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**International Union of Operating Engineers, Local 627  
and Stacy M. Loerwald.** Case 17–CB–072671

August 6, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On January 29, 2019, Administrative Law Judge Charles J. Muhl issued the attached supplemental decision.<sup>1</sup> The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

<sup>1</sup> The Respondent has questioned whether the judge was validly appointed under the Appointments Clause of the United States Constitution. In *WestRock Services, Inc.*, 366 NLRB No. 157, slip op. at 1–2 (2018), the Board confirmed that it had validly appointed all of its judges, including Judge Muhl.

<sup>2</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent’s exceptions allege that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

We make the following additional observations. First, the Respondent appears to question some of the Board’s findings in the underlying, judicially-enforced decision, including the date on which the Respondent should have returned Loerwald to the out-of-work list. *Operating Engineers, Local 627*, 361 NLRB 908 (2014) (incorporating by reference, with minor modifications, 359 NLRB 758 (2013)), enfd. 635 Fed. Appx. 480 (10th Cir. 2015). However, the Respondent’s statements in this respect are meritless, as it is well settled that issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Paolicelli*, 335 NLRB 881, 883 (2001).

Second, the Respondent, in its exceptions, has not presented any argument challenging the judge’s findings regarding the duration of the backpay period (November 7, 2011, to August 9, 2012) and the amount of money the Respondent owes Loerwald for job-search expenses (\$1013, plus interest). Thus, to the extent the Respondent has excepted to these findings, we find that the exceptions should be disregarded. See Sec. 102.46(a)(1)(ii) of the Board’s Rules and Regulations; *Natural Life, Inc., d/b/a Heart and Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). In any event, we agree with the judge’s description of the backpay period and his finding that the Respondent owes Loerwald \$1013, plus interest, for her job-search expenses.

The Respondent excepts to the judge’s finding that it did not sustain its burden of showing, as an affirmative defense, that Loerwald failed to mitigate the Respondent’s backpay liability. Specifically, the Respondent argues that Loerwald could have obtained interim employment earlier if she had made reasonable efforts to be restored to the Respondent’s hiring hall out-of-work referral list. This exception is without merit. In

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Supplemental Order as modified<sup>3</sup> and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Operating Engineers, Local 627, its officers, agents, and representatives, shall make whole Stacy M. Loerwald and the fringe benefit funds listed below by paying them the amounts set forth below, plus interest accrued to the date of payment, as prescribed in *New Horizons*, 283 NLRB 1173 (1987),

the underlying proceeding, the Board found that “Loerwald put forth a sufficient effort to be placed back on the list.” 359 NLRB at 768. Moreover, the Respondent has not otherwise argued that it satisfied its burden of showing that there were substantially equivalent jobs in the relevant geographic area available to Loerwald during the backpay period. See *St. George Warehouse*, 351 NLRB 961, 967 (2007) (holding that the burden shifts to the General Counsel to produce evidence of the reasonableness of a job search only “when a respondent . . . satisfies its burden of coming forward with evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period”). In any event, even assuming for the sake of argument that the Respondent had sustained its burden in this regard, the General Counsel established that Loerwald reasonably searched for work by showing, inter alia, that Loerwald received unemployment benefits from the State of Oklahoma. See *Pessoa Construction Co.*, 361 NLRB 1174, 1188 fn. 43 (2014) (“The Board has held that the receipt of unemployment compensation under the applicable eligibility rules for such benefits constitutes prima facie evidence of a reasonable search for interim employment.”), enfd. 632 Fed. Appx. 760 (4th Cir. 2015).

Finally, we agree with the judge’s determination that 2011 should be excluded from the representative period of earnings. As the judge found, “Loerwald was removed from the [out-of-work list] on November 7, 2011, leaving only a partial year of earnings. In addition, the Board found in the underlying decision that, in September and October 2011, the Union did not adhere to its hiring hall referral rules. *International Union of Operating Engineers, Local 627*, 359 NLRB at 762, 767.”

<sup>3</sup> We have modified the judge’s recommended Supplemental Order to clarify that Loerwald’s job-search expenses—\$1013, plus interest—constitute a separate item from taxable net backpay. Job-search expenses are not subject to payroll or Social Security taxes. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 6 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). We further clarify that the amounts the Respondent owes to the Operating Engineers Health and Welfare Fund and the Central Pension Fund of the Operating Engineers and Participating Employers on Loerwald’s behalf are to include interest, as alleged in the Compliance Specification. Because the remedy in the underlying unfair labor practice decision did not refer to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), with respect to the amounts due to the Funds, and because the United States Court of Appeals for the Tenth Circuit has enforced the Board’s order, the Respondent shall not be required to pay additional amounts to the Funds pursuant to *Merryweather Optical*. See *NLRB v. Gimrock Construction, Inc.*, 695 F.3d 1188, 1192–1194 (11th Cir. 2012) (the Board may not modify a court-enforced order); *Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006) (same).

compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State laws.

Net Backpay:	\$15,876
Job Search Expenses:	\$ 1,013
Operating Engineers Health and Welfare Fund:	\$ 3,437
Central Pension Fund of the International Union of Operating Engineers and Participating Employers:	\$ 2,949
TOTAL:	\$23,275

IT IS FURTHER ORDERED that the Respondent shall compensate Stacy M. Loerwald for the adverse tax consequences, if any, of receiving a lump sum backpay award, in the manner prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Dated, Washington, D.C. August 6, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Bradley Fink, Esq.*, for the General Counsel.  
*Steven R. Hickman, Esq. (Frasier, Frasier, & Hickman, LLP)*, of  
Tulsa, Oklahoma, for the Respondent.

#### SUPPLEMENTAL DECISION

CHARLES J. MUHL, Administrative Law Judge.<sup>1</sup> This compliance case requires a determination as to how much money Respondent International Union of Operating Engineers, Local 627 owes Charging Party Stacy M. Loerwald to remedy the Union's discriminatory removal of Loerwald from its out-of-work list on November 7, 2011. The Union must make Loerwald whole for

<sup>1</sup> In its answer, the Respondent objected to "any hearing conducted by an administrative law judge. . . who does not meet the requirements of the appointments clause of the U.S. Constitution." However, at the time of the hearing, the Board already had ruled that all of its existing administrative law judges, including me, had been properly appointed under *Lucia v. SEC*, 138 S.Ct. 2044 (2018). See *Westrock Services, Inc.*, 366 NLRB No. 157 (2018). In *Westrock*, the Board concluded that,

any loss of earnings or benefits that resulted from its unlawful conduct.

To do so, the General Counsel's compliance specification alleges the Respondent must pay Loerwald \$15,876 in backpay and \$1013 in job search expenses. The specification also alleges the Respondent must contribute \$3437 to the Operating Engineers Health and Welfare Fund and \$2949 to the Central Pension Fund of the International Union of Operating Engineers and Participating Employers on Loerwald's behalf. The total amount allegedly due is \$23,275, plus interest accrued to the date of payment. The General Counsel arrived at these amounts by using the projection method based upon Loerwald's hours worked in the 2 full calendar years preceding the backpay period. The Respondent disputes the overall amount owed, arguing the General Counsel's method is flawed and proposing its own calculation, which the Union claims is based on the actual referrals Loerwald would have received if she remained on the out-of-work list. The Respondent also contends that Loerwald failed to mitigate her damages. I conclude the use of projected hours to determine the amount due Loerwald is the most accurate method of the two proposed. I also find the Respondent did not sustain its burden of showing Loerwald failed to mitigate her damages. Thus, the amount the Respondent must pay to make Loerwald whole is \$23,275, plus interest.

#### I. BACKGROUND

On August 21, 2012, Administrative Law Judge Eleanor Laws found, among other violations not at issue here, that Local 627 of the International Union of Operating Engineers (the Respondent or the Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act), by arbitrarily and discriminatorily removing Charging Party Stacy M. Loerwald from the Union's out-of-work referral list (OWL) and refusing to permit Loerwald to re-register on the OWL. To remedy these violations, Judge Laws recommended that the Respondent be required to rescind Loerwald's removal from the out-of-work list, restore her to the list in her rightful order of priority, and make her whole for any loss of earnings or benefits that resulted from the Union's unlawful conduct. In a decision and order dated April 17, 2013, the National Labor Relations Board (the Board) adopted Judge Laws' decision in full, with a minor addition to the remedy requiring the Respondent to compensate Loerwald for any adverse income tax consequences of receiving her backpay in one lump sum. *International Union of Operating Engineers, Local 627*, 359 NLRB 758 (2013). On July 2, 2014, the U.S. Court of Appeals for the Tenth Circuit vacated the Board's decision and remanded the case for further processing. The appellate court did so, as a result of the U.S. Supreme Court's June 26, 2014 decision in *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550 (2014). *Noel Canning* invalidated the appointments of certain members of the Board, including two that participated

under *Lucia*, the agency's administrative law judges are inferior officers. Thus, the judges must be appointed in accordance with the Appointments Clause of the U.S. Constitution. That clause requires the appointments to be made by the president, the courts, or the head of department. Because the Board collectively, as the head of department, appointed each of its existing administrative law judges, the appointments comply with the constitutional requirements.

in the first Board decision in this case. On November 5, 2014, the Board issued a second Decision and Order, wherein it considered Judge Laws' decision de novo. The Board affirmed the judge's rulings, findings, and conclusions and adopted her recommended Order, which contained all of the same affirmative obligations described above. *International Union of Operating Engineers, Local 627*, 361 NLRB 908 (2014). On December 3, 2015, the U.S. Court of Appeals for the Tenth Circuit enforced the Board's 2014 order. *International Union of Operating Engineers, Local 627 v. NLRB*, 635 Fed.Appx. 480 (2015).

On June 27, 2018, due to a dispute over the amount of backpay owed, the General Counsel, through the Regional Director of Region 14 of the Board, issued a compliance specification and notice of hearing. On July 13, 2018, the Respondent filed an answer to the specification.<sup>2</sup> The Respondent conceded that it owed Loerwald money but did not agree to the alleged amount.

On October 11, 2018, in Tulsa, Oklahoma, I conducted a trial on the compliance specification. The parties were given a full opportunity to participate in the hearing; to introduce relevant evidence; and to call, examine, and cross-examine witnesses. The General Counsel called Loerwald and Ann G. K. Wright,<sup>3</sup> the compliance officer for Region 14. The Respondent called Michael Stark, the business manager for the Union. On the entire record, including my observation of the demeanor of those witnesses, and after considering the briefs filed by the General Counsel and the Respondent on November 14, 2018, I make the following findings of fact and conclusions of law.<sup>4</sup>

## II. APPLICABLE LEGAL STANDARDS

The Board has long held that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *The Lorge School*, 355 NLRB 558, 560 (2010); *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1991), enfd. 952 F.2d 1393 (3rd Cir. 1991). In a compliance proceeding, the General Counsel's burden is limited to showing the gross backpay due each discriminatee. *St. George Warehouse (St. George Warehouse I)*, 351 NLRB 961, 963 (2007); *Florida Tile Co.*, 310 NLRB 609, 609 (1993). The Board has applied a broad standard of reasonableness in approving numerous methods of calculating gross

<sup>2</sup> In its answer, the Respondent denied every sentence of the compliance specification. Many of the denials were supported by additional arguments. However, the only arguments I have considered are the issues the Respondent raised at the hearing or in its posthearing brief. The Respondent has waived all other arguments. See, e.g., *SBC Midwest*, 346 NLRB 62, 64 fn. 8 (2005); *Compact Video Services, Inc.*, 319 NLRB 131, 144 (1995). The Respondent also included almost 300 pages of attachments in the answer to support its alternative calculation of the amount owed to Loerwald. Although the answer and attachments are in the record (GC Exh. 1(g)), those formal papers are not evidence under Sec. 10(b) of the Act or Sec. 102.39 of the Board's Rules and Regulations. See, e.g., *South Alabama Plumbing*, 333 NLRB 16, 22 (2001); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 679–680 fn. 12 (1993). Thus, I have not considered the attachments to the Respondent's answer, except those that were independently offered and received into evidence as an exhibit at the hearing.

<sup>3</sup> This is the proper spelling of Ms. Wright's first name.

<sup>4</sup> In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. In assessing witnesses' credibility, I have considered their

backpay. *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001). Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable, if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). The Board is required only to adopt a formula which will give 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). Nonetheless, where it is presented with conflicting backpay formulas, the Board must determine the most accurate method for computing backpay. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998). The objective is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period, if no unlawful action had occurred. *American Mfg. Co. of Texas*, 167 NLRB 520, 520 (1967).

Once the General Counsel shows the gross backpay owed, the burden shifts to the respondent to establish facts that negate or mitigate its liability. *St. George Warehouse*, 351 NLRB at 963; *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), enfd. 260 Fed. Appx. 607 (4th Cir. 2008). Any uncertainty about how much backpay should be awarded to a discriminatee should be resolved in the discriminatee's favor, and against the respondent whose violation caused the uncertainty. *The Lorge School*, supra at 560.

### III. WAS THE GENERAL COUNSEL'S METHOD OF CALCULATING BACKPAY THE "MOST ACCURATE" ONE?

#### A. The General Counsel's Use of the Projection Method

To calculate Loerwald's backpay, the General Counsel utilized a projection method. Estimating gross backpay, including overtime, with this method is conventional and noncontroversial. *East Wind Enterprises*, 268 NLRB 655, 656 (1984). Gross backpay is estimated by projecting over the backpay period the discriminatee's earnings and hours worked during a representative period prior to the unlawful action. *Intermountain Rural Electric Assn.*, 317 NLRB 588, 593 (1995). Loerwald's backpay period runs from November 7, 2011 to August 9, 2012.<sup>5</sup>

demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed.Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions herein.

<sup>5</sup> In its answer, the Respondent generally denied the General Counsel's allegation that the backpay period ran from November 7, 2011, to August 9, 2012. The Respondent's only additional statement was "the order and order and judgment speak for themselves." No alternative backpay period dates or explanation for alternative dates was provided. Moreover, the Board's order does not address the end date of the backpay period in any manner. Thus, the answer fails to comply with Sec. 102.56(b) of the Board's Rules and Regulations. That rule states a "general denial" to dispute a premise of the backpay computation will not suffice. The rule also requires the answer to detail the Respondent's position and furnish appropriate "supporting figures" or, in this context,

Wright testified concerning how she computed Loerwald's gross backpay. Wright projected the hours Loerwald would have worked during the backpay period, based upon the actual hours she worked out of the Respondent's hiring hall in 2009 and 2010. (Tr. 24–42.) To determine Loerwald's total work hours each year, Wright relied upon information and documents provided by Loerwald, as well as records from the Oklahoma Operating Engineers Welfare Plan. Wright determined that Loerwald worked 739.5 straight-time hours and 256.5 overtime hours in 2009. She worked 564 straight-time hours and 111.5 overtime hours in 2010. During the 2-year period, then, Loerwald worked an average of 12.53 regular hours and 3.54 overtime hours each week. To determine Loerwald's wage rate, Wright utilized the collective-bargaining agreement between the Respondent and the Oklahoma Commercial and Industrial Builders and Steel Erectors Association. Wright chose the Group V hourly wage rate therein, because most of the equipment Loerwald was qualified to operate fell into that group. (GC Exh. 2, pp. 15–16; GC Exh. 3.) Wright used this method to determine the wage rate, since the Respondent did not provide her with payroll records showing which wage groups Loerwald was referred out under during 2009 and 2010.<sup>6</sup>

*B. The Respondent's Proposed Alternative Method for Calculating Backpay*

The Respondent objects to the General Counsel's selection of the projection method to calculate Loerwald's backpay. The Union argues that the most accurate method for doing so is to recreate its actual referral history and determine which jobs Loerwald would have been referred to during the backpay period, if she had remained on the OWL. At the hearing, the Respondent introduced into evidence its dispatch histories for the District I Tulsa office and the District II Oklahoma City office during the backpay period. (R. Exhs. 5, 6, 7, and 8.) Those records include the name of the operator dispatched; the date of the dispatch;<sup>7</sup> the contractor to which the operator was dispatched; and, for some entries, the equipment the operator used. The Respondent also introduced Loerwald's work and dispatch history, as well as her qualifications form. (R. Exhs. 9, 10, and 11; see also GC Exhs. 3 and 4.) Finally, the Respondent entered into evidence qualifications forms, dispatch histories, work histories,

dates. The failure to do so is an admission. At the hearing, the Respondent stated only that the backpay period should be "shorter," due to Loerwald's failure to mitigate her damages. (Tr. 18.) Once more, it did not offer specific, alternative dates. In its brief, the Respondent makes no argument regarding the dates of Loerwald's backpay period, but again claims it should be shorter because Loerwald failed to mitigate her damages. Therefore, I find that the Respondent has admitted the specific dates of Loerwald's backpay period. I address the Respondent's failure-to-mitigate argument in Section IV below.

<sup>6</sup> In addition to Wright's stated reasons for using the Group V wage rate, I credit Loerwald's testimony that, for a majority of the time in 2009 and 2010, she was sent out on Group V jobs. (Tr. 126–128, 145–149, 175–176.) Stark said he was "not sure" if she was referred out on Group V jobs prior to the backpay period, but he had not personally done so. (Tr. 258.) Moreover, Loerwald's referral records for 2009 and 2010 do not identify the wage rate she was paid on each job. (R. Exhs. 9 and 10.) Accordingly, I find Wright's use of the Group V wage rate to determine Loerwald's backpay is reasonable.

and work hours reports for seven other operators, which it claims are comparable employees to Loerwald.<sup>8</sup> (R. Exhs. 12–18.) Thereafter, Stark testified at length concerning the Respondent's dispatch history, attempting to reconstruct the jobs to which the Union would have dispatched Loerwald from November 7, 2011 to August 9, 2012. (Tr. 203–236.)

In theory, the Respondent's approach could produce the most accurate backpay figure, because it is premised on the actual job referrals the Union made. Where a single job referral was at issue, the Board has approved of this method. In *Chauffeurs, Teamsters & Helpers Local Union No. 186*, 319 NLRB 151 (1995), a union removed a business agent from his position, placed him at the top of its out-of-work list, and then referred him to a specific construction job. In the underlying decision, the Board found the union's conduct violated Section 8(b)(1)(A) and (2). The Board ordered the union to make whole the registrant on the list who should have been referred to the construction job. In the subsequent compliance proceeding, the union contended that the registrant at the top of the list would not have been referred to the job. It argued, in part, that the registrant turned down three referrals prior to the referral date and, as a result, should have been at the bottom of the list. The judge rejected that claim as unsubstantiated by the evidence and awarded make-whole relief to the registrant who was next on the list. The remedy was comprised of backpay for the one construction job and pension contributions, both based on actual hours worked.

The Board's Compliance Manual, Section 10546 on Gross Backpay, also provides support for the Respondent's position.<sup>9</sup> The manual first sets forth the general proposition that, when a union is the respondent, the method of calculating gross backpay is the same as in other cases. Thus, the gross backpay is calculated on the basis of what employment the discriminatee would have received had the unlawful action not taken place. The manual then specifically states: "If a union unlawfully fails to refer a discriminatee from its hiring hall, gross backpay will be based on what employment and earnings would have resulted from that referral." The manual then notes that hiring hall records should provide information concerning which employees were referred and to which employers.

The problem for the Respondent here is its application of the theory, which is speculative and unreliable. *Chauffeurs Local*

<sup>7</sup> The Respondent entered the referral records into evidence with numerous dates cut off and unreadable in the documents. The Respondent was advised of the issue at the hearing but did not provide corrected copies to the court reporter. (Tr. 190.)

<sup>8</sup> A work history report was not included for employee Dustin Schultz. (R. Exh. 13.)

<sup>9</sup> In its brief, the Respondent asserts the compliance manual, which is issued by the General Counsel, is binding legal authority in this proceeding. The assertion is incorrect, as the Board has held the manual provides only guidance. See, e.g., *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn. 4 (2007); *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996). The compliance manual likewise states in its introduction that it is intended to be used for guidance only and does not bind the Board. The Board and administrative law judges frequently have used the manual as guidance in compliance proceedings, as I do here. See, e.g., *Lou's Transport*, 366 NLRB No. 140, slip op. at 4–5 (2018); *St. George Warehouse*, 351 NLRB at 963.

186 involved recreating only one job referral. Determining who should have been referred to a single job was a straightforward task. That is far from the situation in this case. The Union's records establish that it made 292 referrals of employees to jobs during Loerwald's backpay period. Although the contractor's name is included in the record, the job is not. The equipment the operator used is not always listed. The qualifications an operator needed for the work are not included. Even if they were, the operator qualification forms in the record are unclear and inaccurate, providing no sound basis to determine what specific qualifications each operator had.<sup>10</sup> Loerwald herself also had certain restrictions that prevented her from being referred to all available jobs. But the record is silent as to any similar restrictions the other operators had. As to the alleged seven comparable employees, the Respondent neither offered any evidence as to how and why these individuals were chosen, nor explained how the seven were relevant to its backpay calculation.

The Respondent itself has established the unreliability of its backpay calculation, by coming to two different conclusions concerning the actual jobs to which it would have referred Loerwald. During the compliance investigation, Stark, the Respondent's counsel, and an unidentified dispatcher reviewed the Union's dispatch histories and other documentation described above.<sup>11</sup> (Tr. 203–204, 256.) They determined that Loerwald would have been referred to four jobs and worked 468½ hours. (R. Exh. 19,<sup>12</sup> p. 2.) One of those jobs was a referral to Builders Steel, where Steven Farrell worked 100 hours. However, in its posthearing brief, the Respondent contends that Loerwald only would have been referred to three jobs and worked 368½ hours, no longer giving the Builders Steel referral to her. No explanation is provided for this inconsistency, but, at the hearing, Stark testified with uncertainty regarding whether Loerwald would have gotten the job now excluded. (Tr. 222–223.)

Stark's uncertain and inconsistent testimony about the referral reconstruction did not end there. First, another referral the Union gave Loerwald during the compliance investigation was to Bennett Steel, where Shane Nelson worked 130 hours. At the hearing, Stark initially stated that job was at a refinery. But Loerwald is unable to pass the background check necessary to work at refineries, meaning she could not have been referred there. When counsel noted for him that they had put Loerwald down for that job, Stark suggested the job did not have to be at a refinery, but "it could have very well been." (Tr. 233–234.) Next, Stark stated it was possible Loerwald could have been referred to a

different job at Builders Steel that went to Brett Hinkle, even though the Union did not include that one in either of its calculations. (Tr. 216.) Finally, Stark said it was possible that Loerwald could have been referred to a third job at Builders Steel that went to Dustin Schultz, but that too was not included in the Union's calculations. (Tr. 224–225.) Beyond these specific examples, Stark's testimony included a staggering number of qualifiers, leaving a distinct impression of unreliability.<sup>13</sup> Moreover, at various points during this testimony, the Respondent's counsel essentially was testifying himself through the use of leading questions, without being subjected to cross-examination.

In *East Wind Enterprises*, 268 NLRB 655 (1984), the General Counsel proposed using the projection method to determine the backpay owed to an individual who was wrongfully discharged. The employer contended that work conditions changed after the discharge, such that the quantity of work the claimant would have performed in the backpay period was substantially reduced. Thus, the employer argued, the projection method was inaccurate. Instead, the employer proposed an examination of the work actually done by its employees during the backpay period to determine which portions of it would have been performed by the claimant. The Board rejected this argument by adopting the judge's conclusion that the projection method was the most accurate one. In reaching this conclusion, the judge first noted that the employer's formula, in theory, was a better one for calculating backpay, because it used the actual work of the employer to measure what the claimant would have been paid. However, the application of the formula to the claimant's specific situation was too complicated and required too many speculative assumptions. The judge noted that, on the record there, the "quantification of work that would have been assigned to the backpay claimant is simply not susceptible to certain resolution..." That conclusion applies with equal force in this case. The Respondent's referral reconstruction is rife with uncertainties. That the Respondent had difficulty determining the referrals which Loerwald would have received is not the least bit surprising, given the information deficiencies in the records as described above and the more than 6 years that have passed since the referrals were made. It is impossible to independently reconstruct what referrals Loerwald would have received using the Respondent's records and Stark's testimony. When available records made it impossible to reconstruct what referrals would have been made out of a hiring hall, the Board approved an alternative method of approximating gross backpay. See *Laborers Local 135 (Bechtel Power Corp.)*,

<sup>10</sup> For example, Loerwald has been qualified to operate a forklift and an oiler since at least September 29, 2009. (GC Exhs. 3 and 4; Tr. 126.) However, according to the Union's qualification form for her, Loerwald was not qualified to operate a forklift until February 15, 2014, and was never qualified to operate an oiler. (R. Exh. 11.) Nonetheless, the Respondent's referral reconstruction has Loerwald being sent out to jobs in both classifications during the backpay period, confirming her qualifications form is inaccurate.

<sup>11</sup> The Respondent did not call the dispatcher to testify at the hearing. The record also does not establish who actually was making job referrals for the Union during Loerwald's backpay period.

<sup>12</sup> Absent objection, the Respondent entered into evidence a two-page, typewritten calculation that is undated and unsigned; has no letterhead; and contains handwritten notes from the Respondent's counsel made

prior to the hearing. The record does not establish whether this document was submitted to the General Counsel during the compliance investigation. (Tr. 237–238; R. Exhs. 2, 3, 19.) Nonetheless, I assume that the General Counsel received R. Exh. 19 prior to the hearing.

<sup>13</sup> Stark used in the neighborhood of 100 qualifiers over 36 transcript pages of direct testimony on this issue. They included "probably;" "I think" or "I don't think;" "may have been," "may not have been," "might have been," and "maybe;" "I am not sure" or I am "pretty sure;" "I guess;" "I believe" or "I don't believe;" "I don't know;" "possible" or "possibly;" and "it looks like" or "it doesn't look like." At other points in the referral reconstruction testimony, Stark stated, "I am not positive;" "I am going to say;" "I can't tell from this;" "I'm assuming;" "as far as I know;" and "I don't have a clue on that one."

301 NLRB 1066 (1991), and 311 NLRB 617 (1993). Because the Respondent's method for calculating Loerwald's backpay is speculative and unreliable, I conclude that the General Counsel's projection method is the "most accurate" of the two proposed, in the circumstances of this case.<sup>14</sup>

*C. The General Counsel's Exclusion of 2011 from the Computation of Loerwald's Average Weekly Hours*

The Respondent also argues that the General Counsel improperly excluded Loerwald's 2011 work hours from its projection. Loerwald's welfare fund report shows she worked 409 hours in the period from January 1 to November 7, 2011, with all the work occurring from February through May. (GC Exh. 5, p. 2.) Wright acknowledged that this period was closest in time to the backpay period. But she testified she did not include 2011 when calculating Loerwald's projected hours, because 2011 was the year the Respondent discriminatorily removed her from the OWL. (Tr. 80–81, 104–105.) Wright further stated it was reasonable to conclude the Union's discrimination against Loerwald could have occurred prior to November 7, 2011, based upon the judge's finding in the underlying decision that the Union did not strictly adhere to its hiring hall rules.

In this regard, I find the General Counsel's approach to be reasonable. Loerwald was removed from the OWL on November 7, 2011, leaving only a partial year of earnings. In addition, the Board found in the underlying decision that, in September and October 2011, the Union did not adhere to its hiring hall referral rules. *International Union of Operating Engineers, Local 627*, 359 NLRB at 762, 767. In September 2011, one of the Union's business agents, Alan Farris, referred two people who were below Loerwald on the OWL to a new job, even though she should have been referred to it first. In October, Farris admitted to Loerwald that "a bunch of people" refused a job three times, but he had not yet moved them to the bottom of the OWL, as required by the bylaws and OWL procedures. In addition, from October 13, 2011, to March 30, 2012, another operator remained on the OWL list without a working telephone number, also in contradiction of the OWL procedures. For the period prior to September 2011, the Board's decision is ambiguous as to whether the Union failed to strictly adhere to its hiring hall referral rules. Stark took over as the Respondent's business manager in August 2011. 359 NLRB at 760. Upon taking office, he replaced the business agents at both Oklahoma districts. In addition, the Respondent's regional director asked Stark to "implement a

<sup>14</sup> In arguing against the projection method, the Respondent also contends the "Great Recession" dramatically decreased the work hours of employees during Loerwald's backpay period. The Respondent relies only on the fact that Loerwald's work hours decreased from 996 hours in 2009 to 675.5 hours in 2010 and to 409 work hours in 2011. Based on these decreases, the Respondent claims Loerwald's hours during the backpay period would have been far less than the 2-year average for 2009 and 2010. I find the record evidence insufficient to establish that fact. Stark testified in conclusory fashion that work on building projects and at oil fields slowed as a result of the recession. But the Respondent did not introduce any documents showing that overall work hours or referrals out of the Union's hiring halls decreased in 2012. The Union obviously has access to those records. The Respondent also concedes that work in the construction industry varies, meaning decreases in two consecutive years do not necessarily forebode a decrease the next year. Absent a

stronger adherence to the Union's procedures and bylaws." Stark also testified that "the administration before his did not strictly follow the written protocols." Although Stark provided no further details, these findings strongly suggest the prior union administration also was not complying with the hiring hall rules. In any event, the ambiguity in this regard must be construed against the Respondent as the wrongdoer. Accordingly, I find the General Counsel properly excluded 2011 from the hours projection for Loerwald.<sup>15</sup>

*D. Job Search Expenses*

In the compliance specification, the General Counsel seeks \$1013 in job search expenses for Loerwald. The government has the burden of establishing a discriminatee's search-for-work expenses and interim-employment expenses that exceed what would have been incurred working for the Respondent. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 8 (2016), *enfd.* in pertinent part 859 F.3d 23, 36–39 (D.C. Cir. 2017). Such expenses are awarded if they are "both reasonable and actually incurred," "regardless of the discriminatees' interim earnings and separately from taxable net backpay, with interest." *Ibid.* Accord: *Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 6 (2018). See also *Lou's Transport, Inc.*, 366 NLRB No. 140, slip op. at 6 (respondent was liable for the discriminatee's additional commuting expenses to and from his interim employer regardless of his interim earnings).

Wright testified that her job expense figure for Loerwald included expenses Loerwald incurred through local and out-of-state travel while searching for work. (Tr. 47–49, 54–64; GC Exh. 9.) The bulk of the travel expenses was for a trip Loerwald took to Houston, Texas from August 7 to August 9, 2012 to register at the hiring hall of International Union of Operating Engineers, Local 450. (Tr. 121–125, 138, 140–141, 144; GC Exhs. 8 and 11.) That local required operators to register in person. The Houston expenses included lodging, meals, incidental expenses, and mileage. Wright used the federal government's reimbursement rates for those expenses. (GC Exhs. 12 and 13.) The remaining expenses were mileage reimbursement for Loerwald's local travel, including to the Respondent's office in Oklahoma City. (Tr. 122–124.) Although it denied the job search expense allegations in its answer, the Respondent did not offer any evidence to contradict Wright's and Loerwald's testimony or the documentary evidence. The Respondent also does not offer any argument in its brief for why the expense figure is incorrect.

specific evidentiary showing that overall work hours out of the hiring hall decreased in 2012, it is improper to assume that Loerwald's hours would have decreased in that year. See *Weldun International, Inc.*, 340 NLRB 666, 672–673 (2003).

<sup>15</sup> The Respondent's lack of strict adherence to its referral procedures in September and October 2011, the 2 months immediately prior to the backpay period, is yet another reason to reject its alternative method for computing backpay. The Respondent's backpay calculation requires the assumption that the Union changed its ways and fully abided by its referral rules immediately thereafter in November 2011. Nothing in the Board decision or in the record evidence in this case establishes that fact. If the failure to follow the referral rules continued into the backpay period, the actual referral list used by the Respondent in its calculations would be unreliable.

Thus, I conclude the General Counsel's request to reimburse Loerwald for job search expenses totaling \$1,013 is reasonable.

#### E. The Gross Backpay Calculation

Before setting forth the gross backpay due Loerwald, two additional issues warrant discussion. First, Loerwald testified without contradiction that she had no interim earnings during the backpay period. (Tr. 135; GC Exh. 9.) Although the Respondent denied this allegation, it neither offered proof at the hearing nor made any argument in its brief to the contrary. Thus, I credit Loerwald's testimony and find she had no interim earnings, meaning her gross and net backpay are the same. Second, the Respondent concedes that a component of Loerwald's backpay is contributions to both the health and pension funds. The Respondent only disputes the total hours for which these contributions must be made. As a result, those contributions are a part of Loerwald's make-whole remedy. Contributions to those funds are made based on total work hours, without distinguishing between regular and overtime hours.

With all that said, the total amounts due to Loerwald are:

Net Backpay	\$15,876
Job Search Expenses	\$ 1,013
Health and Welfare Fund	\$ 3,437
Pension Fund	\$ 2,949
TOTAL	\$23,275

#### IV. DID LOERWALD FAIL TO MITIGATE HER DAMAGES?

Having established the backpay figure, the burden shifts to Respondent to establish facts that negate or mitigate its liability. Any uncertainty as to mitigation will be resolved against the Respondent, since its unlawful actions against Loerwald caused the uncertainty. The Respondent argues its liability should be reduced, because Loerwald failed to mitigate her damages. To sustain its burden that Loerwald failed to make a reasonable search for work, the Respondent first must establish there were substantially equivalent jobs within the relevant geographic area. *Teamsters Local 25*, 366 NLRB No. 99, slip op. at 2 (2018); *St. George Warehouse*, 351 NLRB at 961.

The Respondent seeks to sustain its burden, not by arguing substantially equivalent jobs existed, but by claiming Loerwald could have obtained employment sooner through the Union's own hiring hall. The Respondent points to its August 3, 2012 deposition of Loerwald in a different case. (Tr. 169–175.) Loerwald was asked if she wanted to be on the OWL and replied yes. She then was asked for her phone number and provided it. The Respondent subsequently returned her to the OWL as of that date. (GC Exh. 14.) The Respondent argues it would have put Loerwald back on the OWL if, at any earlier point in the backpay period, she simply had gone to the Respondent's office, requested to be put back on the list, and provided a phone number where she could be contacted.

I reject the Respondent's contention, as the Board's underlying decision already addressed and rejected this defense. *International Union of Operating Engineers, Local 627*, 359 NLRB at 763, 767–768. The Board found that, on November 7, 2011, the Respondent removed Loerwald from the OWL for not having a working phone number. On November 8, 2011, Loerwald's

attorney sent the Respondent a letter in which he stated Loerwald had provided a working phone number—her attorney's number. Nonetheless, the Respondent did not put her back on the OWL. The Board concluded that, as of November 8, 2011, Loerwald met the OWL requirements and the Respondent should have placed her back on the list. The Board rejected the Respondent's argument that Loerwald never requested to be put back on the OWL, instead finding she had done so multiple times after being removed from the list. The remedy for the Respondent's discriminatory removal of Loerwald from the OWL included restoring her to the list in her rightful order of priority. Having found that Loerwald requested to be put back on the list and met the OWL requirements as of November 8, 2011, the onus was on the Respondent to place her back on the list in order to mitigate its backpay liability. Indeed, once the Respondent returned her to the OWL in August 2012, the General Counsel terminated the backpay period. Accepting the Respondent's failure-to-mitigate argument would run roughshod over the Board's decision.

The Respondent relies on cases that do not support its argument and/or have no bearing on mitigation. In *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982), the U.S. Supreme Court held that an employer could toll a backpay award for a discriminatory refusal to hire, by offering the applicants the jobs previously denied without retroactive seniority. However, the case involved a claim under Title VII of the Civil Rights Act of 1964, not the National Labor Relations Act. In any event, the Court's decision actually undercuts the Respondent's argument. The discriminatees there did not have to resubmit their job applications or ask to be hired again in order to mitigate their damages. Rather, the employer had to offer them the original jobs for which they applied. Similarly here, Loerwald did not have to ask once more to be put back on the OWL. The Respondent was required to place her back on the list in the proper order of priority. *Jackson v. City of Albuquerque*, 890 F.2d 225 (10th Cir. 1989), involved a Section 1983 civil rights claim (42 U.S.C. § 1983), not the National Labor Relations Act. A jury found that the plaintiff, a city employee, was unlawfully discharged due to his race. The trial court awarded the employee front pay, instead of reinstatement. The reinstatement denial resulted from an “impossibly high” level of “general hostility” between the plaintiff and defendants. The appellate court reversed the denial of reinstatement, finding insufficient evidence for the trial court's hostility conclusion. In that same vein, *Marshall v. TRW, Inc.*, 900 F.2d 1517 (10th Cir. 1990), involved a retaliatory discharge lawsuit brought under Oklahoma state law, where the plaintiff claimed he was discharged for filing a worker's compensation claim. The case likewise did not involve the National Labor Relations Act. In addition, the appellate court again held that reinstatement was an appropriate remedy, in lieu of front pay, because the record lacked any evidence of hostility in the workplace. Thus, these latter two cases addressed whether reinstatement was an

appropriate remedy, not mitigation of damages.<sup>16</sup> No question exists that Loerwald was entitled to be reinstated to the OWL, in order to remedy the Respondent's unlawful conduct. None of these cases stand for the proposition that Loerwald was required to ask to be put back on the OWL to mitigate her damages.

Accordingly, I find that the Respondent has not met its failure-to-mitigate burden of showing that substantially equivalent jobs existed in the relevant geographic area.<sup>17</sup>

#### SUPPLEMENTAL ORDER

It is hereby ordered that the Respondent, International Union of Operating Engineers, Local 627, based in Oklahoma City and Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall make whole Stacy M. Loerwald by paying her \$16,889, plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010),

and minus tax withholdings required by Federal and State laws. In addition, the Respondent shall reimburse Stacy M. Loerwald for any adverse tax consequences of receiving a lumpsum backpay award calculated for the calendar year in which the payment is made, as prescribed in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), allocating the backpay award to the appropriate calendar years as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).<sup>18</sup> In addition, the Respondent shall make whole the Operating Engineers Health and Welfare Fund by contributing \$3,437 on Loerwald's behalf and the Central Pension Fund of the International Union of Operating Engineers and Participating Employers by contributing \$2949 on Loerwald's behalf, as well as any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Dated, Washington, D.C., January 29, 2019.

<sup>16</sup> Of course, appellate court decisions, including the two from the 10th Circuit Court of Appeals, are not binding precedent on the NLRB. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004).

<sup>17</sup> In its brief, the Respondent asserts that my rulings at the hearing demonstrated bias and prejudice against it. However, the Respondent therein neither requests that I withdraw from this case, nor seeks any other relief. The Respondent also did not file a motion to disqualify me or an affidavit setting forth in detail the matters alleged to constitute the

grounds for my disqualification, as required by Sec. 102.36 of the Board's Rules and Regulations. Having no proper motion before me, I decline to address the Respondent's claim.

<sup>18</sup> The compliance specification did not allege that the Respondent owed any money due to the adverse tax consequences of Loerwald receiving her backpay in a lump sum in 2018. (GC Exh. 1(c), pp. 4-6 and Appendix C.) However, that calculation may change based upon the year in which the Respondent actually renders the payment to Loerwald.