

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

AMPERSAND PUBLISHING, LLC d/b/a SANTA  
BARBARA NEWS-PRESS

and

Case 31-CA-028589  
31-CA-028661  
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31-CA-028733  
31-CA-028734  
31-CA-028738  
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31-CA-029076  
31-CA-029099  
31-CA-029124

GRAPHIC COMMUNICATIONS CONFERENCE,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

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

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## I. PROCEDURAL BACKGROUND<sup>1</sup>

The Board issued a Decision and Order on the underlying unfair labor practice allegations in these cases on September 27, 2012 (Original ULP Decision), finding that Respondent committed numerous and significant unfair labor practices, in violation of Section 8(a)(1), (3), and (5) of the Act. 358 NLRB 1415 (2012).<sup>2</sup> The Board subsequently issued an Order Denying Motion for Reconsideration and Modifying Remedy on May 31, 2013 (Order Modifying Remedy), addressing and confirming certain affirmative remedial provisions in the Original ULP Decision. 359 NLRB 1110 (2013).<sup>3</sup> The Board later affirmed both decisions on March 17, 2015, following the U.S. Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (Final ULP Decision). 362 NLRB 252 (2015).<sup>4</sup>

Several portions of the Board's affirmative remedy are now the subject of these compliance proceedings. In the Final ULP Decision issued on March 17, 2015, the Board ordered that Respondent take the following affirmative actions, among others, to remedy its unfair labor practice violations:

- b) Reimburse the Union for its costs and expenses incurred in collective bargaining from November 13, 2007, until the date on which the last negotiation session occurred;
- c) Make unit employees whole for any losses they may have suffered as a result of the discontinuation of the program of merit pay raises for the performance years 2006 – 2008 and the change in the timing of employee-supervisor performance evaluation meetings, with interest;

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<sup>1</sup> References to the transcript in this matter are identified as "Tr.," followed by the appropriate page and line numbers. References to the General Counsel's Exhibits are identified as "GC Ex. \_\_\_." References to Respondent's Exhibits are noted as "R Ex. \_\_\_."

<sup>2</sup> The Original ULP Decision is included in the record as GC Ex. 1(a).

<sup>3</sup> GC Ex. 1(b).

<sup>4</sup> GC Ex. 1(d).

d) Make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral use of the nonunit employees of contract agencies or other nonemployees, with interest;

...

g) Make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the unlawful employment actions against them, with interest; and

h) Compensate Dennis Moran and Richard Mineards and other unit employees for the adverse tax consequences of receiving a lump-sum backpay award.

362 NLRB at 253-54. The Board's Final ULP Decision, including these remedial provisions, was fully enforced by the U.S. Court of Appeals, District of Columbia Circuit, on March 3, 2017 (Court Order). 2017 WL 1314946 (D.C. Cir. 2017).<sup>5</sup> Subsequently, on March 22, 2017, these cases were transferred from Region 31 to Region 27 of the Board.<sup>6</sup>

On July 13, 2018, the Regional Director for Region 27 (Regional Director) issued a Compliance Specification and Notice of Hearing (Specification). The Specification provides the calculations of the affirmative financial remedies owed by Respondent for its various unfair labor practices in five general categories: (1) Section II, and incorporated Appendices A-1 and A-2, specify the Union's costs and expenses incurred in collective bargaining (Bargaining Expenses Remedy); (2) Section III, and incorporated Appendices B-1 through B-32, specify the backpay owed to employees for the loss of merit pay raises for performance years 2006 through 2008 (Merit Pay Remedy); (3) Section IV, and incorporated Appendices C-1 through C-7, specify the backpay owed to employees for Respondent's use of non-employees to perform bargaining unit work (Remedy for Use of Nonunit Employees); (4) Section V, and incorporated Appendices D-1 and D-2, specify the backpay owed to Dennis Moran (Moran) and Richard Mineards (Mineards) for

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<sup>5</sup> GC Ex. 1(e).

<sup>6</sup> See *Santa Barbara News-Press*, 368 NLRB No. 65, slip op. 1, fn. 4 (2019); GC Ex. 1(r).

the unlawful employment actions taken against them (Moran and Mineards Backpay Remedy); and (5) Section VIII, and incorporated Appendix E, specify the amounts owed to employees for the adverse tax consequences resulting from their receipt of lump-sum backpay awards (Excess Tax Remedy). (GC Ex. 1(f), pp. 3-16).

The Specification also contains related allegations regarding the calendar quarters used in the calculations (Section I), the fact that Respondent has made no payments to satisfy any of its obligations under the Board's Final ULP Decision (Section VI), the Respondent's requirement to file a report with the Regional Director allocating backpay awards to the appropriate calendar year (Section VII), and a summary of the total award owed (Section IX). (GC Ex. 1(f), pp. 2, 13-14, 16-17).

On August 2, 2018, Respondent filed its Response to the Compliance Specification. (GC Ex. 1(h)). On August 6, 2018, Respondent filed an Errata to its Response to the Compliance Specification and a corrected Response to the Compliance Specification (Answer). (GC Ex. 1(i)).

Significant portions of Respondent's Answer failed to meet the requirements of Section 102.56(b) of the Board's Rules and Regulations, Series 8, as amended (Rules). As such, the General Counsel filed a Motion for Partial Summary Judgment (Motion) with the Board. On January 31, 2019, the Board issued an Order Transferring Proceedings to the Board and a Notice to Show Cause why the General Counsel's Motion should not be granted (Notice to Show Cause). (GC Ex. 1(p)). In responding to the Notice to Show Cause, Respondent filed an Amended Response to the Compliance Specification on February 22, 2019 (Amended Answer). (GC Ex. 1(q)).

On September 3, 2019, the Board issued a Decision and Order on the General Counsel's Motion (Decision on Summary Judgment), granting the Motion in full. 368 NLRB No. 65 (2019).<sup>7</sup> With respect to the Bargaining Expenses Remedy alleged in Section II of the Specification, the Board granted summary judgment of Section II(a), which alleges that the period of reimbursement for the Bargaining Expenses Remedy spans from November 13, 2007 to January 10, 2013. (GC Ex. 1(f), pg. 3). The General Counsel did not seek summary judgment on the remaining allegations in Section II(b) through (d) of the Specification. The Board remanded those remaining allegations for a hearing. *Id.* at slip op. 3, fn. 11.

The Board granted all of the provisions of the Specification related to the Merit Pay Remedy (Sections III(a) through (p)), as well as the totality of the incorporated Appendices B-1 through B-32. *Id.* at slip op. 3. Included in the granted allegations is Section III(m), which states that “[t]he backpay period for current employees who suffered losses as a result of the discontinuation of the program of merit pay raises...does not toll until the proper wage rate is being paid.” (GC Ex. 1(f), pg. 8).

The Board granted all of the Specification provisions related to the Remedy for Use of Nonunit Employees (Sections IV(a) through (r)), as well as the totality of the incorporated Appendices C-1 through C-7. *Id.* at slip op. 3.

The Board granted Section V(a) through (i), (l) through (m), and (q) of the Specification, which encompass the measure of gross backpay owed to Moran and Mineards, and other related allegations on subjects that are within Respondent's knowledge. The Board also granted the portions of incorporated Appendices D-1 and D-2 relevant to the measure of gross backpay. *Id.* at slip op. 3, fn. 11. The General Counsel did not seek summary judgment on provisions of the

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<sup>7</sup> GC Ex. 1(r).

Specification, and related portions of Appendices D-1 and D-2, pertaining to Moran's and Mineards' interim earnings and interim medical expenses, or the total net backpay owed to each of them. The Board did not grant summary judgment on these provisions (Section V(j), (k), (n) through (p), and (r) through (w)), and instead remanded these matters for a hearing. *Id.* at slip op. 3, fn. 11.

The Board granted the entirety of the Excess Tax Remedy alleged in Section VIII of the Specification. *Id.* at slip op. 3. The Board granted the calculations set forth in incorporated Appendix E, except for the specific amounts calculated for Moran and Mineards. However, the Board stated that adverse tax consequences for Moran and Mineards must be defrayed, and Respondent is precluded from arguing to the contrary on remand. *Id.* at slip op. 3, fn. 11.

Finally, the Board granted related allegations in the Specification regarding the calendar quarters used in the calculations (Section I), the fact that Respondent has made no payments to satisfy any of its obligations under the Board's Final ULP Decision (Section VI), and Respondent's requirement to file a report with the Regional Director allocating backpay awards to the appropriate calendar year (Section VII). *Id.* at slip op. 3. The Board also granted summary judgment with respect to the appropriate interest formula to be used to calculate the interest Respondent will owe on the final remedy, once it is prepared to pay. In this respect, the Board stated that Respondent will owe "interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010)." *Id.* at slip op. 3, fn. 9.

On September 5, 2019, the Regional Director issued an Order Scheduling Hearing, setting a date for the hearing on the remanded portions of the Specification that were not granted by the

Board's Decision on Summary Judgment. The hearing was scheduled for December 10, 2019. (GC Ex. 1(s)).

Before the hearing, on November 15, 2019, the Regional Director issued an Amendment to Compliance Specification (Amendment to the Specification). The Amendment to the Specification amends certain portions of Section II, pertaining to the Bargaining Expenses Remedy. The Amendment to the Specification leaves intact Section II(a), which was granted by the Board's Decision on Summary Judgment. The Amendment to the Specification replaced the remaining allegations in Sections II(b) through (d) with revised allegations labeled Sections II(b) through (m). The Amendment to the Specification also replaced Appendices A-1 and A-2 with Amended Appendices A-1 and A-2. (GC Ex. 1(u), pp. 1-3, 6-26). Finally, the Amendment to the Specification updated the summary allegations in Section IX of the Specification and related Appendix F. (GC Ex. 1(u), pp. 3-4).

The Amendment to the Specification states that Respondent may file an answer to the Amendment to the Specification by December 6, 2019. (GC Ex. 1(u), pg. 4). The answer requirement in the Amendment to the Specification further states that "[a]s to all matters...that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient." It further states that if Respondent's answer fails to deny allegations of the Amendment to the Specification in the manner required under Section 102.56 of the Board's Rules, and the failure to do so is not adequately explained, "the Board may find those allegations in the Compliance Specification are true and preclude Respondent from introducing evidence controverting those allegations." (GC Ex. 1(u), pg. 5). Respondent did not file any answer to the Amendment to the Specification.

A compliance hearing in these cases was held before Administrative Law Judge Dickie Montemayor (Judge Montemayor) on December 10 through 13, 2019, and February 11 and 12, 2020. During the course of the hearing, the General Counsel moved to amend the Specification, and the Amendment to the Specification, in several instances, all of which were granted by Judge Montemayor. Specifically, the General Counsel moved to amend the amount of interim medical expenses sought for Moran and Mineards in several calendar quarters. (GC Ex. 6; Tr. 7:5-21, 9:12-14). The amendments were incorporated into Amended Appendices D-1 and D-2. (GC Ex. 2 & 3; Tr. 8:1-5, 9:12-14). The General Counsel moved to amend the Specification to seek additional interim search-for-work and interim work expenses for Moran in 2015. (GC Ex. 44; Tr.676-79). Finally, the General Counsel moved to further amend Amended Appendices A-1 and A-2, related to the Bargaining Expense Remedy, as well as Amended Appendix F – the summary of all amounts owed. (GC Ex. 45; Tr. 689). The General Counsel introduced Second Amended Appendices A-1 and A-2, and Second Amended Appendix F, incorporating these amendments. (GC Ex. 46-48; Tr. 690).

## **II. GENERAL PRINCIPLES**

The Board has stated that “[i]t is axiomatic that the finding of an unfair labor practice is presumptive proof that some back pay is owed by the Respondent.” *In re Demi’s Leather Corp.*, 333 NLRB 89, 90 (2001) (internal quotations omitted); *Intermountain Rural Elec. Assn.*, 317 NLRB 588, 590 (1995) (applying the presumption that backpay is owed due to respondent’s unilateral changes); *Teamsters Local 25*, 366 NLRB No. 99, slip op. 2 (2018) (“An unfair labor practice finding by the Board that an employee was unlawfully terminated is presumptive proof that some backpay is owed.”)

“The objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices.” *Interstate Bakeries Corp.*, 360 NLRB 112, 113 (2014) (quoting *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998)); *see also In Re Cobb Mech. Contractors, Inc.*, 333 NLRB 1168, 1168 (2001). However, since recreating what would have happened, economically, absent the respondent’s unfair labor practices is difficult and inexact, a backpay award “is only an approximation, necessitated by the employer’s wrongful conduct.” *Cobb Mech.*, 333 NLRB at 1168 (quoting *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977)).

With respect to the make-whole remedies ordered for Moran and Mineards, “[t]he General Counsel bears the burden of establishing gross backpay due...Once the General Counsel has met this burden, the Respondent may establish an affirmative defense that would reduce its liability, including, for example, willful loss of earnings.” *Teamsters Local 25*, 366 NLRB at slip op. 2. Regarding the calculation of gross backpay owed to a discriminatee, the Board has held that “several equally valid theories may be available, each one yielding a somewhat different result,” and the General Counsel “is allowed a wide discretion in picking a formula.” *Interstate Bakeries*, 360 NLRB at 113. Any ambiguities or uncertainties in the amount of backpay due are resolved against the respondent, “who is responsible for the underlying unfair labor practices that have led to uncertainties.” *Id.* “Indeed, to hold otherwise would effectively punish backpay claimants for the respondent’s illegal conduct against them.” *Id.*

The Board has not yet had any opportunity to address the calculation of amounts owed by a respondent to a union pursuant to a bargaining expenses remedy. To date, no other matter involving a bargaining expenses remedy has reached a compliance hearing, or been submitted to

an Administrative Law Judge (ALJ) or the Board for a determination of the approximate amounts owed pursuant to such a remedy. The Board has not specified any particular standards or guidelines in calculating such a remedy, or expressly allocated the burdens of proof and production between the parties. However, there is no basis to believe that the Board will deviate significantly from the longstanding compliance principles stated above. Thus, the General Counsel bears the burden of demonstrating the amounts owed to a union pursuant to a bargaining expenses remedy, with some latitude in using reasonable formulas to approximate the economic position of the union absent the respondent's unfair labor practices. Any remaining ambiguities in the amounts owed should be resolved against the respondent, whose egregious unfair labor practices create the challenge of having to recreate a union's costs and expenses incurred in bargaining.

### **III. THE BARGAINING EXPENSES REMEDY**

#### **A. The Scope of the Remedy**

1. The Board awarded the remedy due to a broad range of unfair labor practices, both at and away from the bargaining table, which caused the Union significant financial losses.

In the Original ULP Decision, the Board determined that “Respondent’s bad-faith bargaining was sufficiently aggravated to warrant reimbursement of the Union’s bargaining expenses.” 358 NLRB at 1417. The Board cited to *Frontier Hotel & Casino*, 318 NLRB 857 (1995) enfd. in relevant part 118 F.3d 795 (D.C. Cir. 1997) as providing the standard for determining when a respondent’s unfair labor practice violations warrant the reimbursement of a union’s bargaining expenses. 358 NLRB at 1415. In *Frontier Hotel & Casino*, the Board established “a clear and consistent approach to the reimbursement of negotiating costs as a remedy for unlawful bargaining.” In that case, the Board stated:

[W]here it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies...an order requiring respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.

*Frontier Hotel & Casino* 318 NLRB at 859 (internal quotations omitted).<sup>8</sup>

In ordering the Bargaining Expenses Remedy in the Original ULP Decision, the Board noted a range of unlawful conduct by Respondent. The Board stated: “[f]rom the outset of negotiations, the Respondent insisted on a broad management-rights clause and proposals concerning discipline/discharge and grievance/arbitration that were so extreme that they would leave employees and the Union with fewer rights and protections than they would have without any contract at all.” 358 NLRB at 1417. The Board also referred to Respondent’s bargaining proposals on management rights, including proposals made by Respondent that would place it under no obligation to bargain under Section 8(a)(5) of the Act during the life of the contract or after the contract expired. *Id.* at 1417-18. The Board noted that these proposals essentially sought to ensure that the “Union’s representational role as envisioned by the statute and Section 8(a)(5) would be eviscerated in perpetuity.” *Id.* at 1418. The Board also referred to Respondent’s bargaining proposal regarding discipline and discharge, which insisted on “at-will employment” and provided for a grievance procedure that ended with an “unreviewable decision by Respondent’s copublishers.” *Id.*

In ordering the Bargaining Expenses Remedy, the Board did not solely rely on Respondent’s unlawful conduct at the bargaining table, but rather a collection of unlawful actions

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<sup>8</sup> The Board still applies this standard in determining whether to award bargaining expenses. *See Columbia College Chicago*, 368 NLRB No. 86, slip op. 2 (2019) (“The Board has awarded negotiation expenses in cases of unusually aggravated misconduct where a respondent’s substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by application of traditional remedies.”).

both at and away from the table that depleted the Union's bargaining, and financial, strength. The Board noted that "Respondent's conduct away from the bargaining table also demonstrated its calculated strategy to reduce negotiations to a sham and undercut the Union's bargaining strength, so that employees would perceive collective bargaining as futile." *Id.* at 1418. The Board remarked on Respondent's conduct in using independent contractors to perform unit work in violation of Section 8(a)(3) and (5) of the Act, and "dealing directly with an unlawfully laid-off unit employee [Mineards] concerning a return to his duties as a nonemployee freelancer." The Board also noted Respondent's other unlawful disciplines and discharges, as well as its unreasonable delays in providing information. *Id.*

The Board concluded that "[u]nder all these circumstances...Respondent's unlawful conduct at and away from the bargaining table so infected the core of the bargaining process that it cannot be fully redressed by the Board's traditional remedies." *Id.* at 1418 (internal quotations omitted). The Board stated: "*The economic loss by the Union in the futile pursuit of a collective-bargaining agreement is the direct result of Respondent's willful defiance of its statutory obligations. Accordingly, in order to restore the status quo and make the Union whole for its financial losses, we shall require the Respondent to reimburse the Union for its negotiation expenses.*" *Id.* (emphasis added).

Thus, the Board ordered the Bargaining Expenses Remedy based on a broad range of unlawful conduct by Respondent that naturally had a significant impact on the Union's financial strength. In describing the remedy, the Board did not place any limiting language on the types of economic losses the Union might recover, the specific varieties of negotiation expenses it may

seek in compliance, or the kinds of compensable activities, both at and away from the bargaining table, which depleted the Union's financial strength.<sup>9</sup>

2. The remedy encompasses costs and expenses incurred from November 13, 2007 through April 22, 2008.

In the Final ULP Decision, the Board ordered Respondent to “[r]eimburse the Union for its costs and expenses incurred in collective bargaining from November 13, 2007, *until the date on which the last negotiation session occurred.*” 358 NLRB at 1419 (emphasis added). The Bargaining Expenses Remedy did not include a finite end date. This is likely due to the fact that the parties continued to meet and bargain throughout the underlying unfair labor practice hearing, which took place over the period from May through August 2009. Thus, the exact date of the final bargaining session was unknown to the Board when it issued the Original ULP Decision. 358 NLRB at 1422.

In making his recommendations to the Board, ALJ Anderson noted that “[t]he parties first met in face-to-face bargaining on November 13, 2007, and met on numerous occasions thereafter through the date of issuance of the complaint, herein March 24, 2009.” *Id.* at 1426. ALJ Anderson also stated: “Bargaining has continued, at least to the end of the hearing in the instant case, without agreement having been reached.” *Id.* at 1495.

The scope of the Bargaining Expenses Remedy extends at least to the date that the last negotiation session occurred before the close of the underlying unfair labor practice hearing.<sup>10</sup> This is the period of bad faith bargaining referenced throughout the Original ULP Decision and

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<sup>9</sup> In the Order Modifying Remedy, the Board reaffirmed the Bargaining Expenses Remedy, without any limitations. 359 NLRB at 1113.

<sup>10</sup> Section II(a) of the Specification, which Respondent unequivocally admitted in its Amended Answer and was granted by the Board in its Decision on Summary Judgement, alleges that the relevant backpay period extends to January 10, 2013. (GC Ex. 1(f), pg. 3, GC Ex. 1(i), pg. 3). The General Counsel now seeks bargaining expenses for a more limited timeframe, fully encompassed within the granted backpay period.

relied on in ordering the Bargaining Expenses Remedy. If the Board had intended to cease the backpay period earlier, on a specific bargaining date that occurred before the opening of the hearing, the Board would have so stated, and used one of the specific bargaining dates referenced in the Original ULP Decision as an end date to the remedy. Instead, the Board phrased the remedy with open-ended language as to the close of the relevant backpay period.

Section II(b) of the Amendment to the Specification alleges:

The parties held in-person negotiation sessions in Santa Barbara, California on the following dates: November 13 and 14, 2007; February 12, 13, 14, 15, 25, 26, and 27, 2008; April 2 and 3, 2008; May 14 and 15, 2008; June 3 and 4, 2008; July 10 and 11, 2008; September 3 and 4, 2008; October 22 and 23, 2008; January 14 and 15, 2009; February 25 and 26, 2009; and April 21 and 22, 2009.

Section II(c) also alleges that “[t]he last in-person negotiation session that the parties held before the close of the underlying unfair labor practice hearing in this matter occurred on April 22, 2009.” (GC Ex. 1(u), pg. 2). The facts alleged in these sections are within Respondent’s knowledge, as Respondent was a party to the negotiation sessions. Respondent did not deny these allegations, either in a written answer, or verbally at the compliance hearing. (Tr. 26:8-16, 30:2-25, 31:1-13). Therefore, pursuant to Section 102.56 of the Rules, Section II(b) and (c) of the Amendment to the Specification should be granted.

Based on the foregoing, the Backpay Expenses Remedy includes the Union’s costs and expenses incurred in collective bargaining from November 13, 2007 through April 22, 2009. This is the period of time for which the General Counsel itemized the bargaining expenses in Second Amended Appendices A-1 and A-2. (GC Ex. 46 & 47).

3. The remedy encompasses the fees and expenses that the Union paid for its attorney's involvement in bargaining and related preparation, follow-through activities, and travel.

Section II(d) of the Amendment to the Specification asserts: "A reasonable calculation of the Union's costs and expenses incurred in collective bargaining includes the fees and expenses the Union paid for legal counsel's involvement in bargaining at the negotiation table and in related bargaining activities, such as preparation, follow-through, and travel." (GC Ex. 1(u), pg. 2).<sup>11</sup> The General Counsel seeks the legal fees and expenses, itemized in Second Amended Appendix D-1, only to the extent that they were incurred during the Union's bargaining efforts. To that extent, they are a natural component of the Union's economic loss in its futile pursuit of a collective-bargaining agreement with Respondent.

At all relevant times, the Union's lead negotiator in bargaining was Union staff representative Nicholas Caruso (Caruso). (Tr. 226:15-22, 441:1-18). Caruso did most of the negotiation across the table with Respondent. (Tr. 227:4-11). During the relevant time period for the Bargaining Expenses Remedy, November 13, 2017 through April 22, 2009, the Union's bargaining team also included its attorney, Ira Gottlieb (Gottlieb). Caruso testified at the compliance hearing that he obtained Gottlieb's assistance in bargaining for several reasons. Initially, the employee members of the bargaining committee were familiar with Gottlieb, and not

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<sup>11</sup> Respondent did not explicitly deny this allegation in Section II(d) of the Amendment to the Specification. However, unlike Section II(b) and (c), this allegation is not necessarily within Respondent's knowledge. Thus, the General Counsel accepts that Respondent's previous blanket denials in its Amended Answer, denying any and all amounts owed to the Union for the Bargaining Expenses Remedy, fairly encompass a denial to the specific allegation amended into Section II(d) of the Amendment to Specification. (GC Ex. 1(i), pg. 4). The same also holds true for Sections II(c) through (m) of the Amendment to the Specification.

Caruso, and they felt more conformable having Gottlieb at the bargaining table. (Tr. 534:14-25).<sup>12</sup> Furthermore, while Caruso was experienced in bargaining, he was not well versed in the law.

Respondent's bargaining team at all relevant times included two attorneys, including Respondent's spokesman and counsel Michael Zinser (Zinser), who Caruso described as having a reputation "of winding things up in court."<sup>13</sup> Caruso testified that needed Gottlieb involved in bargaining to watch for potential legal issues and pitfalls that Caruso did not have the legal expertise to recognize, such as determining the difference between mandatory and permissive subjects of bargaining and crafting bargaining proposals to fit the former classification. (Tr. 535:21-25, 536:1-4, 549:1-25). Caruso also testified that if Respondent was doing something that was a violation of the status quo, Gottlieb would flag the potential issue, and advise that the Union needed more information. (Tr. 536:16-25, 537:1-7). Caruso testified that Gottlieb had as much to say as the rest of the committee on bargaining issues. (Tr. 536:5-9). Gottlieb's essential role was to spot legal pitfalls in bargaining to *avoid* litigation.<sup>14</sup> The same was true regarding Gottlieb's aide to the Union away from the bargaining table, when he reviewed bargaining-related correspondence that Caruso planned to send to Respondent. (Tr. 549, 196:2-24). Naturally, Gottlieb's law firm billed the Union, on a monthly basis, for Gottlieb's fees and expenses, including the fees and expenses he incurred working on bargaining matters for the Union. (Tr. 202:16-21).

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<sup>12</sup> By the time bargaining started in November 13, 2007, the Union, with representation by Gottlieb, was already pursuing a set of unfair labor practices charges against Respondent involving the unlawful discharges of several employees who ultimately became members of the Union's bargaining committee, including Melinda Burns, Dawn Hobbs, and Thomas Schultz. Shortly after bargaining started, on December 26, 2007, ALJ Kocol issued a recommended decision and order in those cases, finding that the discharges were unlawful in violation of Section 8(a)(1) and (3) of the Act. On August 11, 2011, the Board issued a Decision and Order, also finding the discharges unlawful. The Board's Decision was later vacated by the D.C. Circuit on December 18, 2012. *See Santa Barbara News-Press*, 357 NLRB 452 (2011), vacated 702 F.3d 51 (D.C. Cir. 2012) (*Santa Barbara I*).

<sup>13</sup> *Accord Santa Barbara I*.

<sup>14</sup> Respondent's egregious bargaining conduct nonetheless overwhelmed these efforts, as demonstrates by the numerous unfair labor violations committed during the course of bargaining in these cases. 358 NLRB 1415.

Gottlieb's role on the Union's bargaining committee was well known to the Board when it issued the Original ULP Decision ordering the Bargaining Expenses Remedy. The Original ULP Decision references Gottlieb's presence at the bargaining table as part of the Union's negotiating committee. The Original ULP Decision also highlights several specific actions Gottlieb took on behalf of the Union in furtherance of bargaining, such as: sending correspondence to Respondent stating the Union's bargaining position on Respondent's use of non-unit employees to perform unit work; submitting related information requests; sending correspondence to Respondent following up on discussions from negotiation sessions; receiving Respondent's responses to the Union's information requests, and sending follow-up correspondence; and responding to Respondent's bargaining proposals. 358 NLRB at 1438-40, 1446-48, 1490. The Board thereby acknowledged Gottlieb's role in the Union's "futile pursuit of a collective-bargaining agreement." Moreover, the Board gave no indication in the Original ULP Decision that it believed Gottlieb provided services to the Union in this capacity for free.

The General Counsel is only seeking Gottlieb's "attorney's fees" and other expenses to the extent that they constitute a type of bargaining expense, and, therefore, are part of the economic harm caused by Respondent's unlawful behavior and intended to be remedied by the Bargaining Expenses Remedy. Respondent contends that "attorney's fees," of any kind, are tantamount to "litigation expenses." In conflating these two distinct terms, Respondent asserts that the Union cannot recover "attorney's fees" regardless of the underlying services of the attorney for which the fees were incurred.

The Board admittedly did not order a "litigation expenses" remedy in these cases and the General Counsel does not seek any compensation to the Union for its "litigation expenses," of which there were surely plenty throughout the course of its defense against Respondent's

numerous unfair labor practice violations. But there is no basis to conflate the terms “litigation expenses” and “attorney’s fees,” as Respondent does, and thereby exclude any *non-litigation-related* attorney’s fees from the Bargaining Expenses Remedy.

Not all attorney’s fees are incurred in litigation. For example, attorneys routinely charge their clients fees for drafting contracts, advising on compliance with laws, rules, and regulations, and all manner of other work that is not related to litigation. Conversely, not all litigation expenses are attorney’s fees. Litigation expenses can include court reporter fees, expert witness fees, and other expenses unrelated to the receipt of legal advice from counsel. “Litigation expenses,” in the Board’s jurisprudence, are described as the “costs and expenses incurred in the investigation, preparation, presentation, and conduct” of unfair labor practice proceedings before the Board. *HTH Corp.*, 361 NLRB 709, 711 (2014), *enfd. in part* 823 F.3d 668 (D.C. Cir. 2016). The Board has never equated the term “litigation expenses” with “attorney’s fees” in the manner that Respondent urges. Moreover, the Board has never expanded the description of litigation to include any and all lawful collective-bargaining strategies. To do so would strain logic. Respondent argues that attorney’s fees incurred for advice on bargaining, such as researching mandatory versus permissive subjects or bargaining, given in order to craft *lawful* bargaining proposals and *avoid* litigation is tantamount to a “litigation expense.” (Tr. 298:15-20, 299:5-12).

There is no basis in the Board’s Original ULP Decision, or the Board’s jurisprudence on “litigation expenses,” to suggest that the Board intended to exclude the entire category of non-litigation-related “attorney’s fees” from the broad Bargaining Expenses Remedy in this case. The Union is not precluded from recovering attorney’s fees that were in fact incurred in relation to bargaining, simply because the Union also separately incurred litigation expenses, for which it is not seeking to recover from Respondent. The General Counsel will demonstrate *supra*, based on

reliable documentary and testimonial evidence, that certain of Gottlieb's fees and expenses were related to bargaining and are properly compensable.

4. The remedy includes the salaries and wages paid to the Union's bargaining committee for their time spent in negotiations and related preparation and follow-through activities.

Amendment to the Specification Section II(f) alleges: "A reasonable calculation of the Union's costs and expenses incurred in collective bargaining includes the salary for the Union's lead negotiator for the days he spent at the negotiation table and in related bargaining activities, such as preparation, follow-through, and travel." (GC Ex. 1(u), pg. 2). Section II(g) of the Amendment to the Specification also asserts: "A reasonable calculation of the Union's costs and expenses incurred in collective bargaining includes the wages paid to the employee (and/or former employee) members of the Union's bargaining committee for the days they spent at the negotiation table and in related bargaining activities." (GC Ex. 1(u), pg. 2).

In describing the bargaining expenses remedy, the Board has repeatedly stated that "[s]uch expenses may include, *for example*, reasonable *salaries*, travel expenses, and per diems." *HTH Corp.*, 361 NLRB 709, 713 (2014), *enfd.* in part 823 F.3d 668 (D.C. Cir. 2016) (emphasis added); *Fallbrook Hospital*, 360 NLRB 644, 646 (2014) *enfd.* 785 F.3d 729 (D.C. Cir. 2015). In the Underlying ULP Decision here, the Board did not use such particular examples in describing the scope of the Bargaining Expenses Remedy, but instead, used much broader language, describing the overall economic harm caused to the Union. The Board did not describe the remedy in any manner that suggests it intended to *exclude* any particular type of bargaining expense, such as salaries, travel expenses, and per diems. The Board did not disavow any of its prior precedent describing particular types of potential bargaining expenses in cases such as *HTH Corp.* and *Fallbrook Hospital*. Thus, salaries are an appropriate type of bargaining expense that the Union

may recover in this matter. As the Board stated that “salaries” were an “example,” of a bargaining expense, and described the types of expenses very generally, there is no basis to determine that hourly wages are not also a related type of compensable bargaining expense.

During the relevant time period from November 13, 2007 through April 22, 2009, Caruso worked full time for the Union, which paid him a salary, in bi-weekly increments. (Tr. 58: 3-19, 443:9-17). Caruso testified that he received his salary no matter what work he was performing for the Union during the course of the year, whether it was bargaining with Respondent or working on other matters. (Tr. 512:1-8). However, he also testified that if he had not spent his paid time bargaining with Respondent, he could have spent the time working on other matters for the Union. (Tr. 554:9-10). Thus, the Union suffered an economic loss as a result of Caruso’s wasted time spent in fruitless bargaining efforts with Respondent, for which the Union paid him, when it could have allocated his paid time towards serving its other interests.

The Union also compensated employee members of the bargaining committee for their attendance at bargaining sessions, based on their hourly wage rates. (Tr. 451:9-11). The Union compensated the employee-committee members as an incentive to participate in the Union’s bargaining efforts and to offset the wages they lost by missing paid shifts with Respondent to attend the bargaining sessions. This type of expense was a clear financial expenditure in the Union’s effort to constitute a bargaining committee and pursue a collective-bargaining agreement with Respondent and is properly encompassed in the Bargaining Expenses Remedy.

5. The remedy includes the Union lead negotiator’s travel expenses, as well as committee meals, meeting rooms fees, and other miscellaneous expenses.

Sections II(h) through (k) of the Amendment to the Specification collectively allege that a reasonable calculation of the Union's costs and expenses incurred in collective bargaining includes “the travel expenses for the Union's lead negotiator to travel for negotiation sessions and related

bargaining activities,” “the cost of meals for the Union's bargaining committee while they were in negotiation sessions and conducting related bargaining activities,” “the portion of the meeting room rental price that was paid by the Union for use of a meeting space for negotiations,” and, “other miscellaneous expenses the Union incurred in its bargaining efforts, such as the cost of office supplies, postage, internet fees, and telephone expenses.” (GC Ex. 1(u), pg. 3).

As discussed *infra*, the Board has repeatedly stated that bargaining expenses “may include, for example, reasonable salaries, travel expenses, and per diems.” *HTH Corp.*, 361 NLRB 709, 713 (2014), *enfd.* in part 823 F.3d 668 (D.C. Cir. 2016) (emphasis added); *Fallbrook Hospital*, 360 NLRB 644, 646 (2014) *enfd.* 785 F.3d 729 (D.C. Cir. 2015). The categories of expenses described in Sections II(h) through (k) of the Amendment to the Specification are encompassed in, or comparable to, travel expenses and per diems. The term per diem is generally understood to mean a daily allowance for expenditures such as lodging, meals, and incidentals. Travel expenses entail the cost of getting to and from a destination, by car, plane, train, or otherwise.

During the relevant course of bargaining, Caruso traveled from his home office in South Saint Paul, Minnesota, to all of the bargaining sessions, which were held in-person in Santa Barbara, California. (Tr. 443:3-4, Tr. 473:12-22). The Union paid for Caruso’s work-related travel expenses on these trips, such as his airfare, lodging, meals, business meals, gas, car rental, tips associated with lodging and meals, and hotel internet fees. The Union also paid for other costs incurred on the bargaining trips, such as copying and supplies. The Union paid for Caruso’s office phone and fax line, which he used to correspond with Respondent in bargaining, instead of by email, at the insistence of Respondent’s lead negotiator Zinser. (Tr. 58: 20-25, 443:18-25, 444:1-24, 445:12-15, Tr. 453:17-20; Tr. 456:7-11; GC Ex. 4(f)). The Union also made arrangements

with Respondent to split the costs of the hotel meeting room reserved for the bargaining sessions. (Tr. 456:22-24).

Rather than rely on the generic terms of “salaries, travel expenses, and per diems,” the General Counsel simply adapted the language of the Amendment to the Specification to the realities of the particular case, and to an accurate description of the various types of bargaining expenses the Union incurred. As demonstrated below, the Union incurred all of these types of expenses in its fruitless efforts to reach a collective-bargaining agreement with Respondent, and they are properly compensable as part of the Board’s broadly described Bargaining Expenses Remedy.

#### **B. Calculation of the Approximate Amounts Owed**

The General Counsel has calculated the various categories of bargaining expenses described above (e.g., attorney’s fees and expenses, salaries and wages, travel-related expenses, etc.) according to different formulas, estimations, and theories that are appropriate for each category of expense. There are some overarching principles applicable to all these calculations that support their inherent reasonableness.

First, most of the available documentary evidence of these bargaining expenses is nearly ten to twelve years old, because it was created at or near the time the expenses were incurred between November 13, 2007 through April 22, 2009. The quality of such documentary evidence is not perfect, and some records are incomplete, due to the fact that the compliance proceedings were initiated long after any reasonable retention period. These facts should not be weighed harshly against the Union. At the time the Union incurred its bargaining expenses, the Union had no inkling that these expenses would later become the subject of the compliance proceedings, wherein the Union would be entitled to compensation from Respondent. The Bargaining Expenses

Remedy was not included in ALJ Anderson's recommended decision and order in this case, issued on May 28, 2010. No party had requested the remedy up to that point in the unfair labor practice proceedings. 358 NLRB at 1418, fn. 8. The Union did not request a bargaining expenses remedy until it submitted exceptions to the Board. 359 NLRB at 1110. Thus, the Union did not have any notice at the time of the relevant bargaining that its records of various bargaining expenses may become relevant in a compliance proceeding.

Second, at the time the Union incurred its bargaining expenses, the Union had no inkling that these expenses would later become the subject of the compliance proceedings, wherein the Union would be entitled to compensation from Respondent. Therefore, the Union had no potential incentive to inflate the expenses, miscategorized them, or otherwise distort them in order to artificially increase the amount of money it might later seek from Respondent. On the other hand, the Union also had no notice at the time of bargaining that it should keep track of its bargaining expenses in any heightened manner, in anticipation that they may become the subject of contentious compliance proceedings a decade later. The Union simply kept track of its varying expenses, including those connected to bargaining, in the ordinary course of its business. The fact that the records relating to certain expenses were created in the ordinary course of business, and not strictly prepared for litigation, they are inherently more reliable.

Third, throughout its records, the Union may have specifically designated or recorded some expenses as "bargaining expenses" at the time (by that term or a similar one), and in other instances it did not. The Union's categorization of what was a bargaining expense at the time was not defined by what the Board considers to be a compensable bargaining expense pursuant to a Bargaining Expenses Remedy. During the relevant bargaining period there was no available guidance or advice from the Board as to *all* the types of bargaining expenses that may be

recoverable and how they might be appropriately calculated. Thus, in determining the bargaining expenses owed, the General Counsel does not strictly rely on the Union's own contemporaneous labeling or categorization of something as a bargaining expense. Rather, the General Counsel reflects on all the evidence from various sources to reasonably recreate the economic cost of the Union's futile attempt to bargain with Respondent.

Finally, because the Union had no notice at the time of the relevant bargaining that its related bargaining expenses would be encompassed in a Board remedy, let alone a protracted compliance proceeding over a decade later, the individuals involved in bargaining and the Union's routine record-keeping systems had no notice that they may be asked to testify on the minutia of the Union's expenses. They had no notice that they should preserve their memories on normally mundane, irrelevant, and forgettable facts, such as why their hotel bill does not list the hotel's name. This factor should be considered in judging both the witnesses' credibility and the sufficiency of the testimonial evidence to support the bargaining expenses.

1. The General Counsel reasonably relied on the Union Attorney's contemporaneous recordings of his fees and expenses related to bargaining.

Gottlieb has been employed with the law firm Bush Gottlieb (Bush Gottlieb or the firm) since 1986, and has been a shareholder for 30 years. (Tr. 192:23-25, 193:1-6). Gottlieb is licensed in New York and California. (Tr. 193:9-11). The Union has been a client of the firm since 2006, and Gottlieb has represented the Union since that time. (Tr. 194:3-11). Gottlieb has provided counseling to the Union on a variety of matters, regarding organizing, potential unfair labor practices, various NLRB proceedings, and, of course, bargaining.

At the compliance hearing, Gottlieb testified about his process during the relevant timeframe for recording the work he performed for the Union. When the Union first retained Bush Gottlieb, the firm assigned the Union a client number, number 11621. With each new matter, case,

or project that the firm opened for the Union, the firm assigned a “matter” number. The firm entered the Union’s client and matter numbers into its computer system. Each time Gottlieb performed work for the Union, he would find the matter number for the matter related to the work, and also specify what the work entailed, such as whether it was a phone call or drafting a document, attending a meeting. He used short-hand activity codes to enter in the type of work her performed. Along with the activity code, he recorded the amount of time it took him to perform the activity, in increments of one tenth of an hour. (Tr. 198:15-25, 199:1-19). Gottlieb had a regular practice of recording his work in this manner contemporaneously with performing the work, or on some occasions, the following day. (Tr. 199:24-25, 200:1-5).

Gottlieb assigned a specific matter number for the work he performed for the Union in bargaining, specifically for his involvement at the bargaining table and advising the Union on bargaining proposals, correspondence, and such in between sessions. The matter number he assigned for the bargaining activities is 16015, and the matter was called “preparation for bargaining.” (Tr. 200:6-21). It was called *preparation* for bargaining, because the firm opened the matter in 2006, before the first bargaining session, when it started preparing for bargaining. Gottlieb continued to use this matter number and name for his bargaining activities during the relevant timeframe from November 13, 2007 through April 22, 2009. (Tr. 200:19-21).

The Union was also in litigation with Respondent during the entirety of the relevant bargaining period. (Tr. 257, 309:11-17).<sup>15</sup> Gottlieb created separate matter numbers for the litigation work. (Tr. 309:22-235, 310:1-5). The purpose at the time was to let the client, the Union, see how much time the firm was spending on each matter. (Tr. 310:9-11).

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<sup>15</sup> *Accord Santa Barbara I.*

Gottlieb also testified about his billing practices during the relevant bargaining period. At the time, the firm had a regular billing practice, whereby it billed clients on a monthly basis. In preparing each client's monthly bill, the firm aggregated all the activity it engaged in for the client that month. During the billing process, the firm generates a "pre-bill," showing all the entries made for the client for that month. (GC Ex. 300; Tr. 201:23-25, 202:1-7, Tr. 205:9-20). The work was separated on the pre-bill, as well as the ultimate bill, by matter name. For example, the bargaining work Gottlieb engaged in for the Union shows up on the monthly bill under the heading "Preparation for Bargaining." (GC Ex. 300, pg. 2; Tr. 205:8-13). The billing partner assigned to the client then reviewed the pre-bill for any inaccuracies, or to apply discounts. Once the firm approved the pre-bill, the accounting personnel sent the bill, or invoice, to the client. (Tr. 202:8-15). The firm billed the Union on a monthly basis in this manner, as it did with all its clients. (Tr. 202:16-21). Gottlieb was the billing partner assigned to the Union, which means he was ultimately responsible for the bill and its accuracy and for any issues that may arise from the bill. (Tr. 204:17-24).

The firm's final invoices sent to the client Union reflect many details about the work the attorney's fees and costs billed to the client, such as the date work was performed, the matter it falls under, a description of the work, the amount each task took, the billing rate, and the initials of the attorney who performed the work, the hourly rate applied, and the total fee for each item of work (according to the time it took multiplied by the billing rate). (GC Ex. 300; Tr. 207:20-25, 208:1-24). The invoices also reflect Gottlieb's attempts to separate out the work he performed for the Union in bargaining, as opposed to litigation. The firm billed the Union under a separate matter for work it performed for the Union related to the bad faith bargaining charge the Union filed in this case, including work performed when the charge was being investigated by the Board. (GC

Ex. 308, pg. 3; Tr. 209:12-25, 210:1-3). The firm also billed the Union under a separate matter for work it performed for the Union in responding to unfair labor practice charges filed by Respondent. (GC Ex. 308, pg. 4; Tr.210:4-17). Gottlieb's billing rate changed from \$185 to \$200 over the course of the relevant bargaining period. However, the rate was applied the same to all types of work the firm performed for the Union during this time, whether it was for litigation, counseling, bargaining, or otherwise. (Tr. 201:5-12).

In addition to billing the Union his regular fees for time he spent in bargaining activities and providing advice on bargaining, the firm also billed the Union for Gottlieb's time spent traveling to and from bargaining sessions. (Tr. 207:10-12). The firm billed the Union for his overnight travel, such as hotel stays, in connection with bargaining, and other out-of-pocket expenses, such as filing fees or copying expenses. (Tr. 207:2-9). For example, Gottlieb attended bargaining sessions in person in Santa Barbara. He traveled to those sessions by car from Los Angeles. (Tr. 197: 16-23). In between the sessions, he stayed in a hotel in Santa Barbara, typically a hotel called the Canary Hotel. (Tr. 198:1-3). He stayed at that hotel in connection with the first bargaining sessions on November 13 and 14, 2007. (GC Ex. 22, pg. 1; Tr. 217:8-24). Gottlieb's Canary Hotel bill for that stay reflects a total charge of \$560. (GC Ex. 22). The firm billed the Union for the stay in the December 2007 invoice, in the amount of \$600.00. (GC Ex. 301, pg. 2). Gottlieb also billed the Union \$8.50 for copies and faxes during this time. (GC Ex. 300, pg. 2). Gottlieb was in Santa Barbara for bargaining over the course of February 11 through 15, 2008. He again stayed at the Canary Hotel and his hotel bill reflects total charges of \$1,634.65. (GC Ex. 23; Tr. 219: 17-25, 220:1-8). He also stayed in Santa Barbara to attend the bargaining sessions from February 24 to 27, 2008. His bill from the Canary Hotel shows charges of \$1,227.04. The firm did not bill the Union for these entire amounts. Instead, the firm applied a discount and billed the

Union for \$1,327.41 and \$995.55, respectively, on the April 2008 Invoice. (GC Ex. 305; pg. 2; Tr. 221:10-16). Gottlieb attended bargaining sessions in Santa Barbara over the course of July 9 to 11, 2008. His hotel bill reflects charges of \$758.86. (GC Ex. 23; Tr. 222:14-22). The firm billed the Union for this amount on the July 2008 Invoice. (GC Ex. 308, pg. 2).

The record contains all of the monthly invoices the firm sent to the Union during the relevant bargaining period from November 13, 2007 through April 22, 2009. (GC Ex. 300 through 317). The Union's Director of Accounting Ayesha Wright (Wright) credibly testified that each of the invoices were routed at the time they were received through the Union's President, Secretary-Treasurer, and Accounting Department for approval and payment, according to the Union's regular practices. (GC Ex. 300; Tr. 39-45).

In preparation for this compliance matter, before the issuance of the Specification, Gottlieb and the firm prepared a document listing all the fees charged to the Union on the relevant invoices for the matter named "preparation for bargaining" (i.e., matter no. 16015). (GC Ex. 7; Tr. 211:19-25). Gottlieb reviewed the list and culled out some of the items that he thought "might not pass muster in this proceeding in terms of being clearly bargaining related as opposed to perhaps other activity." For example, he removed a line item from the November 2007 Invoice for "draft ULP charge and press release." (GC Ex. 300, pg. 2, GC Ex. 7; Tr. 212: 22-25, 213:1-11). Gottlieb also removed line item for "draft bad faith bargaining charge" from the April 2008 Invoice. (GC Ex. 305, pg. 1, GC Ex. 7; Tr. 214:17-25, 215:1-8). He credibly testified how drafting an unfair labor practice charge may have been entirely related to bargaining, and not litigation, such as, theoretically,<sup>16</sup> if the Union drafted the charge with the intention to present it at the bargaining table to convince Respondent to voluntarily correct an unlawful course of action, rather than the

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<sup>16</sup> Gottlieb spoke theoretically, so as not to reveal any attorney-client privileged information about the Union's bargaining strategy in drafting an unfair labor practice charge.

Union actually filing the charge. (Tr. 291:22-25, Tr. 292:5-15). Gottlieb also testified that at the first bargaining session the Union told Respondent that they want to file an unfair labor practice charge, but if Respondent does not correct its behavior they would have to. (Tr. 294:10-21). Thus, despite potentially having a very legitimate purpose for billing the Union to “draft bad faith bargaining charge” as a bargaining expense, Gottlieb conservatively removed it from the list.

Gottlieb then submitted that reduced list to the Region 27 Compliance Officer Erika Bailey (CO Bailey) for her use in investigating Respondent’s compliance in this matter. (Tr. 212:1-6). CO Bailey used Gottlieb’s reduced list in preparing Second Amended Appendix A-1. (GC Ex. 46, pp. 3-12; Tr. 721:13-25, 722:1-12). She included the items starting on November 13, 2007, the date the backpay period begins, including only portions of Gottlieb’s hotel bills incurred on or after that date. (GC Ex. 46, pg. 3; Tr. 721:13-14, Tr. 723:5-11).

The foregoing process, starting with Gottlieb’s good-faith, contemporaneous categorization of his work for the Union into separate matters, including a matter number dedicated to bargaining, and ending with CO Bailey dutifully removing any expenses outside the clear scope of the backpay period, sufficiently demonstrates that the General Counsel’s calculation of the amounts owed to the Union for the attorney’s fees and expenses are reasonable, well substantiated, and should be granted in total.

Respondent may assert that the Union should not recover the attorney’s fees and expenses connected to bargaining, because Gottlieb did not testify with independent recollection as to each and every single billed item on his decades’ old invoices. Respondent essentially suggests, without any basis, that Gottlieb’s contemporaneous categorization of his work for the Union cannot be trusted. This argument must fail. Any remaining ambiguities as to how Gottlieb billed the Union for bargaining versus non-bargaining work should be resolved against the wrongdoing

Respondent. Respondent's unlawful conduct throughout the course of bargaining placed the Union in the original predicament of having to constantly balance its efforts to bargain towards a collective-bargaining agreement and respond appropriately to an onslaught of unfair labor practices. Respondent should not reap the benefit of its unlawful behavior by defeating the Union's claim to attorney's fees on this basis.

Moreover, Respondent suggests that the standard of proof should require the Union to waive its attorney-client privilege, and bargaining privilege, and reveal to the wrongdoer Respondent details about each and every conversation between Gottlieb and Caruso for which Gottlieb billed the Union, and for which the Union now seeks compensation pursuant to the Bargaining Expenses Remedy. Such a standard would be patently unjust. The Board has long-applied the broad protections of the attorney-client privilege to an attorney's work for clients in collective bargaining. *Patrick Cudahy, Inc.*, 288 NLRB 968, 971 (1988) (Board held that the attorney-client privilege encompasses "advice rendered" by outside counsel to the respondent-employer "in the course of helping it prepare for and conduct negotiations with the Union" and in advising the respondent-employer as to potential legal constraints in the event of a strike.); *see also Taylor Lumber and Treating, Inc.*, 326 NLRB 1298, 1298 fn. 2 (1998) (finding that the attorney-client privilege applied to confidential communications between an attorney and respondent's management team where the attorney served as respondent's chief negotiator in negotiations and was engaged by respondent to provide legal services in connection with other employment relations matters). Nothing in the Board's enunciated compliance principles suggest that a wronged union must waive its attorney-client privilege to a wrongdoer respondent as a threshold to seeking compensation pursuant to a Board-ordered remedy. Such a requirement would not redress the Respondent's unlawful conduct, but instead, would compound the harm

caused to the Union. The Union is still in negotiations with Respondent to this date, with Caruso as the lead negotiator. (Tr. 442:12-17).

Based on the foregoing, the General Counsel has demonstrated that the amounts sought in Second Amended Appendix A-1 are substantiated, reasonably calculated, and should be granted in total.

2. The General Counsel reasonably estimated the bargaining committees' salaries and wages for time spent in negotiations and related preparation and follow-through.

As the Union's lead negotiator during the relevant backpay period spanning the seventeen (17) months from November 13, 2007 to April 22, 2009, Caruso undoubtedly spent a countless number of hours involved in bargaining, preparation, and follow-through activities, in pursuit of a collective-bargaining agreement with Respondent. The parties conducted twenty-seven (27) days of in-person bargaining in Santa Barbara. He testified that on the days that the parties were in bargaining, he typically worked longer than eight hours, because he might have worked after bargaining to prepare for issues the next day, or meet with the committee early in the morning before bargaining. (Tr. 551:7-18). Caruso traveled for all of these bargaining sessions from his home in Minnesota, over twelve separate trips. (Tr. 446:23-24). Caruso's bargaining preparation and follow-through activities entailed communicating with the Union's bargaining committee by phone and email, and sending negotiation update letters to the membership. (Tr. 447:1-12). He also traveled to Santa Barbara on two additional trips to meet with the bargaining committee and employees regarding ongoing negotiations. He put together the Union's bargaining proposals. He responded to Respondent's bargaining proposals. He sent and received correspondence with Respondent regarding bargaining in between sessions. Throughout the course of bargaining, he sent communications to Owner and Co-Publisher Wendy McCaw, and head of Human Resources Yolanda Apodaca, as well as Zinser. (Tr. 452:6-16).

During the relevant timeframe, November 13, 2007 through April 22, 2009, Caruso did not keep any sort of hourly accounting of the work he performed in bargaining with Respondent. (Tr. 447:16-22). He did not keep an accounting of how much time he spent on preparation or follow-through activities. (Tr. 448:1-3). He did not keep an accounting of how much time he spent putting together proposals for bargaining, or responding to Respondent's bargaining proposals. (Tr. 448:12-15). He did not keep an accounting of how much time he spent sending or responding to letters. (Tr. 448:19-21). He did not keep track of the hours he spent updating the membership and sending correspondence to employees. (Tr. 448:22-25). He testified that he does not have a way to go back now and quantify how much time he spent in those activities during the relevant timeframe. (Tr. 449:1-3).

The only way to account for the man-hours the Union lost when all of Caruso's bargaining efforts became futile, is to estimate. The General Counsel estimated Caruso's salary based on his daily equivalent salary rate at the time, multiplied by the approximately number of days he spent in bargaining sessions with Respondent, traveling for the bargaining sessions, or traveling and meeting with the bargaining committee and unit employees on two occasions. (GC Ex. 336; Tr. 727:6-25).

The amount of Caruso's bi-weekly salary during the relevant timeframe is reported in the Union's general ledger, and shown in a report generated by Accounting Director Wright. (GC Ex. 335; Tr. 69:13-25, 70:1-5). The general ledger report shows the exact amount of Caruso's gross wages each pay date over the relevant backpay period. (GC Ex. 335; Tr. 71:20-23, 72:21-23). Wright converted Caruso's bi-weekly salary into a daily rate, by dividing it by 10. Wright also allocated the approximate number of days that Caruso worked on the News-Press matters each week by reviewing his related weekly expense reports. As discussed in more detail below,

Caruso's weekly expense reports are contemporaneous business records of all the expenses he incurred when he traveled to Santa Barbara for negotiations and other preparation and follow-through activities. Relevant to the salary calculations, the expense reports include the dates of his travel to Santa Barbara for these activities. Wright used the expense reports to estimate the number of days Caruso spent traveling for bargaining sessions and other related trips, as well as the days during each trip he was working in Santa Barbara.

Wright created a spreadsheet with the daily equivalent salary amounts, along with the approximate number of days Caruso worked on bargaining, during each week in the backpay period. (GC Ex. 336; Tr. 75:7-25, 76:1-4). The document was provided to Region 27 during the compliance investigation. CO Bailey, in turn, reviewed Caruso's underlying expense reports and general ledger amounts to verify the numbers the Union reported. (GC Ex. 336; Tr. 727:6-25). These estimates are allocated in Second Amended Appendix A-2 to the relevant weeks during which the work occurred. (GC Ex. 47, pg. 3; Tr. 725:5-25, 726:6-14).

The General Counsel's estimates are based on reliable documentation and testimonial evidence of Caruso's salary and the time periods he was traveling and engaging in bargaining activities. The General Counsel's estimate is reasonable, and even fairly conservative, as it is limited to periods of in-person bargaining sessions, two meetings with the bargaining committee and unit employees, and related travel days. The estimation does not account for all the other time Caruso surely spent in bargaining, in drafting proposals and sending correspondence. Moreover, the estimation does not account for all the time Caruso surely spent drafting information requests and attempting to bargain with Respondent over matters that eventually became unfair labor practices. The same unfair labor practices that the Board explicitly referred to in ordering the Bargaining Expenses Remedy.

The General Counsel used a similarly reasonable formula in calculating the wages paid by the Union to the employee members of the bargaining committee for their role in the bargaining efforts. The composition of the bargaining committee changed over time. In November 2007 it consisted of Dawn Hobbs, Melinda Burns, Tom Schultz, Dennis Moran, and Lynn Ward. Karna Hughes was an alternate who stepped up later in the relevant bargaining period. Marilyn McMahon also joined the bargaining team later in 2008. (Tr. 449:23-25). There is no factual dispute as to which employee members of the bargaining committee attended each specific bargaining session. The session attendees are listed in the Union's underlying bargaining notes from each session, as well as contemporaneous spreadsheets that Caruso maintained to track the employees' bargaining attendance. All of these documents are completely consistent in noting exactly which employee members of the bargaining team attended each bargaining session. (GC Ex. 4(b), GC Ex. 9, GC Ex. 10; Tr. 457:19-25, Tr. 458:21-25).

During the relevant bargaining period, the Union agreed to pay the employee members of the committee for eight hours of missed work, at their hourly wage rate with Respondent. In a few instances, the Union paid a committee member for only four hours of work, if they left a bargaining session early. (Tr. 539:2-19). Caruso maintained a contemporaneous spreadsheet tracking each committee-member's bargaining hours, wage rates, and the gross pay owed to each of them for their attendance at bargaining sessions. (GC Ex. 9). The Union submitted this spreadsheet to Region 27 during the compliance investigation. CO Bailey, in turn, verified the information contained in the spreadsheet by reviewing wage data provided by Respondent and the documents reflecting which employee committee members attended each bargaining session. (GC Ex. 10; Tr. 729:23-25, 730:1-24). CO Bailey then allocated the hours, wages rates, and gross wages reflected in Caruso's spreadsheet to the weeks in which those wages were earned in Second Amended

Appendix A-2. (GC Ex. 47, pg. 3; Tr. 725:11-25, 726:1-20, 728:19-25, 729:1-18). Thus, the General Counsel's formula for determining amounts owed to the Union for wages paid to employee members of the committee amounts to the gross wages the Union paid, i.e., work hours multiplied by wage rate.

The Union in fact paid the employee committee members as a gross employer, meaning, the employees submitted the relevant tax documentation to the Union (I-9s and W-4s). The Union then deducted the appropriate tax withholdings from their gross pay and remitted it to the U.S. Government. (GC Ex. 337; Tr. 78:13-25, 79: 9-21, 80:23-25, 81:1-3). As a result of this arrangement, on top of paying the total gross wages, the Union paid an employer's share of FICA payments to the U.S. Government. The FICA payments for employee-members of the bargaining committees are reflected in the Union's general ledger reports. For example, in March 2008, the Union made FICA payments for Thomas Schultz in amounts totaling \$97.38, and for Melinda Burns totaling \$167.99. (GC Ex. 344, pp. 5-6). In July 2008, the Union made FICA payments for Thomas Schultz in amounts totaling \$91.31, and for Melinda Burns totaling \$142.80. (GC Ex. 345, pp. 4-5). In August 2008, the Union made FICA payments for Marilyn McMahon totaling \$31.10 and for Nora Wallace totaling \$46.12. In September 2008, the Union made FICA payments totaling \$210.04 on behalf of Moran. (GC Ex. 345, pg. 5). Finally, in February and March 2009, the Union made FICA payments for Moran totaling \$26.26. (GC Ex. 346, pg. 6). These exact amounts are itemized in Second Amended Appendix A-2 in the weeks they were paid. These amounts are appropriately included as part of the cost to the Union to pay for employee-committee members' involvement in bargaining.

3. The General Counsel demonstrated a nearly exact accounting of other types of bargaining expenses owed to the Union based on reliable business records.

The remaining types of expenses sought in the Amendment to the Specification (e.g., meals, travel expenses, copying and other miscellaneous expenses) do not require any approximations. The specification seeks the exact costs that the Union incurred for each of these types of expense, over the course of the backpay period, as reflected in the Union's business records.

The Union had a regular process for recording and paying these types of bargaining expenses that Caruso incurred when he traveled for work on the News-Press negotiations. Caruso used a software called Quick Expense to complete weekly expense reports. The software required him to enter each discreet expense as a separate item and then the system aggregated the expenses into appropriate categories that it generated on a report. (GC Ex. 319; Tr. 59:10-22, 61:19-24). For each expense, Caruso input the form of payment, the date of payment, the vendor name, and a description of the expense. (Tr. 445:18-25). For business meals, he input notes about who attended the meal. (GC Ex. 319, pp. 1-2; Tr. 63:3-18, 474-475). After inputting the information, Caruso generated an expense report from the system that lists each individual expense Caruso entered into two separate formats, a spreadsheet on the first page, followed by a detailed list of expenses. (GC Ex. 319, pp. 4-7; Tr. 64:3-15). Caruso then submitted the expense reports to the Union's Secretary-Treasurer's office, along with all the supporting receipts for the expenses. (GC Ex. 319, pp. 8-20; Tr. 64: 16-20).

Accounting Director Wright testified about the union's approval process for Caruso's expense reports, whereby they were approved by the Union Secretary-Treasurer, and then submitted to the Accounting Department for review. In the Accounting Department, the accounts payable processor reviewed the reports and coded them, Accounting Director Wright reviewed

and approved them, and then they were sent back to the accounts payable processor for payment. (Tr. 59:1-10). Wright also testified about the Union's accounting policy that every expense must be documented with a receipt in order to be reimbursed, unless it is for an expense such as tips, coin laundry, vending machine purchase where you normally would not receive a receipt. (Tr. 97:4-17). She testified that if someone lost a receipt and made a good faith effort to find it, they may still get reimbursed for an expense, but if the expense is for a significant amount, and there is no receipt, the Union will not reimburse. (Tr. 97:18-22).

All of the expense reports in the record have the visual markings of being processed through the Union's normal payment and approval process, such as a date stamp and signature from the Union Secretary-Treasurer Robert Lacy, as well as Wright's initials. (GC Ex. 319-334; Tr. 61:3-18, 68:9-22). They also have handwritten corrections by the accounts payable processor Carol Ann Occhipinti, such as when Caruso submitted a receipt for an expense but did not properly record the item in the expense software. (GC Ex. 319; Tr. 62:6-15). The expense reports also have copies of the receipts originally submitted with the report. Some receipts have been lost or destroyed over the last decade, in the Union's process in gathering all these records for the compliance proceeding, submitting them to the Region, and the Region reviewing them and preparing them for hearing. However, all of the relevant expense reports remain intact and bear all the relevant markings that they were accompanied by appropriate receipts at the time they were submitted and approved.

Thus, the General Counsel has a near exact accounting of the Union's costs and expenses incurred in bargaining as reflected in the expense reports. These individual expenses allocated in each week of Second Amended Appendix A-2 are substantiated below.

*a. Expenses for Week Ending 11/17/07*

The parties had in-person bargaining sessions in this week on November 13 and 14, 2017. Caruso traveled to Santa Barbara for the bargaining. (GC Ex. 5). The related expenses itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 3</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 319)</b>	<b>Detailed Summary Description Or Receipt Page(s)</b>
Flight	\$199.55	√	None
Rental Car	\$107.52	√	Page 6
Hotel	\$504.00	√	Pages 3 to 5
Office Supplies	\$408.67	√	Pages 3 and 5
Dinner with Negotiations Committee	\$344.45	Page 2	Page 4
Business Meal with Union Attorney	\$55.33	√	Page 4
Caruso Breakfast/Lunch/Dinner	\$38.80	√	Pages 5 and 6
Tips (Housekeeping and valet)	\$8.00	√	5

Since Caruso traveled to Santa Barbara on November 12, 2007, before the backpay period begins, CO Bailey halved the cost of the total roundtrip flight (\$399.10) reflected in Caruso's expense report to arrive at a cost for the return flight (\$199.55) and included that amount in the Second Amended Appendix A-2. (GC Ex. 47, pg. 3, GC Ex. 319, pg. 1, 9; Tr. 736:2-14). CO Bailey also used his hotel amounts on Caruso's expense report, but only for November 13 and 14, 2007. (GC Ex. 47, pg. 3, GC Ex. 319, pg. 1; Tr. 736:19-25).

CO Bailey included the total of Caruso's breakfast, lunch, and dinner amounts, as listed in the table on the first page of his expense report and included the combined amount, of \$38.80, in Second Amended Appendix A-2, listed as "Caruso breakfast/lunch/dinner." (GC Ex. 319, pg. 1, GC Ex. 47, pg. 3; Tr. 738:2-11). CO Bailey continued this pattern of combining the breakfast, lunch, and dinner amounts from the first page of Caruso's expense reports into one total amount listed throughout Second Amended Appendix A-2. All such items are listed as "Caruso breakfast/lunch/dinner." (Tr. 738:12-19).

The business meals with the Union committee are itemized in Caruso's expense reports. CO Bailey used the itemized amount in Second Amended Appendix A-2. For example, on his November 17, 2007 expense report, Caruso listed a business meal with the negotiation committee, comprised of seven people in total, in the amount of \$344.45. (GC Ex. 319, pg. 2). CO Bailey incorporated this figure into Second Amended Appendix D-2. (GC Ex. 47, pg. 3; Tr. 737:10-15). CO Bailey also included the amount of the business meal between Caruso and Gottlieb, as listed on Caruso's expense report. (GC Ex. 319, pg. 1, GC Ex. 47, pg. 3; Tr. 737:16-23).

The \$408.67 of office supplies was also included in Second Amended Appendix A-2 for the week ending November 17, 2007. (GC Ex. 47, pg. 3). Caruso testified that he made seven copies each of all the initial booklets and proposals that Respondent provided at the outset of bargaining, so that each committee member had a copy to use throughout the bargaining sessions. (GC Ex. 319, pg. 13; Tr. 481:10-25).

Finally, the \$8 in tips included in Second Amended Appendix A-2 for the week ending November 17, 2017, are supported by Caruso's expense report, as they are itemized on the first page and described in detail on page 5. (GC Ex. 319, 1 & 5).

*b. Expenses for Week Ending 11/24/07*

During this week, Caruso did not travel for bargaining, but he booked future flights to Santa Barbara for future bargaining dates scheduled to take place in January 2008. (GC Ex. 5; Tr. 484:4-25, 485:1-7). He also purchased postage to mail unit employees an update on negotiations. (Tr. 485:8-22). These expenses itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 3</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 320)</b>	<b>Detailed Summary Description Or Receipt Page(s)</b>
Flight	\$401.60	√	Page 2
Office Supplies (postage)	\$16.40	√	Page 2

CO Bailey used the expense report to determine a flight expense related to bargaining. Caruso's expense report lists a total airfare amount of \$1,591.51. (GC Ex. 320, pg. 1). Within that amount is a flight for January 14 to 17, 2008 in the amount of \$401.60. (GC ex. 320, pg. 4). CO Bailey incorporated this flight expense into the Second Amended Appendix A-2 for the week of November 24, 2007. (GC Ex. 47, pg. 3; Tr. 739:21-25, 740:1-4). She also looked at a flight itinerary from a later expense report for the same flight that supports this \$401.60 figure. (GC Ex. 321, pg. 13; Tr. 740:8-25).

*c. Expenses for Week Ending 1/19/08*

Although bargaining was scheduled for the week of January 14, 2008, the parties did not meet in bargaining because Zinser canceled over the preceding weekend. (Tr. 486:1-8). Caruso traveled to Santa Barbara that week, nonetheless, because there was a cost associated with

cancelling the trip and he met with the committee to review their bargaining proposals in preparation for later bargaining dates. (Tr. 486:14-25, 487:3-7). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 3</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 321)</b>	<b>Detailed Summary Description Or Receipt Page(s)</b>
Flight (for upcoming “2/11/08 Negotiations”)	\$412	√	Page 3
Flight (for upcoming “2/24/08 Negotiations”)	\$512	√	Page 3
Flight (“rescheduled flight”)	\$220.93	√	Page 3
Hotel	\$403.17	√	Pages 2 to 4
Rental Car	\$106.54	√	Page 5
Parking	\$64	√	Page 5
Caruso “Breakfast/Lunch/Dinner”	\$90.90	√	Pages 4 to 5
Business Meal (“with Union Attorney”)	\$196.53	√	Page 2
Tips	\$10	√	Page 4
Telephone	\$47.32	√	Page 2

*d. Expenses for Week Ending 2/16/08*

The parties had in-person bargaining sessions during this week on February 12, 13, 14, and 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses

for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type</b> of Expense Listed in Second Amended Appendix A-2, pg. 4	<b>Amount</b> of Expense Listed in Second Amended Appendix A-2	<b>Expense</b> <b>Itemized on</b> <b>Page 1 of</b> <b>Expense</b> <b>Report</b> (GC Ex. 322)	<b>Detailed</b> <b>Summary</b> <b>Description</b> <b>Or</b> <b>Page(s)</b>
Hotel	\$1171.05	√	Pages 4 to 6
Rental Car	\$159.91	√	Page 7
Caruso Breakfast/Lunch/Dinner	\$249.23	√	Pages 3 to 7
Business meals with negotiation committee	\$271.69	Page 2	Pages 4 and 6
Tips (housekeeping 6 nights)	\$8.00	√	Page 7
Internet fee at hotel (3 days)	\$29.85	√	Pages 3 to 5
Taxi (Caruso home to airport)	\$27.26	√	Page 3

*e. Expenses for Week Ending 3/1/08*

The parties had in-person bargaining sessions during this week on February 25, 26, and 27, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type</b> of Expense Listed in Second Amended Appendix A-2, pg. 4	<b>Amount</b> of Expense Listed in Second Amended Appendix A-2	<b>Expense</b> <b>Itemized on</b> <b>Page 1 of</b> <b>Expense</b> <b>Report</b> (GC Ex. 323)	<b>Detailed</b> <b>Summary</b> <b>Description</b> <b>Or Receipt</b> <b>Page(s)</b>
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Hotel	\$936.84	√	Pages 3 to 6
Rental Car	\$123.18	√	Page 7
Caruso Breakfast/Lunch/Dinner	\$199.63	√	Pages 3 to 7
Business meals with negotiation committee	\$271.35	Page 2	Pages 4 and 5
Business meal with Union attorney	\$43.52	√	Page 4
Tips (housekeeping)	\$5.00	√	Page 6
Internet fee at hotel (3 days)	\$29.85	√	Pages 3, 4, and 6
Telephone	\$48.37	√	Page 7
Gasoline	\$18.54	√	Page 7

In addition to the expense report, the record also contains a separate fax from Zinser to Caruso with invoices for meeting rooms for three days in February 2008. The Union had agreed to pay half. (GC Ex. 33; Tr. 507:22-25, 508:1).

*f. Expenses for Week Ending 4/5/08*

The parties had in-person bargaining sessions during this week on April 2 and 3, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type</b> of Expense Listed in Second Amended Appendix A-2, pg. 5	<b>Amount</b> of Expense Listed in Second Amended Appendix A-2	<b>Expense</b> <b>Itemized on</b> <b>Page 1 of</b> <b>Expense</b> <b>Report</b> (GC Ex. 325)	<b>Detailed</b> <b>Summary</b> <b>Description</b> <b>Or Receipts</b> <b>Page(s)</b>
Flight	\$439.00	√	Page 18

Hotel	\$669.00	√	Page 3 to 5
Rental Car	\$174.05	√	Page 6
Caruso Breakfast/Lunch/Dinner	\$143.34	√	Page 3 to 5
Business meals with Union committee	\$107.09	√ and Page 2	Pages 3 and 4
½ Cost of Meeting Room Rental	\$175.00	√ w/ Hotel	Page 4
Office Supplies	\$44.72	√	Page 3
Internet Fee at Hotel (2 days)	\$19.90	√	Page 5
Tips (housekeeping)	\$7.00	√	Page 6
Telephone	\$48.19	√	Page 3
Taxi (to and from airport)	\$58.77	√	Pages 3 and 6

Caruso's expense reports list his hotel room and the meeting room fees together on the first page. CO Bailey separated out these different expenses in the Second Amended Appendix A-2. For example, Caruso's expense report for the week ending April 5, 2008, includes a hotel expense on April 3, 2008 in the amount of \$398, \$223 of which is attributed to his hotel room and \$175 is the Union's share of the meeting room where negotiations took place. CO Bailey separated these expenses in Second Amended Appendix A-2. (GC Ex. 47, pg. 5, GC Ex. 325, pg. 1, 7; Tr. 741:20-25, 742:1-11). The parties split the cost of the negotiations meeting room that week and the Union paid for half, as reflected on Caruso's expense report. (GC Ex. 325, pg. 1, 17; Tr. 492:1-18). In addition to the expense report, the record contains a fax from Zinser to Caruso asking him to reimburse Respondent half the cost of the room rental. (GC Ex. 31; Tr. 493:4-14).

*g. Expenses for Week Ending 5/17/08*

The parties had in-person bargaining sessions during this week on May 14 and 15, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5; Tr. 494:10-16). The related

expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 5</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 326)</b>	<b>Detailed Summary Description Or Receipts Page(s)</b>
Flight	\$502.00	√	Page 12
Hotel	\$702.63	√	Pages 3 to 5
Rental Car	\$163.28	√	Page 6
Caruso Breakfast/Lunch/Dinner	\$157.44	√	Pages 3 to 5
Business meal with Union committee	\$193.94	Page 2	Page 4
½ Cost of Meeting Room Rental	\$350	√ w/ Hotel	Pages 4 and 5
Internet Fee (3 days)	\$29.85	√	Pages 3 to 5
Taxi (home to airport)	\$27.64	√	Page 3
Tips (housekeeping)	\$5.00	√	Page 5

In addition to the expense report, Caruso testified that the Union paid a portion of the meeting room for negotiations. (Tr. 495:1-11). The record also contains an invoice from the catering department of the hotel for the meeting room on May 14 and 15, 2008. (GC Ex. 32; Tr. 495:23-25, 496:1-3).

*h. Expenses for Week Ending 6/7/08*

The parties had in-person bargaining sessions during this week on June 3 and 4, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type</b> of Expense Listed in Second Amended Appendix A-2, pg. 5	<b>Amount</b> of Expense Listed in Second Amended Appendix A-2	<b>Expense</b> <b>Itemized on</b> <b>Page 1 of</b> <b>Expense</b> <b>Report</b> (GC Ex. 327)	<b>Detailed Summary</b> <b>Description</b> <b>Or Receipt</b> <b>Page(s)</b>
Flight	\$593.50	√	Page 18
Hotel	\$870.72	√	Pages 4, 5, 6 and 11
Rental Car	\$148.22	√	Page 7
Caruso Breakfast/Lunch/Dinner	\$249.55	√	Pages 4 to 8
Business Meal with Union Committee	\$169.73	Page 3	Pages 5 and 7
½ Cost of Meeting Room Rental	\$350.00	√ w/ Hotel	Pages 5 and 7
Office Supplies	\$6.45	√	Page 6
Internet Fee at Hotel (3 days)	\$32.85	√	Pages 5, 6, and 11
Taxi (home to airport)	\$27.64	√	Page 4
Extra Bag on Flight	\$25.00	√	Page 8
Tips (housekeeping)	\$7.00	√	Pages 7 and 8

*i. Expenses for Week Ending 7/12/08*

The parties had in-person bargaining sessions during this week on July 10 and 11, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type</b> of Expense Listed in Second Amended Appendix A-2, pg. 6	<b>Amount</b> of Expense Listed in Second Amended Appendix A-2	<b>Expense</b> <b>Itemized on</b> <b>Page 1 of</b> <b>Expense</b> <b>Report</b> (GC Ex. 328)	<b>Detailed</b> <b>Summary</b> <b>Description</b> <b>Or Receipt</b> <b>Page(s)</b>
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Flight	\$300	√	Page 18
Hotel	\$971.55	√	Pages 3, 4, and 13
Rental Car	\$167.09	√	Page 5
Caruso Breakfast/Lunch/Dinner	\$145.79	√	Pages 2 to 5
Business Meals with Union Committee	\$218.17	√	Page 3
½ Cost of Meeting Room Rental	\$350	√ w/ Hotel	Page 4
Office Supplies	\$102.15	√	Pages 2 and 4
Internet Fee at Hotel (3 Days)	\$35.95	√	Page 3
Taxi (to and from airport)	\$59.91	√	Pages 2 and 5
Bag on Flight	\$25.00	√	Page 5
Tips (Housekeeping)	\$5.00	√	Page 5

*j. Expenses for Week Ending 8/23/08*

The parties did not have in-person bargaining sessions during this week, but Caruso testified that he traveled to Santa Barbara to meet with employees to put a face to the chief negotiator and to talk to them about negotiations and related issues. (Tr. 498:5-25, 499:1-23, 502:15-25). Before the meeting, Caruso mailed a letter to all unit to employees inviting them to the meeting on August 21, 2008. (GC Ex. 12; Tr. 504:8-17). Caruso started his trip by traveling to Los Angeles to meet with Cenveo, an international commercial printer, on a matter unrelated to Respondent or these proceedings. He traveled from Minneapolis to Los Angeles, met with Cenveo, and then traveled from Los Angeles to Santa Barbara to meet with unit employees (Tr. 498:5-25, 499:1-23, 502:15-25). He met with the employees at the Hotel Santa Barbara on August 21, 2008. (Tr. 500:1-10). He rented a conference room to use for the meeting and a hotel room to

sleep. (GC Ex. 11; Tr. 500:11-25). He took the train back to Los Angeles and traveled back to Minnesota. (Tr. 503:8-19).

Second Amended Appendix A-2 contains only the expenses from Caruso’s expense report fairly associated with the portion of the trip related to News-Press negotiations, namely his hotel stays in Santa Barbara, his airfare for the trip, his transportation from the Los Angeles to Santa Barbara, and back to the airport, his meals on days he traveled to Santa Barbara, and the meeting room he rented in Santa Barbara. (GC Ex. 329, pg. 1 & 2; Tr. 743:5-24).

The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.<sup>17</sup>

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 6</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 329)</b>	<b>Detailed Summary Description Or Receipt Page(s) (GC Ex. 11 or GC Ex. 329)</b>
Flight	\$381.00	√	GC Ex. 11, Page 7
Hotel	\$445.76	√	GC Ex. 11, Page 2
Caruso Breakfast/Lunch/Dinner	\$47.06	√	GC Ex. 329, Pages 2 to 4
Meeting Room	\$185.00	√ w/ Hotel	GC Ex. 11, Page 1
Telephone	\$48.20	√	GC Ex. 329, Page 2
Taxi (to and from airport and hotel)	\$72.82	√	GC Ex. 329, Pages 2, 4, and 5
Tips (Housekeeping)	\$5.00	√	GC Ex. 329, Page 4

<sup>17</sup> The relevant receipts for this expense report were introduced into the record in a separate exhibit, GC Ex. 11. (Tr. 498:1-4).

*k. Expenses for Week Ending 9/6/08*

The parties had in-person bargaining sessions during this week on September 3 and 4, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5; Tr. 505:18-25). The parties each met with a mediator separately; they did not meet face-to-face. However, mediator shuffled between them and the parties exchanged proposals. (Tr. 471:6-19). The parties also jointly reserved a meeting room for this purpose and the Union paid a share. (Tr. 506:17-25, 507:1-13). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 6</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 330)</b>	<b>Detailed Summary Description Or Receipt Page(s)</b>
Flight	\$391.50	√	Page 17
Hotel	\$623.70	√	Pages 3, 4, and 12
Rental Car	\$144.40	√	Pages 5 and 15
Caruso Breakfast/Lunch/Dinner	\$61.75	√	Pages 3 and 5
Business Meals with Union Committee	\$105.41	√ and Page 2	Page 4
½ Cost of Meeting Room Rental	\$150.00	√ w/ Hotel	Pages 5 and 14
Telephone	\$48.37	√	Page 3
Taxi (to and from airport)	\$67.39	√	Pages 3 and 5
Bag Check	\$15.00	√	Page 5
Tips (housekeeping and delivery)	\$8.00	√	Pages 4 and 5

*l. Expenses for Week Ending 10/25/08*

The parties had in-person bargaining sessions during this week on October 22 and 23, 2008. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 7</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 331)</b>	<b>Detailed Summary Description Or Receipt Page(s)</b>
Flight	\$453.50	√	Page 15
Hotel	\$702.63	√	Pages 4, 5, 6 and 19
Rental Car	\$165.12	√	Page 6
Caruso Breakfast/Lunch/Dinner	\$137.79	√	Pages 3, 5, 6, and 7
Business Meals with Union Committee	\$139.13	√ and Page 2	Pages 5 and 6
Meeting Room Rental	\$350.00	√ w/ Hotel	Page 5
Internet Fee at Hotel (3 Days)	\$35.95	√	Pages 4 and 19
Telephone	\$48.30	√	Page 3
Taxi (to and from airport)	\$66.01	√	Pages 3 and 7
Bag Check (\$40 each way)	\$80	√ w/ Flight	Pages 3 and 6
Office Supplies	\$6.99	√	Pages 4 and 5
Tips (Housekeeping)	\$5.00	√	Page 6

CO Bailey used the flight price of \$453.50 listed on a receipt within Caruso's expense report, rather than the total listed on the first page. (GC Ex. 331, pg. 15, GC Ex. 47, pg. 7; Tr. 744:15-23).

*m. Expenses for Week Ending 1/17/09*

The parties had in-person bargaining sessions during this week on January 14 and 15, 2009. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 7</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 332)</b>	<b>Detailed Summary Description Or Receipt Page(s)</b>
Flight	\$352.00	√	Pages 14 and 15
Hotel	\$454.26	√	Pages 3, 4, and 19
Rental Car	\$142.85	√	Pages 5 and 18
Caruso Breakfast/Lunch/Dinner	\$120.57	√	Pages 3 to 5
Business Meals with Union Committee	\$111.24	√ and Page 2	Page 4
½ Cost of Meeting Room Rental	\$185.00	√ w/ Hotel	Page 5
Telephone	\$48.74	√	Page 6
Taxi (to and from airport)	\$68.49	√	Pages 3 and 5
Bag Check	\$15.00	√	Page 5
Tips (Housekeeping)	\$5.00	√	Page 6
Office Supplies	\$16.80	√	Pages 4 and 5

*n. Expenses for Week Ending 2/26/09*

The parties had in-person bargaining sessions during this week on February 25 and 26, 2009. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type of Expense Listed in Second Amended Appendix A-2, pg. 7</b>	<b>Amount of Expense Listed in Second Amended Appendix A-2</b>	<b>Expense Itemized on Page 1 of Expense Report (GC Ex. 333)</b>	<b>Detailed Summary Description Or Receipts Page(s)</b>
Flight	\$242.40	√	Page 8
Hotel	\$632.01	√	Pages 3, 4, and 11
Rental Car	\$143.51	√	Pages 5 and 12
Caruso Breakfast/Lunch/Dinner	\$97.53	√	Pages 3 and 5
Business Meals with Union Committee	\$115.65	√ and Page 2	Pages 4 and 5
½ Cost of Meeting Room Rental	\$185.00	√ w/ Hotel	Pages 4 and 11
Taxi (to airport)	\$32.00	√	Page 3
Bag Check	\$15.00	√	Page 5
Tips (Housekeeping)	\$5.00	√	Page 5

*o. Expenses for Week Ending 4/25/09*

The parties had in-person bargaining sessions during this week on April 21 and 22, 2009. Caruso traveled to Santa Barbara for the negotiations. (GC Ex. 5). The related expenses for this week itemized in Second Amended Appendix A-2 are supported by the relevant expense report as summarized in the table below.

<b>Type</b> of Expense Listed in Second Amended Appendix A-2, pg. 8	<b>Amount</b> of Expense Listed in Second Amended Appendix A-2	<b>Expense</b> <b>Itemized on</b> <b>Page 1 of</b> <b>Expense</b> <b>Report</b> (GC Ex. 334)	<b>Detailed</b> <b>Summary</b> <b>Description</b> <b>Or Receipt</b> <b>Page(s)</b>
Flight	\$336.40	√	None
Hotel	\$847.16	√	Pages 3 to 6
Rental Car	\$180.01	√	Page 7
Caruso Breakfast/Lunch/Dinner	\$277.81	√	Pages 3 to 7
Business Meals with Union Committee	\$169.38	√ and Page 2	Pages 4 and 5
Union Share of Meeting Room	\$400	√ as "Other"	Page 5
Taxi (to airport)	\$31.70	√	Page 3
Bag Check	\$15.00	√	Page 7
Tips (housekeeping and laundry)	\$12.50	√	Page 6
Internet Fee at Hotel (4 Days)	\$58.80	√	Pages 4 and 6

Based on the detailed contemporaneous business records described above, the General Counsel has certainly substantiated the Union's negotiation expenses for Caruso's travel expenses, the cost of meals for the Union's bargaining committee, meeting room rental prices, and other miscellaneous expenses the Union incurred in its bargaining efforts, such as the cost of office supplies, postage, internet fees, and telephone expenses. Moreover, the amounts tabulated in Second Amended Appendix A-2 in these categories reflect the exact amounts incurred by the Union and do not rely on any approximations. Thus, they must be compensable.

### **C. MORAN AND MINEARDS BACKPAY REMEDY**

The Board, by its September 3 Decision and Order, has already granted all of the Specification allegations regarding the gross backpay owed to Moran and Mineards. 368 NLRB at slip op. 3, fn. 11. Thus, the General Counsel has satisfied its burden with respect to gross backpay. The burden shifts to Respondent to demonstrate that gross backpay must be reduced in any manner. *Teamsters Local 25*, 366 NLRB at slip op. 2.

#### **A. Mitigation**

Respondent blanketly asserts that both Moran and Mineards made no effort to mitigate their damages. (GC Ex. 1(q); Tr. 31:14-17). Respondent has not specified any particular basis for asserting that Moran failed to mitigate his losses. (Tr. 31:14-25, 32:1-5). Respondent asserts that Mineards failed to mitigate by accepting only part-time work almost immediately after his layoff and by quitting his search for other work several years before the end of the backpay period. (Tr. 31:14-24).

“A claim that a discriminatee did not make reasonable efforts to find interim employment, and thus failed to mitigate damages, is an affirmative defense for which the employer bears the ultimate burden of proof.” *M.D. Miller Trucking & Topsoil, Inc.*, 365 NLRB No. 57, slip op. 5 (2017) (citing *St. George Warehouse*, 351 NLRB 961 (2007)); *Lucky Cab Company and Industrial*, 366 NLRB No. 56, slip op. 3 (2018). Respondent’s burden to demonstrate that a discriminatee failed to mitigate by making an inadequate search for work “generally has two elements – one, that there were substantially equivalent jobs within the relevant geographic area and, two, that the discriminatee unreasonably failed to apply for these jobs.” *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99, slip op. 2 (2018) (citing *St. George Warehouse*, 351 NLRB 961 (2007)).

1. Respondent has completely failed to demonstrate that there were substantially equivalent jobs in the relevant geographic area available to Moran and Mineards during the backpay period.

A respondent's initial burden with respect to a failure-to-mitigate affirmative defense is to demonstrate that there were substantially equivalent jobs in the relevant geographic area available to discriminatees during the backpay period. This is not a light burden. "[S]ubstantial equivalence is determined, not just by whether the jobs have the same title or duties, but by a consideration of all the circumstances, including their respective working conditions and wages and benefits." *Lucky Cab Company and Industrial*, 366 NLRB No. 56, slip op. 4 (2018); *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99, slip op. 3 (2018) ("In evaluating whether a position is substantially equivalent, the Board compares various criteria, such as pay, working conditions, job duties, commutes, and work locations. The Board has also considered hours, shift scheduling, and benefits.")

Here, Respondent has completely failed to satisfy its initial burden to demonstrate there were substantially equivalent jobs in the relevant geographic area available for discriminatees Moran and Mineards during the backpay period. Respondent did not call a single witness nor offer a single piece of documentary evidence to establish *any* available jobs in *any* geographic area during the backpay period, let alone substantially equivalent ones in the relevant geographic area of Santa Barbara. Respondent merely offered basic employment and unemployment data from the U.S. Bureau of Labor Statistics (BLS) without any additional context or insight into how the data might reflect on what jobs were available during the backpay period. (R Ex. 5-9).<sup>18</sup> This raw data does not satisfy Respondent's burden. *See, e.g., International Brotherhood of Teamsters*

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<sup>18</sup> The BLS data provided by Respondent on the employment statistics for several media-related occupations in California is completely irrelevant, because it is limited to the period of May 2018, which is outside the relevant backpay periods for both Moran and Mineards. The backpay periods ended on June 18, 2017 and April 27, 2017, respectively. (R Ex. 8 & 9, GC Ex. 1(f), pg. 11).

*Local 25*, 366 NLRB No. 99, slip op. 3 (2018) (respondent did not satisfy burden of showing substantially equivalent jobs with testimony and report by a certified rehabilitation counselor about job vacancy data, wage data, and individual job vacancies); *Lucky Cab*, 366 NLRB at slip op. 4 (respondent failed to demonstrate there were substantially equivalent jobs in the geographic area, because, although respondent put on evidence that several companies were hiring within the geographic area and during the backpay period, respondent did not demonstrate that the jobs were substantially equivalent in terms of pay, benefits, hours, and other working conditions); *compare M.D. Miller Trucking*, 365 NLRB at slip op. 5 (respondent met initial burden to show that there were substantially equivalent jobs within the relevant geographic area during the backpay period by demonstrating that at least three companies in the area hired over 1000 drivers with CDL's during the relevant period).

Respondent may assert that can satisfy its burden based on Moran's and Mineards' testimony of their interim employment and search-for-work efforts. However, once the burden shifts to Respondent to demonstrate a failure to mitigate or willful loss of earnings, Respondent cannot merely rely on cross-examination of the discriminatees "and their alleged impeaching testimony to satisfy its burden." *In re Bauer Group, Inc.*, 337 NLRB 395, 398 (2002) (quoting *United States Can Co.*, 328 NLRB 334, 338 (1999)). Respondent must satisfy its burden with affirmative evidence, which it has clearly failed to do in this case.

Not only did Respondent completely fail to meet its burden regarding the failure-to-mitigate defense, but the BLS data that Respondent entered into the record paints a grim picture of the job market available to Moran and Mineards during the backpay period. The backpay period arising from Moran's unlawful termination begins on August 31, 2008. The backpay period for Mineards' unlawful layoff begins on February 1, 2009. (GC Ex. 1(f), pg. 11). Santa Barbara,

like the rest of the country, experienced a vast economic downturn during this period. The unemployment rate in Santa Barbara County rose from 8.1% at the beginning of 2009 to 9.4% by the end of the year. (R Ex. 6, pg. 2). In 2010, the unemployment rate in this area started at 10.4% and hovered between about 9-10% during the entire year. A similar pattern followed in 2012 and 2013. The unemployment rate did not dip below 7% until April 2013, for a period of just two months. The unemployment rate did not reach below 5% until August 2015, about six years into the backpay period. (R Ex. 6, pg. 3). The trend was worse across the wider California area during this time, with unemployment rates reaching 12% by the end of 2009, and only dipping to 5% for the first time in March 2017. (R Ex. 7, pp. 2-3). Thus, Respondent has only succeeded in demonstrating that it unlawfully terminated Moran and Mineards during a period of time where it was particularly difficult to find employment.

2. Moran's and Mineards' interim search-for-work efforts are irrelevant in light of Respondent's failure to carry its burden, but are nonetheless reasonable.

When a respondent does not meet its burden of proving substantially equivalent employment, it is not necessary to reach the second part of the analysis as to whether a discriminatee's job search was reasonable. *International Brotherhood of Teamsters Local 25, 366 NLRB No. 99, slip op. 5, fn. 9 (2018)*. Since Respondent has completely failed to demonstrate there were substantially equivalent jobs in the relevant geographic area available to Moran and Mineards during the backpay period, the reasonableness of their actual search for interim employment is irrelevant. Furthermore, the General Counsel had no burden to produce any evidence regarding their respective search-for-work efforts at the hearing. Only when a "respondent raises a job search defense *and 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 back pay period, the burden shifts to the General Counsel to produce

competent evidence of the reasonableness of the discriminatee's job search." *St. George Warehouse*, 351 NLRB 961, 967 (2007) (emphasis added).<sup>19</sup>

Even assuming *arguendo* that Respondent met its burden to show substantially equivalent jobs in the relevant geographic area, or that the General Counsel had a burden to produce evidence of Moran's and Mineards' search-for-work efforts, the ultimate burden of persuasion that the discriminatees did not reasonably mitigate their damages still rests with the wrongdoer Respondent. "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 of diligence. For a respondent to prove its affirmative defense, it must show, on the part of the backpay claimant, a clearly unjustifiable refusal to take desirable new employment. Any doubts or uncertainties are resolved in favor of the discriminatee, not the respondent." *Teamsters Local 25*, 366 NLRB at slip op. 2 (internal quotes and citations omitted). Notably, the test for mitigation is not measured by a discriminatee's success in gaining employment, but rather by the efforts made to seek work. *Lorge School*, 355 NLRB No. 94, slip op. at 3 (2010); *Pessoa Constr. Co.*, 361 NLRB 1174, 1188 (2014). Based on the entirety of the record, Respondent cannot meet that burden. The record clearly demonstrates that Moran and Mineards reasonably mitigated the losses they suffered as a result of Respondent's unlawful conduct, and despite the economic downturn across the country.

*a. Moran's Search-for-Work and Interim Record*

Moran worked for Respondent from September 15, 2005 until he was discharged on about August 31, 2008. (Tr. 569:10-11). At the time of his discharge, he was a sportswriter and page designer. (Tr. 569:18-20). He worked full-time, 40 hours per week, on five days. Respondent

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<sup>19</sup> Furthermore, the General Counsel had no basis to preemptively produce this search-for-work evidence in its case-in-chief at the hearing, in anticipation of Respondent's defense, since Respondent refused to even articulate or proffer that it would satisfy its initial burden on mitigation. (Tr. 184-187).

provided him with an office space and computer equipment. (Tr. 570:7-22). He traveled to sporting events for work and Respondent reimbursed him for his travel expenses. (Tr. 571:1-19).

Within a few days from his termination, Moran applied for and was granted unemployment benefits from the State of California. (GC Ex. 14; Tr. 575:13-25). He received unemployment benefits for approximately six months. (GC Ex. 15, 16, 17; Tr. 577:1-16, 578:4-11). “Board precedent establishes that the receipt of unemployment compensation pursuant to the rules regarding eligibility constitute prima facie evidence of a reasonable search for interim employment.” *M.D. Miller*, 365 NLRB at slip op. 5 (internal quotations omitted).

Moran also testified about his search-for-work efforts during the period he received unemployment compensation. He contacted people he knew to see if there were openings in their organizations. He contacted Michael Todd, editor of Miller-McCune Magazine in Santa Barbara. Todd said they did not have openings. (Tr. 579:12-25). Moran also contacted the Monterey Herald, where he had worked previously, and spoke the city editor Royal Calkins and executive editor Joe Livernois. They both said they would be happy to hire Moran back but they didn’t have any openings at the time for copyeditor or reporter. (Tr. 579:24-25, 580:1-8). Moran also registered with a few job search websites, such as Monster.com and journalismjobs.com. He also registered with the State of California Employment Development Department site called “CalJobs.” (Tr. 580:9-14). He applied for a reporting job with the Burbank Leader. (Tr. 581:1-8). He applied for another reporting job covering the courts in the North Bay area. (Tr. 581:9-16). He applied for a job with the Hispanic Business Journal as a copyeditor in Santa Barbara. (Tr. 581:17-25). Moran even expanded his search for work outside the Santa Barbara area to Northern California and even Philadelphia. (GC Ex. 43; Tr. 582:19-25; 583).

In early 2009, Moran obtained work with ABC-CLIO. ABC-CLIO is a publisher of reference and academic books. They produce websites on different social studies topics that are used in high schools, colleges, and universities throughout the United States. Moran started working for the company on about March 15, 2009 as a writer and editor for the world geography and United States geography websites. (Tr. 586:14-25, 587:1). Moran worked forty hours per week, amongst five days per week. He worked for ABC-CLIO for about five years and two months. He earned about \$17 per hour. (Tr. 589:1-9). He was promoted to senior writer/editor in late 2012, with a pay bump to about \$19 per hour. (Tr. 589:11-19). Moran continued to work for ABC-CLIO until about early to mid-May 2014. (Tr. 592:22). He voluntarily quit his job with ABC-CLIO and the impact of his decision on the backpay owed to him are discussed in more detail *supra*.

After leaving his job with ABC-CLIO, Moran moved back to Moline, Illinois, where he had family and job contacts, due to having previously lived and worked in the area. Upon arriving in Moline, Moran made calls and inquired about open jobs with the Moline Dispatch and the Quad-City Times and was told there weren't any openings. (Tr. 663:14-25). In about July 2014, he started doing freelance work for the Moline Dispatch. (GC Ex. 37; Tr. 598-694, 663:6-15). He also looked for other work in that time and applied to several state government jobs in California (Tr. 605, 609-612).

Moran obtained a part-time job with the North Scott Press in about January 2015, which he worked on top of continuing his freelance work for the Moline Dispatch. Moran worked for the Press covering meetings, like the Eldridge City Council meeting and feature stories on issues affecting people in rural Iowa. (Tr. 616:25, 617, 1-6). Moran commuted from Moline, Illinois to Eldridge, Iowa several days each week to work for the Press covering rural Iowa news. (CITE).

His work with the Press until the middle of May 2015, the circumstances and impact of which is discussed in more detail *supra*. (Tr. 619, 17-18).

After Moran's employment with the Press ended, he continued doing freelance reporting with the Moline Dispatch. He also did about a half dozen freelance jobs for Augustana College during the time before he was hired full-time with the Moline Dispatch. (Tr. 666:17-23). In the summer of 2015, Michael Romke, the head of the copy desk for the Moline Dispatch, informed Moran that a full-time opening on the copy desk there. (Tr. 623:2-10). The position formally came open later in the summer and Moran applied. He was hired and started work in on about September 15, 2015 as a copy editor and page designer. (Tr. 623:11-20). His job entailed designing pages and editing stories for a total of four different newspapers that were part of the Small Newspaper Group, including the Moline Dispatch. (Tr. 623:22-25, 624:1-6). He continued working there full-time, eventually becoming a reporter, until he was reinstated to work for Respondent in June 2017. (Tr. 624:24-25, 625:1-3).

To summarize, over the course of a nearly nine-year backpay period, Moran obtained full-time interim employment for a period of nearly seven years, five years with ABC-CLIO, and almost two years of full-time work with the Dispatch. In between these periods of full-time employment, he obtained unemployment benefits and dutifully searched for work, even expanding his search outside the geographic area of Santa Barbara. When he moved to Moline, Illinois he relied on prior job contacts and performed freelance work in between periods of full-time employment. On top of the freelance work, he added part-time for about six months, despite the long commute from Moline, IL to Eldridge, Iowa. In light of the desperate economic times, Moran's efforts to mitigate his losses due to Respondent's discriminatory discharge were more than reasonable, they were exhaustive and valiant.

*b. Mineards' Search-for-Work and Interim Work Record*

Mineards, like Moran, also engaged in reasonable mitigation efforts, albeit in a different manner. Mineards obtained substantially equivalent employment within just days of Respondent's unlawful layoff and he maintained that employment throughout the entire backpay period.

Mineards worked for Respondent as a columnist and broadcaster from April 2007 until January 2009. (Tr. 317:21-25). During that time, he did a weekly column every Tuesday, which was limited by the News-Press to about a half page of the paper, or about 1,400 or 1,500 words. (Tr. 322:18-22). Mineards column at the News-Press was a mix of highlighting people and organizations every week, such as charity galas and nonprofits. (Tr. 318:11-14). Moran's typical Tuesday column for the News-Press was a mix of personality pieces on organizations, the theater, etc. (GC Ex. 24; Tr. 321:15-19). He covered events in the Santa Barbara area from Goleta to Summerland/Carpinteria. (Tr. 319:8-12). He also co-hosted a radio show with the co-publisher Arthur Von Wiesenberger. Towards the end of his employment, he started doing some video real estate ads for Respondent's website. (Tr. 318:3-8).

While working for Respondent, Mineards was a salaried employee who earned \$75,000 per year. (Tr. 339:2-5). Mineards was not required to keep track of his exact hours each week at the News-Press. (Tr. 318:17-23). He testified on cross that it could be more, depending on what was happening each week. (Tr. 366:5-8). He then testified that he worked 30 or 40 hours at the News-Press. (Tr. 366:11-12). During the week he would go to various functions, be it lunches or charity galas, and talk to individuals. (Tr. 319:1-7). The weekly radio show was an hour long on Thursdays. He went in an hour beforehand, so he spent about two to three hours each week on it. (Tr. 320:7-23; 366:5-6).

Mineards was offered a job with the Montecito Journal (Journal) within about three days of his layoff from the News-Press. He worked for the Journal throughout the entire backpay period. (Tr. 324:1-8). The Journal is a free weekly newspaper distributed in Montecito, Carpinteria, and Summerland. (Tr. 324:22-25, 325:7-12). He works for the Journal as an independent contractor, on a freelance basis. (Tr. 340:21-23). Mineards did not have a choice as to the freelance employment arrangement, as the Journal did not offer to hire him as an employee. (Tr. 347:1-4).

Mineards' work for the Journal is similar to that at the News-Press. He writes a weekly column called Montecito Miscellany and it is an "olio of personalities, organizations, charity galas, the ballet, the opera, the theater," etc. The column can range from four to eight pages each week, depending on the number of events he attends and the number of photographs included. (GC Ex. 25; Tr. 324:10-19). Sometimes his column is 4,000 to 4,500 words, as the Journal, unlike the News-Press, does not place any limitation on the length of his column. (Tr. 326:5-20). In working on the column for the Journal, Mineards travels to charity lunches, charity galas, the theater, the ballet, the opera, the Choral Society, the Ensemble Theatre. (Tr. 327:1-8). He covers events in Santa Barbara, Montecito, and Summerland and Carpinteria. (Tr. 327:22-25). The Journal does not have a radio show and has not asked Mineards to work on a radio show. (Tr. 336:9-14, 365:21-25).

The Journal does not require Mineards to account for his exact hours each week. (Tr. 326:21-23). The Journal pays him a flat rate per week for producing a column. When he started with the Journal, they paid him a weekly check of \$500. (Tr. 328:3-14). At some point several years in, the Journal increased his pay to \$575 per week, which he has been making since. (Tr. 328:24-25, 329:1-3). Mineards does not tabulate the hours he works each week for the Journal but

estimated that he attends and covers events five to six days a week for several hours and then takes about five to seven hours to write the column.

Mineards' interim employment with the Journal is substantially equivalent to his work for the News-Press in terms of the type of work he is performing. He writes nearly the same column still, only without any limitations. In terms of the events he covers, the type of events he attends and the geographic area is the same between his work with the News-Press and the Journal.

Respondent asserts that the work was not substantially equivalent. Respondent argues that Mineards' work for the Journal was only part-time, but the record demonstrates otherwise. The work is equivalent in terms of the hours. He was not required to keep track of his exact hours at either the News-Press or the Journal, and the amount of time he works each week depends on how much time he spends attending events.

Respondent may also argue that Mineards' work for the Journal is not substantially equivalent because he is working on a freelance basis as an independent contractor. However, this factor alone does not make the work substantially different. In fact, the freelance arrangement was exactly what Respondent was offering Mineards when it unlawfully dealt directly with him immediately after his layoff. Board precedent is clear that self-employment is not equivalent to a willful loss of earnings, but is to be treated as other interim employment. *In Re California Gas Transp., Inc.*, 355 NLRB 465, 469 (2010) (citing *Cliffstar Transportation Co.*, 311 NLRB 152, 169 (1993); *Heinrich Motors*, 166 NLRB 783 (1967)). Self-employment, such as Mineards' freelance work for the Journal, is a proper and adequate way for a discriminatee mitigate their losses, and cannot be construed as a withdrawal from the labor market or be equated. *Heinrich Motors*, 166 NLRB 783 (1967), *enfd.* 403 F.2d 145, 148 (2d Cir. 1968).

Moreover, in addition to his work at the Journal, Mineards obtained other paid employment throughout the backpay period, covering the royal wedding of Prince William and Kate, Duchess of Cambridge for an NBC affiliate in Los Angeles, California. In the same year, he also covered Kate and William's trip to the Santa Barbara Polo Club. (Tr. 336:17-25). In covering those events, he went to a studio in Burbank and gave commentary. (Tr. 337:3-9). He estimated that he earned approximately \$2,000 or \$3,000 for that work. (Tr. 337:17-19).

Finally, in addition to working for the Journal and supplementing that work with paid commentary appearances, Mineards also looked for other full-time work during the backpay period to supplement his meager earnings. Mineards was nearly 60 at the time of his layoff. (Tr. 362:15-19). So in addition to the overall economic recession and high unemployment rates, Mineards had the added hardship of back entering into the workforce as older individual.

Mineards credibly testified about his job search early in the backpay period and provided relevant details about his efforts when he was given an opportunity to answer direct questions, and was not simply being cross examined.<sup>20</sup> Mineards could not recall, unassisted, *all* of the specific jobs he applied for in the backpay period, which started nearly 11 years before he gave his testimony. (Tr. 351:4-8). However, a discriminatee's inability to recall the names of interim employers he applied to "is neither unusual nor suspicious, and indeed readily understandable, and does not automatically disqualify him from receiving backpay." *M.D. Miller Trucking & Topsoil Inc.*, 365 NLRB No. 57, slip op. 6 (2017). Given the length of the backpay period in this case, it is especially understandable that a discriminatee may not recall in minute detail ever job they applied to.

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<sup>20</sup> Since the General Counsel had no burden to produce evidence of Mineards' search-for-work efforts in its case-in-chief, such as in the direct examination of Mineards, he was first subjected to questioning on the topic on cross examination.

Mineards testified about looking for jobs that used his expertise, such as public relations jobs and journalism jobs. He testified how he looked for jobs each month and he looked in sources such as the Independent, a weekly magazine, and the website journalismjobs.com. (Tr. 352:2-12). He also looked for jobs at the University of California, Santa Barbara (UCSB). (Tr. 348:18-24). Mineards recalled, unassisted by any memory aides, applying for a public relations job at QAD, a computer company in Summerland, within the first few months after his layoff. (Tr. 351:16-21, 352:19-25). He also recalled, unassisted, applying and interviewing for a job at Santa Barbara City College for an operations officer, or head of communications, within about eight months of his layoff. (Tr. 377:6-9, 378:5-6). He could not recall if the job he applied for at Santa Barbara City College over a decade ago was specifically called “head of communications” or “public information officer,” but he considered those titles to be essentially the same. (Tr. 414:18-24). The NLRB Form 5224 that Mineards submitted to the NLRB, recording his search-for-work efforts during the third quarter of 2009, confirm that he applied to jobs at QAD Summerland and Santa Barbara City College in that timeframe. (GC Ex. 26). In that same period, he also applied to jobs at the Bacara Resort, The Chicago School in Santa Barbara, the Burham Institute at Santa Barbara, the American Red Cross, and the Arthritis Foundation of Santa Barbara. (GC Ex. 26; Tr. 406:4-18).

Mineards generally testified that he continued to look for other work throughout the initial years of the backpay period and continued to fill out the NLRB Form 5224s, but he was not given an opportunity to refresh his memory on the specifics of exactly which jobs he applied for in the period that spans seven to ten years before his testimony. (Tr. 408:2-5).<sup>21</sup>

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<sup>21</sup> General Counsel ceased questioning Mineards in this regard, since the General Counsel did not have any burden to produce interim search for work evidence. (Tr. 408:2-5).

Mineards consistently testified that he stopped applying for *other* jobs, other than his job at the Journal, at some point later in the backpay period when he began receiving social security benefits due to his age, and a SAG AFTRA pension that he earned from work he did before his employment at the News-Press. (Tr. 354:1-25, 355:1-7, 391:4-7). He could not recall exactly when he stopped looking for supplemental work, but he consistently testified that it was prompted by the receipt of the supplemental pension and social security benefits. (CITATION). Respondent may argue that at this point, Mineards removed himself from the labor market. However, any such argument misses the salient point that Mineards was continued in his substantially equivalent work for the Journal throughout the entire backpay period. A discriminatee who accepts an interim job at a lower rate of pay than the job from which he was illegally discharged is under no duty to continue to search for work. *Champa Linen Service Co.*, 222 NLRB 940 (1976); *see also Roman Iron Works*, 292 NLRB 1292 fn. 3 (1989) (application for or receiving Social Security or other retirement benefits does not necessarily establish a withdrawal from the labor market). Mineards did not remove himself from the labor market, he merely stopped suffering the strain of trying to supplement his meager income from the Journal with *additional* work.

In conclusion, Mineards, like Moran, made reasonable efforts to search for interim employment, and in fact obtained interim employment during the entirety of the backpay period. In light of these facts, Respondent cannot meet its burden to demonstrate that Mineards failed to mitigate his damages in any manner that would offset the measure of gross backpay owed to him.

3. Moran reasonably quit interim employment and his decision does not affect the measure of backpay owed to him.

Respondent will argue that Moran is not due any backpay after he voluntarily quit his interim employment with ABC-CLIO in about May 2014. There is no doubt that Moran left work with ABC-CLIO voluntarily. He testified credibly and consistently to that fact. (Tr. 595:1-10,

649:2-3). Moran's decision to quit work for ABC-CLIO after five years of gainful employment was entirely reasonable given the circumstances and does not reduce his gross backpay. When a discriminatee voluntarily quits interim employment, "the burden shifts to the General Counsel to demonstrate that the decision to quit was, in the circumstances, reasonable." *A. A. Superior Ambulance*, 292 NLRB 835, 840 (1989) (internal quotations omitted). "A claimant who obtains a job but then leaves it for a justifiable reason is not deprived of all further claims to backpay since the assumption is that the reason for the claimant's quitting the job would not have been present absent Respondent's wrongdoing." *Beverly California Corp.*, 329 NLRB 977, 982 (1999) (holding that a reason which is personal to the discriminatee, in this case the discriminatee adjusting her schedule to care for her ailing mother, can be deemed justifiable and negates a willful loss of earnings).

ABC-CLIO is a publisher of reference and academic books. They produce websites on different social studies topics that are used in high schools, colleges, and universities throughout the united states. Moran started working for the company on about March 15, 2009 as a writer and editor for the world geography and United States geography websites. (Tr. 586:14-25, 587:1). At the time he was hired, there was a supervisor and two other employees in his work group. (Tr. 587:10-16).

The websites for U.S. and world geography, for about 196 countries, had landing pages with information about the economy, the physical geography, the politics and government and various cultural matters. Those pages needed constant updating. (Tr. 587:17-25). In addition to updating the websites, Moran and others in his group provided content such as reference entries for the sites and critical thinking projects for students. The projects involved soliciting essays from scholarly sources on a topic and formulating activities for the students on the given topic.

Moran and his co-workers were expected to complete several of these projects per year. (Tr. 588:1-13). Moran and his co-workers split up the world geography into segments. Moran was initially responsible for Sub-Saharan Africa and Latin America when he started. (Tr. 588:20-25).

Over the course of his employment with ABC-CLIO, the amount of work Moran was expected to produce increase. One of the colleagues in his work group left employment and was not replaced. His other colleague left at some point to work in another area of the company. By 2013, Moran was in a work group alone with just his supervisor, who worked in Colorado. As his former colleagues left and were not replaced, Moran had to keep track of everything as best he could. (Tr. 591:13-25, 592:19). Still, Moran persisted in the job.

Moran originally worked at the job in Goleta, California, but in May 2013 he moved to Colorado. (Tr. 586:18-19, 589:11-14). The move was prompted by a change in supervision at work, such that his new supervisor worked in Colorado. ABC-CLIO's main office was in Santa Barbara and also had an office in the suburbs of Denver, Colorado. Moran believed that a move to Colorado would be beneficial in terms of working in the same office as his supervisor as well as an economic benefit in terms of the cost of housing as compared to Santa Barbara. (Tr. 589:23-25, 590:1-7). At the time he was living in Santa Barbara, he shared a house and paid about \$950 to \$980 per month, including utilities. He testified that when he moved to Colorado, he paid about \$900 in rent for a one-bedroom apartment, and also had to pay utilities. (Tr. 590:17-20).<sup>22</sup>

Despite the move, by about the fall of 2013, Moran was experiencing difficulties at work, due to having new assignments, on top of the added burden from his reduced work group. There was essentially a lot more work being done by fewer people, including Moran. The company placed more emphasis on websites, as the publishing side of the business declined. Moran started

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<sup>22</sup> The General Counsel moves to correct the transcript at page 590, line 17, which incorrectly states 100, where it should state "\$900" or "nine hundred." Moran testified that his rent in Colorado was \$900 per month.

to do lesson plans, to adhere to common core curriculum for high schools, and scripts for videos to be presented in classrooms. Moran researched for some of these video scripts outside the area of geography, like ancient history. This work was in addition to the expectation that he keeps the geography websites updated. (Tr. 592:24-25, 593:1-25).

Moran testified that his supervisor became a little unhappy with his work and he was not entirely keeping up with demands to a satisfactory level. His supervisor warned him at the beginning of 2014 that more would be expected of him as a senior writer/editor, hinting that discipline could occur if he didn't step up his work. In the early months of 2014, Moran did improve, and his supervisor told him that she appreciated it. However, Moran did not think he would be able to catch up on all his 2013 work and goals, and still make the annual 2014 goals on top of that. (Tr. 594:1-14).

Moran decided to leave work with ABC-CLIO, even after meeting his first quarter 2014 goals and being told that he did good work. (Tr. 595:1-10). His bosses were happier with him than they had been a few months earlier, but he was still catching up to what they expected of him in his position as senior writer/editor. (Tr. 649:4-9). In early January 2014, he received a warning at the beginning of the year that he needed to improve productivity or there could be disciplinary action. (Tr. 649:11-14, 21-23). A few months later, his supervisor thanked him for improving his productivity. (Tr. 650:1-3). However, his supervisor also reminded him of things he needed to complete from the year before, as well as the work for the current year. (Tr. 650:14-18). At the time he quit, they were coming to the end of a quarterly assessment that he thought he was going to fall short of. (Tr. 651:13-17).

Around the same time he was facing increased pressures at work Moran was experiencing increased financial strain. The suburban Denver area where he lived was not as much of a financial

break as he thought it would be and housing prices were rising. His rent would go up at the end of his year-long lease. He was making less money for ABC-CLIO than he did with Respondent, but his living expenses were nearly the same. He began seeing some attractions to moving back to his hometown of Moline, Illinois. (Tr. 594:14-24). Moran was born and raised in Moline, Illinois. At the time, he had two sisters who lived there, and an aging brother-in-law. One of his sisters was a widow with two adopted children. There were reasons why Moran and others would benefit from his presence there. Moran also had a lot of contacts for employment in Moline, so it seemed like a good place to transition. Moran had worked for several years as a reporter for the Moline Dispatch, a daily newspaper. (Tr. 597:17-25)

Due to these considerations, Moran gave about six-weeks' notice to ABC-CLIO and moved to Moline, Illinois in about the end of May 2014. (Tr. 595:13-25, 596:1-14). Moran moved in with one of his sisters, who owned the home. He didn't pay rent, but only utilities, initially about \$100-200 per month, and so his living expenses were significantly reduced. (Tr. 597:6-16). Also, as described above, he used his prior contacts from the Moline Dispatch to obtain freelance work and ultimately full-time employment in the area.

Moran credibly testified that the multifaceted reasons prompting his resignation from ABC-CLIO. He was facing increased work demands, he had recently failed to meet expectations, and despite a brief period of satisfying his supervisor, he feared he would not meet the upcoming quarterly goals. He also had financial reasons for quitting, such that his living expenses were high, and he had an opportunity to live less expensively by moving in with relatives in Moline.

Moran was employed at ABC-CLIO for five years, which is longer than he was employed with Respondent before he was unlawfully discharged. At the outset, it is worth reiterating that Respondent has not demonstrated that there were substantially equivalent jobs in the relevant

geographic area of Santa Barbara during the backpay period. More specifically, Respondent has not shown that there were any sports reporter copy editor jobs in sports with similar pay, hours, and responsibilities, as Moran had with Respondent before his discharge. In order to mitigate his own damages, Moran took a job with ABC-CLIO, which is sufficient to satisfy any burden Moran had to mitigate, but it still did not provide him the benefit of substantially similar work and working conditions as his job with Respondent. He went from reporting on sports events to doing in-depth research and content creation for educational materials in the geography and world history subjects. *See Ryder Systems*, 302 NLRB at 609 (“A claimant is not required to continue employment which is not suitable or not substantially equivalent to the position from which he was discriminatorily discharged.”); *Lundy Packing*, 286 NLRB at 144 (a voluntary quit is not a willful loss of earnings “if the interim job is substantially more onerous or is unsuitable or threatens to become so . . . [or] when it is prompted by unreasonable working conditions or an earnest search for better paying employment.”); *Lucky Cab Company*, 366 NLRB No. 56., slip op. 13 (2018) (not unreasonable for employee to quit job where he did not get a regular shift and worked the worst hours and made substantially less money than with respondent).

#### **A. Interim Earnings**

Respondent may argue that Moran’s or Mineards’ gross backpay should be reduced by additional amounts of interim earnings than is reflected in the Specification. “It is a respondent employer's burden to establish how much its backpay liability should be reduced by a discriminatee's interim earnings... Further, as the employer created the dispute by its unlawful actions, doubts or uncertainties in the evidence are generally resolved against it.” *Lucky Cab Co.*, 366 NLRB No. 56, slip op. 6 (2018) (internal citations omitted). The General Counsel’s inclusion of “known interim earnings and other offsets to gross income in the specification, [is] done only as an administrative courtesy.” *Id.* at slip op. 7 (2018) (internal quotations omitted).

By the close of the hearing, Respondent did not articulate any particular amount in any particular quarter that the interim earnings should be adjusted for Moran or Mineards. Nor did Respondent assert that the earnings should be calculated pursuant to any specific formula resulting in more deductions than were included in the Specification. Thus, the General Counsel does not have notice to address any particular calculations Respondent may propose for the first time in its brief. Rather, Respondent merely hinted at certain arguments with respect to interim earnings in its cross-examination of CO Bailey. They are generally addressed below.

1. The Specification properly allocates interim earnings on a quarterly basis and according to appropriate approximations.

Moran's quarterly interim earnings are reflected in the column titled "Quarter Interim Earnings" in Amended Appendix D-1. (GC Ex. 2; Tr. 746:16-20). Mineards' quarterly interim earnings are similarly reflected in Amended Appendix D-2. (GC Ex. 3; Tr. 764:4-6). In calculating quarterly interim earnings, CO Bailey testified about how she used the gross amount of earnings from various earnings statements or W-2s and divided it by the approximate number of weeks worked that year and then allocated those weeks to the appropriate quarters to arrive at quarterly total of interim earnings. (Tr. 793:17-25, 794:1-9). Respondent may assert that this process is not exact, because it does not reflect the actual amount Moran or Mineards earned in each discrete week of the eight to nine-year backpay period. However "exactitude in calculating interim earnings is not required; reasonable estimates and approximations are sufficient." *Cab Company and Industrial*, 366 NLRB No. 56, slip op. 9 (2018).

Moreover, CO Bailey described how for calendar quarters where Moran earned more than the gross backpay amount in the quarter, of which there was only one, she did not give "a credit" to Respondent for that amount, or otherwise offset the backpay owed. (GC Ex. 2, pg. 8; Tr. 788-89). Respondent may assert that the allocation of interim earnings by quarter in this manner, and

the resulting quarterly net backpay calculations, does not properly account for any “extra” money that Moran and Mineards were able to earn after their unlawful discharges, and does not reflect the true total of the damage done to Moran or Mineards as a result of Respondent’s unlawful actions.

The Board has long maintained that is appropriate, and in fact necessary, to calculate interim earnings and net backpay on a quarterly basis, rather than subtracting the cumulative interim earnings over the course of the entire backpay period from the cumulative gross backpay. The Board first articulated this formula in *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950), ordering that “the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement.” *Id.* Furthermore, the Board stated that “[e]arnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.” *Id.* The Board maintains this standard of computing interim earnings and net backpay on a quarterly basis to this day. Any of Respondent’s arguments for a contrary formula are unsupported by Board precedent and must be rejected.

2. The Specification properly offsets Mineards’ interim earnings for his lost vacation pay.

Respondent may assert that Mineards’ interim earnings should not be offset for his lost vacation pay. Specification Section V(q), which was granted by the Board’s September 3, 2019 Decision and Order, alleges that “Respondent provided four (4) weeks of paid vacation each year.” (GC Ex. 1(f), pg. 13; 368 NLRB at slip op. 3). Specification Section V(r) alleges:

Mineards [sic] lack of a paid vacation during the backpay years was offset from interim earnings because he would have had a 4-week paid vacation at Respondent each year. The offset is reflected by subtracting 4 weeks of interim earnings in the 1<sup>st</sup> Quarter of each year of the backpay period.

(GC Ex. 1(f), pg. 13). This section of the Specification was not granted by the Board's September 3, 2019 Decision and Order.

Mineards did not earn any paid vacation from his interim employer, the Journal. (Tr. 329:4-8). In order to account for the loss of this paid vacation benefit, the four weeks of paid vacation he would have received had he continued to be employed with Respondent is offset from his interim earnings. (Tr. 769:8-18). Starting with the year 2010,<sup>23</sup> CO Bailey subtracted the equivalent of four weeks'-worth of interim earnings from the Journal from the first calendar quarter of the year. (GC Ex. 3, pg. 2; Tr. 769:19-25, 770:1-6). CO Bailey testified that she relied on the Casehandling Manual, Section 10544.5, in performing this offset.<sup>24</sup> (Tr. 770:23-25, 771:1-4). Section 10544.5 states:

If a discriminatee receives less paid vacation from an interim employer than he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer.

Thus, CO Bailey properly reduced Mineards' interim earnings each year, starting in 2010, by the four weeks of paid time off he would have earned but for Respondent's unlawful actions.

3. Mineards' net earnings from self-employment were appropriately deducted from gross backpay.

Mineards was self-employed during the backpay period, in that he was working as a freelance independent contractor for the Journal and his earnings were reported on an IRS Form 1099, not a W-2. Respondent may assert that Mineards' gross earnings from his freelance work for the Journal, rather than his net earnings from self-employment, should be deducted from gross backpay in order to calculate net backpay. However, "[i]t is well established that only net earnings

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<sup>23</sup> Mineards was paid for his unused vacation after his unlawful layoff in 2009. (GC Ex. 1(f), pg. 11, fn.11).

<sup>24</sup> The Board has held that the Board's Casehandling Manual on Compliance (Casehandling Manual or Compliance Manual) provides relevant guidance in compliance proceedings, but is not binding. *International Union of Operating Engineers, Local 627*, 368 NLRB No. 39, slip op. 2, fn. 9 (2019).

from self-employment are considered to be interim earnings deductible from gross backpay.” *In re California Gas Transport, Inc.*, 355 NLRB 465, 465 fn. 1 (2010) (internal quotations omitted).

In *California Gas*, the Board stated:

The use of gross wages in the backpay calculation reflects the fact that in the employment relationship most costs of doing business are borne by the employer. The use of net earnings for purposes of mitigation in the case of a self-employed discriminatee, by contrast, reflects the fact that the self-employed bear their own costs of doing business. Thus, in most instances, gross wages minus net earnings accurately reflects what a discriminatee lost as a result of the violation of the Act.

*Id.* This observation holds true in Mineards’ case. The Journal paid Mineards a weekly check of \$500, or \$575 in the later years of his employment, which did not include any deductions for Social Security, Medicaid, or Medicare. (Tr. 328:3-14, 24-25, 329:1-3). Mineards worked for Respondent and traveled to events to write about in his column he used his own car, and Respondent reimbursed him for his mileage, as well as parking or valet parking. (Tr. 319:13-18). He had an office at the News-Press where he could work and the News-Press provided equipment, such as computer, printer, a copying machine, stationary, pens and pencils. (Tr. 319:21-25, 302:1-4, 344:19-21). By contrast, when Mineards travels to events to write his column for the Journal, he uses his personal car and the Journal does *not* compensate him for this travel expenses. (Tr. 327:9-13). He works out of his home and the Journal has not provided him any equipment or materials to do so. (Tr. 327:14-19). Thus, CO Bailey appropriately calculated the net backpay owed to Mineards by using the default formula of deducting his net earnings from interim

employment from gross backpay.<sup>25</sup> Respondent has not provided any basis to demonstrate that a different formula should be used.

Respondent may also argue that certain expenses and deductions Mineards claimed in his tax filings are not legitimate, and that these deductions should be added back to his interim earnings. Where interim earnings are derived from self-employment, the burden is on the to establish that any claimed business expenses should not be deducted in calculating the total net amount earned. *Cliffstar Transportation Co.*, 311 NLRB 152, 169-70 (1993); *Lucky Cab Company*, 366 NLRB No. 56 (2018). “Further, as the employer created the dispute by its unlawful actions, doubts or uncertainties in the evidence are generally resolved against it.” *Lucky Cab Co.*, 366 NLRB No. 56, slip op. 6 (2018) (citing *California Gas Transport, Inc.*, 355 NLRB 465 fn. 1 (2010)).

Mineards’ net earnings from this self-employment were derived from his tax records, specifically the yearly net profit from his yearly IRS form Schedule C Profit and Loss From Business (Schedule C).<sup>26</sup> All of these documents were provided to Respondent at the outset of the hearing. (Tr. 813:1-8, 815:10-25). However, Respondent chose to only introduce Mineards’ 2011 Schedule C into the record. (R Ex. 4). In reference to this document, CO Bailey described how some of the claimed expenses on the Schedule C, which lowered the net profit amount, were expenses that she determined Mineards also had while he was previously employed with Respondent. For example, Mineards’ Schedule C deducts “Other Expenses” in the amount of

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<sup>25</sup> CO Bailey testified that she relied on the relevant Casehandling Manual section regarding “net profit” when she calculated Mineards’ net backpay, but she could not recall the specific section number at the time of her testimony. (Tr. 817:21-25, 818:1-2). Casehandling Manual Section 10552.3, titled “Self-Employment, states in relevant part that net earnings from self-employment should be deducted from gross backpay. The Casehandling Manual cites to *Regional Import & Export Trucking Co.*, 318 NLRB 816, 818 (1995) in this regard, as well as the relevant provisions from *California Gas* quoted *infra*.

<sup>26</sup> Section 10552.3 of the Casehandling Manual notes that “Federal tax returns may also establish net earnings from self-employment. Internal Revenue Schedule C is the form used to report net earnings from self-employment; the schedule requires reporting of gross receipts as well as offsetting expenses approved by IRS.”

\$3,958, for items such as for SAG-AFTRA dues, newspapers and magazines, phone and internet, cable TV. CO Bailey testified about adding these “other expenses” back to the net profit amount listed in the Schedule C, and then deducting the resulting larger interim earnings amount from gross backpay, essentially working to Respondent’s benefit, even where no burden to do so exists. (R Ex. 4; Tr. 815:17-25, 816:1-7, 827:5-15).

Respondent will argue that even more of the claimed expenses from the 2011 Schedule C need be added back to interim earnings, such as the \$12,792 amount Mineards claimed for the business use of his home. (R Ex. 4). Respondent did not offer a shred of evidence that would substantiate this claim. Respondent did not question Mineards about the basis for the deduction. Respondent did not call Mineards’ tax preparer to question him or her about the appropriateness of the deduction. Respondent did not offer any other evidence to demonstrate that the deduction is improper. Mere speculation about whether the deduction is legitimate or necessary is insufficient to satisfy Respondent’s burden. *See California Gas*, 355 NLRB at 465 fn. 1 (even while acknowledging that there may be some doubt about the correctness of the deductions claimed in the discriminatee’s tax return, the Board did not rely on the uncertainty to reduce the backpay); *Cab Company and Industrial*, 366 NLRB No. 56, slip op. 9 (2018) (discriminatee deducted IRS allowable per diem for truck drivers on his Schedule C, even though it was admittedly not the actual amount spent on meals); *Lucky Cab Company and Industrial*, 366 NLRB No. 56, slip op. 7 (2018) (tax return for business is sufficient evidence showing that commissions were paid and deducted as a business expense from gross income of the business); *see also Midwestern Personnel Services*, 346 NLRB 624, 625 (2006), *enfd.* 508 F.3d 418 (7th Cir. 2007) (“Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent.”).

4. Respondent has not demonstrated that any additional earnings should be deducted from gross backpay.

Respondent may assert that additional classifications of earnings by Moran and Mineards, such as strike payments, wages for participating in bargaining, Social Security payments, or pension payments, should be deducted from their gross backpay allocations. Any such arguments must fail, as they are not supported by law or the evidence offered by Respondent at the hearing.

Moran earned wages from the Union for his role on the Union's bargaining committee and his participation in negotiations. (Tr. 572:17-25). He was paid for participation in these negotiations before his unlawful discharge from Respondent. (GC Ex. 8; Tr. 573:1-4, 14-18). He continued to participate in the same manner after the discharge. (GC Ex. 13; Tr. 574:1-10, 17-21). Thus, his earnings from the Union are considered moonlighting, i.e., work he performed in addition to his work for Respondent. If a discriminatee holds a second job before respondent's unlawful action and continues to hold that job through the backpay period, earnings from the second job are not deductible. *See, e.g., Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952); *see also U.S. Telefactores Corp.*, 300 NLRB 720, 722 (1990).

Moran also received strike payments from the Union after his unlawful discharge, but he did not perform any work in exchange for these payments. (Tr. 575:2-12). Thus, the payments do not constitute interim earnings to be deducted from gross backpay. *See, e.g., Lundy Packing Co.*, 286 NLRB 141 fn. 2 (1987), *enfd.* 856 F. 2d 627 (4th Cir. 1988); *See also Hansen Bros. Enterprises*, 313 NLRB 599, 605 (1993).

Mineards started collecting social security benefits when he reached the eligible age at some point during the backpay period, around 2015. He also started collecting a small pension from SAG AFTRA around the same time, which he earned as a result of his work in the television industry before he was employed with Respondent. (Tr. 354:1-25, 355:1-7, 391:4-7). Neither of

these sources of income constitute earnings for employment during the backpay period. Moreover, Mineards would have been entitled to these payments had he continued to be employed with Respondent. Thus, they should not be deducted from his gross backpay.

### **B. Interim Expenses**

The General Counsel bears the burden of demonstrating that expenses are included in the backpay remedy, reasonably calculated and substantiated. “The fact that expense computations are based on estimates does not preclude their acceptance.” *Best Glass Co.*, 280 NLRB 1365, 1370 (1986) (citing *Aircraft & Helicopter Leasing*, 227 NLRB 644, 645 (1976)).

1. Moran’s interim work and search-for-work expenses are included in the make-whole remedy.

By its motion to amend the Specification at hearing, the General Counsel seeks interim expenses in the total amount of \$2,158.50 owed to Moran resulting from his interim employment and interim search-for-work. (GC Ex. 44).

In 2014, while he was doing freelance work for the Moline Dispatch, Moran’s brother, who lived in Northern California and worked for the California Water Board, notified Moran of an opening there for a Public Information Officer position in Sacramento, California. Moran applied for the job in July 2014, and got a call back for an interview in about late August 2014. Moran went to Sacramento, California in September 2014 to interview for the position. (Tr. 605:18-25, 606:1-25, 607:1-6).

Moran made it through two interview rounds, which were several days apart. (Tr. 607:1-25, 608:1-4). Moran took one trip to Sacramento, California for these interviews. (Tr. 608:5-7). His trip was from late September to early October 2014. (Tr. 613:22-24). He traveled to Sacramento on Amtrak. He could not recall how much it cost, but he recalls purchasing a coach ticket, so he did not have a sleeping quarter. For the two nights that it took the train to get to

Sacramento, Moran slept in a regular train seat. (Tr. 614:1-6, 18-22). He stayed with his brother and sister-in-law in Modesto, which is about 70 miles south of Sacramento. Moran got to and from the city for his interviews with his brother, who commuted in from Modesto to Sacramento with several others for work. (Tr. 614:7-17). His other cost associated with the trip was for meals. (Tr. 614:23-25, 615:1-2). Specifically, the General Counsel seeks \$412 for round-trip coach Amtrak ticket from Moline, Illinois to Sacramento, California, as well as \$217 in food costs for an approximately seven-day trip (\$31 per day). (GC Ex. 44). These expenses are reasonable in light of the fact that Respondent reimbursed Moran for similar travel expenses, and per diem, when he traveled out of the Santa Barbara area to cover sports events.

Moran testified that in early January 2015 he obtained a part-time job working with a newspaper called the North Scott Press, a weekly newspaper in North Scott County, Iowa, which is across the river from Rock Island County, which includes Moline, Illinois, where he was living. The North Scott Press covers rural areas in a large county. The newspaper was about a 20-mile drive from where Moran was living in Moline. (Tr. 615, 22-25, 616:1-7). Moran started work on about January 7, 2015. (Tr. 616:8-9). Moran worked about 24 to 30 hours per week, spanning three and a half to four days per week. (Tr. 616:14-21). Moran testified that while he was working at the News-Press, he lived in a few different locations and his commute to work was about a mile or two. (Tr. 617:19-22). His work with the North Scott Press until the middle of May 2015. (Tr. 619, 17-18).

The Board has found that increased commuting costs for interim employment are compensable to discriminatees as part of a make-whole backpay awards. *Interstate Bakeries Corp.*, 360 NLRB 112, 114 (2014) (determining the difference in miles between discriminatee's extended roundtrip commute to interim employment and the discriminatee's round trip commute

before an unlawful transfer, multiplying the difference by the number of trips made, and compensating the extra miles at the mileage rate in effect at the time to compensate Federal employees for their use of private automobiles on Government business).

The General Counsel also seeks \$1,529.50 in extra out-of-pocket mileage costs associated with Moran's increased commute for his work at the North Scott Press. The formula for the calculations is included in the amendment. Moran's commuting expenses at the News-Press were calculated by multiplying Moran's approximate commuting mileage at the News-Press of 20 miles per week (four miles round trip times five days per week) times \$0.575 per mile. That weekly number - \$11.50 - is then subtracted from Moran's weekly commuting costs from Moline, Illinois to the North Scott Press. Moran's weekly commuting costs to the North Scott Press were approximately 160 miles per week (40 miles round trip times four days per week) times \$0.575 per mile, totaling \$92 per week. (GC Ex. 44). \$0.575 is the U.S. General Services Administration mileage reimbursement rate for 2015. (GC Ex. 49).<sup>27</sup> The General Counsel calculated the weekly difference in commuting costs, \$80.50 per week, times 19 weeks, the approximate span of time that Moran worked at the North Scott Press from January through May 2015. (GC Ex. 44). According to these calculations, the total out-of-pocket expense for Moran's longer commute to the North Scott Press is \$1,529.50. (GC Ex. 44).

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<sup>27</sup> The U.S. General Services Administration mileage reimbursement rate for the time period that Moran was commuting to work at the News-Press fluctuated, from \$0.445 per mile to \$0.585 per mile. The median of all the mileage reimbursement rates for the period that Moran worked for the News-Press is \$0.515, which is lower than the mileage rate used by the General Counsel in calculating Moran's commuting costs. By using a higher mileage rate to calculate Moran's commuting costs at the News-Press and then subtracting that higher number from Moran's commuting costs at the North Scott Press, the calculation of Moran's additional interim commuting costs is a *lower* amount than what would be calculated using a \$.515 mileage reimbursement rate.

2. Moran's interim moving expenses to accept reinstatement with Respondent are included in the make-whole remedy.

“A discharged employee is not confined to the geographic area of former employment; he or she remains in the labor market by seeking work in any area with comparable employment opportunities.” *Best Class Co.*, 280 NLRB 1365, 1370 (1986) (quoting *Mandarin v. NLRB*, 621 F.2d 336 (9th Cir. 1980)). The Board has awarded employees’ relocation expenses, as part of a make-whole backpay award. *See, e.g., Best Glass*, 280 NLRB at 1370 (granting moving expenses for two trips to Santa Fe to look for work, where the discriminatee also had family members living there who defrayed some of his expenses); *California Corp.*, 329 NLRB 977, 980-81 (1999) (granting relocation expenses to discriminatee for two relocations to and from Michigan to search for interim employment and, as was the prevailing method at the time, deducting these relocation expenses from interim earnings).<sup>28</sup>

Specification Section V(p) alleges that “Moran’s moving expenses owed from his move from Illinois to California resulting from his reinstatement at Respondent are set forth in the column titled “Interim Expenses” in Appendix D-1.” (GC Ex. 1(f), pg. 12). Those moving expenses are included in Amended Appendix D-1 as well, in the amount of \$1,376. (GC Ex. 2, pg. 12; Tr. 748:14-24).

Moran moved out of the Santa Barbara area to pursue work with ABC-CLIO. Respondent has not demonstrated that there were any substantially equivalent jobs in the Santa Barbara area, such that Moran could have reasonably supported himself and stayed there during the entire nine-year backpay period. At the time he received his offer of reinstatement, Moran was still living in Moline, IL. (GC Ex. 41; Tr. 627:8-9, 628:12-16). Moran accepted the reinstatement, and in order

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<sup>28</sup> In *King Soopers, Inc.*, 364 NLRB No. 93, slip op. 12 (2016), *enfd.* in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Board determined that search-for-work and interim employment expenses would be compensated, regardless of whether they exceeded interim earnings, and should be calculated separately from taxable net backpay.

to do so he had to move across the country. The related moving expenses are properly part of the make-whole remedy.

In order to get from Moline to Santa Barbara, California, he drove. (Tr. 628:19-25, 629:1-3). Moran drove his personal vehicle from Moline to Santa Barbara over the course of four days and three nights in mid-June 2017. (Tr. 629:4-20). Along the route, he stayed in motels in Olathe, Kansas, Amarillo Texas, and Flagstaff, Arizona. (Tr. 629:20-25, 630:1-2). His moving expenses included the motel stays, food, and gasoline. (Tr. 630:3-6). He itemized his expenses in a NLRB Expense form for the quarter covering April to June 2017. (GC Ex. 42, pg. 2; Tr. 631:20-24). He listed the mileage on his car as it changed throughout his drive from Moline to Santa Barbara. (GC Ex. 42, pg. 2; Tr. 632:9-10). His also included his motel receipts. (GC Ex. 42, pp. 3-5; Tr. 632:14-25). He also kept and included receipts from all the meals he purchased on his trip. (GC Ex. 42, pp. 6-13; Tr. 633:1-5).

In order to calculate the mileage expense, CO Bailey subtracted Moran's starting mileage (35,621) from his ending mileage for the trip (37,461), as reported on NLRB Form 5224 that he submitted, and then multiplied that amount by the government rate for mileage. (GC Ex. 42, pg. 2; Tr. 750:7-25). The U.S. General Services Administration mileage reimbursement rate for automobiles at the relevant time, in 2017, was \$0.535 per mile. (GC Ex. 49; Tr. 750:4-9). That amount equals \$979, which is listed in the column for interim expenses in Amended Appendix D-1. (GC Ex. 2, pg. 12). CO Bailey also included the total amounts of all Moran's motel stays during his relocation, which are supported by receipts from each motel that he attached to NLRB Form 5224. His three motel stays cost \$51.84, \$157.55, and \$124.82, amounting to \$334, which is listed in Amended Appendix D-1. (GC Ex. 42, pp. 3-5, GC Ex. 2, pg. 12; Tr. 751:13-20). The General Counsel also seeks the food expenses that Moran itemized on NLRB Form 5224 during his

relocation. The discreet amounts for each meal (\$10.65, \$8.30, \$7.90, \$19.05, and \$16.40) are each supported by a receipt and add up to \$62, which is included in Amended Appendix D-1. (GC Ex. 42, pp. 2, 6, 8, 10, 11, 13, GC Ex. 2, pg. 12; Tr. 751:21-25, 752:1-6).

3. Moran's and Mineards' interim health insurance expenses are included in the make-whole remedy.

“[T]he Board customarily includes reimbursement of substitute health insurance premium and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.” *Cliffstar Transp. Co.*, 311 NLRB 152, 167 (1993) (internal citation omitted). Specification section V(l) asserts that Moran and Mineards were covered by the Respondent's health and dental insurance plans. Section V(m) alleges that Moran and Mineards paid \$51.53 biweekly for medical insurance and \$4.17 for dental insurance coverage at the time of their termination from Respondent. (GC Ex. 1(f), pg. 12). Both of these sections of the Specification were granted in the Board's Decision and Order on the General Counsel's Motion for Partial Summary Judgment. 368 NLRB at slip op. 3.

The health and dental insurance premium expenses owed to Moran and Mineards are set forth in the column titled “Medical Expenses” in Amended Appendices D-1 and D-2, respectively. (GC Ex. 1(f), pg. 12, GC Ex. 2 & 3; Tr. 764).

CO Bailey calculated interim health insurance by subtracting what Moran and Mineards would have paid for insurance from if they continued to be employed by Respondent from what they did pay for insurance during the backpay period, if the amount of interim health insurance premiums was higher. (Tr. 752:15-25, 753:1-4, 764:10-13). CO Bailey used the amounts alleged in the Specification, and granted by the Board, to determine what Moran and Mineards would have paid in insurance premiums had they continued to be employed by Respondent. (Tr. 754:2-7, 764:10-13). CO Bailey used Casehandling Manual Section 10544.2 in determining a formula for

interim medical insurance. (Tr. 755:7-10). Section 10544.2 states, in relevant part, that “premiums paid by discriminatees to maintain comparable health insurance,” are reimbursable, “to the extent the premiums exceeded those paid when employed prior to the unlawful conduct.”

The General Counsel seeks total medical expenses in the amount of \$2,714 for Moran. (GC Ex. 2, pg. 12; GC Ex. 6). During the second and third quarter of 2015, Moran obtained health insurance from the Land of Lincoln insurance provider. (Tr. 619:24-25, 620:1-6). Moran could not recall specifically how much he paid for insurance with Land of Lincoln, but he recalled making several payments of \$200 or \$300 at a time. (Tr. 621:9-15). This is consistent with the payment amounts indicated on the paperwork he obtained from the Land of Lincoln. (GC Ex. 39, 50). CO Bailey used the invoice amounts on the Land of Lincoln paperwork that Moran obtained from his insurance provider and submitted to CO Bailey. (GC Ex. 39; Tr. 756:1). CO Bailey simplified the spreadsheet in Xcel for ease of use and identified four monthly invoice amounts of \$476.72 each, and corresponding payments. (GC Ex. 50; Tr. 756:18-25, 757:10-25, 758:2-20). In order to obtain the difference between what Moran paid monthly to Land of Lincoln and what he would have paid, monthly had he continued to be employed by Respondent, CO Bailey converted the biweekly premium amount that Moran would have paid at Respondent into a monthly equivalent. She did so by dividing the biweekly amount in two, to reach a weekly amount, and then multiplied the weekly amount by 4.3, the average number of weeks in one month. Using this formula, the monthly equivalent that Moran would have paid had he continued to be employed at Respondent is \$110.79. CO Bailey then subtracted this monthly equivalent from Moran’s Land of Lincoln monthly premiums to arrive at the interim monthly expense of \$366 per month. (Tr. 759:6-20). This expense is itemized for four months in 2015 in Amended Appendix D-1. (GC Ex. 2, pg. 10; Tr. 759:21-25, 760:1-4).

Moran obtained health insurance from the Moline Dispatch after he started working their full-time. His health insurance benefits kicked in after a three-month probationary period, in about December 2015. (Tr. 624:16-21). To calculate Moran's health insurance expenses while he was employed full time for the Moline Dispatch in 2016 and 2017, CO Bailey used Moran's pay stubs from the Moline Dispatch to determine his health insurance and dental premiums. (GC Ex. 2, pg. 11; Tr. 760:5-13). For the pay periods where Moran's health insurance expenses with the Moline Dispatch were lower than what they would have been had he continued to be employed with Respondent, CO Bailey did not include any interim medical expense in Amended Appendix D-1. (Tr. 761:1-7). Moran's Moline Dispatch pay stubs indicate he was paying for health and dental insurance on a biweekly basis, just as he did at Respondent. (GC Ex. 40: Tr. 761:8-17). Moran's health and dental insurance premiums with the Moline Dispatch increased over time. (GC Ex. 40). For the weeks where he paid more in biweekly health and/or dental insurance with the Moline Dispatch, CO Bailey calculated the biweekly difference by subtracting the amounts he would have paid for health and/or dental insurance with Respondent and itemized biweekly balance in Amended Appendix D-1. (GC Ex. 2, pg. 11; Tr. 761:8-25, 762:1-20, 763:1-21). The total health insurance expense, in addition to those Moran paid with Land of Lincoln amount to \$2,714.

Respondent asserts that the formula for calculating health insurance premiums during the backpay period should include an offset for periods of time where Moran "saved money" by getting cheaper health insurance than the insurance they had with Respondent, such as when Moran's earnings were so low after his unlawful discharge that he qualified for Medicaid. (Tr. 774:6-12). Similar to Respondent's argument with respect to offsets for periods of higher interim earnings, this argument has no basis in Board precedent or principle.

The General Counsel seeks total medical expenses in the amount of \$2,949 for Mineards. (GC Ex. 3, pg. 12, GC Ex. 6). During the backpay period, Mineards obtained health insurance coverage through Covered California, the state exchange for health insurance. (Tr. 329:12-21). In 2014, he received a monthly advanced tax credit, as reflected in the tax documents for his Covered California insurance. He paid the out-of-pocket difference each month between the Silver Plan premium amount and the tax credit. (GC Ex. 18, pp.#; Tr. 331:22-25, 332:1-25, 333:1-2). In 2015, he continued to have the Silver Plan with Anthem Blue Cross. (GC Ex. 19, pg. #; Tr. 333:21-25, 334:1-3). In 2016, he again paid the difference between the Silver Plan and the tax credit through Covered California. (GC Ex. 20, pg. #; Tr. 334:13-25, 335:1-6). In 2017, he again obtained health insurance through Covered California, paying the difference between the Silver Plan and the tax credit. (GC Ex. 21, pg. #; Tr. 335:20-25, 336:1-3).

In calculating Mineards' interim health insurance expenses, CO Bailey used Mineards' Covered California records for years 2014, 2015, 2016, and 2017. (GC Ex. 18, 19, 20, and 21; Tr. 765:3-18, 767:3-15, 768:1-18). CO Bailey determined Mineards' health insurance costs under Covered California by subtracting the monthly advanced tax credit amount he received from his monthly plan cost to determine his out-of-pocket monthly expense. (GC Ex. 18, pg. 9; Tr. 765:6-18). CO Bailey converted the biweekly amount that Mineards would have paid had he continued to be employed by Respondent using the same calculation she performed in determining Moran's expenses. (Tr. 766:21-25, 767:1-3). Then, in months where Mineards' monthly cost for health insurance with Covered California was higher than the monthly equivalent he would have paid for Respondent, CO Bailey itemized the difference on Amended Appendix D-2. (GC Ex. 18, pg. 9; Tr. 766:4-11).

**c. CONCLUSION AND FINAL AMOUNTS OWED BY RESPONDENT**

The General Counsel has demonstrated by substantial, reliable evidence that all of the backpay and expenses alleged in the Specification, and amendments thereto, is encompassed in the scope of the Board's remedial order and has been reasonably calculated. The General Counsel respectfully requests that the Judge grant all of the alleged backpay and expenses, without any offsets or deductions.

Second Amended Appendix F describes the final overall amounts sought by the General Counsel in the broad categories of remedy described above (i.e., Bargaining Expenses Remedy, Merit Pay Remedy, Remedy for Use of Nonunit Employees, Moran and Mineards Backpay Remedy, and Excess Tax Remedy). (GC Ex. 48). The General Counsel seeks a total of \$111,040 be paid to the Union for the costs and expenses incurred in collective bargaining, plus interest. (GC Ex. 48).

The General Counsel seeks a total of \$221,596 to be paid pursuant to the Merit Pay Remedy. (GC Ex. 48). The specific amount of money owed to individual employees for the Merit Pay Remedy, as alleged in the Specification, was granted by the Board's September 3, 2019 Decision and Order. The Decision granted the related appendices, including Appendix B-32, which lists the total amounts owed. (GC Ex. 1(f), pg. 269; 368 NLRB at slip op. 3, fn.11). Accordingly, Respondent should be ordered to pay the amounts of backpay owed to each of the individuals listed in Appendix B-32, plus interest.

The backpay period on the Merit Pay Remedy continues to run until Respondent restores the proper wage rate to employees. (GC Ex. 1(f), pg. 8; 368 NLRB at slip op. 3). Thus, in addition to the specific amounts listed above, Respondent should be directed to pay any additional backpay, excess tax, and interest as has accrued since the issuance of the Specification, until such

time as Respondent restores the proper wage rates to all affected employees.<sup>29</sup> *See Mike-Sells Potato Chip Co.*, 366 NLRB No. 29 (2018) (in order to fully remedy a unlawful unilateral change to that had not yet been rescinded as of the time the compliance specification issued and the compliance hearing was held, the Board ordered that the backpay alleged in the specification be paid “plus such additional backpay and interest as has accrued until such time as Respondent restores, honors, and continues the terms of the collective-bargaining agreements...”).

The General Counsel seeks that Respondent pay a total of \$936,005 for the Remedy for Use of Nonunit Employees. (GC Ex. 48). The specific amount of money owed to individual employees for the Remedy for Use of Nonunit Employees, as alleged in the Specification, was granted by the Board’s September 3, 2019 Decision and Order. The Decision granted the related appendices, including Appendix C-7, which lists the total amounts owed to individual employees. (GC Ex. 1(f), pg. 433; 368 NLRB at slip op. 3, fn.11). Thus, Respondent should be ordered to pay the amounts of backpay specified for each individual employee listed in Appendix C-7, plus interest.

The amounts owed to Moran and Mineards for net backpay and interim expenses, substantiated above, are reflected in Amended Appendix D-1 and D-2, respectively. (GC Ex. 2,

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<sup>29</sup> There are in fact several affected employees who continued to be employed by Respondent after the date the Specification issued and were not restored to their proper wage rate pursuant to the Merit Pay Remedy. For example, when Moran was reinstated to employment with Respondent on June 20, 2017, and continued to be employed until December 5, 2018, after the Specification issued, he was only paid \$21.45. (Tr. 569:14, 633:13-23). Thus, he was never granted the \$0.914 wage increase owed to him pursuant to the Merit Pay Remedy, as reflected in the granted portions of the Specification, Section III(f), Table No. 3, line 7. (GC Ex. 1(f), pg. 6). Furthermore, according to wage rate data as of February 1, 2019, after the Specification issued, employee Marilyn McMahon was still earning only \$25.41. She had not been granted the \$0.948 wage increase owed to her, as reflected in the as reflected in the granted portions of the Specification, Section III(f), Table No. 3, line 7. Similarly, Matthew Smolensky was earning \$22.11, with no increase of \$0.983. Steve Tonnesen was still earning only \$21.76, without the increase owed to him of \$1.468. (GC Ex. 51, GC Ex. 1(f), pg. 6). The adverse tax consequences on any additional lump sum awards for those with continuing backpay will also change and need to be calculated by the Regional Director. *See International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99, slip op. 5, fn. 10 (2018) (Board expressly notes in its order awarding adverse tax consequences that amounts may change because the order issued in a different year from the specification and the discriminatee’s tax situation may have changed, leaving the additional calculation to the regional director).

pg. 12, GC Ex. 3, pg. 12). Moreover, additional amounts of interim expenses sought for Moran, as amended into the Specification at hearing, are reflected in GC Ex. 44. Thus, Respondent should be ordered to pay Moran and Mineards the following amounts, plus excess taxes, and interest:

	Backpay	Expenses
Dennis Moran	\$150,187	\$6,878
Richard Mineards	\$547,067	\$2,949

Finally, Respondent should be ordered to pay the amounts owed to individual employees, aside from Moran and Mineards, pursuant to the Excess Tax Remedy, as listed in the granted portions of Appendix E. (GC Ex. 1(f), pp. 462-67; 368 NLRB at slip op. 3).

DATED at Denver, Colorado, this 18th day of March, 2020.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Brief to the Administrative Law Judge**, together with this Certificate of Service, was E-Filed, or E-mailed, as indicated below, to the following parties on March 18, 2020.

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