, and work locations. *Pennsylvania State Corr. Officers Ass'n*, 364 NLRB No. 108 (Aug. 26, 2016); *Essex Valley Visiting Nurses Ass'n*, 352 NLRB 427, 437 (2008) (citing *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962)).

As discussed *supra*, the job functions of many of the jobs at issue were not substantially similar; the duties and working conditions greatly varied from the jobs the Claimants held with Respondent. But beyond that, other factors important to determining substantially equivalent employment were not established. For example, many of the jobs Respondent proffered were too geographically removed from the Claimants' homes to qualify as substantially similar employment. *St. George Warehouse, supra* (requiring respondent to show jobs available "within the relevant geographic area."). For example, Respondent asserted that the Claimants should have applied to positions at Cape Regional Medical Center, a hospital that is located nearly 60 miles from the Claimants. GC 52. Linda Carr-Sibley testified that during the summer, when there was traffic from shore-goers, it would take her nearly 1 hour and 15 minutes to drive to Cape Regional. Tr. 338. *See, e.g., Big Three Industrial Gas*, 263 NLRB 1189, 1211 fn. 77 (1982) (50 mile one-way commute unreasonable); *Nickey Chevrolet Sales*, 160 NLRB 1279, 1280 (1966) (50 to 55 mile one-way commute unreasonable). Likewise, other hospitals Respondent proffered, like many Virtua locations, Jennersville Hospital, Phoenixville Hospital, Lancaster Hospital, and Chestnut Hill Hospitals were 45 to 75 miles away from the Claimants. The Board has held that claimants are not required to travel such lengths to secure interim employment. *See Lorge School*, 355 NLRB 558, 561 (2010) (finding reasonable a claimant's decision to limit her geographic search to Manhattan, the Bronx, and suburban counties of northern New York and

¹⁸ This is not to be confused with a bachelor's degree in nursing. A master's degree in nursing is an even higher degree than a bachelor's degree. The Claimants in this case only had associate's degrees, which is a step below a bachelor's.

only later to broaden her search to Brooklyn and Queens); *WHO Radio*, 233 NLRB 326 (1977) (finding 35 mile one-way commute unreasonable); *Concourse Porsche Audi*, 211 NLRB 360, 361 (1974) (finding justified claimant's refusal to search for work 15 miles from her home through a congested metropolitan area, as she traveled only 8-10 miles when she worked for respondent); *Rome Products Co.*, 77 NLRB 1217, 1237 (1948) (finding employee did not obtain substantially equivalent employment where he was forced to move 16 miles from the city he made his home in order to find employment); *American Steel Scraper Co.*, 29 NLRB 939, 951 n.13 (1941) (noting additional several miles' commute can render employment not substantially equivalent).

Based on the above, the Claimants were under no duty to apply to these far-away hospitals. Although one Claimant (Linda Carr-Sibley) became desperate enough to travel that far, the other Claimants were not similarly required to go to such great lengths. *Madison Courier*, 472 F.2d 1307, 1314 n.18 (D.C. Cir. 1972) (noting that just because some strikers were "willing to undertake the excessive commuting burden" to drive long distances does not mean others had to as well); see also *The Lorge School*, 355 NLRB at 562 n.10 (rejecting respondent's argument that just because a claimant may settle for lesser jobs, these jobs do not, therefore, become substantially equivalent).

In addition to geographic area, many of the jobs Respondent has proffered are not substantially similar with respect to pay and working conditions. For example, Respondent subpoenaed Genesis Health System, which runs a nursing home facility, not a hospital. Genesis pays its nurses much less per hour than the claimants were earning working for Respondent. Genesis pays its nurses between \$29.00 and \$31.50 per hour, and only offers 8-hour shifts. Tr. 1148: 9-10; Tr. 1172: 4-5. By contrast, Respondent paid the OB nurses between \$36 and \$39 per hour and offered 12-hour shifts. GC 3. Furthermore, Genesis jobs have some supervisory requirements within the nurse's job function. In particular, Genesis requires its nurses to oversee LPNs (licensed practical nurses) and CNAs (certified nurse assistants). Tr. 1145: 4-5. The nurses at Genesis act as supervisors and can discipline and also recommend hiring and discharge for CNAs and LPNs. Tr. 1162: 5-18. Thus, the jobs at Genesis, for many reasons, are not substantially equivalent. It should be noted, however, that despite these differences, two desperate Claimants (Jill Cottrell and Jacqueline Engle) applied to jobs at Genesis. Johnson could not say whether they were offered positions with Genesis. Tr. 1150-51. Nevertheless, the case law is clear that just because one Claimant applies to a position, does not make that position a substantially equivalent position to which others were required to apply. See, e.g., *Madison Courier*, 472 F.2d at 1314 n.18. Rather, Cottrell and Engle's applications at Genesis reflect just how broadly and painstakingly the Claimants searched for work.

Considering all the circumstances, there were no available positions that were comparable to Maria Soone's position at Salem. In particular, she worked the "Baylor shift," which meant she only worked two 12-hour shifts, but was paid as if she worked three. The

Baylor program incentivized nurses to work every weekend night. Soone said no other area hospitals were offering Baylor positions when she was laid off by Respondent, and that she had preferred to work the Baylor shift. Tr. 448: 6-8. Soone now works more hours at Inspira than she did at Salem in order to earn the same salary because Inspira does not offer the Baylor option. Such a drastic change in working conditions and hours requirements cannot be considered substantially equivalent employment. And yet, Soone diligently mitigated damages and accepted the position at Inspira because she needed a paycheck.

Based on the above, Respondent has failed to show that many of the positions were substantially equivalent to the positions the Claimants held in the OB unit at Salem Hospital.

3. Respondent did not meet its burden to show that the Claimants would have been hired into these “available” positions.

Under the *St. George Warehouse* framework, Respondent has the burden of coming forward with evidence that substantially equivalent jobs existed in the relevant geographic area. *St. George Warehouse*, 351 NLRB at 967. Respondent must not only show substantially equivalent job existed, it also carries the burden of showing that the claimants would have been hired for those jobs had they applied. *The Bauer Group, Inc.*, 337 NLRB 395, 398 (2002); *E & L Plastics Corp.*, 314 NLRB 1056, 1058 (1994) (respondent did not meet burden of showing available jobs where it did not also show claimant would have been successful in obtaining the job); *Services Lines*, 231 NLRB 1272, 1273 (1977) (finding respondent did not meet burden where it did not establish that the jobs would have been available if the claimant applied or that she would have been selected for any available position); *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976) (finding respondent failed to meet burden of showing claimant would have been hired); *Firestone Synthetic Fibers*, 207 NLRB 810, 813 (1973) (The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied); *Lloyd's Ornamental and Steel Fabricators, Inc.*, 211 NLRB 217 (1974); *Alaska Chapter of the Associated General Contractors*, 119 NLRB 663, 670-71 (1957).

In *Midwestern Personnel Services, Inc.*, the Board found that a respondent failed to satisfy its burden when it merely identified particular job openings, but did not include data as to the pool of potential applicants in the job market at the time in question, data concerning how many applicants actually put in for each of these jobs, evidence concerning the likelihood that the discriminatees would have gotten the jobs, evidence concerning whether the jobs would have offered comparable wages or had comparable commutes, or evidence or analysis concerning how specific discriminatees would have fared in their applications. 346 NLRB 624, 625-26 (2006). The Board has generally given little weight to the existence of job ads, noting that such evidence does not establish whether the jobs would have been available had a discriminatee applied, or whether a discriminatee would have been hired. *The Bauer Group*, 337 NLRB at 398; *Arlington Hotel Co.*, 287 NLRB 851, 853 (1987), enf. granted in part, 876 F.2d 678 (8th Cir. 1989); *Delta Data Systems Corp.*, 293 NLRB 736, 737 (1989) (mere “existence of job opportunities by no

means compels a decision that the discriminatees would have been hired had they applied.”); *Associated Grocers*, 295 NLRB 806 (1989).

Respondent failed to show that the Claimants would have been hired had they applied to the jobs in question, and to the contrary, Respondent provided evidence suggesting that the Claimants *would not* have been hired. Specifically, Respondent’s evidence showed that the Claimants applied to some of these jobs, but were rejected, including Cottrell (rejected by Inspira) and Soone (rejected multiple times by Inspira until she was finally hired). R. 3; Tr. 491; Tr. 591.

Furthermore, a respondent does not meet its burden of proof by simply identifying job openings. *Midwestern Personnel Services, Inc., supra*. Like the respondent in *Midwestern Personnel Services*, Respondent failed to satisfy its burden of proof because it did not provide evidence of the pool of potential applicants in the job market, data concerning how many actually applied for each of these jobs, and evidence concerning the likelihood that the Claimants would have gotten the jobs. Notably, *none* of Respondent’s witnesses could identify the successful candidate for the job, the nature of the successful candidate’s background experience, or how many applicants they had. Respondent’s witnesses could not say whether the successful candidate had been referred by a contact at the hospital, had gotten a job because they had previously worked there, or whether they were hired through some other advantage that the Claimants did not have. For example, though Maria Soone and Renee Garrison were hired by Inspira, both obtained those jobs because of a connection. In particular, Soone had done per diem work for Inspira in the past, and Garrison was referred by a friend who worked for Inspira. The other Claimants may never have stood a chance.

Furthermore, many of the area hospitals preferred higher degrees than the degrees the Claimants possessed. In particular, Inspira strongly preferred to hire nursing candidates with a bachelor’s degree, and required candidates without one to obtain one within five years. Tr. 549 (testifying to the preference for bachelor’s degrees and commitment to achieving Magnet status by 2020, which requires 80 percent of nurses to have a bachelor’s degree). This preference for bachelor’s degrees is included in Inspira’s job posting to potential candidates. Tr. 581: 20-22. Likewise, Virtua has a preference for candidates with a bachelor’s degree, and is working toward a Magnet certification which would require 80 percent of nurses to have a bachelor’s degree by 2020. Tr. 1013. Jefferson’s recruiters also may have set their pre-screening questions to screen out candidates without bachelor’s degrees in 2014 and 2015. Tr. 644: 24-25. These preferences also make it less likely that the Claimants would have been hired had they applied. Accordingly, this evidence comports with the credible testimony of the Claimants, who said the vast majority of the job postings they saw preferred or required a bachelor’s degree, and that they were therefore, deterred from applying.

Finally, many of the hospitals preferred internal candidates. For example, Inspira simultaneously posts jobs internally and externally, but will always give first preference to internal candidates and will only look to external candidates if no internal candidates apply. Tr. 523: 16-17; Tr. 550: 10-15, 22. The nurses at Inspira are unionized, and per the union contract, preference is given to internal candidates who meet the qualifications for the job. Tr. 550: 10-15. Inspira's Deborah Gianchetti said it is possible that Inspira will post a job externally but never consider an external candidate for the position. Tr. 551: 15-17. Likewise, Virtua and Genesis preferred internal candidates. Therefore, Respondent has again failed to show that the Claimants would have been hired had they applied to these positions, which is part of its burden of proof. It would be patently unfair to allow Respondent to argue that the Claimants should have applied to jobs when, in fact, they never would have been hired for those positions, which seems to be the case with most of the jobs Respondent presented at the hearing.

In short, Respondent has not provided evidence to meet its burden of proof showing that the Claimants would have been hired if they applied for jobs at area hospitals. Rather, the evidence shows that the Claimants did not have the bachelor's degrees preferred by potential employers, and unless they had a personal or prior connection, they were often rejected when they applied.

4. Respondent did not establish that it offered the Claimants substantially equivalent employment within the hospital.

Respondent failed to establish that it made an offer of employment to any of the former OB nurses. Rather, Respondent produced only vague testimony that it offered the Claimants a position in other departments at Salem after the OB unit closed. At most, some Claimants were told to apply to openings with a promise of first consideration. Respondent's witness could not recall specific dates of meetings, did not present sign-in sheets (though they said they existed),¹⁹ and did not present any written offers of employment, nor any other evidence to establish that any of the OB unit nurses were offered jobs in other departments within the hospital.

Most of the Claimants testified that Respondent's managers made general or vague statements that the Claimants could apply to jobs in other departments, but that there was no guarantee they would be placed in those jobs. Specifically, Carr-Sibley recalled being told that if she applied for a position with Respondent she would be given first consideration. Tr. 317: 2-4. Garrison recalled being told that she could apply for open positions with Respondent. Tr. 386: 5-9. Likewise, Moore recalled that someone from Respondent told her they would try to accommodate nurses in a different department. Tr. 471: 9-18; Tr. 472: 16-17. Soone did not recall being offered a job in another department, but recalled it being "in the air" that she could go to a different department. Tr. 444: 21-22; 457: 9-25. Kirkwood recalled being told that she

¹⁹ Hampton testified that there were sign-in sheets for these meetings and that they were packed away in storage. Tr. 1076: 18-20.

could contact human resources or look on Respondent's website to see what jobs were available if the unit closed. Tr. 307: 15-16.

Former Salem Chief Nursing Officer Pat Scherle testified that she would have found space for the OB nurses in other departments if they wished, but at the same time testified that all of the departments were adequately staffed, and she could not explain how she would rearrange staff or cut hours with this influx of new employees Tr. 734: 2-6. In fact, Claimant Jill Cottrell said she was not sure positions in the OR at Salem were stable, since she heard other employees say they did not have enough hours and were being told to stay home. Tr. 355: 7-10; Tr. 379: 6-7. Thus, it is possible that if all the Claimants had transferred to other departments, their hours would have fallen far short of adequate mitigation. Based on Respondent's lack of evidence regarding the details of the jobs that were available or the hours that would be offered, it would be unfair to allow Respondent to now claim positions were available that would have tolled the Claimants' backpay when this might not be the case.

There was certainly no offer for the Claimants to go to a sister hospital (Jennersville,²⁰ Phoenixville and Lancaster²¹ were mentioned as sister hospitals within the CHS network, the parent company of Salem Hospital), but Respondent's witnesses admitted they had no authority to place the Claimants in those jobs, and that they could not guarantee the Claimants would have been hired at these hospitals. Tr. 736: 21-15.²²

Furthermore, in order for Respondent to show the Claimants failed to mitigate by refusing positions in other departments in the hospital, it would have to show they refused to accept substantially equivalent employment. *St. George Warehouse*, 351 NLRB at n.4; *see also Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991). At the hearing, Respondent failed to show that any position within the hospital was substantially equivalent to the jobs the Claimants had in the OB unit. Claimants like Esperanza Driver and Gail Kirkwood, who took positions in other departments in the hospital, testified about the differences in their

²⁰ Jennersville's OB unit also closed in November of 2016. Tr. 736: 8.

²¹ Jennersville, Lancaster and Phoenixville are all outside a reasonable geographic area from the Claimants' homes in New Jersey. GC 52.

²² Respondent introduced R. 41 purporting to show available jobs at Jennersville Hospital in 2014, however, the Respondent's witness could not authenticate the document because she did not create it, nor did she even work for Jennersville Hospital. She testified that she obtained the document from the Jennersville Hospital human resources director, but did not have personal knowledge of the document. Tr. 1185:10-12, 20-24. The document should not be given weight because the General Counsel was prejudiced in not being able to cross examine this witness – or any witness – about the document. Inexplicably, the document lists an individual named “Cathy Creazzo” who was replaced by an individual named “Cathy Creazzo.” Tr. 1199-1200. It is not clear whether this is an error, indicating the document is unreliable, or if Cathy Creazzo filled the position herself and it was never truly open. Respondent's witnesses could not shed light on Jennersville or Chestnut Hill's job postings, how long jobs are posted, or whether they are posted internally or externally, or what positions pay. Tr. 1202-03. The General Counsel objected to this evidence during the hearing and urges Your Honor not rely on it.

work and how much their new jobs differed from their old ones, including different shifts and job functions. Respondent's witnesses testified that the 12-hour shifts that the Claimants worked in OB were no longer available and that the longest shift they could have worked in another department was an 8-hour shift. As such, the Claimants would have needed to work an extra day per week in order to reach the same number of hours they worked in the OB unit. Additionally, the on-call requirements in the other departments differed from that in the OB-unit and were significantly more demanding.

Based on the above, Respondent failed to show any concrete offers of employment were made, and even if they were, the offers were not to substantially equivalent positions.

VI. EACH CLAIMANT ENGAGED IN A REASONABLE JOB SEARCH AFTER RESPONDENT CLOSED THE OB UNIT.

The General Counsel asserts that Respondent has failed to meet its burden to show that there were substantially equivalent jobs in the geographic area. However, even if Your Honor were to find that Respondent met its burden, the burden shifts back to the General Counsel to show that the Claimants engaged in a reasonable job search and the General Counsel has easily met its burden. *See St. George Warehouse*, 351 NLRB 961 (2007).

Claimants need only exercise reasonable diligence in searching for interim employment and must not willfully incur losses. *The Bauer Group, Inc.*, 337 NLRB 395 (2002); *Ryder System, Inc.*, 302 NLRB 608, 609 (1991); *Black Magic Resources*, 317 NLRB 721 (1995); *American Bottling Co.*, 116 NLRB 1303 (1956). The law only requires an "honest, good-faith effort." *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). In determining whether a good-faith effort was made, "[t]he entire backpay period must be scrutinized," *Cornwell Co.*, 171 NLRB 342, 342 (1968). Thus, a backpay claimant will not necessarily be found to have incurred a willful loss of earnings because his or her search for employment was not made in each and every quarter of the backpay period. *Id.*; *see also Mastro Plastics Corp.*, 136 NLRB at 1359 (what constitutes reasonable efforts depends upon the circumstances of each case, an examination of the entire backpay period, not upon a purely mechanical examination of the number or kind of applications for work made by the discriminatees). In addition, a discriminatee is not required to apply for each and every possible job that might have existed. *Champa Linen Service*, 222 NLRB at 942; *Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *Sioux Falls Stock Yards*, 236 NLRB at 551. This reasonable diligence standard does not require a discriminatee to exhaust all possible job leads. *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). Finally, the claimant need only follow his or her regular method for obtaining work. *Midwestern Personnel Services*, 346 NLRB 624 (2006); *Tualatin Electric, Inc.*, 331 NLRB 36 (2000) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment), *enfd.* 253 F.3d 714 (D.C. Cir. 2001); *United States Can Co.*, 328 NLRB 334 (1999), *enfd.* 254 F.3d 626 (7th Cir. 2001); *Continental Insurance Co.*, 289 NLRB 961 (1982).

Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances, and is measured over the backpay period as a whole, not isolated portions thereof. *Pope Concrete Products*, 312 NLRB 1171 (1993); *Cornwell Co.*, 171 NLRB 342, 343 (1968); *Wright Electric*, 334 NLRB 1031 (2001); *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 266 (1995). In determining the reasonableness of this effort, the discriminatee's age, aptitude, education, skills, training, experience, qualifications, motivation, and personal mobility and labor conditions and economic climate in the area are also factors to be considered. *Taylor Mach. Prod., Inc.*, 338 NLRB 831, 832 (2003).

The Claimants are all passionate OB nurses who spent their careers – some 25 years long – aiding mothers deliver babies and caring for mother and baby after delivery. They all expressed a desire to find employment after the OB unit closed, however, they faced roadblocks, including their age and the absence of a bachelor's degree that many hospitals were seeking. Two Claimants had to withdraw money from their retirement plans to cover expenses until they found interim employment. It is clear that none of these women had the luxury of sitting idly by without a job; they were all greatly burdened as a result of Respondent's decision to close the OB unit. Ultimately, through diligent job searches, every single Claimant found new jobs. Some of the Claimants had to settle for different types of nursing jobs, and some had to settle for less pay or fewer hours, but all secured employment. Each Claimant's job search is set forth in the following section.

The Claimants testified honestly and credibly, and to the best of their ability regarding job searches that occurred nearly four years ago. The Board has found that poor record keeping, uncertain memory and even exaggeration do not necessarily disqualify an employee from receiving backpay. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1156 (1980); *Sioux Falls Stock Yards*, 236 NLRB 543, 559-60 (1978); *United States Can Co.*, 328 NLRB at 342. Further, it is neither unusual nor suspicious if a discriminatee cannot accurately recall details of a work search undertaken several years before. *United Aircraft Corp.*, 204 NLRB 1068, 1068 n.4 (1973); *see also Allegheny Graphics*, 320 NLRB 1141, 1145 (1996) (discriminatee's testimony was sufficient to show that he made a reasonable effort to mitigate despite his poor memory and failure to keep adequate records of his job search efforts); *Bagel Bakers Council of Greater New York and its Employer Members*, 226 NLRB 622, 626 (1976) (noting that the lapse of time between the backpay period and the proceeding necessarily had the effect of limiting available evidence). Notably, a large part of the delay is attributable to Respondent's failure to bargain with the Union over the effects of the closure. *See, e.g., W. C. Nabors Company*, 134 NLRB 1078, 1078 n.3 (1961).

This brief will not discuss the five employees (Tina Kille, Sylvia Drennan, Jacqueline Engle, Jacqueline Wood, Michelle Newsome) owed the two week's minimum under *Transmarine*. In particular, The Board's Enforced Order states that in no event shall the sum that is paid to the former employees be less than what they would have earned for a 2-week period at

the rate of their normal wages, and for the reassigned employees, the sum must not be less than the economic losses each of them had incurred for a 2-week period. Respondent did not present evidence or argue that these five individuals failed to mitigate.²³ Therefore, any argument by Respondent that these five employees should receive less than what is in the Compliance Specification must be dismissed, as the remedy has already been decided by the Board and affirmed by the Third Circuit.

A. Linda Carr-Sibley

At the time the OB unit closed, Carr-Sibley was 57 years old and had been an OB nurse for 27 years. During the Compliance investigation, she submitted a detailed letter to the Region outlining her contacts with at least eleven potential employers including, Inspira, Virtua, Kennedy Hospital,²⁴ Cooper Hospital, Atlantic City Medical Center, Premier Orthopedics, Genesis Elder Care, NJ Veterans Memorial Home, Bishop McCarthy Nursing Home, Bayada Home Care-Pediatrics, and Cape Regional Medical Center. R1. Respondent Exhibit 36 shows Carr-Sibley applied to at least four positions at Inspira Voorhees in November of 2014, but that another candidate was hired for all of those positions. R 36. She also spoke with representatives at Our Lady of Lourdes. Tr. 341: 8-14. She explained that she would “Google” the hospital to see if a job was available, and if there was no job posted, she would call human resources to double check if anything was available in obstetrics, nursery, or postpartum. Tr. 343: 1-5.²⁵

In September 2014, Carr-Sibley began searching for OB nurse positions. Tr. 319: 2-5. The Compliance Specification and Amendment reflect a toll of Carr-Sibley’s backpay for the time period between June and September when she was not searching for work. GC 1 and 2. Beginning in September, Carr-Sibley called all of the area hospitals, but learned that many were not hiring or required or preferred a bachelor’s degree, which she does not have. Tr. 321; Tr. 326: 15-17. She called Inspira, where she worked for nine months in 2003, at a time when Inspira was owned and operated by South Jersey Healthcare. Tr. 339: 21-23; Tr. 340: 8-13. Carr-Sibley said Inspira told her it required a bachelor’s degree or that the nurse be enrolled in a bachelor’s degree program with a completion date within three years of hire. Tr. 340: 3-5. Carr-Sibley briefly considered going back to school to obtain a bachelor’s degree, however, at age 57, she was unwilling to go into debt for a three-year degree. Tr. 344: 3-10. This decision not to go back to school was reasonable. *See Taylor Mach. Prod., Inc., supra* (the reasonableness of a claimant’s search efforts is colored by factors including age, training, and education). Carr-Sibley’s initial inability to find work as an OB nurse in no way establishes a lack of trying. *Parts*

²³ In its Answer, Respondent said Engle and Wood terminated employment voluntarily, but presented no evidence to support this position at the hearing.

²⁴ Now Jefferson Health System.

²⁵ Though Carr-Sibley could not recall the exact dates she contacted these hospitals, her inability to recall the details is not unusual and is not a bar to recovery. *See United Aircraft Corp., supra; Allegheny Graphics, supra.*

Depot, Inc., 348 NLRB No. 9, slip op. at 1 fn. 6 (2006) (rejecting, *inter alia*, respondent's "bootstrap attempt" to equate a lack of success with lack of trying).

In February of 2015, after her search for OB work proved fruitless, Carr-Sibley obtained employment at Bayada as a nurse caring for special needs children. 313: 2-6; 314: 7. Though she earns less than she earned at Salem, she took the job because it was a short commute and she had not been successful finding an OB nurse job in a hospital. Respondent has argued that because Carr-Sibley's job at Bayada paid less, she had a duty to continue searching for a higher-paying job. However, it is well settled that a claimant has no continuing duty to search for a more lucrative job. *Grosvenor Orlando Associates, Ltd.*, 350 NLRB 1197, 1237 (2007) (citing *F. R Hazard, Ltd.*, 303 NLRB 839 (1991), enf. denied 959 F.2d 407 (2d Cir. 1992)). Nevertheless, Carr-Sibley attempted to increase her pay once she began working for Bayada. For example, she took a tracheotomy and ventilator training course to become certified, and with this new certification, she increased her pay by \$2.00 per hour. She also covered shifts for coworkers and picked up an extra patient on the weekends, working every other Friday and Saturday overnight, in order to make this extra money. Tr. 336: 11-13.

In December of 2014, Carr-Sibley applied to Cape Regional Medical Center and in or around April of 2015, she was offered a position as a per diem labor and delivery nurse, which she accepted. Tr. 322: 25; Tr. 323: 1. She worked at Cape Regional one or two nights per month, while also working at Bayada. Tr. 323: 5-9. Cape Regional never offered her more hours, nor did it offer her part-time or full-time employment. Tr. 338: 9-11. Additionally, traveling from her home to Cape Regional would take approximately 45 minutes, but in the spring and summer months it would take her more than one hour and 15 minutes due to Jersey shore traffic. Tr. 338: 17-22. After about six months working both jobs, Carr-Sibley began working exclusively at Bayada. Her decision to stop working at Cape Regional was certainly reasonable, especially when her hours at Bayada were increasing.

Based on the above, Carr-Sibley diligently searched for work and is owed the backpay due to her in the Compliance Specification.

B. Jill Cottrell

Cottrell spent 23 years of her career working for Respondent with approximately 20 of those years in the OB unit. Tr. 353: 2, 22-23. At the time of her layoff, Cottrell was a 52-year-old single mother. Tr. 354: 2-9; Tr. 372: 7. Cottrell's job search more than meets the Board's standards for reasonable diligence.

Cottrell testified that after the OB unit closed, she took a position in Respondent's operating room (OR). She worked in the OR for three days, but was not able to stay in the position. Tr. 354: 10-13. She testified that the physical demands of the OR job were too much for her because the job required her to stand the entire shift, and her back was hurting. Tr. 354: 2;

Tr. 373: 5. *Pennsylvania State Corr. Officers Ass'n & Bus. Agents Representing State Union Employees Ass'n*, 364 NLRB No. 108 (Aug. 26, 2016) (working conditions weigh into whether job is substantially equivalent). Additionally, she testified that her assigned shift in the OR varied greatly from her assigned shift in the OB unit; she worked five days per week in the OR (instead of three in the OB unit), and eight hours per shift (rather than twelve-hour shifts in OB). Cottrell said this increase in the number of days she had to work was a hardship for her because she was a single mother with two young children. Tr. 354: 2-9. *Kaase Co.*, 162 NLRB 1320 (1967) (finding claimant has a right to reject employment which fails to accommodate personal or family needs); *see also John S. Barnes Co.*, 205 NLRB 585, 588 (1973). Cottrell testified that it was hard to leave Salem Hospital after working there for 23 years, but she could not make the OR position work. Tr. 354: 19-25; Tr. 354: 1.

Cottrell was also unsure that the OR position was stable, since she heard other employees complaining that they did not have enough hours and were being told to stay home. Tr. 355: 7-10; Tr. 379: 6-7. After a trial period in the OR, Cottrell notified Human Resources that she could not work in the OR and Respondent provided her with a severance package. Tr. 356: 5, 17-24.²⁶ As the General Counsel argued above, this offer to relocate Claimants to the OR was not substantially equivalent employment due to the working conditions and different hours, nor was Cottrell required to accept or remain in a position outside of her specialty area so soon after the closure of the unit. Indeed, Cottrell tried to work in the OR but learned from personal experience that it was not substantially equivalent to her job in the OB unit. Her decision to look for OB work elsewhere was perfectly reasonable and once she did, she engaged in a diligent job search.

About a week after the OB unit closed, Cottrell began looking for jobs online at different hospital websites. Tr. 358: 10-11, 14-18. Cottrell looked on hospital websites every other day or so, searched Indeed.com and another online job search engine, and enrolled for daily job posting updates through Indeed.com. Tr. 369: 14-16, Tr. 371: 9-13.

Cottrell engaged in an expansive search – applying for jobs in Maryland, Delaware, and New Jersey. Tr. 361: 22-24.²⁷ She applied to Kent General Hospital in Dover, Delaware, as well as positions at Christiana Hospital in Delaware, but was not offered a job. Tr. 358: 24-25; Tr. 359: 1, 5-6, 12-13; Tr. 361: 25; Tr. 362: 1-5. Cottrell applied for a labor and delivery position at Elmer Hospital. Tr. 361: 2-12. On October 8, 2014, Cottrell applied to a maternity position at Inspira Woodbury, but was not hired. R 3. She also applied to Underwood Hospital in New Jersey, and was interviewed a couple of times, but Underwood did not hire her. Tr. 362: 3-7. When she was unable to find a job in the hospital setting, Cottrell started looking at doctors' offices with OB/GYN and family practices. Tr. 360: 20-24. She also applied to an eldercare nurse position at Genesis on September 29, 2014. R 39. Certainly, Cottrell made a painstaking

²⁶ Respondent's decision to offer all of the Claimants severance packages belies its argument at the hearing that the Claimants voluntarily quit employment with Salem.

²⁷ Cottrell's home was located in Pennsville, New Jersey, which is in southern New Jersey.

job search, but was unsuccessful at finding employment initially. *The Bauer Group, Inc.*, 337 NLRB 395, 398 (2002) (“success is not the test of reasonable diligence.”).

She was 52-years-old at the time of the OB unit closure. Tr. 372: 7. She said that during her job search, the job postings almost always noted a preference for a bachelor’s degree, and some required a bachelor’s degree, and she only had an associate’s degree. Tr. 371: 18-23; Tr. 372: 2-4. She testified that it was not her preference to go back to school to obtain the degree, and at her age and in her circumstances, this decision was reasonable. Tr. 7-10.

Cottrell persisted in her job search, and on January 25, 2015, she started a full-time OB nurse position with Milford Memorial Hospital, which is part of Bayhealth. Tr. 350: 1-2, 14-16; Tr. 363: 13-14; Tr. 368: 19. She earned approximately the same salary at Milford as she did working for Respondent. Tr. 351: 25. Cottrell took the position at Milford even though it was an hour and a half drive from her home and even though Milford required new hires to obtain a bachelor’s degree within 3 years. Tr. 350: 3-4; Tr. 372: 3-5. Thereafter, Cottrell left Milford and began working for Union Hospital in Elkton, Maryland, which is nearer to her home. Tr. 349: 8-11, 20-22; 350: 9-10. Although Union Hospital did not require her to have a bachelor’s degree when she was offered the job, it has since begun requiring nurses to have bachelor’s degrees to work there. Tr. 372: 11-14.

C. Renee Garrison

Garrison worked for Respondent for about 25 years at the time the OB unit closed. Tr. 383: 6-11. She was primarily assigned to the OB unit throughout her career. Tr. 383: 12-14. She was 55 years old at the time of her layoff and held only an associate’s degree in nursing. Tr. 401: 16-20; Tr. 411: 16-17.

Garrison began seeking employment soon after the OB unit closed. Tr. 386: 20-23. When she knew she would soon be out of a job, Garrison, with the help of her daughter, created a resume for the first time in her 25-year career. Tr. 406: 8-18; GC 25. Garrison stated that she is not tech-savvy and the last time she applied for a job, everything was done in writing, and not with computers. Tr. 392: 15-19.

Garrison first searched individual hospital websites for jobs, and spoke with her friends who worked at hospitals to see what was available. Tr. 386: 25; Tr. 387: 1. She signed up for job alerts on Indeed.com and Job.com, and called a couple of potential employers. Tr. 387: 1-3. If she could not find a posting online, she would call directly to see what jobs were available. Tr. 387: 4-6. She was seeking a job close to her home, or in New Jersey because it is the only state in which she holds a nursing license. Tr. 387: 3-5. She said she hardly saw any full-time positions posted during her job search, but said she applied for part-time and per diem positions. Tr. 395: 19-24. After being unsuccessful finding OB job, Garrison expanded her search to the following places:

- a. Hospice of Salem. Garrison testified that she was certified as a grief counselor so thought she may have some skills a hospice nurse would require. Tr. 401: 10-13. Hospice of Salem had no openings. Tr. 387-88.
- b. Prison nurse position at South Woods Prison in South Woods, New Jersey. Tr. 390: 20-25.
- c. Staff nurse at Friends Home in Woodstown, New Jersey in or around June of 2014. Tr. 390: 13-15; Tr. 402: 6-14. She did not receive a call back. Tr. 390: 25; Tr. 391: 1.
- d. Health South Rehab Center in Vineland, New Jersey. Tr. 402: 16-15.²⁸

Garrison also continued applying for OB nurse positions, including positions at the following locations and records of her applications are in evidence as GC 25:

- e. Virtua in Marlton, New Jersey. Tr. 407: 21-22. Though she could not recall the date she applied, it was prior to October 21, 2014. Virtua did not hire her. Tr. 408: 11-12; GC 25.
- f. Labor and delivery nurse at Virtua Voorhees, where she applied on September 26, 2014. R. 36 (Virtua's records showing she was not selected).
- g. OB nurse at Cooper Hospital, some time before September 15, 2014. Tr. 391: 24-25; Tr. 392: 6. Cooper sent her a rejection letter on September 16, 2014. Tr. 392: 9-10; Tr. 408: 17-17-23; GC 25.
- h. Cape Regional Medical Center. Tr. 405: 18-22; GC 25.
- i. Inspira Vineland, where she was ultimately hired.

HealthSouth offered Garrison a non-OB position in October 2014, paying about \$30 per hour. Tr. 404: 14-17; Tr. 404: 16-19. Garrison was prepared to accept the position when she received a call from a friend who worked at Inspira Vineland, informing her that there was an OB position and that she had recommended Garrison for the job. Tr. 410; Tr. 413: 1-3. Garrison applied to Inspira and was told her application would be fast-tracked. Tr. 403: 17-24; Tr. 404: 10; Tr. 417: 3-4. In November 2014, she began working at Inspira Vineland as an OB nurse on the night shift. Tr. 381: 15-22; Tr. 382: 4-5, 13-19, 24. Garrison sought full-time employment, but Inspira only had a part-time job available at the time she was hired. Tr. 393; 13-14. However, about four months, Garrison moved into a full-time position at Inspira. Tr. 393. She earns approximately \$40 per hour at Inspira, which is more than she earned at Salem. Tr. 393: 8; Tr. 411: 15-16. At the time Garrison applied, Inspira Vineland preferred to hire nurses with bachelor's degrees and now, Inspira requires nurses to have a bachelor's degree. Tr. 412: 12-14. Garrison testified that if she does not obtain a bachelor's degree by 2019, she will lose her job at Inspira. Tr. 413: 6-9.

²⁸ Salem Hospice, South Woods Prison and Friends Home were all less than 30 minutes from her home. Tr. 391: 14-19. Health South is approximately 15-20 minutes from her home. Tr. 403: 2.

Any argument by Respondent that Garrison was required to take the job at HealthSouth must be rejected. In particular, the fact that a claimant rejects a job offer is not, by itself, sufficient to toll backpay if the job offered is not substantially equivalent to the job lost. Thus, if the offered job pays significantly less money or if the conditions of employment are significantly more onerous, a discriminatee's refusal to accept that offer "does not evidence a willful loss of employment requiring the termination of or a reduction in his backpay." *Arlington Hotel Co.*, 287 NLRB 851, 852 (1987); *Lundy Packing Co.*, 286 NLRB 141, 144 (1987) (voluntarily leaving a job does not toll the backpay period if prompted by earnest search for better paying employment). Moreover, a claimant may leave one interim job to obtain another one in order to improve his earnings, especially where he has been holding jobs which are less remunerative than the job to which he is entitled with the respondent. *Alamo Express, Inc.*, 217 NLRB 402 (1975). Likewise, claimants are not required to "lower their sights" in a search for employment immediately, and Garrison was justified in choosing the OB job at Inspira over a non-OB, lower-paying job at HealthSouth. *Moss Planing Mill Co.*, 119 NLRB 1733, 1744 (1958). Finally, Respondent cannot have it both ways. In particular, Respondent cannot argue that Garrison's backpay should be tolled for failing to take a lower-paying job because it was offered to her first, while at the same time arguing that the other Claimants should have continued to searched for more lucrative employment. To be sure, if Garrison had taken the HealthSouth job, Respondent would likely owe her more money than is does.

Garrison's decision to wait for the Inspira job was reasonable and she conducted a thorough and expansive search for employment, both in the OB field and in non-OB jobs. Respondent must be ordered to pay her the amounts in Compliance Specification.

D. Betty Moore

Moore started her career with Respondent as an OB nurse in June 1991. Tr. 457: 22. At the time Respondent closed the OB unit, she was 63 years old²⁹ and held an associate's degree. She worked three 12-hour shifts per week at the time of the closure of the unit. Tr. 467: 23-25; Tr. 468: 1-3; Tr. 469: 9-12.

Moore began looking for work prior to the closure.³⁰ Tr. 477: 13-16. However, she did not see many job postings. Tr. 477: 15-17. Moore searched for jobs online on Indeed.com and on other hospital websites. Tr. 476: 10-12. She said many job listings required a bachelor's

²⁹ The General Counsel cannot predict the inherent age bias that the Claimants may have faced when searching for work.

³⁰ The Claimants had absolutely no duty to begin searching for employment before they were laid off. The Claimants testified that in prior years, they were told on more than one occasion that the OB unit would close, but each time it did not. Moreover, the claimants in this case would not have had any responsibility to mitigate damages if Respondent had bargained with the Union over the closure rather than committing an unfair labor practice. Respondent's argument that the Claimants should have been looking for jobs before the OB unit closed must be rejected.

degree or required that the candidate be pursuing one. Tr. 476: 10-14. At age 63, she did not wish to go back to school. Tr. 476: 14-15.

She looked at Christiana, Underwood Hospital and Inspira Hospital for openings. Tr. 476: 24-25. Christiana did not have any relevant jobs, and it required a bachelor's degree. Tr. 478: 2-5. She did not see any labor and delivery jobs at Underwood while she was looking. Tr. 480: 14-22. She looked at Cooper as well, but did not see many openings for OB work. Tr. 477: 8-10. Moreover, Cooper was far from her home, and it required a bachelor's degree. Tr. 483: 21-23. Inspira Elmer Hospital did not have any OB positions at the time either. Tr. 481: 11. She also noted that Inspira Elmer desired that applicants have a bachelor's degree or be enrolled for a bachelor's degree at the time they applied. Tr. 481: 11-20. She did not see any positions for labor and delivery in Inspira Vineland either. Tr. 483: 12-13.

In addition to searching area hospitals, Moore searched for jobs at doctor's offices. She asked a former Salem Hospital OB unit doctor, Dr. DeCastro, if he was hiring, but he was not. Dr. DeCastro has since retired. Tr. 497: 3-8, 10-13. She also said many of the nurse jobs in doctors' offices paid much less than in the hospitals, by nearly \$20 per hour. Tr. 484: 24-25.

Moore said she looked for jobs every week or so after the closure of the OB unit. Tr. 477: 19-21. Moore was looking at other hospitals until about August of 2014, when she took a school bus nurse position with Lower Alloways School. Moore said she took the job because she needed to work and it was close to her home. Tr. Tr. 463: 12-19; Tr. 467: 15- 21; Tr. 478: 22-25; Tr. 479: 1-4. In this position, Moore cared for an autistic girl whose medical condition required her to have a nurse. Tr. 463-64. Moore worked the most hours possible in this job, 5 and ¼ hours per day. Tr. 466: 18-21. The job required her to work 7 a.m. to 10 a.m. and 1:15 p.m. to 4 p.m. (before and after school), making it virtually impossible for Moore to find supplemental employment in the couple hours of the day between her shifts. Moore filled in for the school nurse where she could in order to make more money. Tr. 466; Tr. 467: 1-2.

Based on the foregoing, Moore searched for an equivalent-paying job for about two months, but was unsuccessful. She then settled for a lower-paying job in order to earn a paycheck. In these circumstances, and considering her age and work history, Moore's efforts to mitigate were more than reasonable. *See, e.g., Grosvenor Orlando Associates, Ltd.*, 350 NLRB 1197, 1237 (2007) (no duty to continue searching for more lucrative job) (citing *F. R Hazard, Ltd.*, 303 NLRB 839 (1991), enf. denied 959 F.2d 407 (2d Cir. 1992)).

Though Respondent contends that Moore retired from the workforce after the OB unit closed, Moore held this position with Lower Alloways Creek School for three years, when she finally retired. Tr 463: 5-10. Prior to the OB unit closing, Moore may have told colleagues she did not know what to do, because she did not know who would hire a 63.5-year-old lady, and that she might have said, "maybe I just have to retire." Tr. 473: 12-15. However, Moore could not afford to retire so soon. She had planned to retire at age 66, but the OB unit closed before

she reached that milestone. Tr. 432: 15-17. Likewise, Respondent's argument that Moore retired because she took money out of her 401(k) plan is nonsense. Moore testified that she needed the money to supplement lost income after the OB unit closed, and it is not uncommon for claimants to dip into their 401(k) plans after losing their jobs. Her gross backpay certainly should not be offset by her own 401(k) money. Tr. 500 (Moore testifying she needed money after the unit closed, that it was never her plan to withdraw from her 401(k) before she retired); Tr. 133: 17-20 (Compliance Officer Thurman testifying that he's seen many claimants cash out 401(k) plans if they are short on money). *See, e.g., Workroom for Designers*, 289 NLRB 1437, 1439 n.7 (1988) ("Pension benefits, which are, in effect, delayed compensation for earlier employment, are not earnings and thus do not affect the Respondents' backpay liability.") (citing *F. & W. Oldsmobile*, 272 NLRB 1150, 1152 (1984)). Accordingly, any argument that Moore's backpay should be reduced for retirement disbursements is without merit. Furthermore, it is ironic that Respondent would argue that Moore should be penalized when its own unlawful conduct required her to withdraw the money from her retirement savings.

Based on the above, Moore engaged in a reasonably diligent job search and is owed the money due to her in the Compliance Specification.

E. Maria Soone

Soone worked the Baylor shift at Salem, which is a regular, full-time position that required her to work every Friday and Saturday night. Tr. 429-430. She stated that as an incentive to work both weekend nights, Respondent paid her as if she worked three shifts instead of two. Tr. 430. At the time of the OB unit closure, Soone had worked for Respondent for 17 years as an OB nurse. Tr. 431: 12.

Soone began looking for jobs online prior to the unit closing. Tr. 435: 21-24. She looked on websites such as Glassdoor.com and Indeed.com. Tr. 435: 21-25; Tr. 436: 1. Soone registered to receive emails from Indeed and Glassdoor, and looked at the websites daily. Tr. 449: 24-25; Tr. 450: 1-3. She was looking for a job within an hour's drive of her home, in the OB field. Tr. 436: 23-25; Tr. 450: 4-7. From June to October 2014, she looked online for jobs, but found nothing in OB. Tr. 438: 13-16; Tr. 439: 11-12. Soone applied for a case management position in Woodbury Hospital's women's department and was interviewed for the position, but was not hired. Tr. 439: 13-16, 22-25; R 3. Soone contacted potential employers directly as well. For example, she contacted a traveling nursing agency. Tr. 436: 5-7. The traveling nurse position was not practical for Soone because it would have required her to take a job outside of the state for an extended period of time, and she had children to care for at home. Tr. 449. *Kaase Co.*, 162 NLRB 1320 (1967) (finding claimant has a right to reject employment which fails to accommodate personal or family needs); *see also John S. Barnes Co.*, 205 NLRB 585, 588 (1973). Soone has an associate's degree and stated that it was almost impossible to get a job without a bachelor's degree. Tr. 460: 19-21. While she was looking for work she was behind on car payments and other bills. Tr. 459: 12-19. She had a family to support and was desperate to

find employment. Tr. 459: 20-21. Soone said she was “scampering about like a hungry little mouse” looking for work. Tr. 448: 13-14.

There were no open labor and delivery positions at Inspira Elmer when Soone was looking in 2014. Tr. 454: 23-25; Tr. 455: 1, 19-21. Her testimony is corroborated by Respondent Exhibit 3, which shows Soone applied to jobs at Inspira Bridgeton, Vineland, and Woodbury between August and November 2014. R 3. About four months after the closure of the OB unit, Soone secured an OB nurse job at Inspira. At first, Inspira only had a part-time, night shift position available, and Soone took what she was offered. Tr. 427: 1-8; Tr. 428: 19. Within about a month, a full-time position opened and Soone obtained that position. Tr. 428: 1-5.

Soone said that she had done sporadic per diem work for Inspira Elmer since 2012, so she had an “in” for the job. Despite this “in,” Soone applied to a number of positions at Inspira and was rejected from many of them. The difficulty Soone faced in obtaining employment at Inspira is indicative of the challenging job market at the time the Claimants were searching. If it took Soone at least three attempts to secure employment at a hospital that knew her and obviously liked her since it ultimately hired her, it is not hard to see why the Claimants found it so difficult to find a job after their layoff.

Soone’s job search clearly meets the standards for reasonable diligence and Respondent must be ordered to pay according to the Compliance Specification.

F. Esperanza Driver

Driver was a per diem OB nurse for Respondent from November 2011 until the unit closed in June 2014. Tr. 257: 4-6; Tr. 272: 12. Driver was categorized as a “Tier 3” per diem in the OB unit. Tr. 279: 4-5. As such, Driver worked at least one shift per week and every third weekend. Tr. 261: 3-9. She said at the time the unit closed, she was working two 12-hour shifts per week. Tr. 257: 9, 24; Tr. 258: 3.

Prior to the OB unit closing, Respondent’s Perioperative Services Manager Linda Truitt offered Driver a position in her department, which includes the OR, same day surgery, and pain management divisions. Tr. 254; 275: 8-15. Driver accepted the opportunity. The Tier 3 requirement in the OR was different from the Tier 3 requirement in the OB unit because it required her to work an overnight on-call shift one night per week. Driver was initially assigned to the OR where nurses assist with general surgeries, such as surgeries involving the appendix, colon, bladder, kidney, orthopedics and ear, nose and throat (ENT). Tr. 283: 25; Tr. 284: 4. Driver testified that she felt unprepared to work in the OR, and that she needed more training on orthopedics (bone surgeries) and ENT surgeries. Tr. 284: 8-12. Notably, the OB nurses at Salem were not involved in surgeries – not even cesarean section surgeries or hysterectomy surgery, so the OR work was all new to Driver.

In November 2014, Driver's status changed from Tier 3 to Tier 1, which meant she would earn less money. Tr. 278-79. Respondent has argued that Driver voluntarily switched from Tier 3 to Tier 1 because she preferred not to work the on-call shift overnight, but this is not true. Driver testified that she had no problem working at night. Tr. 286: 10-22. The issue was that she felt ill-equipped to handle the overnight on-call shift because she was not properly trained. Driver explained that she could perform the job during the day when there were many other nurses and doctors around to help her, but when she was on-call at night, she was often alone or had only one other nurse to help her, and she did not believe it was safe for her to treat patients in those situations. Tr. 259: 13-25; Tr. 260: 1-8; Tr. 264: 9-25. Julie Ellis, of Jefferson Health Systems, corroborated Driver's testimony, testifying that perioperative/OR services are completely different than other fields of nursing and that Jefferson Hospital requires nine months of training to successfully become an OR nurse. Tr. 666: 17-23.

Before changing her status to Tier 1, Driver constantly requested additional training to be equipped to work on her own during the on-call hours. She said she had many conversations with Manager Jackie Jenkins about obtaining training. Tr. 267: 19-20. Driver even identified a training course that she felt would help her attain full competency, but Jenkins never allowed her to register. Tr. 267: 23-25; Tr. 268: 1. For nearly two years, Driver asked Jenkins every month if she could take the training course, but Jenkins would only tell her she was "working on it." Tr. 268: 3-5. In early 2017, Driver learned that two full-time nurses from same day surgery were enrolled in the class, but Driver was not. Tr. 268: 5-7. As soon as she learned this, she obtained a supplemental job elsewhere because she realized Respondent would never train her.

The record establishes that Driver's decision to switch to Tier 1 was prompted by Respondent's refusal to provide her with the requisite training to perform her job at a Tier 3 level. Her assessment of her ability to do this job, which was arguably not substantially equivalent to her OB unit job, was not unreasonable. *See, e.g., Essex Valley Nurses Ass'n, 352 NLRB 427 (2008)* (finding reasonable nurses' belief that they were not qualified to perform certain other nursing positions after their unit closed). Moreover, Respondent's argument that Driver switched to Tier 1 because she did not want to work is belied by the evidence. In particular, as soon as Driver saw the writing on the wall, that she was never going to get the training she requested, she searched for other jobs. Driver applied for a position at Widener University in February of 2016, and to Premier Surgical Center in Marlton, New Jersey on June 5, 2017. Driver was hired at Premier in June of 2017, where she works as a per diem nurse, while maintaining her Tier 1 shift with Respondent. Tr. 253: 22-23; Tr. 266: 20; Tr. 291-93. Between the two jobs, she averages about four or five shifts per week (about 32 to 40 hours per week). Tr. 254: 9-10; Tr. 256: 9-13.

Based on the above, Driver suffered economic losses after Respondent closed the OB unit. Though she accepted and attempted to orient herself to the OR position, she still suffered a lower income and Respondent must be ordered to make her whole. Driver diligently sought training in order to keep her Tier 3 status, but Respondent did not provide Driver with the

training. Respondent should not be able to limit its backpay liability where its own actions put Driver at a disadvantage.

G. Gail Kirkwood

At the time Respondent closed the OB unit, Kirkwood was a per diem OB nurse working at least one shift per week at Salem. Tr. 310: 11-13. After the OB unit closed, Kirkwood accepted a per diem position working for Respondent in same day surgery. Tr. 297: 2-11. Since moving to Respondent's same day surgery unit, she continued working at least one, eight-hour shift per week. Tr. 297: 2-6; 310:20. Kirkwood's hourly pay rate at Salem remained the same after the OB unit closed, but she earned less money because Respondent's same day surgery unit only offers 8 hour shifts, while the OB unit offered 12-hour shifts. Tr. 302: 2-10; Tr. 310: 23-25.

Before the OB unit closed, Kirkwood worked part-time as an OB nurse for Inspira Hospital in Elmer, New Jersey. Tr. 296: 13-22. After the OB unit closed, Kirkwood maintained her job at Inspira. She also sought to increase her hours at Inspira after the OB unit closure, but was unsuccessful because Inspira did not have more hours to offer. Tr. 303: 25; Tr. 304: 1-6. Kirkwood had also worked for Cooper Hospital prior to the closure of Respondent's OB unit, and she picked up one shift every two weeks at Cooper in order to supplement her income after the OB unit closure. Tr. 304: 23-25; Tr. 305: 1-4.

Based on the above, Kirkwood made reasonable efforts to lessen her economic losses by increasing her hours and picking up shifts at other hospitals. Kirkwood would have picked up extra shifts at Salem after the closure, but could not because her schedule at her other jobs prevented her from doing so. Tr. 302: 18. It is not Kirkwood's fault that Respondent only offered her an 8-hour shift in same day surgery, rather than the 12-hour shift it offered her in the OB unit. At the hearing, Respondent suggested that Kirkwood should have made herself more available to Salem by quitting her other jobs and increasing her hours at Salem (without presenting any evidence that Respondent offered Kirkwood this option at the time), or that Kirkwood should have quit her job at Salem to increase her hours with her other employers. Respondent's expectations are unreasonable and must be rejected.

Based on the above, Kirkwood made diligent efforts to lessen her economic losses and should be paid according to the Compliance Specification.

VII. RESPONDENT'S EXTRANEOUS AFFIRMATIVE DEFENSES TO REDUCE ITS BACKPAY LIABILITY MUST BE REJECTED

Respondent attacked the General Counsel's Compliance Specification further by asserting additional affirmative defenses claiming net backpay calculations in the Specification are incorrect. Respondent's affirmative defenses are without merit.

A. Respondent's fifth affirmative defense must be dismissed.

Respondent asserted in its fifth affirmative defense that the NLRB Regional Office failed to obtain affidavits or monitor mitigation efforts of the former employees. This defense must be dismissed.

It is well established that the provisions of the NLRB's casehandling manual are not binding procedural rules; rather, they are in place to provide operational guidance to the Agency. *See Belle of Sioux City*, 333 NLRB No. 13 slip op. at 22 (2001); *Avante at Boca Raton, Inc.*, 323 NLRB 555 (1997); *Queen Kapiolani Hotel*, 316 NLRB 655 (1995); *Michigan Roads Maint. Co., LLC*, 2006 WL 2792424 (Sept. 26, 2006). The language of the manual itself states, in introduction, that the manual lacks binding authority and is not to be used against the NLRB:

The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. Accordingly, the provisions of the Manual should not be used against the National Labor Relations Board in any proceeding before the Board or in Federal court. The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law. . . .

Although it is expected that the Agency's Regional Directors and their staffs will follow the Manual's guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances

"Whether or not the Regional's staff fully followed the NLRB's Casehandling Manual in this...case is...completely irrelevant. *G & T Terminal Packaging Co., Inc.*, 356 NLRB 181, 189 (2010). The manner in which a Regional Office's compliance investigation is conducted has absolutely no bearing on employees' rights to backpay. *Houston Building Services*, 321 NLRB 123, 130 (1996), *enfd.* 128 F.3d 860 (5th Cir. 1997).

In this case, the Region went beyond its sole burden to establish gross backpay by making extensive efforts to identify interim earnings and adjust gross backpay accordingly. The Region's investigation into interim earnings and job search was diligent and consistent with past practice. Compliance Officer Thurman testified that he followed his standard practice in obtaining interim earnings information. In January of 2017, Thurman sent letters to the Claimants in order to collect earnings data directly from them. Tr. 49. Thurman also requested interim earnings records directly from interim employers. Likewise, he sought unemployment compensation records from the state of New Jersey Department of Labor and received quarterly earnings reports for Carr-Sibley, Cottrell, Garrison, Soone, and Wood.³¹ Tr. 53: 2-11; GC 7;

³¹ Thurman testified that the fact that claimants collected unemployment benefits was supplemental evidence of a reasonable job search, noting that case law exists stating that receipt of unemployment compensation is *prima facie* evidence of a reasonable job search. Tr. 136:21-25; Tr. 137: 1-3; *see e.g.*,

R.1.³² Tr. 49. He also sought information from the Delaware Department of Labor for the two Claimants who worked outside the state of New Jersey. Tr. 56: 2-3. Thurman testified that, in his experience, these records are reliable because all employers are required to report quarterly earnings information to the State Department of Labor. Tr. 54: 23-5; Tr. 55: 1-4. Thurman also called and emailed with the Claimants to obtain additional information, though he stated that it is quickest and most accurate to obtain the records directly from the state and/or interim employers. Tr. 49: 18-20.

Notably, Respondent did not elicit any testimony or evidence from the Claimants that indicated that any of the information in the Compliance Specification and Amendment was inaccurate. In any event, the General Counsel's responsibility is to establish gross backpay. The General Counsel is not required to establish interim earnings or to track mitigation efforts, as Respondent asserts in its Answer. Rather, it is Respondent's burden to prove that the Claimants failed to mitigate. In this case, although the burden to reduce gross backpay rests squarely on Respondent, the General Counsel's Compliance Specification sets forth net backpay calculations for administrative ease. Therefore, Respondent's fifth affirmative defense is misguided and must be dismissed.

B. Respondent's sixth affirmative defense must be dismissed.

Similarly, Respondent's sixth affirmative defense is without merit. In it, Respondent asserts that the net backpay calculations in the Compliance Specification failed to properly offset gross backpay by factors including, but not limited to, periods of employees' unavailability for work or increase of hours at other facilities prior to termination of employment with Respondent.

Contrary to Respondent's argument, the General Counsel properly considered and offset gross backpay where appropriate, as is reflected in the Compliance Specification and Amendment. In fact, the General Counsel *sua sponte* reduced gross backpay when it learned that certain Claimants were not actively looking for work or where it learned of their unavailability for work. GC 2. Furthermore, as discussed above, it is Respondent's burden to establish any offsets to gross backpay. Notably, Respondent did not establish on direct examination of the Claimants that any were unavailable to work for any period of time that was not reflected in the

Taylor Machine Products, 338 NLRB 831, 832 (2003) (Once it is shown that a discriminatee received unemployment benefits, a respondent must rebut that presumption of a reasonable job search); *Birch Run Welding*, 286 NLRB 1316, 1319 (1987) (receipt of unemployment compensation pursuant to the rules regarding eligibility constitutes "prima facie evidence of a reasonable search for interim employment"). Moreover, Thurman relied on more probative direct evidence of the Claimants' job searches. Accordingly, any argument that Respondent may make that the Claimants received unemployment benefits without searching has no bearing on this proceeding. All periods where Claimants were admittedly not searching for jobs have already been accounted for by the Region in the Compliance Specification.

³² The record disclosed that nearly all of the twelve Claimants had interim employment in the state of New Jersey, and those who did not admitted that the Region captured any interim earnings they had outside of the state.

Specification or Amendment.³³ Likewise, Respondent failed to establish that any of the Claimants held part-time jobs before the closure of the OB unit where any increase in hours should have offset gross backpay. In fact, any reduction of backpay for hours the claimants regularly worked at other jobs before the closure of the OB unit would be improper. *See, e.g., NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 433 (2d Cir. 2001) (second job earnings normally not considered interim earnings to be deducted from gross backpay where the claimant held the job prior to discharge and was able to work that job simultaneously); *US. Telefactores Corp.*, 300 NLRB 720, 722 (1990); *Calson Tower Geriatric Center*, 281 NLRB 399, 402 (1986). Based on Respondent's failure to establish its burden to reduce gross backpay in this respect, the sixth affirmative defense must be dismissed.

Respondent may also argue that gross backpay should have been reduced by vacation payouts it made to the Claimants upon their layoffs, but this argument is also erroneous. The Region determined that vacation pay was a benefit that accrued to Claimants during the course of their employment, which was not comparable to interim earnings. Tr. 65: 22-25. Compliance Officer Thurman relied, in part, on Respondent's own vacation policy in making this determination. Tr. 66: 25-67: 5; GC 11. The vacation policy specifically states that employees separating from employment will be paid for all vacation/PTO that is unused as of the last full day of the pay period. GC 11. Therefore, it would not be appropriate to count this benefit as interim earnings against a claimant's gross backpay. Moreover, the Board has repeatedly affirmed decisions not to reduce gross backpay by vacation payouts. *See, e.g., Ryder Distribution Sys.*, 302 NLRB 608, 613 (1991) (backpay formula should include money regularly paid to employees, including vacation pay, and noting "these moneys are not bonuses but emoluments of employment that the discriminatees would normally have received had they been employed."); *Rainbow Coaches*, 280 NLRB 166, 195-96 (1986) ("Vacations and illnesses have not been shown to be proper offsets" to backpay); *Kaase, Richard W., Co.*, 162 NLRB 1320, 1322-23 (1967) (recognizing that vacation benefits are properly included in backpay computation for a discriminatee). Respondent may argue that *Brandau Printing, LLC*, 342 NLRB 867, 868-69 (2004) requires a different finding, but that case is distinguishable. There, the Board ordered gross backpay reduced by vacation payouts. However, the Board noted that it was the General

³³ Any argument that Carr-Sibley was ineligible for work because her nursing license expired is without support in the record. Respondent introduced a letter from Cape Regional, dated May 29, 2015, (R23) stating that the hospital had not received proof of her RN license renewal. This by no means, however, means Carr-Sibley was unlicensed. Rather, it means she may not have sent her licensure information to Cape Regional. In fact, the evidence suggests Carr-Sibley was licensed to practice and fully available to work because in May of 2015, Carr-Sibley was a practicing nurse for Bayada. Likewise, at the hearing Respondent attempted to show that Carr-Sibley was unavailable for work between June and December 2014 because she wrote on her Cape Regional application that she was "enjoying her family" when explaining why she was unemployed for a period of time. R23. It is axiomatic that employers find it unattractive when a candidate has a large, unexplained gap in employment, and it is clear that Carr-Sibley was attempting to cover this gap. At the hearing, Carr-Sibley credibly testified that she was searching for work from September 2014 onwards and it would be inappropriate to reduce her backpay based upon this document from Cape Regional.

Counsel who determined that the vacation pay reduction was warranted in that case, but noted that the reduction may not be warranted in every case. The Board made a point of noting that it was appropriate to award the remedy sought by the General Counsel in that case, but that future cases involving gross backpay where vacation is paid may not require such limited relief. *Id.* By contrast, in this case, the General Counsel reasoned that reduction of gross backpay by vacation benefits was not appropriate and based its reasoning on sound Board law. The facts in *Brandau* do not change this determination.

C. Respondent's seventh affirmative defense must be rejected.

Finally, Respondent's seventh affirmative defense must be dismissed. In it, Respondent asserted that each of the former employees was offered comparable work as a nurse in another department in the hospital, that they chose to retire, and that they took severance in lieu of remaining employed, effectively nullifying entitlement to backpay. Respondent's argument must fail.

First, as was discussed more fully above, Respondent failed to meet its burden to show that the employees were offered positions elsewhere in the hospital, and even if they were, that those positions were substantially equivalent. Second, Respondent argued that Betty Moore and Linda Carr-Sibley retired when Respondent laid them off, and that they should therefore, be barred from collecting backpay. As discussed above, the record disclosed that Moore and Carr-Sibley had no intention of retiring and both obtained interim employment and remained employed for years following the OB unit closure. Respondent's attempt to show they retired because they made withdrawals from their 401(k) plans is unimpressive.

Finally, Respondent's argument that by accepting severance pay, the Claimants somehow are barred from collecting backpay, is similarly unpersuasive. There is no authority that supports this proposition. Quite the opposite, in many cases where the *Transmarine* remedy is being paid, backpay claimants received severance, indicating that severance is not a bar to a remedy under *Transmarine*. See *W.R. Grace*, 247 NLRB 698 (1980); see also *Times Herald Printing Co.*, 315 NLRB 700, 701 (1994) (discussing severance payments, *Transmarine* remedy, and *W.R. Grace*). Furthermore, it is inconsistent for Respondent to offer severance packages, but at the same time, argue that the Claimants quit employment. Respondent admitted it is not its practice to offer severance when employees quit. Tr. 726: 1-5.

Based on the above, Respondent's various affirmative defenses aimed at lowering its backpay liability must be rejected.

VIII. CONCLUSION

The General Counsel submits that Respondent's arguments in this case are highly insensitive, if not offensive, especially since Respondent is the party that engaged in unlawful

conduct. During the course of this proceeding, Respondent disparaged these nurses whose conduct would not have been questioned were it not for Respondent's unfair labor practices. The General Counsel demonstrated that the nurses made more than reasonable efforts to mitigate their losses, and Respondent should be ordered to make them whole.

For the reasons set forth above, the General Counsel respectfully requests that Respondent be ordered to pay the Claimants in the amounts set forth in the Compliance Specification and Amendment, plus daily compound interest.

Respectfully submitted,

/s/

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