Nos. 18-1909, 18-1988

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 18-1909, 18-1988

LOU'S TRANSPORT, INC. AND T.K.M.S., INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF ORAL ARGUMENT

This case involves the application of settled principles to straightforward facts established on credited testimony, and therefore does not require oral argument. However, because the Company has requested oral argument, the Board also requests the opportunity to argue. The Board believes that 15 minutes per side will be sufficient for the parties to present their views.

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BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on Lou's Transport, Inc. and T.K.M.S., Inc.'s ("the Company") petition for review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Supplemental Decision and Order issued against the Company. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended

(29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Supplemental Decision and Order issued on July 24, 2018 and is reported at 366 NLRB No. 140, 2018 WL 3280875 (2018). (A 5-13.)[1]

This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper pursuant to Section 10(f) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices took place in Michigan. The Company's petition for review, filed August 13, 2018, and the Board's cross-application for enforcement, filed August 29, 2018, were timely because the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE

Whether the Board acted within its broad remedial discretion in determining the make-whole amount of backpay and other monies owed to a discriminatee for the losses he suffered when the Company unlawfully discharged him.

STATEMENT OF THE CASE

The Board recently stated that "[d]iscriminatees who have lost their jobs are some of the most seriously aggrieved victims of unlawful conduct," likening the loss of employment to the "industrial equivalent of capital punishment." *King*

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[1] "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's brief.

Soopers, Inc., 364 NLRB No. 93, slip op. at 4 (Aug. 24, 2016) (quotation omitted), *enforced in relevant part* 859 F.3d 23, 39 (D.C. Cir. 2017). Unlawfully discharged discriminatees have been deprived of their jobs, "causing a loss of income and employment benefits," as well as the additional "significant financial hardship" of finding and maintaining interim employment. *Id.* In remedying such a violation, the Board must ensure that the discriminatees are fully compensated for these losses.

This case involves a determination of the monies owed to Michael Hershey, whom the Board previously found that the Company unlawfully and discriminatorily discharged on the basis of his protected concerted activity, in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *Lou's Transp., Inc.*, 361 NLRB 1446, 1446-47 (2014), *enforced* 644 F. App'x 690, 697 (6th Cir. 2016). In its Supplemental Decision, which it now seeks to enforce, the Board ordered the Company to pay a specific amount of backpay to Hershey. (A 5.) Thus, this Court must determine whether the Board properly exercised its broad discretion in determining the amount of backpay to sufficiently restore Hershey to the place he would have been in absent the Company's unlawful conduct. The procedural history of this case is set forth below; facts relevant to the backpay award are discussed in the Argument.

I. STATEMENT OF THE FACTS

A. THE UNFAIR LABOR PRACTICE PROCEEDING

The Company, located in Pontiac, Michigan, transports various aggregates within the state. *Lou's Transp., Inc.*, 361 NLRB at 1449. Hershey worked for the Company as a quad-axle truck driver hauling dirt and clay at a limestone quarry in southeastern Michigan. (A 7.) *Id.* at 1446. Hershey was represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union #614 ("Union"), and was paid pursuant to a collective-bargaining agreement ("labor agreement") between the Company and the Union. (A 7.)

On March 27, 2013, the Company discharged Hershey after he complained about the drivers' unsafe working conditions and the Company's failure to maintain the drivers' equipment. *Lou's Transp., Inc.*, 361 NLRB at 1449-50. Specifically, the Company discharged Hershey after a Company representative overheard a conversation between Hershey and a co-worker, wherein Hershey discussed being forced to work in unsafe conditions, mentioning, among other things, that the Company refused to pay for requisite truck parts and to pay a traffic fine he incurred because of the truck's unsafe tires. *Id.* at 1451-52.

On December 16, 2014, the Board (Members Miscimarra, Johnson, and Schiffer) issued a decision finding that the Company committed an unfair labor practice when it discharged Hershey because of his discussion about his unsafe working conditions. *Id.* at 1447-48. The Board's Order required, among other remedies, that the Company reinstate and make Hershey whole for any losses suffered by him as a result of his unlawful discharge, including backpay. *Id.* at 1447-48. On April 6, 2016, this Court enforced the Board's Order. *Lou's Transp., Inc. v. NLRB*, 644 F. App'x 690, 697 (6th Cir. 2016).[2]

B. THE COMPLIANCE PROCEEDING

After the Court enforced the Board's order requiring the Company to offer Hershey reinstatement to his former job and to make him whole, a controversy arose over the amount of backpay owed to Hershey. As a result, on August 14, 2017 the Board's Regional Director issued a final notice of hearing and a fourth amended compliance specification to the Company detailing the gross amounts of backpay and other monies owed. (A 1381.)

In its September 6, 2017 Answer, the Company denied the amounts itemized in the compliance specification and challenged various aspects of the Board's methodology in calculating backpay liability. (A 904.) Specifically, the Company

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[2] The Company's claim (Br. 15) that it discharged Hershey because he placed "obscene signs" in his truck is contrary to the findings of this Court, which found that the Company discharged Hershey because of his protected conversation with his co-worker concerning his unsafe working conditions. *See Lou's Transp.*, 644 F. App'x at 697.

contested the backpay period, claiming that Hershey had rejected an offer of reinstatement allegedly made during the unfair labor practice hearing, effectively cutting off the backpay period as of the date of the hearing. (A 907.) The Company also disputed the comparator employees and the wage rate that the Board relied on to determine Hershey's backpay. (A 905-07.) The Company further challenged the Board's calculation of overtime pay, its inclusion of 401(k) benefits in the backpay award, its refusal to deduct unemployment compensation, union dues and uniform fees from the award, and the inclusion of interim expenses Hershey incurred driving to his interim employment following his discharge. (A 905-08.)

On January 25, 2018, after a full hearing on the issue, an administrative law judge issued a supplemental decision rejecting most of the Company's challenges and finding that the methods used to calculate the Company's backpay liability were reasonable. (A 5.) The judge rejected the Company's claim that it had made a valid reinstatement offer to Hershey during the November 2014 unfair labor practice hearing, and instead found that the backpay period ended on August 22, 2016, when Hershey refused to answer the Company's unconditional reinstatement offer. (A 7.) The judge also found that appropriate comparable employees were used to calculate Hershey's backpay; those employees, like Hershey, were quad-axle truck drivers and had similar seniority. (A 7-8.) The judge agreed that applying the infrequent variance in wage rates earned by those comparators to Hershey's backpay award was appropriate. (A 8-9.) Regarding overtime, the judge agreed with the Board's method of calculating overtime, which involved a comparison of weekly overtime hours available at the Company with the weekly overtime hours that Hershey earned at his interim employment. The Board noted that the Company's payroll records allowed for a weekly comparison and that the calculations complied with the well-established rule that Hershey should not be penalized for working hours in excess of that offered by the Company. (A 8-9.)

The judge rejected claims that union dues, uniform fees, and unemployment benefits should be deducted from Hershey's backpay award. (A 9-10.) The judge also found that make-whole compensation was reasonably calculated and awarded to Hershey for expenses he incurred driving to and from interim employment in excess of expenses he would have incurred driving to and from work at the Company. (A 10-11.) Finally, in agreeing with the inclusion of 401(k) benefits in the award, the judge found that the calculation reasonably relied on rates of return from an equity fund comparable to that offered by the Company and that Hershey's regular participation in retirement plans warranted the inclusion of the benefits in the backpay award. (A 11-13.) Accordingly, the judge ordered the Company to pay Hershey $49,817, plus interest, in net backpay, bonuses, interim expenses, and 401(k) distributions. (A 12-13.)

II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On July 24, 2018, a unanimous Board (Chairman Ring, and Members McFerran, and Emanuel) issued a supplemental decision affirming the judge's findings, and adopting her recommended Order. (A 5.) The Board additionally required that the Company reimburse Hershey for any additional lost 401(k) gains to the date of the payment and for any adverse tax consequences. (A 5.) The breakdown of the Board's backpay award is:

Net Backpay:	$11,683
Bonuses:	$5,267[3]
Interim Expenses:	$21,354
401(k) Non-taxable distribution:	$11,513
TOTAL	$49,817

SUMMARY OF THE ARGUMENT

The central issue in this case is whether the Board abused its broad remedial discretion in determining the amount of backpay owed to Hershey for the losses he suffered as a result of being unlawfully discharged by the Company. The bulk of the Company's contentions are an attempt to circumvent the Board's established precedent and compliance policies which guided the Board's calculation of backpay liability in this case, as well as an attempt to undermine the Board's findings of fact upon which the calculation was based. The Company, however,

[3] There is no dispute regarding the bonus calculations. (A 8, n.4.)

has failed to identify any way in which the Board deviated from its standard compliance methodologies or exceeded its broad remedial discretion. Contrary to the Company's claims, the Board did not deviate from precedent or policy in calculating Hershey's award, and substantial evidence supports the Board's findings that the Company failed to carry its burden of proving facts which would mitigate its backpay liability.

To begin, the Board properly exercised its discretion in determining the backpay period and rejecting the Company's claim that its backpay obligation was tolled as of the day it extended—and Hershey rejected—a reinstatement offer at the unfair labor practice hearing. Both the facts and applicable precedent demonstrate that the Company did not make a valid unconditional and unequivocal reinstatement offer at that time.

In calculating the backpay, the Board reasonably selected comparable employees who had seniority and job duties similar to Hershey. The Company failed to show that the Board abused its discretion in choosing these comparable employees over the Company's proffered comparator, who had gaps in his employment that the Company could not explain. Likewise, the Company presents no credible evidence undermining the wage rates that the Board used to calculate Hershey's backpay.

The Board acted consistently with the Company's payroll documents and with Board precedent in calculating overtime by using a week-by-week comparison of overtime hours between Hershey and the comparators. The Company provided documents that allowed for such weekly calculations, and Board precedent requires that calculations not penalize a discriminatee for working extra hours. The Board's method met that requirement.

The Board also properly rejected, as contrary to settled law, the Company's requests to reduce Hershey's backpay for union dues, uniform fees, and unemployment compensation. Such deductions would also unnecessarily penalize Hershey by forcing him to pay for benefits he was deprived of when the Company unlawfully discharged him.

The Board acted well within its discretion in awarding Hershey, as a separate component of the backpay award, interim expenses that he incurred commuting to his interim employment. Both substantial evidence and applicable precedent support this award, and the Company's arguments to the contrary misread the record and supporting caselaw.

The Board also acted consistent with precedent in allowing Hershey to recover his lost 401(k) gains. Such an award was supported by substantial evidence, not speculation, as the Company contends. That evidence shows that Hershey routinely contributed to 401(k) plans when offered by employers, and would likely have continued contributing had he not been deprived the opportunity to do so by the Company's unlawful act. Accordingly, the Board acted within its broad remedial discretion in calculating Hershey's award based on Hershey's prior established conduct. Finally, the Company raises several arguments challenging the Board's proceedings that are either waived for failure to brief adequately or jurisdictionally barred, and, in any event, lack merit.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF BACKPAY THE COMPANY OWED HERSHEY FOR UNLAWFULLY DISCHARGING HIM

A. Standard of Review

The Supreme Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review," and that the authority to fashion remedies under the Act "is for the Board to wield, not for the courts." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)). Accordingly, judicial review is limited to "whether the Board has abused its discretion in fashioning a remedial order." *Joyce W. Corp.*, 873 F.2d 126, 128 (6th Cir. 1989) (quoting *Marlene Indus. Corp. v. NLRB*, 440 F.2d 673, 674 (6th Cir. 1971)).

The Board's discretion extends to the appropriateness of a backpay remedy as well as to the computation of the backpay amount. *See Virginia Elec. & Power Co. v. NLRB*, 319 U.S. at 540; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *NLRB v. Akron Paint & Varnish Co.*, 985 F.2d 852, 854 (6th Cir. 1992); *Master Iron Craft Corp.*, 289 NLRB 1087, 1087 (1988), *enforced* 898 F.2d 138 (2d Cir. 1990). As the Supreme Court has explained, a Board backpay order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.*, 319 U.S. at 540. Indeed, as this Court has recognized, the Board has "wide latitude in computing the amount of backpay to award a discriminatee." *Akron Paint & Varnish Co.*, 985 F.2d at 854. Thus, the Board "is required only to adopt a formula which will give it a close approximation of the amount due; it need not find the exact amount due." *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir. 1987) (citing *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963)).

With regard to the findings of fact underlying the Board's decision, such findings are "conclusive" if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord Squier Distrib. Co. v. Local 7, Int'l Bhd. of Teamsters*, 801 F.2d 238, 241 (6th Cir. 1986). The Board's finding that an employer has failed to carry its burden of establishing facts that would mitigate its backpay liability is also reviewed under the substantial evidence standard. *See NLRB v. Ryder Sys., Inc.* 983 F.2d 705, 712 (6th Cir. 1993); *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

B. Backpay is a Make-Whole Remedy That Serves to Deter the Commission of Unfair Labor Practices

The Board's authority to award backpay as a remedy for an unfair labor practice derives from Section 10(c) of the Act (29 U.S.C. § 160(c)), which provides that upon finding that an unfair labor practice has been committed, "the Board shall order the violator 'to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies' of the Act." *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 262. Under the Act, an award of reinstatement with backpay is the "normal" remedy in cases of employer discrimination that results in an employee's loss of employment. *See Phelps Dodge*, 313 U.S. at 194; *Golden Day Sch., Inc. v. NLRB*, 644 F.2d 834, 840 (9th Cir. 1981). Indeed, a "finding of an unfair labor practice is presumptive proof that some backpay is owed." *NLRB v. Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968). *Accord NLRB v. Mastro Plastics Corp.*, 354F.2d 170, 178 (2d Cir. 1965).

A backpay award is a make-whole remedy designed to restore "'the economic status quo that [the discriminatee] would have obtained but for the [employer's] wrongful [act].'" *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). *See also Phelps Dodge*, 313 U.S. at 198. *Accord NLRB v. Robert Haws Co.*, 403 F.2d 979, 980 (6th Cir. 1968). A backpay award also serves to deter the commission of unfair labor practices by preventing wrongdoers from gaining any advantage from their unlawful conduct. *See J.H. Rutter-Rex*, 396 U.S. at 265; *Mastro Plastics*, 354 F.2d at 175.

To restore the economic status quo, the discriminatee is ordinarily entitled to the difference between his gross backpay—the amount that he would have earned but for the wrongful conduct—and his actual interim earnings. *Ryder Sys., Inc.*, 983 F.2d at 712 n.2. The backpay period normally runs from the date of the unlawful discharge to the date that the employer makes a valid reinstatement offer to the discriminatee. *See, e.g., Westin Hotel*, 785 F.2d at 1127-29.

The burdens of proof in a backpay proceeding are matters of settled law. Where, as here, entitlement to backpay has been established in prior Board and Court proceedings, the General Counsel's burden is limited to showing only "the gross amounts of back pay due." *NLRB v. Ohio Hoist Mfg. Co.*, 496 F.2d 14, 15 (6th Cir. 1974) (quoting *Brown & Root, Inc.*, 311 F.2d at 454). Once that has been done, "the burden is upon the employer to establish facts which would negate the existence of liability to a given employee or which would mitigate that liability." *Id.* Any doubts arising with regard to alleged affirmative defenses are to be resolved against the employer who committed the unfair labor practice. *See, e.g.*, *NLRB v. Rogers Mfg. Co.*, 406 F.2d 1106, 1109 (6th Cir. 1969); *Kawasaki Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 531 (9th Cir. 1988).

C. The Board Reasonably Determined the Amount of Backpay that the Company Owes Hershey

The backpay award set forth in the compliance specification was a reasonable approximation of the amount owed to Hershey and, therefore, well within the Board's broad remedial authority. The amount itself was calculated following accepted methodologies established by Board law and compliance procedures.[4] The Company, which has the burden of rebutting the Board's gross

[4] In calculating Hershey's award, the Board relied on established procedures contained in the NLRB's compliance manual. 3 *NLRB Casehandling Manual* (June 2018), *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/chm3_0.pdf. The manual itself, while not binding precedent, is an accepted form of guidance for Board personnel that sets forth standard or typically optimal practices and procedures. *Id.*, Purpose of the Manual; *see also Convention Servs., Inc. v. NLRB*, 85 F.3d 671, 674 & n.7 (D.C. Cir. 1996).

backpay calculation, failed to offer any persuasive legal or factual arguments in support of its mitigation arguments. The Company claims (Br. 17), without factual or legal support, that the Board's backpay award runs contrary to its remedial purpose—putting the employee in the same place it would have been absent the employer's unlawful conduct—because, according to its calculations, Hershey earned more money at his interim employment than he would have earned with the Company, thereby creating a punitive windfall. The Company's windfall claim, however, relies on its backpay calculations, which used methodologies that the Board rejected as contrary to accepted Board practice. (A 798-99, 804, 915-38.) Instead, as shown below, substantial evidence, established precedent, and proven methodologies support the Board's findings that the backpay award fully reimburses Hershey for the losses he suffered as a result of the Company's unlawful conduct, restoring to Hershey the economic status quo that would have obtained absent that conduct.

1. The Board reasonably determined the proper backpay period

Substantial evidence supports the Board's finding that the proper backpay period ran from the date of Hershey's discharge, March 27, 2013, to August 22, 2016, when Hershey failed to timely respond to the Company's unequivocal and unconditional offer of reinstatement. (A 7; A 744-45.) The Company agrees that March 27 is the correct backpay start date, but claims that the backpay period ended on November 24, 2014, when Hershey responded negatively to a question asked by Company counsel at the previous unfair labor practice hearing regarding returning to work. (Br. 18.) Under established Board law, that exchange did not constitute a rejection of a valid offer of reinstatement, and, as such, did not toll the backpay period.

Under well-settled law, the backpay period runs from the date of the employee's unlawful discharge to the date on which the discharged employee responds or fails to timely respond to an offer of reinstatement from the employer. *See NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 309 (6th Cir. 2009). In order to toll the backpay period, an offer of reinstatement must be a valid, genuine offer of permanent employment that is "specific, unequivocal, and unconditional." *Jackson Hosp.*, 557 F.3d at 309-10; *NLRB v. Seligman & Assoc., Inc.*, 808 F.2d 1155, 1163 (6th Cir. 1986). The offer must be "clear and actually communicated to the employee," and provide the employee "sufficient time to accept." *Seligman*, 808 F.2d at 1159; *Jackson Hosp. Corp.*, 557 F.3d at 309-10. The offer must also "indicate the availability of the [discharged employee's] former or comparable position." *Seligman*, 808 F.2d at 1161. In addition, to toll the backpay period, an employee's rejection of reinstatement must be clear and unequivocal. *See Seligman*, 273 NLRB 1216, 1216-17 (1984), *enforced in relevant part*, 808 F.2d 1155, 1161 (6th Cir. 1986). A reviewing court must defer to the Board's expert determinations about the validity of reinstatement offers. *See Seligman*, 808 F.2d at 1161; *John Cuneo, Inc. v. NLRB*, 792 F.2d 1181, 1183 (D.C. Cir. 1986) (per curiam).

Here, the Board properly rejected the Company's claim that the backpay period ended on November 24, 2014. (A 7.) The sole basis for the Company's argument that the backpay period ended that day is Hershey's negative response to an undeveloped question posed by the Company's counsel on cross-examination at the preceding unfair labor practice hearing. Specifically, Company counsel asked Hershey if he "want[ed] to be reinstated," and Hershey replied no. (Br. 18, A 7; A 914.)

The Board reasonably found that this simple exchange falls considerably short of meeting the Board's specific requirements for a full, genuine, unconditional offer of reinstatement and, therefore, Hershey's response did not constitute a rejection of a valid offer. (A 7.) As the Board explained (A 7), counsel's question failed to specify, as required, the conditions of reinstatement or lack thereof, such as Hershey's seniority status upon his return, his ability to collect backpay, and whether he would be reinstated to his former or a substantially equivalent position. (A 7.) Moreover, Hershey was not given "sufficient time . . . to manifest an unequivocal resolve not to accept reinstatement." *Seligman*, 273 NLRB 1216, 1222 (1984).

Finally, the Company argues (Br. 18) that given Hershey's response at the hearing, it would have been "an exercise in futility" to have extended him a reinstatement offer, and so the backpay date should be tolled as of the hearing date. The Company provides no support for this claim, nor does it advance any other argument undermining the Board's finding regarding the proper backpay period.

2. The Board used appropriate comparable employees to calculate backpay

The Board reasonably selected appropriate comparable employees upon which to base the availability of hours in calculating Hershey's backpay. (A 7-8.) When the Board calculates backpay, it can choose from three methods. 3 *NLRB Casehandling Manual* 10540.1 (June 2018).[5] Here, the Board selected the comparable employee approach, which this Court has approved as an accepted methodology on which to base backpay calculations. *NLRB v. S.E. Nichols of Ohio, Inc.*, 704 F.2d 921, 924 (6th Cir. 1983). Under that approach, the Board selects employees of the same employer with similar job classifications and seniority upon whom to base an estimated calculation of the gross backpay the discriminatee would have earned had he not been unlawfully discriminated against.

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[5] The Board may select the following formulas – Formula One: The average hours and/or earnings of the discriminatee prior to the unlawful action; Formula Two: The hours and/or earnings of comparable employees; or Formula Three: The hours and/or earnings of replacement employees. 3 *NLRB Casehandling Manual* 10540.1 (June 2018).

Id; 3 *NLRB Casehandling Manual* 10540.3 (June 2018). The Employer does not challenge the Board's reliance on the comparable employee approach. (A 7; A 1381-82.) Instead, the Company contests the designation of two similarly-situated employees as Hershey's comparable employees. (Br. 19-22, A 905-07.)

The Board acted within its broad discretion in selecting two employees with similar seniority as Hershey who were also quad-axle truck drivers. (A 7-8; A 854, 1382.) In designating comparable employees, the Board relied on the payroll information provided by the Company. (A 7; A 1381-1440.) Using that information, the Board selected Ronnie Smith, hired by the Company on April 12, 2011, and Gary Forsyth, hired on May 17, 2011, as the appropriate comparable employees for Hershey, who was hired on July 26, 2012. (A 7; A 851, 1441.) Forsyth and Smith—who drove the same kind of truck as Hershey and had similar seniority—were "reasonable" comparable employees "on which to base the hours of work used to calculate backpay." [6] (A 8.) *See Fluor Daniel, Inc.*, 351 NLRB 103, 111 (2007) (comparable employees should be similar in skill or pay level to the discriminatee and share a job classification with similar work history).

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[6] The Board also concluded that the compliance specification reasonably relied on only Smith's payroll history during the time that Forsyth was performing higher-paid dispatch work and not quad-axle driving work. (A 7; A 749.)

The Company, however, contends that the Board should have used another driver, Kevin Moore, Sr., with a hire date of May 31, 2012, as the comparable employee. (Br. 19-22.) The Company's preference for Moore appears to be rooted in the fact that, due to gaps in his employment with the Company, he worked fewer hours than Smith and Forsyth, and thus would have reduced Hershey's backpay award if used as a comparable. (A 7-8; A 746, 1381-1441.) The Board properly rejected Moore as the Company's proffered comparator because the Company failed to explain Moore's large gaps in employment. (A 7-8; A 746.) The Board reasonably concluded that these gaps were not attributabl*e to layoff by seniority*, as the Company claimed, because another driver, Jeffrey Clem, hired June 5, 2003, also had large gaps in employment. (A 7-8; A 746-47, 842-43, 1550-66.)

Moreover, the Company failed to produce any documents which would explain why Clem and Moore, despite their drastically different levels of seniority, had these employment gaps. (A 7-8, A 1442-49.) The Board repeatedly attempted to obtain such documents. Specifically, by letters dated April 18, May 1, and June 2, 2017, the Board requested that the Company provide documents that would explain the gaps in employment for Moore and any other employee. (A 7-8, A 1442-49.) The Company did not respond to any of those inquiries, and, in keeping with its recalcitrance, chides the Board (Br. 21) for its document request. (A 747.)

Nor did the Company produce such evidence at the hearing, a glaring omission given that Company's Manager Dave Laming admitted that the Company maintains records for every employee. (A 875-76.)

The Company misconstrues its burden when it argues that the Board failed to present affirmative evidence showing that Hershey would have worked during Moore's employment gaps. (Br. 20.) As previously explained, the Company bears the burden to establish mitigation of its gross backpay obligation. *Ohio Hoist Mfg. Co.*, 496 F.2d at 15 (quoting *Brown & Root, Inc.*, 311 F.2d at 454). Having failed to do that, the Company now seeks improperly to shift the burden to the Board, despite the fact that the documents supporting the Company's argument are solely within the Company's possession, but were not provided after the Board's repeated requests for them. (A 7-8, A 1442-49.) As the Board explained (A 8), "if there was an overall decrease in labor hours for quad-axle drivers, the [Company was] in a position to provide that evidence." (A 8; A 875-76.) *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.")

Finally, the evidence belies the Company's claim (Br. 20) that a seniority-based layoff caused the unexplained gaps in Moore's employment. As the Board noted, the Company was not laying-off, but actually hiring and training new drivers during the backpay period. (A 8; A 871-72.) Thus, the Board properly resolved these ambiguities in favor of Hershey and against the Company, and reasonably determined that Forsyth and Smith were comparable employees upon which to base backpay calculations.

3. The Board used appropriate wage rates to calculate backpay

The Board appropriately exercised its discretion in using wage rates in the backpay calculation that were reasonable approximations of the rates Hershey would have enjoyed if he had not been unlawfully discharged. (A 8.) In calculating Hershey's backpay, the Board relied on the wage rates under the labor agreement that would have applied to Hershey absent his discharge. (A 8; A 748, 1381-82, 1403-34, 1477, 1526.) In a few instances, however, the Board utilized a wage rate higher than what the agreement provided. (A 8; A 750-51, 1403-34, 1477, 1526.) Specifically, at times, Smith, the comparable employee, earned slightly more than the contractual rate, and the Board applied those increases when calculating backpay for the same periods. (A 8; A 750-51, 1381-34.) The Board did so because it reasonably assumed that the higher wage rates were the result of prevailing wages work and that Hershey would have received the same periodic increases. (A 8; A 749-52, 811.)

The Company contends that such wage increases should not have been imputed to Hershey. (A 8; A 807, 811.) While the Company faults the Board for assuming the temporary wage increases were attributable to prevailing wage work, the Company has provided no credible evidence to rebut that assumption or to even explain what caused the periodic wage increase. Instead, the Company (Br. 22-23), pointing to General Manager Laming's testimony, claims that the increase was due to a flat $2 per hour premium given for training drivers—an opportunity that the Company asserts was available to Smith but not Hershey. (A 8; A 807, 811, 1567-1671.) The credited evidence, however, fails to support this claim.

First, as the Board explained (A 8), the payroll records undercut Laming's testimony that the periodic wage increases were solely attributable to a training premium because those records also reflect wage rates that are more than $2 above the contractual amount. (A 8; A 750-51, 1381-34.) Notably, the Company never explained why the wage rate would have varied more than the $2 premium for training new drivers. (A 8.)

Second, the Company failed to offer any evidence explaining why such wage increases, even if for training purposes, would not have also been available to Hershey, a quad-axle truck driver with 35 years of experience. (A 8; A 858.) The Company misplaces its reliance (Br. 23) on Hershey's testimony that he "had no evidence to dispute" that Smith earned the $2 extra pay by training new drivers. It was the Company's burden, not Hershey's, to present any evidence to decrease backpay liability. The Company's claim that Hershey would not have been eligible for the purported training increases, because he had been with the Company less than a year, fails to recognize both Hershey's 35-years of driving experience and his testimony that he did train Company drivers. (A 855, 871.)

The Company further contends (Br. 24-25) that the Board did not use the wage rates specified by the labor agreement. (A 906.) The Company is wrong. As detailed in Schedule D of the amended fourth amended compliance specification (A 1403-34), and, as attested to by Field Examiner Molenda (A 748), the Board utilized the wage rates that Hershey would have made under the labor agreement, save for the occasional comparable increases, which the Company failed to show would not apply to Hershey. (A 8; A 748, 1403-34.)

Finally, the Company claims (Br. 25) that the Board erred by using an average of Hershey's interim hourly wage rather than Hershey's actual interim hourly wage. Assuming that claim is accurate, the Company provides no support for its implied argument that utilizing an average of Hershey's interim wage rates, which necessarily accounts for his actual wage rates, somehow exceeds the Board's remedial discretion. Rather, the Board "is required only to adopt a formula which will give it a close approximation of the amount due; it need not find the exact amount due." *Overseas Motors*, 818 F.2d at 521.

As the Board noted (A 8), any doubts arising with regard to the employer's alleged affirmative defenses to backpay liability are to be resolved against the party who committed the unfair labor practice, which the Board did here. *United Aircraft Corp.*, 204 NLRB at 1068; *see also Rogers Mfg. Co.*, 406 F.2d at 1109; *Kawasaki Mfg. Corp.*, 850 F.2d at 531. Accordingly, the Board properly determined that the backpay calculations relied on reasonable approximations of the wage rates Hershey would have earned absent discharge.

4. The Board reasonably determined that the methods used for calculating overtime payments were appropriate

In calculating overtime, the Board compared the weekly hours worked by the comparable employees with the weekly hours worked by Hershey, refused to deduct pay for excess hours worked by Hershey at the interim employer, and included backpay liability for any hours available to the comparable employees in excess of hours worked by Hershey at his interim employer. (A 8-9.) The Board's methodology was reasonable and well within it broad remedial discretion.

The Company provided the Board with biweekly payroll information for the comparable employees; this information gave total regular hours and overtime hours over each 2-week payroll period. (A 8; A 1381-34, 1567-71, 1791-94.) To compare the available payroll information to Hershey's interim earnings, the biweekly totals for each of the comparable employees were divided by two and equal amounts of regular hours and overtime hours were allocated to each week of the payroll period. (A 8; A 1381-34.) The two comparable employees' regular hours and overtime hours were then averaged for each week. (A 8; A 1381-34.) Much of Hershey's interim employment was compensated weekly, and, therefore, the totals for those individual weeks were utilized in the compliance specification. (A 8; A 1381-34.) However, during the periods that Hershey's interim employment was compensated bi-weekly, his regular hours and overtime hours were divided by two and equally allocated to each week in the same manner. (A 8; A 1381-34.)

After determining the average regular and overtime hours for the comparable employees for each week in the backpay period, the Board used those averages to compare to Hershey's interim hours worked on a weekly basis. (A 9; A 752, 1381-34.) If Hershey worked more hours at his interim employment for any week, the pay for those hours that exceeded the average comparable hours was not subtracted from the backpay liability. (A 9; A 1381-34.) If Hershey worked fewer interim hours than the average of the hours worked by the comparable employees, the pay for the comparable hours that exceeded the hours worked by Hershey that week was included in the backpay liability. (A 9; A 1381-34.) The weekly overtime hours were then allocated to quarterly totals. (A 1381-34.)

The Company argues (Br. 25-33.) that the Board abused its discretion by using the above methodology. It argues (Br. 27) that the Board's calculations simply “guessed or assumed” the correct weekly overtime allocations. The Company’s complaint about the Board’s weekly allocation of backpay fails to recognize the Board’s “wide discretion in picking a formula,” and that a backpay determination is not “an exact science or a precise exercise.” *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998). The fact that the Board “chose one method rather than another hardly makes a case for an abuse of discretion.” *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

Furthermore, as the Board noted, it made these “assumptions” because the Company did not provide the Board with any information, such as time cards, from which the Board could have derived the accurate regular and overtime hours to attribute to each week, nor did the Company enter such records into evidence at the hearing. (A 8.) The Company’s claim (Br. 27-28) that the Board never asked for such records again demonstrates its misunderstanding of the burden allocation in a backpay proceeding. The Company, not the Board, has the burden to establish facts that lessen its liability. *Brown & Root*, 311 F.2d at 454. If the Company had such information, it should have provided it to the Board.

The Company also argues (Br. 26), without any precedential support, that the Board improperly used “mixed methodologies” by calculating regular hours on a quarterly basis and overtime on a weekly basis. It accuses (Br. 31-32) the Board of “manipulat[ing] calculations” to achieve a windfall for Hershey, and it proffers alternative backpay calculations that reduce Hershey's backpay. The Company's arguments, and its proffered alternative methodology, are contrary to established Board precedent.

There is no precedent requiring the Board to calculate overtime on a quarterly-offset basis. *See* 3 *NLRB Casehandling Manual* 10554.3 (June 2018) (providing illustrative example of overtime calculation done on a weekly basis); *cf. Kawasaki Motors Corp.*, 282 NLRB 159, 164 (1986), *enforced* 850 F.2d 524 (9th Cir. 1988) (calculating overtime owed in a backpay proceeding by using a weekly average). Rather, precedent permits the Board to use "any formula which approximates what the discriminatee would have earned absent the discrimination," and that is plainly what the Board's methodology achieves here. *Frank Mascali Constr.*, 289 NLRB 1155, 1161 (1988).

More specifically, the formula applied here complies with Board precedent which requires that Hershey receive credit for the overtime he would have earned with the Company without deducting the earnings from excess overtime earned at interim employment. (A 8.) As the Board has stated, "any pay for hours worked for any employer during the backpay period in excess of those hours which [the discriminatee] would have worked at the [employer] should be considered supplemental income and should not be deducted from earnings." *Regional Import & Export Trucking Co.*, 318 NLRB 816, 818 (1995). *See also* 3 *NLRB*

Casehandling Manual 10554.3 (June 2018) (citing *United Aircraft Corp.*, 204 NLRB at 1073-74). This rule serves two principles: First, a backpay claimant such as Hershey who "chooses to do the extra work and earn the added income made available on the interim job may not be penalized by having those extra earnings deducted from the gross backpay owed by the Respondent." *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989) (internal quotations omitted). Second, the rule encourages discriminatees to mitigate their damages by seeking interim employment. *See United Aircraft*, 205 NLRB at 1073 (in holding that discriminatees be compensated for excess hours worked at interim employment, the Board noted that "to hold otherwise would create the ridiculous anomaly whereby an assiduous and diligent backpay claimant would be penalized for toiling a 24-hour day whereas a shirker would be rewarded.") Thus, the Company's complaint (Br. 31-32) that Hershey's backpay seems to make him more than whole ignores the above precedent and policy, and fails to recognize that the extra hours that Hershey worked are "as a result of his extra effort above and beyond his performance of a full-time job." *United Aircraft Corp.*, 204 NLRB at 1073.

Moreover, what the Company ostensibly means when it says it seeks a calculation of "overtime" hours on a "quarterly basis" is an offset of the average hours worked by comparable employees in any given quarter against the hours worked by Hershey at interim employment in that same quarter. Adopting the

Company's proffered methodology and simply comparing Hershey's interim overtime totals against those of the comparable employees in any given quarter would penalize Hershey by preventing him from receiving the benefit of his extra effort in weeks in which he worked hours in excess of hours available at the Company. Similarly, the Company seeks to penalize Hershey by also preventing him from receiving the benefit of hours which he would have been able to work at the Company that were not available at his interim employment. Such a methodology, if applied, would penalize Hershey and render null the Board's rule requiring that discriminatees be fully compensated for all hours worked in excess of those available at the gross employer, and for all hours worked by the comparable employee in excess of those hours available at the interim employer.

And, as the Board properly noted, the purported backpay calculations which the Company manufactured in support of its argument do not in fact rely upon quarterly calculations, but instead offset quarters of lower interim earnings than backpay liability with quarters of higher interim earnings than backpay liability. (A 9; A 922.) This methodology ignores long-standing Board precedent that holds that "interim earnings that exceed gross backpay in any quarter are not applied against gross backpay in any other quarter." 3 *NLRB Casehandling Manual* 10554.3 (June 2018) (citing *F.W. Woolworth Co.*, 90 NLRB 289 (1950)).

In sum, the Board's overtime calculations comply with Board precedent and policy, and the Company's unsupported allegations fail to show that the Board abused its discretion by calculating overtime on a weekly basis. The Board's chosen methodology ensured that it did not deduct Hershey's weekly earnings for hours worked at interim employment in excess of hours available with the Company. Similarly, the Board's method of overtime calculation ensured that Hershey was fully compensated for the weekly hours available at the Company that were not available to him at his interim employer.

5. The Board appropriately refused to deduct union dues, uniform fees, and unemployment compensation from the backpay award

The Board properly exercised its discretion in refusing to deduct union dues, uniform fees, and unemployment compensation payments from Hershey's backpay award—an approach consistent with Board precedent and policy. (A 10.) The Company offers no factual or legal support for its bare claim (Br. 33) that refusing these deductions runs contrary to the stated purpose of a backpay award.

With respect to union dues, the Board explained that "employees earn a particular amount of pay, and may or may not owe dues to a union." (A 10.) Thus, "in determining how much [the Company] owes Hershey in backpay, any possible obligation that Hershey may have to pay dues to a union is not factored in that calculation." (A 10.) And, as the Board further noted, the Company did not assert that "it was under some duty to remit dues pursuant to the [collective-bargaining] agreement and would do so." (A 10.)

Moreover, as the Board properly observed here, and what the Company fails to appreciate, is that by unlawfully discharging Hershey, the Company deprived him of the benefits of continued union representation. (A 10.) As such, any deduction from Hershey's backpay for non-existent payments for non-existent union representation would only serve to penalize Hershey. (A 10.) Naturally, because penalizing the discriminatee is not a purpose of backpay awards, the Board did not require Hershey to pay the Company for dues the Union may have been deprived of when the Company unlawfully discharged him. (A 821-23.) Accordingly, the Board reasonably refused to reduce Hershey's backpay award for union services not rendered. (A10.)

The Board also properly refused to deduct from Hershey's backpay award fees the Company imposes upon its employees for mandatory work uniforms. (A 10.) Applying precedent and regulations, the Board correctly found that the Company was precluded from making this argument because the Company failed to include this defense in its Answer to the Board's compliance specification, and failed to request to amend its Answer. (A 10.) *Airports Serv. Lines*, 231 NLRB 1272, 1272-73 (1977) (employer cannot raise a defense not pled prior to the hearing); *Baumgardner Co.*, 298 NLRB 26, 27 (1990) (employer admits to backpay liability by failure to adequately respond in its Answer); 29 C.F.R. §§

102.56(b)-(c) (2017) (requiring that all denials of amounts included in a compliance specification "must specifically state the basis for such disagreement" and that if "the failure to deny is not adequately explained, such allegation will be deemed admitted as true, . . . and the Respondent will be precluded from introducing any evidence controverting the allegation"). The Company had the opportunity, prior to trial, to amend its answer to the compliance specification to include an argument related to uniform fees. The Company chose not to do so.

The Company claims (Br. 33-34) that the Board is applying a double standard by penalizing the Company for failing to include a defense in its answer while permitting amendments to the compliance specification that add new elements to the backpay award. But the Company's complaint does not change the fact that the applicable Board policy and regulations permit amendments to compliance specifications and prohibit parties from introducing new arguments at trial that were not raised in prior answers or amended answers to compliance specifications. *Id.*; *see also* 3 *NLRB Casehandling Manual* 10555.1 (June 2018) (permitting amendment to compliance specifications).

In any event, as the Board cogently explained, because Hershey was unlawfully discharged, he was deprived the benefit of wearing the work uniform. (A 10.) Accordingly, the Board was certainly within its discretion in reasoning that Hershey should not be penalized by being forced to pay for a uniform the

Company deprived him the benefit of wearing after it unlawfully discharged him. (A 10.)

Finally, the Company argues (Br. 33-34.), without support, that Hershey should be forced to forfeit the $2,681 in unemployment compensation that he received after the Company unlawfully fired him. (A 10; A 820.) Longstanding Board precedent, however, unequivocally holds that "unemployment compensation payments are not interim earnings," but collateral benefits not offset against gross backpay. (A 10.) *Paint America Servs.*, 353 NLRB 973, 973 n.5 (2009); 3 *NLRB Casehandling Manual* 10555.1 (June 2018) (citing *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951)). Accordingly, the Board properly determined that unemployment compensation not be deducted from Hershey's backpay award. (A 10.)

6. Interim driving expenses were appropriately calculated and included in the backpay award

The Board properly exercised it discretion by including in the backpay award the interim expenses that Hershey incurred commuting to and from work at interim employers in excess of the expenses he would have incurred travelling to and from work at the Company. (A 10.) Specifically, the Board calculated the cost of driving miles to and from interim employers, then offset that amount by the cost of driving miles he would incurred driving to and from work at the Company's Pontiac facility. (A 10-11; A 1384, 1423-34, 1440.) Because

Hershey's commute to his interim employers was greater than his commute to the Company, the calculation resulted in positive make-whole compensation for Hershey. (A 10-11; A 1484.) The Company challenges the inclusion of interim travel expenses in the backpay award and the Board's methodology. (Br. 34-36, A 10-11; A 908.) As shown below, precedent supports inclusion of those expenses and the Company's challenges lack merit.

The Board has been awarding search-for-work and interim employment expenses for over 80 years. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 6 (Aug. 24, 2016), *enforced in relevant part* 859 F.3d 23, 39 (D.C. Cir. 2017). In *King Soopers*, the Board recently announced that it would award search-for-work and interim employment expenses as a separate element of the backpay award, regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest. *Id.* Prior to this change, the Board treated interim expenses as an offset to interim earnings—a practice that the Board subsequently recognized provided less than make-whole relief, failed to fully reimburse discriminatees for their losses, and discouraged discriminatees from searching for and obtaining interim employment so as to mitigate their damages. *Id.*, slip op. at 5. The Board therefore decided to award interim expenses regardless of interim earnings and separately from taxable net backpay. *Id.*, slip op. at 6. Such a remedy is entirely consistent with the remedial purpose of a backpay order, which is "to achieve a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge*, 313 U.S. at 194.

Fully compensating unlawfully discharged employees for their interim employment expenses serves the dual purpose of encouraging employees to mitigate their damages by seeking interim employment and ensuring that employees are truly made whole. *King Soopers*, 364 NLRB, slip op. at 6-7. Specifically, the Board imposes a duty on backpay claimants to mitigate damages by seeking and holding interim employment, but under the Board's pre-*King Soopers* approach, discriminatees who have already lost their source of income "risk[ed] additional financial hardship by searching for interim work if their expenses [were] not reimbursed." *Id.*, slip op. at 5. Under *King Soopers,* however, the Board properly recognizes these expenses as a separate loss, and fully compensates discriminatees for that loss.

The Company raises several arguments against compensating Hershey for his interim expenses, but its arguments demonstrate it misunderstands *King Soopers*. First, it claims (Br. 34) that the Board failed to offset interim expenses with interim earnings, but *King Soopers* plainly forbids such an offset, for the reasons explained above. Next, the Company claims (Br. 36) *King Soopers* does not apply here because Hershey found interim employment immediately and made more money at that employment than if he stayed with the Company. Such factors are irrelevant to determining entitlement to the separate award of interim expenses. The Board also rejected, as a misreading of *King Soopers,* the Company's claim (Br. 36) that *King Soopers* applies only when the discriminatee is similarly situated to the hypothetical discriminatees discussed in that case. (A 10.) As the Board explained (A 10), it used "these two worst case scenarios to highlight the need for the change in its precedent, but it did not find that its holding was limited to these circumstances." Finally, Board precedent contradicts the Company's contention that interim commuting expenses do not qualify for compensation as interim expenses. *See King Soopers*, slip op. at 7, n.11 (awarding the discriminatee $500 in interim travel expenses); *Baker Elec.* 351 NLRB 515, 537-38 (2007) (awarding the discriminatee travel expenses incurred for doing "out-of-town work" during the interim period following his unlawful discharge).

The Company also challenges the Board's calculation of Hershey's interim travel expenses. (Br., 37, A 11; A 908.) It does not dispute the actual commuting distances involved, but rather argues that during the entire backpay period, Hershey would have reported to work in Flat Rock, MI, not to the Pontiac, MI facility. (Br. 38, A 10-11; A 742, 770-71.) The Company prefers Flat Rock over Pontiac because Flat Rock is further from Hershey's home and, thus, would have resulted in a greater offset to his interim commuting expenses and a lower backpay award. (A 11; A 742.) Substantial evidence, however, supports the Board's conclusion that it was reasonable to calculate interim expenses relying on mileage to the Pontiac facility. (A 11.)

The credited evidence shows that during most of his employment with the Company, Hershey worked out of the Pontiac facility. (A 11; A 847-49, 877.) As the winter months approached, however, the Company offered Hershey and other employees who normally reported to the Pontiac facility, temporary work out of its Flat Rock facility, which was approximately one hour further from Hershey's home. (A 11; A 847-48, 882, 1805.) Moreover, dispatcher Tony Allen instructed Hershey to report to the Pontiac facility to hand in time cards before and after each work day on the Flat Rock job. (A 11; A 849.) Hershey complied, and as the Board noted, the Company presented no direct evidence to rebut this claim. (A 11; A 849.) The Flat Rock work was temporary and, consistent with that characterization, Hershey credibly testified that about one month after his unlawful discharge, he passed the worksite at Flat Rock and saw vehicles of a different employer performing the same work the Company had performed. (A 11; A 847-48, 852-53, 882.)

These facts belie the Company's claim (Br. 37.) that Hershey would have had to report to the Flat Rock site for an unspecified duration beyond his unlawful discharge. (A 11; A 742, 882.) As the Board properly noted, however, the Company did not provide invoices or other evidence to support its vague claim that work at Flat Rock continued until some undetermined point beyond Hershey's discharge, or that Hershey would have continued working at that site indefinitely rather than at Pontiac where he was hired. (A 11; A 871, 877-79.)

The Company also did not directly contradict Hershey's credited testimony that work at Flat Rock was discontinued shortly after his unlawful discharge. (A 11; A 852-53.) The Company provided no evidence as to the number of employees performing work at the Flat Rock site, the seniority of those employees, or a lack of work for Hershey at the Pontiac facility, despite being the party that would have had such information in its exclusive possession. (A 11.) Given these ambiguities, the Board properly determined that the doubts should be resolved in favor of the wronged party—Hershey—rather than the Company, as the wrongdoer, because the wrongdoer "is responsible for the existence of any uncertainty against whom any uncertainty must be resolved." *United Aircraft Corp.*, 204 NLRB at 1068; *see also Rogers Mfg. Co.*, 406 F.2d at 1109; *Kawasaki Mfg. Corp.*, 850 F.2d at 531.

The Company also mischaracterizes the testimony of Field Examiner Molenda when it states that Molenda admitted to the accuracy of the numbers and calculations contained in the Company-manufactured spreadsheets. (Br 34-35.) (A 791.) Molenda testified repeatedly that he could not confirm the accuracy of the Company's spreadsheets on-the-spot, without time for deliberation, calculation, and verification. (A 789-92, 797-98, 801-04, 810.) Thus, while Molenda admitted to some of opposing counsel's hypotheticals and the accuracy of certain numbers contained in a few of the Company's spreadsheets, as the record shows, he did not, and simply could not, confirm the accuracy of the entirety of the Company's calculations and spreadsheets at the hearing.[7]

The Company further misses the mark with its discussion (Br. 39-41) of whether the Company promised Hershey compensation for his drive to Flat Rock from the Pontiac facility. As the Board noted (A 7), a determination of that issue is "unnecessary" when determining the Company's legal obligation, under *King Soopers*, to provide Hershey make-whole compensation for the excess interim travel expenses it caused him to incur by unlawfully discharging him.

Applying precedent, the Board here reasonably included Hershey's interim

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[7] For instance, Molenda testified in response to questions from opposing counsel about Molenda's knowledge of the Company's spreadsheet #1, "I just reviewed it now. I have reviewed parts of it, but – I've reviewed parts before, and I just reviewed the first page now." (A 791.) Then, in response to opposing counsel's persistent questioning about the accuracy of spreadsheets, Molenda responded: "I'd have to have a calculator. I'd have to divide it all out to tell you, or I'd have to look at the notes that I took when I did my calculations." (A 810.) When opposing counsel asserted with respect to one of the Company's spreadsheets, "I just want to know if you think they're correct or not," Molenda replied, "I'd have to have a calculator and add them up. I would assume if the gross backpay number is the same, I would assume those are correct, but without adding it up, I can't tell you." (A 792.)

travel expenses in his backpay award. (A 11.) The Board then properly offset those expenses by the mileage cost of the distance Hershey would have traveled to and from the Company's Pontiac facility on the basis of credited testimony at the hearing that the Flat Rock job was temporary and that Hershey would likely have continued working out of the Pontiac facility following completion of the Flat Rock job. (A 11.) Thus, the Board's inclusion of excess interim commuting expenses was reasonable and were calculated on the basis of substantial evidence.

7. The Board appropriately calculated Hershey's 401(k) benefits and included them in the backpay award

The Board properly exercised its discretion in including 401(k) profits and employer contributions in the award and calculating those amounts. (A 11-12.) The Board compensated Hershey $11,513 in estimated 401(k) contributions, employer matching contributions, and profits for the backpay period through November 2015, when Hershey had access to a 401(a) plan through an interim employer. (A 5, 8; A 1383-84, 1435-38.) The Board arrived at this number by totaling the $7,461 in employee contributions, $746 in Company-matching contributions, and $3,306 in projected interest through the time of the hearing. (A 8; A 1383-84, 1435-38.) The Board was careful to ensure that the $7,461 in employee contributions was also deducted from gross backpay, as reflected in the net backpay figure, so as not to double-count against the Company the $7,461

Hershey would have contributed to the Company's 401(k) plan during the backpay period. (A 8; A 762, 1383-84, 1435-38.)

The 401(k) component of the Board's award is consistent with Board precedent and practice which require that discriminatees be compensated for lost 401(k) employer contributions and profits. *See, e.g., Design Originals, Inc.*, 343 NLRB No. 115, slip op. at 2 (Dec. 16, 2004) (ordering the employer to make claimants whole for contractual contributions to 401(k) and any loss of interest that they may have suffered as a result of the failure to make such payments); 3 *NLRB Casehandling Manual* 10544.3 (June 2018) (requiring the inclusion of retirement benefits, including 401(k) benefits, in the make-whole compliance specifications). Such compensation makes the discriminatee whole by reimbursing him for the 401(k) earnings he would have received had the Company not unlawfully discharged him. *Id.* Thus, compensation for Hershey's lost 401(k) earnings was proper.

The Company (Br. 43) challenges the Board's finding that Hershey would have continued making 401(k) contributions. Contrary to the Company's assertions (Br. 43), however, that finding is not based on "speculation upon speculation," but is instead consistent with Hershey's past conduct as established in the record. Specifically, the record shows that prior to his unlawful discharge, Hershey regularly contributed 5% of his pay to the Company-offered 401(k) Plan, which the Company matched at 0.5%. (A 12; A 754, 1435-38, 1791-94.) Hershey's interim employers did not offer pension benefits until he started employment with the Oakland County Road Commission in November 2015. (A 11; A 755, 757.) Hershey began contributing to his interim employer's 401(a) Plan after becoming eligible. (A 11; A 754, 758, 854.)

Accordingly, because Hershey routinely contributed to retirement funds where offered by employers and contributed to his interim employer's plan the moment he was eligible, the Board reasonably found that Hershey would have acted consistently with his past practice of routinely contributing 5% to a 401(k) fund. In making this inference, the Board adhered to the principle that where a claimant's prior conduct supports an inference that they would have acted in a consistent manner, the benefit of doubt is given to the aggrieved party and not the wrongdoer. *See Webco Industries, Inc.*, 340 NLRB 10, 12, 16-17 (2003) (awarding the discriminatee 401(k) compensation, finding that history of contributing 12% of pay to the employer's 401(k) plan supported inference that he would have continued to contribute 12% during the backpay period, despite that the specific 401(k) fund to which he had contributed no longer existed). The Board therefore properly compensated Hershey for the Company's matching contributions and 401(k) profits he likely would have earned based on his continued 5% contribution, with the cutoff being when his interim employer first offered him a 401(a) plan. (A 11-12; A 754-55, 1435-39.) Such an inference is grounded in proven conduct, not speculation.

Moreover, contrary to the Company's contention (Br. 43), the Board's method for calculating 401(k) profits was reasonable and not speculative. (A 11.) Prior to his unlawful discharge, Hershey invested in the Company-offered Securian fund, but that fund no longer existed at the time his backpay was calculated, making its rates of return, which were necessary for calculating profits, unavailable. (A 11; A 756.) Therefore, the Board selected the Vanguard 500 fund—a selection that, as the Board explained, was reasonable because it was a domestic equity fund similar to Securian and it published quarterly rates of return. (A 11; A 756.)

The Company (Br. 43) challenges this choice, claiming that the Vanguard 500 was not a fund that Hershey could have invested in had he remained at the Company, and so returns based on the Vanguard 500 are too speculative. (Br. 43.) The Company, however, presented no evidence in its Answer to the compliance specification or at the hearing to support a finding that the use of the Vanguard 500's quarterly rates of return does not result in a reasonable approximation of the rate of return that Hershey would have received. (A 11.) The Company had the opportunity to, but did not, present the Board with, for example, the names or types of other 401(k) funds offered by the Company or any evidence that their quarterly rates of return would have deviated significantly from those of the Vanguard 500 fund used in the compliance specification. (A 11.) In any event, the Board acted consistently with precedent by awarding Hershey compensation for his lost 401(k) gains despite the Company's interim discontinuance of the fund to which he had contributed. *See Webco*, 340 NRB at 12, 16-17.

Because Hershey routinely contributed to 401(k) plans, and the Vanguard 500 fund the Board relied on for estimated returns was a similar domestic equity fund to the fund Hershey contributed to, the Board's compensation to Hershey for lost 401(k) gains was a reasonable approximation of the amount due. (A 11-12.) Accordingly, such compensation was well within the Board's wide discretion.

D. The Company's constitutional challenges to the Board's processes and backpay award are either waived or jurisdictionally barred and lack merit

The Company (Br. 45), citing no supporting precedent, argues that by allowing an administrative law judge to make findings of fact and conclusions of law, the Board has deprived the Company of its right to have an Article III judge or jury determine the issues. The Company also argues (Br. 44-45), again without elaboration or supporting caselaw, that it is a violation of the separation of powers to have the Board "make[ ]the laws, enforce[] the laws, and interpret[] the laws."

The Company has waived these arguments by failing to fully brief them. Rule 28 of the Federal Rules of Appellate Procedure requires that an appellant's opening brief "must" contain "[its] contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Indeed, as this Court has stated, "[i]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Benge v. Johnson,* 474 F.3d 236, 245 (6th Cir. 2007).

Here, the Company's bare references to Article III of the Constitution and the separation of powers principle fall far short of the required "developed argumentation" sufficient to meet the standard of Fed. R. App. P. 28(a)(8)(A). *See Nat'l Credit Union Admin.n Bd. v. Zovko*, 728 F. App'x 567, 571 (6th Cir. 2018) (dismissing appellant's argument for failure to cite caselaw); *Bouyer v. Simon*, 22 F. App'x 611, 612 (6th Cir. 2001) (dismissing appellant's arguments because brief was "devoid of citation to controlling-or even persuasive-authority"). By failing to fully present their argument, the Company is effectively "leaving the court to do counsel's work, [to] create the ossature for the argument, and put flesh on its bones." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2015) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). The Court is not required to do counsel's work, and the Company has waived these claims.

In any event, the claim that an Article III judge or jury must decide this case has no merit. As the Supreme Court has stated, "neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Article III court." *Thomas v. Union Carbide Agric. Prods., Co.*, 473 U.S. 568, 582 (1985) (quoting *Palmore v. United States*, 411 U.S. 389, 407 (1973)). Indeed, "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Id.* at 583. The Supreme Court has specifically instructed that where Article III concerns are raised in cases involving public rights, resolution of that dispute by an Article III judge is not mandated. *See Northern Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982). The Board was created to "vindicate public, not private rights," and as such, an Article III judge is not necessary to resolve disputes under the Act. *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 543 (1943). And, parties subject to a Board order may seek review of that order and its findings of fact and conclusions of law by an Article III judge in an appellate court of the United States, such as the Company now seeks here. 29 U.S.C. § 160(e).

The Company's other challenge to the Board's authority to interpret and enforce the Act appears to contest the Act's statutory procedure for determining and reviewing unfair labor practices—a procedure that Congress established and the Supreme Court has upheld. *Amalgamated Utility Workers v. Consol. Edison Co.*, 309 U.S. 261, 265 (1940) ("Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose."). Indeed, "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief." *Id.* The Board, "as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Id.* The Company's unsupported and under-developed claim fails to undermine the Board's well-established authority to adjudicate and remedy unfair labor practices.

The Company also argues, for the first time on appeal, that it was deprived of due process and equal protection of the laws in violation of the Fifth Amendment. (Br. 45.) Specifically, it claims (Br. 47-48) that the repeated amendments to the compliance specification, including the addition of the 401(k) calculations only one month before the hearing, and the lack of a "neutral decision maker," violated its due process rights. The Company further claims (Br. 48-49) that the Board violated its right to equal protection and treated it differently from other employers with backpay liability by using "mixed methodologies" and awarding backpay as a punitive measure.

Before the Board, the Company never raised any Fifth Amendment challenge to any of the Board's findings or procedures—either in its exceptions or its exceptions brief. (A 37-70.) Because these constitutional arguments were not raised before the Board, the Company has waived them under Section 10(e) of the Act. 29 U.S.C. §160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) bars courts from considering issues not raised before Board). *See also, e.g.*, *Wal-Mart Stores, Inc. v. NLRB*, 136 F. App'x 752, 755 (6th Cir. 2005) (holding that employer waived argument under Section 10(e) of the Act by failing to raise it to the Board).

The Company also does not assert that extraordinary circumstances would justify its failure to raise these constitutionally-based defenses before the Board. Nor are such circumstances present. Indeed, these newly raised constitutional arguments were fully available to it at all times during the Board proceeding. For whatever reason, it chose not to make them at the appropriate time. The Court is therefore jurisdictionally barred from considering the Company's claim that the Board's compliance proceedings and the resultant backpay award violated the Company's constitutional rights. Moreover, the constitutional nature of the

Company's belated arguments does not except them from the requirements of Section 10(e). *See Marine Eng'rs Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 43 (D.C. Cir. 2000) (constitutional argument was "not properly before the [C]ourt" because not developed in opening brief); *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1368 (11th Cir. 2012) (applying Section 10(e) to bar due-process argument).

In any event, the Company's due process and equal protection arguments lack merit. (Br. 45-46.) As discussed *supra* p. 35, and as the Board explained (A 11, n.7), Board precedent allows for amendments to compliance specifications when necessary to address all compliance issues, including to correct errors and to revise calculations when the Board receives new information. *See Domsey Trading Corp.*, 357 NLRB 2161, 2161 n.1 (2011); 3 *NLRB Casehandling Manual* 106540.1 (June 2018). The Company presents no credible evidence that the amendments were unnecessary or done with any purpose other than ensuring accuracy. Moreover, the fact that earlier drafts of the compliance specification may have not contained 401(k) calculations or have been otherwise incomplete does not make the backpay award, and the inclusion of 401(k) benefits, inappropriate. As the Board explained, the amendments do not "alter the purpose of the compliance proceeding in enforcing the Board's Order 'to make Hershey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.'" (A 11 quoting *Lou's Transp., Inc.*, 361 NLRB at 1448.) And, as discussed throughout, no evidence shows that the Board's backpay remedy is punitive; rather, the Board's award successfully restores Hershey to the economic position he would have enjoyed absent his unlawful discharge.

In sum, the Board, consistent with the purpose of backpay remedies, and following precedent and policy, calculated gross backpay, lost bonuses, lost 401(k) gains, and interim expenses, and offset that figure against Hershey's interim earnings. The result was a positive backpay award for Hershey. The Company failed to produce evidence which would affirmatively prove mitigation of its obligation to pay portions of that amount. Accordingly, the Board acted well within its discretion in ordering the Company to pay Hershey $49,817 in backpay and expenses.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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December 2018

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Petitioner/Cross-Respondent	*	Nos. 18-1909
	*	18-1988
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	07-CA-10257
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,074 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 11th day of December, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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