

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

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

and

GRAPHIC COMMUNICATIONS
CONFERENCE, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

CASE 31-CA-028589
31-CA-028661
31-CA-028667
31-CA-028700
31-CA-028733
31-CA-028734
31-CA-028738
31-CA-028799
31-CA-028889
31-CA-028890
31-CA-028944
31-CA-029032
31-CA-029076
31-CA-029099
31-CA-029124

**RESPONDENT AMPERSAND PUBLISHING LLC D/B/A SANTA BARBARA NEWS
PRESS' REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND RECOMMENDED SUPPLEMENTAL ORDER**

Pursuant to Section 102.46(e) of the National Labor Relations Boards' Rules and Regulations, Respondent hereby submits its Reply Brief in Support of its Exceptions to the September 4, 2020 Decision of the Administrative Law Judge (the "ALJD") in the above-captioned cases:¹

I. The Union Sought Bargaining Costs and Expenses to Which it is Not Entitled

A. The Union is Not Entitled to Recover Its Legal Fees

In its Answering Brief, the Union goes to great length to distinguish between "litigation expenses" and "attorneys' fees" in order to argue it is entitled to recover legal fees that it paid its attorney. (AB at 27). No matter how the Union phrases it, however, there is no real dispute that the Union is seeking "legal fees and expenses it paid for its attorney's assistance" as set forth in its very own heading. (AB at 26). And no matter how hard the Union tries to distinguish *HTH Corp. v. NLRB*, 823 F.3d 668 (DC Cir. 2016), the law is clear that legal fees may not be awarded by the ALJ. *See also Camelot Terrace v. NLRB*, 824 F.3d 1085 (DC Cir. 2016). Indeed, the Union cannot and does not contest that the instant ALJD is the only negative citation reference listed on Westlaw, and only one that refused to follow *HTH Corp* precedent.

Indeed, as set forth in Respondent's initial Brief, in *HTH Corp.*, the D.C. Circuit held that the Board, as a creature of statute, had only those powers conferred upon it by Congress, and that pursuant to the American law attorney fees' were not recoverable as costs nor was the Board granted any punitive powers. *Id.* at 679-80 ("as we said in *Unbelievable*, "The Supreme Court has consistently invalidated Board orders that are not directly related to the effectuation of the purposes of the Act or are punitive.") In reaching this result, the Court specifically rejected the Union's argument that the General Counsel and the Union were forced to squander resources on

¹ Concurrently with its Answering Brief ("AB"), Counsel for General Counsel filed a limited Cross-Exception to the ALJD. Respondent does not object to that limited Cross-Exception correcting the transcript of the proceedings.

this case, and thus the fee award merely “helps restore the parties to where they would have been but for the [company's] unlawful conduct,” which is starkly similar to argument the Union made here and the ALJ accepted. However, the ALJ’s decision and the Union’s Answering Brief wholly ignore the Court’s reasoning in *HTH Corp*:

we recognize that compensation and punishment are not inherently mutually exclusive goals. But in the context of the American rule, any attempt to rest on the compensatory character of a fee award runs into the basic underpinning of the American rule, namely, the idea that the compensatory functions of fee shifting collide, in the litigation context, with other values, particularly broad freedom to assert rights and defenses. *See Summit Valley Indus. Inc. v. Local 112*, 456 U.S. 717, 724–25, 102 S.Ct. 2112, 72 L.Ed.2d 511 (1982). Thus we said in *Unbelievable*, “To the extent that the Board is relying upon the idea that a party is not made whole unless it recovers its attorney's fees, ... that is but a criticism of the American Rule—indeed, a criticism that the Supreme Court has heard and rejected.” 118 F.3d at 805. As the Supreme Court declared in *Chambers*, “That the award ha[s] a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience.” 501 U.S. at 53–54, 111 S.Ct. 2123 (citation and internal quotation marks omitted). See also *id.* at 54 n. 15, 111 S.Ct. 2123.

The Board's opinion also says that the fee award “protects the integrity of our processes, serving as a deterrent to violations” of its Order and protecting the parties' rights (presumably by way of deterring further unfair labor practices). *HTH Corp.*, 361 *N.L.R.B.* No. 65, App. 4. But in the context of identifying the powers granted the Board, the Court

has rejected deterrent purposes precisely on the ground of their overlap with punitive goals. When the Board tried to order an employer to compensate government relief agencies whose expenditures had been increased as a result of the employer's violations, the Court firmly rejected the Board's reliance on deterrent effect. If “a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12, 61 S.Ct. 77, 85 L.Ed. 6 (1940).

Nor does the law draw a distinction between legal fees the Union claims is connected to “bargaining activities” as opposed to litigation-related fees. ***Indeed, neither the ALJ nor the Union in its Answering Brief could point to any legal authority upholding this distinction and overruling HTH Corp.***

Instead, the Union dismisses the above controlling case law, concluding that since the Board did not specifically include any “exception” in its order requiring Respondent reimburse the Union for its “bargaining expenses,” then legal fees and costs were also recoverable. ALJD at 4:10-33. However, this is nonsensical. As set forth above, the Court has already determined in *HTH Corp* and *Camelot*² that a Union is not entitled to recover its legal fees as costs and expenses. Thus, there was no reason for the Board to include an “exception” in its order essentially telling the ALJ it must follow the law and not award legal fees as costs as already set forth in precedent. Nor can the ALJ or Union provide any authority contradicting *HTH Corp* or *Camelot* or any authority indicating the ALJ is authorized to award legal fees as costs and expenses despite the well-established American Rule. Indeed, the ALJ’s decision makes clear he is awarding these legal fees as punishment for Respondent’s purported “aggravated misconduct,”

² The Union does not even attempt in its Answering Brief to distinguish the *Camelot* case which similarly holds that legal fees are not recoverable.

which is not permitted. ALJD at 4:18-33. Therefore, the Union's purported bargaining costs must be reduced by \$42,119.00 given that legal fees are not recoverable as costs.

Even if the Union did have some legal basis for claiming to be entitled to recover fees of its lawyer in what it claims are bargaining activities (it does not), many of Union lawyer Ira Gottlieb's time entries had no relation to bargaining on their face (rather than litigation), and given the overlapping bargaining and litigation issues he was dealing with at the time, he could not confirm whether his time was spent on litigation or bargaining issues. (Tr. at 234-35.) One such example is "draft email to Caruso re bad faith bargaining prep" on 4/22/2008. See GC Exh. 1(u) at 12 of 26 (Tr. 30:1-13). In its Answering Brief, the Union claims that it does not matter whether Gottlieb could recall whether his time was spent on bargaining or litigation. However, it is the Union's burden to establish that it is actually entitled to the expense it seeks. As such, if any legal fees are awarded at all (and under precedent they cannot be), they should be reduced by \$11,239.50 to reflect the amount Mr. Gottlieb could not confirm related to bargaining activities.³

B. The Union Should Not Be Able to Recover A Portion of Union Negotiator Nicholas Caruso's Salary

As part of the Compliance Specification, the Union also sought to recover a portion of the salary of its union staff representative, Mr. Caruso, who was based in Minnesota⁴. However, Mr. Caruso admitted at the hearing that (1) he did not know how much time he spent working on bargaining relating to the instant cases; (Tr. 447) (2) he did not keep time records of any kind

³ The ALJ also improperly sustained numerous objections to Respondents' questions regarding the reasonableness of Mr. Gottlieb's hours. (Tr. 228:1-23)

⁴ The ALJ prohibited Respondent from inquiring into the reasonableness of using an out of state negotiator as well which bears directly on whether the flight and hotel costs were reasonable. (Tr. 105-109). While the Union contends in its Answering Brief that it does not matter where its staff representative was based, it can cite to no authority that this is not a factor to consider in determining the appropriateness of awarding flight and hotel expenses incurred by the Union. (AB at 32-33)

with respect to these matters (Tr. 447-448); (3) he could not go back and quantify how much time he spent on these cases (Tr. 449); (4) he would have been paid his full salary whether or not he had worked on these cases (Tr. 514-16), and (5) he worked on multiple matters a day (Tr. 545-546). The Union concedes in its Answering Brief, as it must, that Mr. Caruso did not account for the time he spent in bargaining. (AB at 34). However, relying on *Interstate Bakeries*, 360 NLRB 122 (2014), it claims it was allowed to use a formula it manufactured itself to support these expenses. However, *Interstate Bakeries* related solely to awarding back pay, and the Union does not cite to a single case that one can recover a salary where the representative admitted under oath (a) he had no way of determining the time he actually spent on bargaining in these matters, and (2) his salary in no way depended on his bargaining on these cases. Such uncertain, speculative and punitive damages are not recoverable. See *FMD Restoration, Inc. v. Baistar Mechanical, Inc.*, 194 F.Supp.3d 118, 129-130 (D.C. 2016) (“[D]amages cannot be awarded on the basis of mere speculation or guesswork”). For all of the foregoing reasons, the bargaining expenses award should be reduced by \$22,204.49 given these amounts are speculative and not tied to any conduct of Respondent.

C. The Union Admittedly Spoiled Evidence Regarding Expenses for Which It Seeks Reimbursement

The Union concedes that it spoiled evidence in this matter after it had initiated legal proceedings against Respondent which were ongoing and in which it was seeking reimbursement of its costs. Despite this, the Union contends that it was appropriate for the ALJ to reject any negative spoliation inference. However, under the very case it cites, *Queen of the Valley Medical Center*, 368 NLRB No. 116 (2019), an adverse inference should have been issued. Indeed, although the Union attempts to argue that that the Union was under no legal obligation to preserve documents, this position is strains credulity. It is undisputed that the Union had already

instituted legal actions against Respondent at the time it destroyed the documents which triggers its duty to preserve documents. Second, contrary to the Union's suggestion that the records must be destroyed as a result of fraud, fraud or a desire to suppress the truth, even simple negligence constitutes a "culpable state of mind. *See Mannina v. District of Columbia*, 437 F. Supp. 3d 1, 12 (2020) ("A party may have a 'culpable state of mind' that would support a finding of potentially sanctionable spoliation even if the party did not act in bad faith or purposefully destroy records...Mere negligence may suffice to impose sanctions such as an adverse evidentiary inference.") Finally, these receipts may have shown that the Union was seeking more than they actually paid. Accordingly, it was improper for the ALJ to refuse to give any weight to the Union's improper destruction of admittedly relevant evidence.

D. The Moran and Mineard Backpay Calculations Must Be Reduced Under Controlling Law

It is undisputed that a discriminatee may not be awarded backpay for any period within the backpay period during which it is determined that he failed to make a reasonable effort to mitigate. *See, e.g., Painters Local 419*, 117 NLRB 1596, 1598 n.7 (1957); *Gimrock Constr.*, 356 NLRB No. 83 slip op. at 11 (2011). In fact, to advance "the healthy policy of promoting production and employment," a striker, for example, must make a reasonably diligent search for suitable interim employment and must accept such employment if offered. *See Phelps Dodge Corp. v NLRB*, 313 US 177 (1941). Further, the Union does not dispute in its Answering Brief that backpay is routinely denied in cases where a discriminatorily discharged employee: (1) fails to remain in the labor market during the period for which backpay was claimed, (2) refuses to accept substantially equivalent employment, (3) fails to search diligently for alternative work, (4) voluntarily quits suitable alternative employment, (5) chooses a lower paying job and refuses to search for a higher paying job. *See e.g. J. H. Rutter Rex Mfg. Co. v NLRB*, 473 F2d 223 (5th Cir.

1973); *NLRB v Madison Courier, Inc.*, 505 F.2d 391 (DC. Cir. 1974) (refusing to award backpay as public policy was best served by encouraging a skilled and healthy worker to obtain a job rather than remain idly unemployed for 18 months); *NLRB v Southern Silk Mills, Inc.*, 242 F.2d 697 (6th Cir. 1957) (finding the failure of two employees to seek or take other suitable, available employment, although at a lower rate of pay, over a period of approximately 3 years, constituted, to some extent at least, a loss of earnings "willfully incurred," thus the Board was in error in making the backpay awards without offsetting credits against the employees' losses.) Here, there are several bases supporting Mineard's and Moran's failure to mitigate their damages.⁵

1. Mineard's Backpay Calculations Must Be Reduced Because He Voluntarily Quit Looking for Equivalent Employment

While the Union goes on at length regarding Mr. Mineard's job search in its Answering Brief, it cannot and does not dispute that Mr. Mineard admitted under oath that he sought out a job that was not reasonably equivalent (part time as a freelancer - Tr. at 343-45), and then stopped looking entirely for an equivalent job when he began receiving a SAG AFTRA pension and Social Security Benefits by at least 2017. (Tr. at 354).

Mr. Mineard's unilateral decision to quit looking for a comparable job is precisely the type of situation where backpay should be denied or at least reduced substantially beginning with the time period he admittedly stopped looking for work. *See e.g. J. H. Rutter Rex Mfg. Co. v NLRB*, 473 F.2d 223 (5th Cir. 1973); *NLRB v Madison Courier, Inc.*, 505 F.2d 391 (DC. Cir.

⁵ It is undisputed that neither Moran nor Mineard maintained any of their records or evidence of their search for a new job even though they knew that they were pursuing backpay. (Tr. at 645-46, 648, 410-11). Although the Union strangely claims that Respondent did not specify what documents, were destroyed that is simply untrue as set forth in the testimony cited in Respondent's initial Brief. Further, while the ALJ and Union cite to cases permitting a discriminatee to rely solely upon his or her own testimony (ALJD at 13, n. 4), this rule flies in the face of the law on spoliation and preservation of evidence, which dictates that one has a duty to preserve relevant evidence and not destroy it.

1974) *NLRB v Southern Silk Mills, Inc.*, 242 F.2d 697 (6th Cir. 1957) In other words, given his undisputed testimony, if Mr. Mineards is awarded any backpay, his right to receive backpay should end at the close of the fourth quarter of 2010.

2. Moran Should Not Be Allowed To Recover Backpay for the Time Period After He Voluntarily Quit His Comparable Position

While the Union unsuccessfully tries to distinguish the cases cited in Respondent's initial brief, NLRB authorities are clear that a person may not claim backpay after the time that he or she chooses to voluntarily quit a reasonably comparable position. *See, e.g., Grosvenor Resort*, 350 NLRB 1201 (2007); *Kentucky River Medical Center*, 352 NLRB 194 (2008). Although the ALJ found that Mr. Moran's decision to quit his job was reasonable (a burden the General Counsel is required to satisfy, *see, e.g., Pope Concrete Products*, 312 NLRB 1171 (1993)) [ALJD at 13], that is simply not the case. Mr. Moran conceded that he quit voluntarily, and through no compulsion, threat, or unreasonable working conditions. In fact, his employer told him that he was improving and moving in the right direction.

Q So when you were working at ABC-CLIO, that job ended by your choice, right?

A Yes.

Q You voluntarily quit that position?

A Yes.

(Tr. at 648-49.)

As a result, his backpay should cut off at the beginning of the first quarter of 2014.

E. Respondent Was Wrongfully Prohibited from Presenting Evidence regarding Damages as to the Board's Remedies for Merit Pay and Use of Non-Unit Employees

The Union is correct and Respondent does not dispute that the Board granted partial summary judgment as to certain remedies related to Merit Pay and Use of Non-Unit Employees. However, the Board did not decide the damages stemming from these violations, which were subject of the compliance hearing. Despite this fact, the ALJ prohibited Respondent from presenting evidence that (1) non-unit employees did not take hours away from any unit employees hence any damages in this regard would be solely punitive, which is prohibited, and (2) given the financial nature of the newspaper business merit pay increases are simply unfeasible and would not have been provided to anyone over the relevant time frame. This was improper, and therefore, the order should be reduced by \$936,005.00. Alternatively, the Hearing Officer should re-open the hearing to hear evidence on this issue.

II. CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Board set aside the ALJD in its entirety or reduce the amounts awarded in the ALJD as required by controlling case law in the amounts set forth in Respondent's Brief.

Dated this 6th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **RESPONDENT AMPERSAND PUBLISHING LLC D/B/A SANTA BARBARA NEWS PRESS' REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED SUPPLEMENTAL ORDER** was served by E-Mail and E-Filed, on the parties whose names and addresses are listed below:

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