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

International Union of Operating Engineers, Local 627

and **Case 17-CB-072671**

Stacy M. Loerwald, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

This case turns on choosing the most appropriate methodology for making discriminatee Stacy Loerwald whole for the discrimination done to her by the International Union of Operating Engineers, Local 627 (Respondent). Counsel for the General Counsel (General Counsel) had three basic models to choose from in selecting a make-whole remedy: projection, comparable employees, and replacement employees. (Tr. 25). The replacement employee model would not work in this case because the Respondent was a union operating an exclusive hiring hall and was not an employer. The comparable employee method was ruled out because it was too speculative and it relied on records that were tainted by an unfair labor practice. However, General Counsel had records showing Loewald's work history prior to the discrimination which could be used to project the hours she would have worked during the backpay period. Therefore, General Counsel reasonably decided that the projection model was best suited for calculating the make-whole remedy.

Respondent, however, has disputed every aspect of General Counsel's make-whole calculation and the parties could not agree on a remedy. Accordingly, on June 27, 2018, General Counsel issued a Compliance Specification for the backpay owed to Loerwald. (GC Exh 1(c)).

Respondent filed its Answer to the Compliance Specification on July 13, 2018, essentially denying all aspects of General Counsel's make-whole remedy. (GC Exh. 1(g)).[1]

The evidence presented during the one-day hearing in this matter confirms the reasonableness of General Counsel's approach, as well as the accuracy and reliability of the records used in the General Counsel's calculations. In contrast, Respondent's proposed make-whole remedy is insufficient, unreasonable, and based on faulty records. Accordingly, Respondent should be ordered to make discriminatee Loerwald whole as detailed in the Compliance Specification. This brief will first explain why Respondent's backpay formula is insufficient before then explaining why General Counsel's method is reasonable.

II. BACKGROUND

Respondent operates an exclusive hiring hall in Oklahoma from which Loerwald sought referrals in 2011 and 2012. (GC Exh. 1(a), incorporating 359 NLRB 758 (2013)). On November 14, 2014, the Board issued a Decision and Order affirming an August 21, 2012, Administrative Law Judge's finding that Respondent removed Loerwald from its out out-of-work list for arbitrary or discriminatory reasons. Id. The Board ordered Respondent to make Loerwald whole for the loss of earnings or other benefits as well as the adverse tax consequences suffered as a result of the discrimination against her. The United States Court of Appeals for the Tenth Circuit enforced the Board's order on December 3, 2015. (GC Exh. 1(b)).

Since that date, Respondent and General Counsel have not reached agreement on the correct method for determining the make whole remedy.

[1] In its Answer, Respondent argued that the hearing was to be conducted by an administrative law judge who was not properly appointed pursuant to the Appointments Clause of the United States Constitution. The Board addressed and rejected this argument in *Westrock Services, Inc.*, 366 NLRB No. 157 (2018).

III. RESPONDENT'S PROPOSED REMEDY IS NOT REASONABLE

Respondent argues that its proposed backpay calculation is more appropriate than General Counsel's calculation. When the General Counsel and the Respondent offer alternative formulas, the administrative law judge must determine the most accurate formula. *Regional Import and Export Trucking Co., Inc.*, 318 NLRB 816, 820 (1995); *Woodline Motor Freight*, Inc., 305 NLRB 6 n. 4 (1991), enfd. 972 F.2d 222 (8th Cir. 1992). Uncertainties and ambiguities are to be resolved in favor of the wronged party, rather than the wrongdoer. *WHLI Radio*, 233 NLRB 326, 330-331 (1977). In this case, Respondent's calculation must be rejected because it is neither accurate nor reasonable in these circumstances.

Respondent's proposed backpay method of finding comparable employees involves combing through hiring hall records to determine which referrals Loerwald would and would not have received during the backpay period. *See* Resp. Exh. 19. The first problem with this method is that it takes the hiring hall referral list at face value even though that very list was the focus of a meritorious unfair labor practice charge in this case. It would be inappropriate to find that the list was unlawfully maintained but then still rely on the accuracy of the same list to determine how to make Loerwald whole for the resulting discrimination.

In addition to the fundamental problem of a tainted list, a second issue with Respondent's proposed backpay methodology is that it is not likely to yield an accurate backpay calculation. Respondent's proposed method requires an examination of each referral made out of the hall during the backpay period to determine if Loerwald would have received that referral. Yet each employee referred out of the hall had a unique set of qualifications, skills, and work restrictions. Respondent's own records are not sufficiently accurate for such an intensely fact-based inquiry. For example, Respondent presented what it described as Loerwald's qualification sheet at the hearing. (Resp. Exh. 11). If this sheet is to be believed, Loerwald did not possess any skills or

qualifications prior to June 2011, even though she had been referred to many jobs out of the hall by that date. (Tr. 248-49). The sheet does not show that Loerwald was qualified to work as an oiler or forklift driver during the backpay period. Despite this, Respondent's proposed remedy assumes that it would have referred Loerwald to oiler and forklift jobs. (Resp. Exh. 19). Moreover, Respondent's qualification sheet is missing many of the skills that Loerwald testified she had in 2009 and 2011, and for which she completed a skill sheet on Respondent's own letterhead. (*See* GC Exh 3 & 4). If Respondent's records for the discriminatee are maintained this poorly, it is reasonable to conclude that documents it provided for the purportedly comparable employees are similarly rife with error. On top of this, none of Respondent's records reflect work restrictions that some of the comparable employees may have had. Respondent's referral list also contains multiple phantom entries that do not reflect actual referrals. (Tr. 222, 228). Given all of the problems with the referral records and other records, they are not sufficiently reliable to perform the type of complex, fact-based analysis Respondent proposes.

Even if Respondent had maintained perfect records, it would be entirely too speculative to reconstruct exactly which referrals would have been made absent its discrimination against Loerwald. Respondent's backpay calculation is based on conjecture stacked on top of conjecture. Each time Loerwald took a job, it would affect where she would stand on the out of work list when she finished that job. If any of Respondent's assumptions about Loerwald's exact spot on the list are incorrect, it could negatively affect all of the referrals that followed. Respondent's speculative approach is not guaranteed to be accurate. As noted above, any uncertainty or ambiguity should be resolved against the wrongdoer.

Another problem with Respondent's backpay calculation is that it apparently does not account for any overtime hours, even though Loerwald's records clearly show she worked

significant overtime before the backpay period. Nor does Respondent's calculation account for contributions to the Health and Welfare Fund or the Pension Fund. It also does not account for any excess tax liability, which is part of the Board order. These flaws are fatal to Respondent's backpay calculation as it would result in a less than complete remedy.

Finally, Respondent's calculation simply does not pass a common sense test. Respondent estimated that Loerwald would have worked a total of 468.5 hours during the 9-month backpay period, which would be prorated to around 590 hours for a 12-month period. This is far less than the hours 996 and 675.5 hours she worked in the two full years before the backpay period, or the 1,319 hours that records show she worked in 2013, the first full year after the backpay period. (GC Exh 5). It is not probable that there was significantly less work available during the backpay period than during the years immediately before or after.

Respondent's backpay calculation is not reasonable. It is based on tainted and unreliable records, fails to account for necessary portions of a make-whole remedy, and is out of proportion to the evidence about the available work.

IV. GENERAL COUNSEL'S BACKPAY CALCULATION

In contrast to Respondent's irreparably flawed methodology, General Counsel's backpay calculation is reasonable and appropriate. In situations involving disputes about backpay, the General Counsel carries the burden of establishing a reasonable calculation about the gross amount of backpay due. *Int'l Union of Operating Engrs., Local Union No. 12*, 185 NLRB 956, 958 (1970). The General Counsel, in demonstrating gross amounts owed, need not show an exact amount; an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1992), enfd. *NLRB v. Heavy and Highway Const. Workers Local Union No. 158*, 952 F.2d 1393, 1393 (3d Cir. 1991). The objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed

had there been no unfair labor practices. *Hubert Distributors, Inc.*, 344 NLRB 339, 341 (2005) (citing *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), enfd. in relevant part *Sever v. NLRB*, 231 F.3d 1156, 1171 (9th Cir. 2000) and *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). Thus, it is well-established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Virginia Elec. Co. v. NLRB,* 319 U.S. 533, 544 (1943); *Laborers Local 158*, 301 NLRB at 36 (citing *Laborers Local 38 (Hancock-Northwest),* 268 NLRB 167, 168-169 (1983), enfd. as modified 748 F.2d 1001, 1006 (5th Cir. 1984)).

The facts of this case establish that, under this set of well-settled Board principles, the formula proffered by the General Counsel is not only reasonable and not arbitrary, but is the most appropriate formula.

A. Backpay Period

The backpay period runs from November 7, 2011, until August 9, 2012. It began when Respondent unlawfully removed Loerwald from the out of work list. This date was conclusively litigated during the underlying proceeding before the Administrative Law Judge and cannot be litigated again. *South Coast Refuse Corp.*, 337 NLRB 841, 842 (2002).

The underlying decision in this case issued before the end of the backpay period. Generally, the backpay period does not toll until there has been a reasonable time after an offer of reinstatement. *Cliffstar Transportation Co.*, 311 NLRB 152, 154-155 (1993). Here, Respondent notified Loerwald that it had returned her to the out of work list by a letter it mailed on August 6, 2012. (GC Exh 14; GC Exh 17). Loerwald did not actually receive the letter until August 13, 2012. (Tr. 141; GC Exh. 17). Although Loerwald was not working at the time that Respondent returned her to the out of work list, she could have been working. If Loerwald had been working, she would have been entitled to several days to consider whether she would quit

her current employment to return to the out of work list or would continue with the employment and remove herself from the list. The backpay period would not have been tolled until Loerwald was given a reasonable amount of time to make her decision. In this case, General Counsel tolled the backpay period for only three days after Loerwald was returned to this list. This amount of time is reasonable, especially when Loerwald did not even receive the letter until August 13. Thus, the backpay period reasonably ended on August 9, 2012.

B. The Backpay Formula is Reasonable

As noted above, the only requirement for General Counsel's backpay formula is that it cannot be arbitrary or unreasonable. Generally, in hiring hall situations, "[i]f a union unlawfully fails to refer a discriminatee from its hiring hall, gross backpay will be based on what employment and earnings would have resulted from that referral." NLRB Casehandling Manual (Part Three) Compliance Sec. 10546.

This case, however, does not present a single refusal to refer out of a hiring hall but instead involves Loerwald's complete removal from the referral list for an extended period of time. As noted above, it would not be reasonable or accurate to try to synthesize a list of referrals Loerwald would have received because Respondent's records are not sufficiently reliable.

In situations such as this, where comparable employees are not a reliable method for determining backpay, the Casehandling manual provides for an alternative method: average hours worked prior to the unlawful action. NLRB Casehandling Manual (Part Three) Compliance Sec. 10540.2 This formula is to be used when a discriminatee's earnings may have varied from week-to-week but were stable over a longer period of time. Such is the case here. Although Loerwald's hours may have fluctuated from season to season, the general economic conditions from the years before the discrimination likely continued into the relatively short

backpay period. In these circumstances, it was reasonable to use an average of hours worked as a baseline for determining the make-whole remedy.

General Counsel used a two-year sample to determine the baseline average. This amount of time was reasonable given the ebbs and flows in the construction industry. (Tr. 28). General Counsel excluded 2011 from the average because that was the year in which the discrimination started, so there were no complete employment records for the year. (Tr. 105). Further, Respondent did not strictly follow the referral criteria prior to the discrimination, so the referral records for 2011 were considered suspect. (Tr. 81).

Respondent argued that the two year-period before the discrimination year should not have been used because economic conditions deteriorated from 2010 through the entire backpay period. However, Respondent did not provide General Counsel with the records necessary to substantiate this assertion. (Tr. 107; GC Exh. 19, at 2). Moreover, records show that Loerwald worked even more hours in the year after the backpay period than she worked in any year before it. Even if Respondent is correct that there was a slowdown around the backpay period, the economic situation was much improved soon after it ended. It is therefore uncertain when economic conditions began to improve. Any ambiguities, doubts, or uncertainties are resolved against the wrongdoer, "because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination." *Performance Friction Corp.*, 335 NLRB 1117, 1131 (2001) (citing *Florida Tile Co.*, 310 NLRB at 610; *Ryder Sys.*, 302 NLRB at 608 n.4; and *Big Three Indus. Gas,* 263 NLRB at 1190 n.8).

C. Application of the Backpay Formula is Reasonable

Having shown that General Counsel selected a reasonable formula for determining backpay, General Counsel must also establish that it reasonably applied this formula. General Counsel determined the total hours Loerwald worked in 2009 and 2010 by using the hours

various employers reported to the Health and Welfare Fund, as well as additional records showing hours Loeward worked for Price Gregory in 2010. (Tr. 35-38). Respondent admitted that the Price Gregory hours were through the hiring hall. (Tr. 238). The 2009 and 2010 hours were then separated into straight time and overtime hours using records provided by Loerwald. (Tr. 41; GC Exh 15; GC Exh 16). All of the hours used in determining Loerwald's average were amply supported by documentary evidence.

Once General Counsel found a weekly average of straight and overtime hours that Loerwald worked during the comparable period, the next step was to multiply that number by the appropriate pay rate for each week of the backpay period. General Counsel selected the Group V wage rate because Loerwald was able to operate equipment in that group and because she had mainly been referred out under that wage group during the comparable period. (Tr. 29, 176). These calculations, which were explained in the Compliance Specification and in the hearing, are a reasonable method for calculating what Loerwald would have earned absent any discrimination against her. Further, based on Loerwald's unrebutted testimony, her total backpay will not be offset by any interim earnings. (Tr. 137).

Respondent asserts that it was unreasonable to include the hours Loerwald worked for Price Gregory in 2010 as part of the same wage calculation because that job had a lower wage rate and benefit rate. However, Respondent did not introduce any documents establishing these applicable rates during the hearing. Further, Loerwald testified that she was sent out under the Group X wage rate for Price Gregory, suggesting it was under Respondent's collective-bargaining agreement. (Tr. 127).

Respondent also contends that not all of Loerwald's hours would have been worked at the Group V wage rate. Yet Respondent did not present any documents to establish which groups Loerwald was actually referred to work in during 2009 and 2010. (Tr. 34). Loerwald testified

that all of 2009 work was at the Group V wage rate and that she only received the lower Group X wage rate for one job in 2010. (Tr. 127, 176). Loerwald was able to operate Group V equipment throughout the backpay period and she had primarily worked out of this group during the comparison period. It was therefore reasonable to use the higher Group V wage rate for determining Loerwald's backpay. As Compliance Officer AnnG Wright testified, the discriminatee should be given the benefit of the doubt and Respondent should not be able to profit from its wrongdoing. (Tr. 77-78).

D. Job Search

Another issue explored during the hearing was whether Loerwald searched for interim employment during the backpay period. The evidence about this issue serves two purposes. First, it establishes that Loerwald sought to mitigate her losses. Second, the costs she incurred in searching for work are a reimbursable portion of the make whole remedy. In all cases, Loerwald's testimony about her search for work should be credited because she testified with precision about her search for work and maintained contemporaneous records of her efforts and expenses.

Loerwald took appropriate steps to search for work and mitigate her backpay. The most basic evidence of her good faith efforts to find work is her application for and receipt of unemployment benefits from the State of Oklahoma for the duration of the backpay period. (Tr. 138; GC Exh 10). The receipt of unemployment compensation pursuant to a state's eligibility rules constitutes prima facie evidence of a reasonable search for interim employment. *Pessoa Construction Company*, 361 NLRB 1174 (2014).

Loerwald also made weekly trips to Respondent's hiring hall during the first few months of the backpay period to see if she had been returned to the hiring hall list.[2] As a union member and a heavy equipment operator, Loerwald had limited options for finding employment. The most reasonable method to search for work was to see if Respondent had returned her to the hiring hall. If Loerwald wished to remain a union member in good standing, she was restricted from working for non-signatory employers during this time. Further, starting in May 2012, Loerwald registered on the out of work list in several other states, including Missouri, Kansas, and Texas. (Tr. 138; GC Exh 9).

Respondent may argue that Loerwald did not actively search for work between February and May 2012. Contrary to Respondent's argument, the 'sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period." *Midwest Personnel Services, Inc.*, 346 NLRB 624, 625 (2006). Here, Loerwald made regular efforts to find work at various points during the backpay period. Any lulls in a search for work may be attributed to Loerwald's limited options. Loerwald was a heavy equipment operator and Respondent controlled access to the unionized heavy equipment operator jobs in Oklahoma. Loerwald was not obligated to search for an entirely different career during this time. *See Champa Linen Service Co.*, 222 NLRB 940, 942 (1976). If Respondent seeks to rebut the evidence that Loerwald conducted an adequate search for work, it must present evidence of actual or potential employment and must show if, when, and where a discriminatee would have been hired. *See McLoughlin Mfg. Corp.*, 219 NLRB 920, 922 (1975); *see also NLRB v. Inland Empire Meat Co.*, 692 F.2d 764 (9th Cir. 1982).

[2] Respondent will undoubtedly try to argue again that Loerwald failed to mitigate her losses when she did not ask the Union to end its discrimination against her and return her to the out of work list. Evidence going to this argument was rightly excluded from the hearing and should not be considered as part of the brief.

Respondent failed to do this. Thus, there was sufficient credible evidence at the hearing to determine that Loerwald adequately searched for work.

Loerwald also credibly testified about her reimbursable job search expenses. She made weekly trips to the hiring hall to determine if she was on the list. The mileage for these trips is reimbursable. Further, Loerwald traveled to Harris County, Texas on August 7-9, 2012, to personally put her name on the out of work list for a union there. Loerwald left for this trip before she knew that Respondent had returned her name to the out of work list and she incurred travel expenses along the way. These expenses are reimbursable because Respondent had not ensured that Loerwald knew the search would be unnecessary before she departed. Loerwald's job search expenses were fully documented. Accordingly, the expenses should be reimbursed as established in the Compliance Specification.

E. Health and Welfare and Pension Benefits

The collective-bargaining agreement in effect at the time of the discrimination provided for the payment of both health and welfare as well as pension benefits. (Tr. 43-48; GC Exh. 2). These payments are owed to entities that are legally separate from Respondent. Additionally, Respondent did not present any specific evidence at the hearing as to why these benefit payments should not be made. Accordingly, the health and welfare as well as pension benefits established in the Compliance Specification should be paid on behalf of Loerwald.

F. Tax and Interest

The Board Order includes both an excess tax liability and an interest portion. Respondent failed to offer any evidence at the hearing as to why these remedies are not appropriate. Thus, Loerwald's make whole remedy should include an excess tax liability and interest portion making her whole using numbers updated to the time of payment. *Perry Brothers Trucking,* 364 NLRB No. 10, slip op. at 6 n. 7 (2016)

V. CONCLUSION

Based on the foregoing, the General Counsel requests an Order requiring Respondent to pay the amounts as pled in the June 26, 2018, Compliance Specification. This will require reimbursement of amounts equal to the difference in taxes owed upon any receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

November 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge was e-filed with the Division of Judges and served via electronic mail on this 14th day of November, 2018, on the following parties:

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