

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

G4S REGULATED SECURITY SOLUTIONS
a Division of G4S SECURE SOLUTIONS (USA) INC.
f/k/a THE WACKENHUT CORPORATION

and

THOMAS FRAZIER, an Individual

Case 12-CA-026644

and

CECIL MACK, an Individual

Case 12-CA-026811

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. Statement of the Case¹

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the General Counsel files the following Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge.

The Charge in case 12-CA-026644 was filed by Thomas Frazier², an individual, on February 22, 2010, and the Charge in case 12-CA-026811 was filed by Cecil Mack, an individual, on July 29, 2010. On June 25, 2015, the National Labor Relations Board (The Board) issued a Decision and Order in the above-referenced cases, reported at 362 NLRB No. 134 (The Board Order), which incorporated by reference the prior Decisions and Orders reported at 358 NLRB 160 and 359 NLRB 947. GCX 1(n), GCX 1(j), GCX 1(k). The Board found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) and ordered Respondent to reinstate Frazier and Mack to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges. The Order further required that Respondent make Frazier and Mack whole for loss of earnings and other benefits suffered as a result of their discharge, and to compensate them for the adverse tax consequences, if any, of receiving a lump sum backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. On November 21, 2016, the United States Court of Appeals for the Eleventh Circuit (the Court) denied Respondent's request for review, and granted the

¹ The following references are used in this document :

- ALJD ____:____ = ALJD page and line numbers
- T ____ = transcript page number
- GCX ____ = General Counsel's exhibit number
- GC Br. ____ = General Counsel's Post Hearing Brief page number.
- RX ____ = Respondent's exhibit number
- RX Br ____ = Respondent's Post Hearing Brief page number
- RX Exc ____ = Respondent's Exceptions and Arguments in Support page number

² Thomas Frazier is no longer involved in these proceedings as all matters related to his discharge have been resolved.

Board's cross-petition for enforcement. GCX 10. On January 24, 2017, the Court denied Respondent's petition for panel rehearing. GCX 1(q). On February 1, 2017, the Court issued its mandate and entered its opinion as the judgment of the Court. GCX 1(p).

On April 17, 2018, the Regional Director issued the Amended Compliance Specification (the Specification) in the instant case. A hearing in this matter took place at the Miami Resident Office of Region 12 on May 23, 2018, before Administrative Law Judge Robert A. Ringler (the ALJ). On December 20, 2018, the ALJ issued his Supplemental Decision (Decision), and on January 17, 2019, Respondent filed Respondent's Exceptions to the Decision of the Administrative Law Judge (Exceptions).

In its Exceptions 1-3, Respondent takes issue with the ALJ's treatment of Mack's interim employment at Rent-A-Wheel. Respondent contends that, for various reasons, the Judge erred in determining Mack's start date and interim earnings, applicable to the calculation of Mack's net backpay. RX Exc 3-11. In its Exception 4, Respondent objects to the ALJ's failure to consider retirement fund contributions paid by Mack's interim Employer, the United States Postal Service, for relevant times during the backpay period, when determining Mack's quarterly interim earnings to be deducted from gross backpay. RX Exc 12-13. In its Exception 5, Respondent objects to the ALJ's failure to penalize Mack for working less than 50 hours per week during interim employment, given that he typically worked around 50 hours per week when employed by Respondent. RX Exc 13-14. In its Exception 6, Respondent objects to the ALJ's refusal to find that Mack's interim search for work was insufficient for the time periods including February 2010 to August 2010, and June 2011 to February 2012. RX Exc 14-15. In its Exception 7, Respondent objects to the ALJ's ruling in favor of the General Counsel with respect to its Motion to Strike portions of Respondent's Answer to the Specification (Answer) challenging both the quarterly method for calculating backpay and the compensation for adverse tax consequences. RX Exc 17-19. In its Exception 8, Respondent objects to the ALJ's award of excess tax liability compensation based on its contention that the award is punitive in nature. RX Exc 19-22.

Finally, in its Exception 9, Respondent objects to the ALJ's refusal to calculate backpay on an annual basis, rather than a quarterly basis. RX Exc 22-24. For the reasons set forth below, the General Counsel urges that the Board deny each of Respondent's exceptions.

II. Argument

A. Respondent's Exception 1 asserting that the ALJ failed to adjust Mack's interim earnings for the third quarter 2010 is without merit and should be rejected.

Respondent's Exception 1 is based on the ALJ's failure to reduce Mack's interim earnings for the third quarter of 2010 based on testimony that Mack started working for an interim employer, Rent-A-Wheel, in mid-August 2010.

Respondent is correct that Mack testified that he was hired in the middle of August 2010. T 31. Mack's testimony at the hearing was based on his best recollection at that time for incidents that occurred 8 years prior to the hearing. The General Counsel's calculations are based upon documents received from the Florida Department of Revenue. Respondent entered these same documents into evidence as Respondent's Exhibit 1. The documents reflect total earnings of \$901.94 for the entire third quarter of 2010. RX 1. Based on these [official] reports from the State of Florida, the General Counsel reasonably concluded that Mack's total earnings for the third quarter of 2010 were \$901.94.³ The ALJ correctly found that the Specification reasonably calculated Mack's third quarter 2010 interim earnings. ALJD 5:41-42. Although Respondent argued in its post hearing brief that Mack began working at Rent-A-Wheel around August 16, 2010, and that he received compensation at an annual rate of \$44,000 per year, the ALJ appropriately rejected Respondent's mischaracterization of the record testimony. RX Br 2; ALJD 6:11. The ALJ correctly noted that although Mack testified that he began working for

³ While information contained in RX 1 lists Insuperity PEO Services as the source of Mack's wage income for the time period including the third quarter of 2010, a simple internet search discloses that Insuperity is a payroll services company. The General Counsel, and presumably the ALJ, reasonably concluded that Insuperity provided payroll services for Rent-A-Wheel for the time period including the third quarter of 2010.

Rent-A-Wheel in the middle of August 2010, Mack did not begin working as a manager, with annual compensation of around \$44,000, until several weeks later. ALJD 6:11-15. As a matter of fact, Mack testified that he began working as a collection specialist, a position he held for almost two weeks. T 32:1-5. He further testified that he worked as an assistant manager for two weeks. T 33:17-19. Based on this uncontroverted testimony, the ALJ correctly concluded that Mack did not begin earning the \$44,000 annual salary until mid or late September 2010, contrary to Respondent's assertions. ALJD 6:13-15.

As noted above, the General Counsel relied on information contained in RX 1 in calculating Mack's interim earnings. Respondent proffered no additional evidence to rebut the General Counsel's conclusions. The ALJ appears to have relied on the Florida Department of Revenue wage report in concluding that Mack's wages for the entire third quarter of 2010 were as alleged in the Specification. As the ALJ correctly noted in addressing another of Respondent's arguments concerning Mack's employment at Rent-A-Wheel, Respondent could have subpoenaed records from Rent-A-Wheel to clarify any ambiguity regarding Mack's interim employment and wages earned therefrom. ALJD 7:5-9. Additionally, Respondent could have submitted a FOIA request to the Florida Department of Revenue, or it could have subpoenaed these same documents from the State. Respondent made no such efforts, and its failure to do so should not be weighed against Mack. The Board has long held that ambiguities regarding the calculation of backpay should be resolved against the wrongdoing respondent. *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006) *enfd.* 508 F.3d 418(7th Cir. 2007); *United Aircraft Corp.*, 204 NLRB 1068 (1973). Respondent has offered no persuasive reasons for departing from the Board's longstanding policy. Applying this principal, any ambiguities created by the testimony of Mack, or the documents offered into evidence by Respondent should be resolved in favor of Mack. Accordingly, Respondent's Exception 1 should be denied.

B. Respondent' Exception 2 asserting that the ALJ erred when he failed to adjust Mack's earnings for the second quarter of 2011 is without merit.

Respondent argues that the ALJ should have increased Mack's interim earnings based on the fact that he was not terminated from Rent-A-Wheel until approximately mid-June 2011.

RX Exc 4. Mack's testimony in this regard is as follows:

Q. *All right. So, and you said when was your last date of employment at Rent A Wheel? Do you remember the date?*

A. *Yes, it was June of 2011.*

Q. *And do you remember was it the beginning, middle, end, do you recall?*

A. *It was probably about the middle, I'm thinking --*

Q. *Now, can --*

A. *-- that's when I was*

T 35. The ALJ correctly concluded that it was not unreasonable for the General Counsel to set the date of discharge occurring earlier in June 2011. ALJD 7:5-9. Most importantly, however, RX 1 reflects that Mack's total wages for the second quarter of 2011 were \$8557.60. This same amount was used by the General Counsel in calculating backpay in the Specification, and the ALJ incorporated this amount in his decision. GCX 1(e); ALJD 10:1. Respondent seeks to have the Board disregard the most reliable information available to the Region, the ALJ and the Board, i.e. RX 1, and substitute it with Mack's vague testimony, excerpted supra, in order to yield a result more favorable to Respondent. Once again, any ambiguities in the calculation of backpay should be resolved against Respondent. In the absence of convincing evidence to show that the General Counsel's calculations were unreasonable, Respondent has failed to establish that a departure from the ALJ's findings is warranted. Accordingly, Respondent's Exception No. 2 should be denied.

C. Respondent's Exception No. 3 which asserts that the ALJ erred when he failed to toll Mack's backpay after his discharge from Rent-A-Wheel is without merit.

Respondent claims that Mack's backpay should be tolled because he was discharged from Rent-A-Wheel for engaging in misconduct, constituting a willful loss of employment. RX Exc 5. As conceded by Respondent, an involuntary discharge from interim employment does not toll backpay, unless the discharge is based on deliberate or gross misconduct establishing a willful loss of employment. *Ryder System, Inc.*, 302 NLRB 608 (1991). The burden is on Respondent to establish that the discriminatee's conduct was so egregious that it amounted to a willful loss of employment and that backpay should be tolled. *Gimrock Construction*, 356 NLRB 529 (2011). Contrary to Respondent's contentions, the Administrative Law Judge correctly concluded that Mack did not engage in deliberate or gross misconduct. ALJD 7:13-26.

Mack testified that he was discharged from his employment at Rent-A-Wheel for what Rent-A-Wheel described as the improper handling of customer funds, or "taking improper payments". T 35:12. Mack explained that if a customer came into his store to make more than the payment due on her account, rather than crediting the entire amount to the customer's account, he would credit the amount due, and place the remainder in an accounts receivable account for the customer. T 35-36. Mack believed that his conduct was permissible since a) he had been instructed during training to accept payments in the manner in which he accepted them from the customer; b) he did not place the money in his personal account (or otherwise improperly divert the money); and c) there were no handbooks or manuals that prohibited his method of handling the customer's payment. T 36-37. Based on this testimony the ALJ correctly concluded that Respondent had not met its burden of showing that Mack "deliberately courted" his discharge. ALJD 7:22.

Respondent further asserts that the denial of unemployment benefits to Mack establishes that he engaged in deliberate misconduct and that his backpay should be tolled

from the date of discharge from Rent-a-Wheel until he was hired by Rent-A-Center in February 2012. Respondent claims that under Florida law the employer has the burden of proving that an employee engaged in misconduct warranting the denial of unemployment benefits. Respondent improperly asks that the Board assume that Rent-A-Wheel defended against Mack's unemployment claim by asserting that Mack engaged in misconduct. Respondent surmises that if the version of events testified to by Mack during the backpay hearing was accurate, "he would have been able to prove to the State of Florida that he did not know, and could not have known about the rule (or policy) that he supposedly violated." RX Exc 9. According to Respondent, Mack's failure to appear at the hearing and to appeal the decision denying benefits is tantamount to an admission that he engaged in deliberate misconduct.

However, Respondent offered no reliable evidence to support its contentions, and its argument is built on nothing more than speculation and conjecture. As an initial matter, the standard for tolling backpay under Board law is more stringent than the standard for denying unemployment compensation under Florida law. Under Florida law an employer need only establish that an employee engaged in misconduct in order for unemployment compensation to be denied, whereas under Board law backpay will not be tolled unless it can be shown that the discriminatee engaged in deliberate or gross misconduct. Thus, an employee who is denied unemployment compensation may still be entitled to receive backpay for the period following the employee's discharge. In any event, Respondent offered no evidence of the arguments or evidence proffered by Rent-A-Wheel to the State of Florida showing the basis for the State's denial of unemployment compensation to Mack. Furthermore, Mack credibly testified, without contradiction, that he did not attend the hearing because he did not learn of the hearing until after the date it was conducted. T 38-39. Nothing suggests that Mack's failure to attend the hearing was intentional or constituted an admission against interest, as claimed by Respondent. Additionally, Respondent failed to elicit any testimony from Mack concerning his reasons for not

appealing the final unemployment agency's decision. Mack took the stand and testified on direct and cross examination. Rather than thoroughly question Mack to determine why he did not appeal the decision, Respondent appears to have intentionally avoided that line of questioning in order to insert its own self-serving explanation as to why Mack did not contest the State's denial of his unemployment benefits.

In summary, Mack credibly testified without contradiction that he followed the instructions given to him during his training and did not violate any rules or policies set forth in Rent-A-Wheel's handbooks or manuals. Respondent's contention that Mack was terminated from Rent-A-Wheel because he engaged in deliberate misconduct relies on assumption and speculation and finds no support in the record evidence. Respondent's arguments regarding the tolling of backpay should be rejected and Respondent's Exception 3 should be denied by the Board in its entirety.

D. Respondent's Exception No. 4 should be denied since the ALJ did not err when he concluded that Mack's retirement benefits earned during interim employment should not be added to his interim earnings.

Respondent argues that the ALJ erred when he failed to reduce Mack's backpay based on the \$5000 Thrift Savings Plan (TSP) retirement benefit that Mack had accrued while working at the United States Postal Service. Mack was hired by the Postal Service in March 2013. T 54-55. Mack participated in the Postal Service's retirement fund presumably by making his own contributions, some or all of which may have been matched by the Postal Service. T 89:8-10. Mack testified that he did not know the rate at which the Postal Service contributed to his retirement account. T 69:8-13.

To begin, as stated by the ALJ, fringe benefit contributions paid by an interim employer generally do not offset gross wages. ALJD 8:18-22. *Tualatin Electric, Inc.* 331 NLRB 36 (2000). *John T. Jones Construction Co. Inc.* 352 NLRB at 1067 (2008); *Alaska Pulp Corp.* 326 NLRB 522, 536 (Fn. 48). Although Respondent argues that the \$5000 value of Mack's TSP should be

included in the amount of interim earnings, Respondent's position misses the point of retirement contributions. These types of fringe benefits are not considered wages, so there should be no dollar for dollar offset for backpay owed. Additionally, as noted by the ALJ, the record is unclear as to what amount of the \$5000 balance could be attributed to Postal Service contributions. ALJD 8:18-29. Further, the record does not reflect what portion of the \$5,000 balance can be attributed to employee contributions, interest, or capital gains. If, for example, Mack contributed \$4,000 to his TSP account, and the Postal Service contributed \$1,000, it would be patently unfair to reduce Mack's backpay by the full \$5,000 since a significant portion of the balance is the result of his own contributions, interest or capital gains. Furthermore, given current market conditions, there is a substantial possibility that the value of Mack's TSP account is less now that it was at the time of the hearing. Reducing backpay by \$5000 would unfairly penalize Mack and is contrary to Board law.

In sum, as correctly noted by the ALJ, Respondent has failed to show that any portion of the TSP retirement benefit should be treated as interim earnings used as an offset from backpay. ALJD 8:24-29. Accordingly, Respondent's Exception 4 should be denied.

E. Respondent's Exception No. 5 should be denied because the ALJ correctly concluded that Mack's backpay should not be reduced due to his failure to work at least 50 hours per week.

It is undisputed that Mack worked an average of around 50 hours per week when he was employed by Respondent. T 69-70. The ALJ concluded that Respondent failed to establish that working for interim employers for less than 50 hours per week necessitates a reduction in backpay. ALJD 8:33-42. Respondent argues that this conclusion was in error. Respondent contends that it is unreasonable to calculate Mack's gross backpay based on a 50 hour work week, and compare it to interim earnings from positions that have a standard 40 hour work

schedule.⁴ Respondent's argument under these circumstances is incredulous at best. The evidence reflects, as correctly noted by the ALJ, that Mack made extensive efforts at searching for, and gaining, reasonable interim employment. ALJD 4-5. Reasonable employment does not require a discriminatee to secure a position with identical pay and hours. Rather, it requires that the discriminatee seek substantially equivalent employment, which Mack did.

Despite Mack's extensive efforts to secure substantially equivalent employment and mitigate damages, Respondent asks that the Board penalize Mack by calculating Mack's gross backpay based on the number of hours that Mack worked for interim employers during certain time periods, rather than using an average of the earnings of other employees who worked for Respondent during the backpay period in the same job classification as Mack previously worked. Respondent does not cite any case law in support of its position.

The Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred. Had Respondent not unlawfully discharged Mack, he would have continued to work on average 50 hours per week. Rather than seeking to restore the status quo, Respondent is asking that the Board punish Mack for failing to find interim employment where he could work 50 hours per week, while benefitting from the fact that Mack mitigated backpay by finding any interim employment.⁵ Respondent's argument should be rejected and its Exception 5 denied.

F. Respondent's Exception 6 asserting that the ALJ erred when he concluded that Respondent failed to show Mack's job searches were inadequate for the time period including February 2010 to August 2010, and from June 2011 to February 2012, is without merit and should be denied.

⁴ Respondent admitted in its Answer to the Amended Compliance Specification that gross backpay was properly calculated. See GCX 1(r), paragraph 6(d). Thus, Exception 5 must be denied to the extent it can be viewed as an argument that gross backpay should have been calculated based on a 40 hour work week.

⁵ Had Mack rejected a job because it only offered 40 work hours per week, Respondent would undoubtedly argue that such a rejection established a failure to mitigate.

Respondent called Claude Seltzer, a certified vocational rehabilitation counselor, as an expert witness in order to establish that there were job opportunities during the backpay period, for which Mack was qualified, and that his failure to obtain interim employment from February 2010 to August 2010 and June 2011 to February 2012 warrants reducing his backpay during those time periods. Seltzer testified that it was his opinion that for the time period from February 2010 through April 2013, specifically in the area of security guards, there were jobs open and available to Mack for which he was qualified. T 109:9-19.

In summary, Seltzer testified that Mack was qualified to work as a security guard, and speculated that Mack could have become a supervisor in the security industry. T 103-32. While the General Counsel avers that Mack indeed was qualified to work as a security guard, had Mack secured a position as described by Seltzer, he would have earned around \$11 per hour, or about \$23,000 per year. T 123:11-14. Seltzer provided no reliable basis for concluding that Mack necessarily would have been offered a security guard position or that he would have advanced to a supervisory position; his conclusions are based on mere speculation. Further, had Mack accepted a low paying security position, and maintained that position throughout the backpay period, Respondent's overall liability would have been significantly higher. Under those circumstances, Respondent likely would have argued that Mack acted unreasonably in accepting interim employment at \$11 per hour, rather than seeking other higher paying positions outside of the security industry in order to mitigate his losses. Essentially, Respondent is arguing that Mack acted unreasonably in not applying for and accepting lower level security positions that would have paid him \$23,000 per year, when he had been making over \$70,000 per year prior to his unlawful discharge by Respondent.

It is well settled that "the test for mitigation is not measured by an individual's success in gaining employment, but rather by the efforts made to seek work." *The Lorge School*, 355 NLRB 558, 560 (2010), quoting *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 429 (2008).

Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances. *The Lorge School*, 355 NLRB at 560, citing *Pope Concrete Products*, 312 NLRB 1171 (1993), enf. mem. 67 F.3d 300 (6th Cir. 1995); *Cornwell Co.*, 171 NLRB 342, 343 (1968). Furthermore, it is measured over the backpay period as a whole, not isolated portions thereof. *The Lorge School*, 355 NLRB at 560, citing *First Transit Inc.*, 350 NLRB 825, 825 fn. 8 (2007) and *Wright Electric*, 334 NLRB 1031 (2001), enfd. 39 Fed. Appx. 476 (8th Cir. 2002). Any doubt or uncertainty in the evidence is resolved in favor of the employee claimant and not the respondent. *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99 (2018) citing *United Aircraft Corp.*, 204 NLRB 1068,1068 (1973), See also *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006) enfd. 508 F.3d 418(7th Cir. 2007); *Jackson Hospital Corp.*, 352 NLRB 194, 200 (2008).; see also *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966). The Respondent does not meet its burden of showing an inadequate job search by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Lorge School*, 355 NLRB at 560 citing *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991). Although a backpay claimant has a duty to mitigate her loss of income, she is held only to a good-faith effort, not the highest standard for diligence. *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99 (2018) citing *Lundy Packing Co.*, 286 NLRB 141, 142 (1987), enfd. 856 F.2d 627 (4th Cir. 1988).

In its exceptions, Respondent cites Seltzer's testimony that Mack's efforts at seeking interim employment were unreasonable since Mack admitted that, during certain time periods, he only submitted "on-line" applications. RX Exc 16. Respondent further asserts that Seltzer explained that Mack should have followed up in person and that it is always preferable to make an in-person effort rather than relying on a phone call or internet search. RX Exc 16. Seltzer received his undergraduate degree in 1971. He began his career in vocational rehabilitation in

1975, over 40 years ago. The bulk of his career extends to time periods that precede wide access to the world wide web. Times have changed. Many, if not most, employers today direct employees to apply online. Companies are often ill-equipped to even handle walk-in appointments. While Seltzer may have an old-school personal preference for face to face contact, his personal preferences are of little probative value here. Nothing in Seltzer's testimony, nor in the record, provides any basis for concluding that Mack's failure to perform an in-person follow-up hindered his ability to obtain interim employment with any particular employer. Seltzer's testimony is of little probative value with respect to the issue of whether Mack conducted a reasonable job search.

Rather, as found by the ALJ, the record establishes that Mack made a "reasonably diligent effort to obtain substantially equivalent employment" and "made an honest effort to find work and remain employed." ALJD 9:30-31, 35. Thus, immediately after being discharged by Respondent, Mack applied for unemployment and began searching for work. T26:9-11; GCX4. Mack also registered with an employment agency, Workforce, which assists unemployed individuals in finding suitable employment. The information in GCX 4 reflects that for the time period between February 15 and March 31, 2010, Mack submitted applications to at least three different potential employers. GCX4 at page 1. Mack also applied for a position at the Krome Detention Center during that quarter. T 28-29.

During the second quarter of 2010, Mack submitted applications to at least eight prospective employers as identified in GCX 4 at page 3. Furthermore, in May of 2010, Mack submitted an application for employment with the State of Florida Department of Corrections. T 30:13-22.

In July 2010, Mack applied for a position with the Florida Highway Patrol. Mack secured employment in August 2010 with a company identified as Rent-A-Wheel where he began working as a collections specialist on a full-time basis. GCX 4 at page 5; T 33:4-13 He quickly

rose up the ranks to the position of assistant manager and then store manager. T 33:15-22. As store manager, Mack worked 40 to 50 hours per week and earned a salary of about \$44,000 per year. T 35:5-9. Mack continued to work for Rent-A-Wheel until around June of 2011, when he was discharged. T 34:15-19. Subsequent to Mack's discharge from Rent-A-Wheel, he continued searching for work. Between June 9 and June 23, 2011, Mack submitted applications for four positions at Baptist Health Hospital. T 39-40. Additionally, he applied for a position with Miami-Dade Public schools on June 27, 2011. T 40:10-11

In July 2011, Mack applied for positions with five different employers. T 40-41. During the month of August 2011, Mack submitted applications for over 30 positions with various employers. T 41-43; GCX 5. For the month of September 2011, Mack submitted at least 11 applications. T 43-45. In total, for the entire third quarter of 2011, Mack submitted at least 46 applications for employment.

Mack continued his job search during the fourth quarter of 2011. In October 2011, he applied for more than 20 positions with various employers. T 45-49. In November 2011, he applied for at least six more positions. T 50-51. For the entire fourth quarter, Mack submitted at least 26 applications for employment.

In January 2012, Mack applied for positions with the City of Miami Police Department and Dyncorp. T 51:2-19. Through his diligent job search efforts, in February 2012, Mack secured employment with RAC Acceptance, an affiliate of Rent-A-Center. T 51:20-24.

Contrary to Respondent's contentions, it is clear that Mack diligently searched for work throughout the backpay period, including during the periods from February 2010 to August 2010 and from June 2011 to February 2012. The ALJ's conclusions in this regard should be affirmed and Respondent's Exception 6 denied.

G. The ALJ did not err in granting the General Counsel's Motion to Strike portions of Respondent's Answer, and Respondent's Exception 7, in this regard, should be denied.

Respondent asserts that the ALJ erred when he granted the General Counsel's Motion to strike Portions of Respondent's Answer. The General Counsel argued that Respondent could not raise issues at the compliance phase not previously raised before the Board or the Court of Appeals. Specifically, the General Counsel sought to strike those portions of Respondent's Answer which raised the issues of the appropriateness of quarterly backpay calculation (as opposed to annual calculations) set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950) and the appropriateness of an award compensating Mack for tax consequences as set forth in *Tortillas Don Chavas*, 361 NLRB 101 (2014). The General Counsel also sought to strike the portions of Respondents Answer challenging the supervisory determinations made by the Board and affirmed by the Courts.

In his decision, the ALJ, relying on *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616 (2001), correctly concluded that Respondent is precluded from raising the issues of quarterly calculations and excess tax liability because it failed to raise such objections before the Board and Eleventh Circuit. ALJD 3:15-30.

Respondent is correct that the Board bifurcates its unfair labor practice proceedings, focusing first on liability, and thereafter on damages, if appropriate. RX 18. Respondent asserts that it is not appropriate or fair to expect it to raise issues based on "esoteric concepts related to damages during the liability phase, simply because the Board *made a passing reference* to such concepts during that phase." RX 18 (emphasis added). Respondent's characterization of the Board's determinations as a "passing reference" is misguided. In an earlier decision involving this matter, 359 NLRB No. 101 (2013), the Board's remedy specifically states:

The Company must also make [Mack and Frazier] whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from... February 2, 2010, in the case of Cecil Mack, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.* GCX 1(k)

Here, Respondent was first put on notice that the General Counsel would use the quarterly method for calculating backpay. Respondent has had numerous opportunities to challenge the quarterly method for calculating backpay as the case was being reviewed by the Board and Courts. Respondent did not raise any such objections until five years later, after it had exhausted all appeals and agreed to partially comply with the reinstatement remedy. In its 2015 decision reported at 362 NLRB No. 134, the Board further ordered Respondent to:

(c) Compensate [Thomas Frazier and] Cecil Mack for any adverse tax consequences of receiving their backpay in one lump sum, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them. GCX 1(n).

In footnote 1 of its decision, the Board specifically notes that it will modify the Judge's recommended remedy and Order in accordance with its then recent decision in *Tortillas Don Chavas*. Respondent sought Court review of the Board's Decision and Order, never once having raised the issue of quarterly backpay calculations as set forth in *F.W. Woolworth*, or adverse tax consequences as set forth in *Tortillas Don Chavas*.

Respondent argues that it should not be required to raise challenges based on theories of calculating damages until it has been given the opportunity to review the manner in which the General Counsel will apply those theories to the case at hand, at which time, the General Counsel converts a theoretical principle into actual numbers. Essentially, Respondent is suggesting that it should have had an opportunity to review the Board's calculations, and that any such obligations to challenge the method of calculating backpay should arise thereafter. Respondent appears to be arguing that it should have the benefit of the calculations before determining whether the *method* of calculation benefits it. The Board is not committed to granting any such luxuries to Respondent. Respondent was aware as far back as 2013 that the

General Counsel intended to use the quarterly approach to calculating backpay, and Respondent was made aware in 2015 that the General Counsel intended to seek compensation for adverse tax consequences. Respondent could have raised both these issues when it sought review before the Court. It did not. By failing to set forth all arguments available to it when challenging earlier Administrative Law Judges' Decisions and Board Orders, Respondent acted at its own peril. Respondent should, therefore, not be allowed to make a late filed claim that the General Counsel's method of calculation was inappropriate, or that the ALJ committed reversible error in granting the General Counsel's Motion to Strike. Based upon these considerations, Respondent's Exception 7 should be denied.

H. The excess tax liability imposed by the ALJ is not punitive as described in Respondent's Exception 8.

In his Order, the ALJ properly directed Respondent to compensate Mack for adverse tax consequences of receiving a lump sum backpay award. ALJD 11:10-12. Respondent argues that the imposition of excess tax liability is punitive rather than remedial, and that the ALJ erred in granting adverse tax compensation to Mack. In support of its rationale, Respondent cites dicta in the Board's decision in *Latino Express* 359 NLRB 518 (2012). Specifically, Respondent cites footnote 34 which acknowledges that the enhanced monetary remedies will act as a deterrent in the commission of unfair labor practices and encourages compliance with Board Orders. Once again, Respondent's rationale is misguided. The Board's conclusion that discriminatees should be compensated for adverse tax consequences associated with the receipt of lump sum payment in a year other than when it was earned is reasonable. In *Tortillas Don Chavas*, The Board made it clear that it's rational for adopting the excess tax liability remedy, already long in use by the courts and other administrative agencies, was to ensure that make whole remedies were the best approximation of restoring discriminatees to their economic status quo ante. *Tortillas Don Chavas* 361 NLRB at 103-104. Although the Board does not specifically discuss the incremental tax liability, these amounts awarded to discriminatees are

necessary to adequately and fully compensate them for all of the losses that they have suffered due to their unlawful discharge. At the hearing, the General Counsel called Region 6 Compliance Officer Jason Scherer to explain the rationale and methodology behind excess tax awards. T 8. Scherer explained that the concept of excess tax refers to the difference in taxes that a discriminatee would have to pay on a lump sum award, versus the amount of taxes he would have had to pay had he received those earnings in the years they would have been earned if the respondent had not unlawfully discharged him. T 12: 22-25; T 13:1-4. In other words, when a discriminatee receives a large lump sum backpay award, that income is taxed at a higher rate than the rate at which the income would have been taxed if the wages had been paid in the years in which they would have been earned. The increased tax burden is a result of the progressive income tax scheme in effect in the United States.

In addition to the excess tax liability due to a lump sum payment, discriminatees may also be subjected to adverse tax consequences in the form of incremental tax. As explained by Scherer, because excess tax in itself is taxable income, the Region takes into consideration that the amount of excess tax compensation actually received by a discriminatee will be further reduced as those amounts are subject to taxation. T13:5-9. In other words, if a discriminatee receives \$5,000 to compensate him for the higher tax rate he will pay as a result of receiving several years backpay as a lump sum payment, the discriminatee will not receive the entire \$5,000, as that amount will be further reduced since it, too, is taxable income. Under these circumstances, the discriminatee might only receive \$3500, instead of the \$5000. The Respondent would then have to compensate the discriminatee an additional \$1500 in order to compensate it for the taxes it would

have had to pay on the \$5000 amount. That additional \$1500 is also subject to tax, so the discriminatee might only receive \$1050. Each reduction is included in the calculation of incremental tax to the point where the discriminatee is fully compensated. GCX 2 at page 11. Excess tax compensation and incremental tax compensation are nothing more than concepts employed by the Board to ensure that discriminatees are truly made whole for the losses that they suffered as a result of their unlawful discharge. In this regard, the ALJ's award of excess tax liability was in no way punitive as argued by Respondent. Accordingly, Respondent's Exception 8 should be denied.

- I. **Respondent has put forth no evidence showing that the award of backpay to Mack would result in a windfall, and its Exception 9 should, therefore, be denied.**

Respondent submits that to avoid a potential windfall to an alleged discriminatee, it was erroneous for the ALJ to refuse to return to the Board's pre-1950s practice of calculating damages annually as opposed to quarterly. Although Respondent argues that the use of quarterly calculations is unfair, Respondent has not demonstrated that the calculations set forth in the Specification, or that the calculations set forth in the ALJ's decision in any way yield a windfall to Mack. Accordingly, Respondent's Exception 9 should be denied.

III. Conclusion

For the above reasons, Counsel for the General Counsel respectfully urges the Board to deny Respondent's exceptions to the ALJ's decision in their entirety.

DATED AT Miami, Florida this 31st day of January, 2019

Respectfully submitted,

/s/ John F. King

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CERTIFICATE OF SERVICE

I hereby certify that the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in the matter of G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation, Case 12-CA-026644 and Case 12-CA-026811 was duly served upon the following individuals by electronic transmittal on January 31, 2019, by the following means:

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