JD–31—10
Warwick, RI

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

CARDI CORPORATION

and Case 1—CA—43892

NEW ENGLAND REGIONAL COUNCIL OF
CARPENTERS, LOCAL 94 a/w UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA

Karen E. Hickey, Esq., for the General Counsel.
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SUPPLEMENTAL DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This compliance hearing was held in Boston, Massachusetts, on January 11-13, 2010. The Acting Regional Director filed his second amended compliance specification and notice of hearing on November 6, 2009. The Respondent, Cardi Corporation, filed its answer to this specification on November 24, 2009. The matter at issue concerns the determination of appropriate monetary remedies for one of the Respondent's employees, Eddie Mejia.

In its response to the compliance specification, the Respondent challenged virtually every aspect of the Acting Regional Director's calculations as to the remedy. In particular, the Company contests the conclusion that Mejia was entitled to backpay for a period extending from November 13, 2006 through July 8, 2008. Instead, the Company asserts that Mejia never became entitled to any backpay. Beyond this, the Company also disputes the choice of methodology used to compute the amount of backpay and benefits. Finally, the Employer contends that Mejia failed to properly mitigate its backpay obligation and that he claimed deductions for improper expenses.

As described in detail in this decision, after careful review of the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[1] filed by the General Counsel, the Charging Party, and the Respondent, I find that none of the Respondent's

[1] By order dated April 19, 2010, I denied the Respondent's motion for leave to file a reply brief.

defenses and objections is meritorious. Instead, I conclude that the Acting Regional Director's methodology and calculations are entirely reasonable, consistent with the Board's directives in this case, and necessary and appropriate to provide relief to Mejia for the Company's violation of the National Labor Relations Act.

A. Background and Procedural History

Cardi Corporation is a Rhode Island firm, founded in 1967 and located in the city of Warwick. It performs heavy road and bridge construction work. Indeed, its counsel noted that it is "the largest bridge and road contractor in Rhode Island." (Tr. 49.) On a typical day, Cardi employs as many as 500 people.

The Company belongs to a multiemployer association, Construction Industries of Rhode Island. On June 5, 2005, that association entered into a collective-bargaining agreement with Local 94 of the New England Regional Council of Carpenters (the Union). That contract extended through June 7, 2009. It was in effect and binding on the parties to this case at the times material to this decision.

At the compliance hearing, the Company presented two witnesses on its behalf. The foremost witness for the Employer was Stephen Cardi. He has been employed by the Company for over 40 years and currently serves as its treasurer. He testified that, in this position, he is responsible for "general office and financial management of the company," adding that he also performs "general executive oversight." (Tr. 454, 534.) Cardi also reported that he is an attorney and a member of the bar.

The second witness called by the Company was Robert Kunz. He was employed by Cardi from June 2001 until the end of September 2007. During the period under examination, Kunz was the Corporation's safety director. His functions included a role in the Company's hiring and employment process as will be detailed later in this account.

The General Counsel presented his case through the testimony of three witnesses. The Region's compliance officer, Claire Powers, was called in order to explain the manner in which she made the determinations and calculations underlying the second amended compliance specification. As such, she was not a fact witness and based her information on statements and documentation provided by the parties.

As would be expected, key testimony was given by Mejia, the sole individual whose situation was at issue in this case. He testified that he has been a member of Local 94 since 2001. For several years before that, he was a member of Local 140 in Tampa, Florida. In June 2002, the Company hired Mejia to perform carpentry work. That November, he sustained a work injury. In the following years, he participated in the workers' compensation system and was intermittently given light duty work by the Company. Ultimately, his condition deteriorated to the extent that he underwent hip replacement surgery in November 2005. One year later, his physician pronounced him fit for duty and he contacted Cardi to seek further employment as a carpenter. The events that followed led to the controversy involved in this case.

Finally, David Palmisciano testified on behalf of the Union. For the past 12 years, he has served as the district business manager for Local 94. He is also the president of that local and a trustee of its benefit funds.

Turning now to the procedural history of this case, the parties agree that upon his recovery from hip replacement surgery, Mejia sought further employment with Cardi. In so

doing, in November 2006, he attended a meeting with Safety Director Kunz. While the events of that meeting are in sharp dispute, there is no doubt that Kunz informed Mejia that the Company had a new policy that its employees must possess a valid driver's license in order to work for the Company.[2] This was a significant development since Mejia had not possessed a driver's license at the time of his original hire by the Company, nor did he possess one on the day of his meeting with Kunz.

On April 19, 2007, the Union filed an unfair labor practice charge against the Employer, alleging that the unilateral imposition and subsequent enforcement of a driver's license requirement for employment constituted a violation of Section 8(a)(5) of the Act. The Regional Director issued a complaint on December 28, 2007, and the Company filed an answer denying the material allegations of wrongdoing.

On April 1, 2008, a trial was conducted before Administrative Law Judge Bruce D. Rosenstein.[3] On June 5, 2008, Judge Rosenstein issued his decision, finding that the Company violated the Act, "by unilaterally implementing a rule without notice to or bargaining with the Union requiring bargaining unit employees to possess a valid driver's license in order to be employed at the Respondent." *Cardi Corp.,* 353 NLRB No. 97, slip op. at 6 (2009). As part of the resulting order, Judge Rosenstein required the Company to reinstate Mejia and "make him whole for pay and benefits that existed prior to the unlawful unilateral change in the driver's license policy that was implemented in 2005." Id., slip op. at 7.

On February 25, 2009, the Board affirmed Judge Rosenstein's findings and conclusions, in particular his finding that:

> Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a rule requiring that bargaining unit employees possess a valid driver's license as a condition of employment, and by enforcing its unlawful driver's license requirement against Eddie Mejia. [Footnote omitted.]

(Id., slip op. at 1.)

Of crucial importance to this proceeding, the Board made certain amendments to the judge's remedial order. It held:

> To remedy the Respondent's unlawful enforcement of the rule against Eddie Mejia on November 13, 2006, we shall order it to place Mejia in the position he would have been in absent enforcement of the rule, including immediate reinstatement if, absent the enforcement of the driver's license requirement, he would have been reinstated by the Respondent at any time on or after November 13, 2006. We shall also order the Respondent to make Mejia whole for any loss of earnings and other benefits

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[2] The trial judge in this case found that the Company implemented this new driver's license policy in late 2005. *Cardi Corp.,* 353 NLRB No. 97, slip op. at 4 (2009). In its decision adopting the judge's findings and conclusions with only minor modifications, the Board observed that the parties did not dispute this finding. Id., slip op. at 2, fn. 8.

[3] Each of the parties at the trial were represented by the same lawyers who now represent them in this compliance proceeding.

> suffered as a result of the enforcement of the rule. [Footnotes omitted.]

(Id., slip op. at 1-2.)

Finally, in a footnote to its amended remedy, the Board made certain observations regarding the nature and scope of this compliance hearing. In framing the issues that have ultimately come before me for resolution, the Board directed that:

> In light of testimony raising the question of whether unit work was available after Mejia sought to return to work, we leave to compliance the issue of whether Mejia, if the Respondent had not unlawfully enforced its driver's license requirement against him, would have been reinstated at any time on or after November 13, 2006, and the related issue of which party bears the burden of proof on this matter. The resolution of these issues will determine the appropriateness of a reinstatement offer and the amount of backpay owed to Mejia.

(Id., slip op. at 2, fn. 7.)

In an effort to expedite resolution of the controversy that would ultimately come before me, the parties entered into a stipulation that was approved by the Regional Director on July 2, 2009. This stipulation contained the private parties' waiver of their rights to seek appellate review of the Board's Order. Instead, it contained the agreement of all parties to immediately proceed to litigate the remedial issues framed by the Board in footnote 7 of its decision. (GC Exh. 1(b).)

Pursuant to the parties' stipulation, the Acting Regional Director set forth his position regarding the remedial issues and the manner in which he calculated the monetary relief owed to Mejia in a second amended compliance specification and notice of hearing with accompanying spread sheets. (GC Exh. 1(m).) The document asserted that Mejia would have been further employed by the Company as of November 13, 2006, and was due backpay and benefits for a period from that date until his eventual reinstatement by the Company on July 8, 2008. After certain final adjustments to the mathematical calculations, the General Counsel contends that the net backpay and benefits due to Mejia and the Union's funds are $69,152.02 and $31,149.98 respectively.[4]

In its answer to the specification, the Employer took the position that it had incurred no monetary obligation arising from its unlawfully implemented driver's license requirement. Its primary contention was the repeated assertion that "prior to his obtaining a driver's license, and at all relevant times thereafter, there were no work opportunities available for [Mejia] or any other carpenter applicant." (R. Answer at p. 5; GC Exh. 1(o).) Lest there be any doubt, counsel for the Company provided a definitive statement of the Employer's position in a subsequent written submission:

> The Employer's basic defense in this proceeding is based on the uncontested evidence that, when Mejia first contacted the Employer

[4] These final dollar figures are set forth by counsel for the General Counsel at Tr. 23-24, and are incorporated in final spread sheets admitted into the record as GC Exhs. 2(a), (b), and (c).

> for possible reinstatement after being told by his physician that he was no longer eligible for any further workers' compensation payments on November 13, 2006, there was no available work for him then or at any other time during the backpay claim raised in this issue through July 2008. The Employer's position clearly is that there was absolutely no work available for any carpenters and no carpenters were hired within the bargaining unit other than the other laid off carpenters being reinstated.

(R. Response to motion in limine, p. 2; GC Exh. 1(p).)[5]

B. Determination of the Correct Backpay Period

The General Counsel contends that the backpay period commences on November 16, 2006 and terminates on July 8, 2008. (GC Exh. 1, p. 2.) All of the parties agree that any potential backpay period in this matter ended on July 8, 2008, the date on which Mejia was reinstated by the Company as a carpenter.[6]

The situation is vastly different regarding the potential commencement date of any backpay period. A crucial key to answering this question is the determination of the circumstances involved in the meeting between Mejia and Kunz. While there is no doubt that this took place in November 2006, there is no definitive indicator of the exact date. In the course of this proceeding, no party has objected to the General Counsel's decision to claim that any backpay period should commence no earlier than November 16, 2006. For this reason, I will treat that date as the day on which any backpay obligation could commence.

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[5] As just indicated, the General Counsel filed a motion in limine seeking to preclude the Respondent from presenting certain evidence. (GC Exh. 1(i).) The Employer's response explained that the General Counsel's concerns resulted from a "misconception" of its position regarding the parties' stipulation. (GC Exh. 1(p), p. 1.) I took this to mean that the issue had been resolved. At the beginning of the trial, I thrice invited counsel for the General Counsel to address any preliminary matters. While she raised a variety of items, ultimately she informed me, "[t]hat's all I have for preliminaries." (Tr. 24.) At no time did she request a ruling on the motion in limine. I was a bit surprised to see that, in her posttrial brief, she now requests that I rule on this motion. This caused me to consult my law dictionary. It defines, "in limine," as "[o]n or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary, revised 4th ed., p. 897 (1968). It is procedurally inappropriate to rule on this motion at this late stage of the litigation. See, for example, *Wisconsin Bell, Inc.,* 346 NLRB 62, 64, fn. 8 (2005) (defense raised in answer but not timely addressed before the judge is waived), and *Harco Trucking, LLC,* 344 NLRB 478, 479 (2005) (argument raised for the first time in posttrial brief is untimely). In any event, the matter is moot as I held the parties to the requirement that they limit themselves to the introduction of evidence that was material to the issues as carefully framed in the Board's Order.

[6] The parties stipulated that Mejia returned to work at Cardi on this date pursuant to a written offer of reinstatement. It bears mentioning that, after his reinstatement, Mejia only worked for the Company for a two-week period before being laid off. He provided uncontroverted testimony that, at the time of his layoff, his foreman told him, "[I]f it was up to him he'd keep me and lay off somebody else, but he was told up management they had to let me go." (Tr. 268.) Counsel for the General Counsel reported that no charge was filed by anyone regarding the circumstances of Mejia's layoff.

It will be recalled that the General Counsel contends that the Company chose to employ Mejia on the day of his meeting with Kunz. During the intake process designed to implement this decision, management learned that Mejia did not possess a valid driver's license. As a result, the Company terminated Mejia's employment in furtherance of its unilaterally implemented driver's license policy. In vivid contrast, the Company contends that Mejia telephoned Kunz to ask for a job and was told that no opening existed for him. He then requested an opportunity to have a face-to-face meeting with Kunz. His request was granted, and the two men did meet. At the meeting, Kunz learned that Mejia did not have a driver's license. Kunz informed Mejia that he needed to obtain a license in order to secure future employment with the Company. Regardless, it is management's position that his lack of a license as of the date of his meeting with Kunz was immaterial since no appropriate job opening for him existed.

In resolving this dispute, I must take note of a circumstance that may frequently occur in compliance proceedings. Such proceedings come at the end of what is sometimes a lengthy process of administrative adjudication. Given the passage of time, witnesses will be asked to testify regarding events that have receded into a relatively distant past.[7] Such is certainly the case here as the witnesses were examined in 2010 about a key encounter and related conversations that took place in 2006. Given this reality, it is perhaps not surprising that the two main witnesses both reported that they had made significant errors in their testimony and sought permission to correct those mistakes. Thus, Kunz sought to correct his testimony from the original trial that Mejia never contacted him to advise him that he had obtained a driver's license. On reflection, he now reported that "[t]o say that he didn't call, I think was probably not the right thing." (Tr. 180.) By the same token, Mejia first testified that, prior to the key meeting, Kunz informed him over the telephone that he was going to be hired. Later, he advised that this testimony was a "mistake," as Kunz did not explicitly tell him that he was going to be hired. Kunz simply told him to report for the meeting and Mejia "assume[d]" that this meant he was going to be hired. (Tr. 286.)

I describe these matters in order to underscore the need to perform a careful analysis of the evidence regarding the critical meeting. In my estimation, the conflict between the accounts of the witnesses cannot be resolved simply by reference to demeanor, sincerity, or perceived strength of recollection. After the passage of so much time, it is vital to turn to additional analytical tools to perform the assessment. The Board has long recognized the power of such additional analytical criteria. As it observed in *Panelrama Centers,* 296 NLRB 711, at fn. 1 (1989), "[w]hen the demeanor factor is diminished, the choice between conflicting testimony rests not only with demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole."[8] [Citation omitted.] Examination of the record in this case demonstrates that these powerful tools provide the means to obtain a clear resolution of the controversy as will shortly be explained.

Before proceeding with that explanation, it is necessary to mention one additional consideration. In its decision, the Board specifically noted that the allocation of the burden of proof was being deferred to the compliance process. *Cardi Corp.,* supra., 353 NLRB No. 97,

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[7] The Board recognized this aspect of the compliance procedure and its practical effect on the adjudicatory process in *Midwestern Personnel Services,* 346 NLRB 624, 627 (2006), enf. 508 F.3d 418 (7th Cir. 2007).

[8] See also *Northridge Knitting Mills, Inc.,* 223 NLRB 230, 235 (1976); *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996); and *CMC Electrical & Maintenance, Inc.,* 347 NLRB 273, 274, at fn. 4 (2006).

slip op. at 2, fn. 7. In this regard, as to the Company's defense that it never acquired any obligation for backpay because it never had a position available for Mejia to fill, there is an established governing principle. As the Board explained in *Cobb Mechanical Contractors,* 333 NLRB 1168 (2001), remanded 295 F.3d 1370 (D.C. Cir. 2002):

> [A]t the heart of the Respondent's exceptions is the argument that, with minor exceptions, the discriminatees are entitled to no backpay. It is axiomatic, however, that the finding of an unfair labor practice is presumptive proof that some backpay is owed. [Citation omitted.]

See also *La Favorita, Inc.,* 313 NLRB 902 (1994), enf. 48 F.3d 1232 (10th Cir. 1995) ("well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed"). This conclusion is consistent with the rule set forth in the recently revised edition of the NLRB Casehandling Manual,[9] Part Three, Compliance Proceedings, Sec. 10648.4 which provides that:

> All elements of a backpay case that reduce the respondent's gross backpay liability, such as . . . starting and ending dates for the backpay period and the lack of a discriminatee's former job or substantially equivalent job, are the respondent's burden . . . .

As indicated, to the extent that the Company claims that it should escape any liability for backpay, it must rebut the presumption that some amount of monetary compensation is required to remedy its unlawful conduct. Having reached this conclusion, I must emphasize, however, that, practically speaking, the allocation of the burden of proof as to this issue is not important. In the career of a judge, there are certainly close cases where presumptions or burdens of proof are decisive. For example, see *American, Inc.,* 342 NLRB 768 (2004) (where evidence was in equipoise, party with the burden of proof lost). For reasons that I am about to describe, this is not such a case. I readily conclude that the General Counsel has proven its contention that Mejia was hired as of his meeting with Kunz by clear and convincing evidence.

Turning now to the consideration of that evidence, the analysis must begin with the testimony of Mejia. He reported that he telephoned Kunz to report that his physician had released him for full duty. Kunz told him to "come on in to make application."[10] (Tr. 286.) When Mejia reported for their scheduled meeting, he was shown a movie and asked to provide a urine sample for a drug test. He provided the sample and passed the drug screening. Kunz then asked him for his social security number and proof of identity. In response, Mejia gave Kunz his State-issued, nondriver's license identification. Kunz left to make a photocopy of it.

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[9] I recognize that the Casehandling Manual is not mandatory authority. See *Hempstead Lincoln Mercury Motors Corp.,* 349 NLRB 552, 553, at fn. 4 (2007). Nevertheless, the Board has noted that it "is free to consider and cite the manual when reviewing backpay calculations, and indeed often does so." *John T. Jones Construction Co.,* 349 NLRB No. 119, slip op. at fn. 4 (2007) (not reported in Board volumes), enf. 575 F.3d 857 (8th Cir. 2009).

[10] Judge Rosenstein credited Mejia's account of this telephone conversation. He found that "Mejia telephoned Kunz in November 2006 to apprise him of his updated medical status and was told to come in to the office in order to take a drug test and fill out employment forms." *Cardi Corp.,* supra., 353 NLRB No. 97, slip op. at 5. I agree with the trial judge's characterization of the content of this telephone conversation.

Mejia testified that, upon his return, Kunz told him that "he has a problem with my ID. He said because I needed a driver's license." (Tr. 272.)

Mejia responded to this information by observing to Kunz that, when he was originally hired by the Company in 2002, he had not had a license and had presented a nondriver's license identification instead. Kunz replied that "their new policy was that you had to have a driver's license, in order to work for Cardi. So he told me they had no work for me." (Tr. 272.) Counsel for the Union then asked Mejia if Kunz made any reference to a lack of available work. Mejia responded, "No, he didn't mention that at all." (Tr. 272.)

The meeting ended with Kunz informing Mejia that "I'm going to have to check this situation about the driver's license with Mr. Cardi and I'll get back to you." (Tr. 292.) Mejia reported that after his meeting with Kunz, he went to the union hall and described what had happened to Palmisciano. He also testified that over the next few days he did not hear from Kunz. As a result, he telephoned Kunz and was told that there was no work for him.

Kunz provided an entirely different account of his interaction with Mejia. He agreed that the two had a brief phone conversation in which Mejia told him that he had been released by his doctor and was seeking employment. Kunz reported that he explained to Mejia that "we didn't have any work." (Tr. 164.) Nevertheless, Mejia asked if "he could come in and see me." (Tr. 169.) Kunz replied, "[S]ure." (Tr. 169.)

Kunz confirmed that Mejia did come to see him. He testified that he told Mejia, "that there were no opportunities at that time." (Tr. 169.) He also told Mejia, "[T]hat he should call us when he receives his driver's license." (Tr. 176.) Kunz testified that, while it was unusual to do so for an applicant who was not being hired, he had Mejia fill out employment forms and take a drug test.

Turning now to the application of the Board's analytical criteria to this testimony, it becomes evident that Kunz' account is implausible, illogical, and incredible. Initially, I note that Kunz claims that he told Mejia there was no work available but acceded to Mejia's request for a meeting. At that meeting, he elected to put Mejia through a full preemployment screening process, including verification of identification and right to lawful employment in the United States, drug screening, and provision of social security and tax information. Kunz admitted that this was not normal procedure. Instead, this treatment was only given to applicants as a special accommodation when requested by union business agents, politicians, or transportation department officials. Although Mejia did not fall within this favored category, Kunz provided no explanation for according him this supposed courtesy.

Beyond this, Kunz was asked to explain the value of putting Mejia through the entire prescreening process if there was no job available. He explained, "[w]ell, we just wanted to basically get him in a position where if the superintendent needed some work—needed someone to work, that he would be instantly available." (Tr. 178.) Apart from the fact that the Company had no practice of this type, the implausibility of this testimony is revealed when one considers that Kunz confirmed that the Company does not keep any list of availability for carpenter job applicants. Furthermore, this explanation is revealed as completely pretextual when it is considered in connection with the Company's contention throughout this litigation that Mejia was completely unqualified to perform the type of highway and bridge carpentry that was Cardi's business.[11]

[11] As counsel for the Respondent put it, "the fact that Mejia obtained a driver's license in

Continued

All of this raises the question of why the Company would go through the time, trouble, and expense of putting Mejia through a full preemployment screening process if it had no work for him to perform, did not maintain an availability list, and did not consider him to possess the qualifications needed for employment. The answer becomes clear when one understands the Company's hiring procedures and Kunz' participation in them. At the beginning of his testimony, Kunz was asked to explain his duties as safety director relating to the employment process. He testified:

> I basically qualified them, the applicants, if you will, qualified them . . . . A qualified person would come to my office, and then I would basically review them from that point, relative to did they have OSHA 10-hour training? Drug test, did they achieve a negative drug test? Did they have credentials that would verify their I-9 forms, and things of that sort.

(Tr. 152-153.) I attempted to summarize this testimony as follows:

> JUDGE: So it wasn't so much that you exercised judgment, but rather you sort of completed a check list of things that could disqualify someone from—who's—somebody who is qualified to do the job, but still can't get hired, because of some other technical problem?
>
> KUNZ: I think that fairly characterizes it, yes.

(Tr. 153.)

All of this was reiterated in counsel for the Union's further examination of Kunz on the topic as follows:

> COUNSEL: Your involvement is after they have someone in mind to hire, you do the paperwork, do the drug testing, all that kind of stuff?
>
> KUNZ: Yeah, they would contact me to see if he needs to come in, if he's had a drug test, if he's had his first hour, first day orientation, to see if he needs to renew his paperwork.

(Tr. 227.)

Tellingly, all of this was confirmed by Cardi. Counsel for the General Counsel explored this topic with him:

February of 2007 is the clearest indication that there was no longer any improper enforcement of any such rule against him as he had a driver's license and therefore, he would have been perfectly eligible for employment had there been work opportunities for him, had he possessed the requisite skill and experience to perform the work involved." (R. Response to motion, p. 2; GC Exh. 1(p).)

COUNSEL: [W]hen people are hired do you meet with them when they're being hired?

. . . .

CARDI: Personally?

COUNSEL: Yes.

CARDI: No. But we have a first hour—first day, first hour safety orientation and fitting in all the stuff and drug testing. Filling in all the stuff and the drug testing.

(Tr. 597-598.)

Before gauging the significance of all this, one additional factor should be noted. It will be recalled that Kunz testified that, even after being told there was no available work, Mejia asked for a face-to-face meeting. Kunz reported that he scheduled that meeting for a Monday morning at 6 a.m.[12] Once again, one must ask the question: why would Kunz set this meeting for what appears likely to have been an inconvenient time for himself at the busy commencement of the workweek and why would he pick such an odd time to direct Mejia to come in? Surely it would make little sense to require a candidate for employment at some unspecified future date to awake in the middle of a dark New England night in November so as to arrive at 6 a.m. for a conversation about that potential future employment.

It is clear that all of this is readily explained by understanding that what occurred was that Kunz told Mejia to report early on the morning of the first day of the new workweek so that he could complete his "first day, first hour" employment screening process in order to be ready to begin his job at the start of the workday. That explains the 6 a.m. appointment on a Monday. It also explains the urine screening for drugs. Indeed, there is no other reasonable explanation for the drug screening of Mejia. Obviously, such a process takes time and money. A reasonable employer would wish to have current test results at the time an employee begins working for it. The Company's witnesses confirmed that the drug screen is an essential part of the preemployment screening process. No explanation was ever provided as to why the Company would want to rely on drug test results from days, weeks, or months before the actual start of employment.[13] The answer is obvious, Mejia was given a drug screening because he was about to start work.[14] In fact, under cross-examination, Kunz conceded that any other policy regarding drug testing would be legally problematic. He testified that he was the corporate official responsible for Cardi's drug testing program and was familiar with State law

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[12] Kunz provided this testimony at p. 63 of the transcript of the unfair labor practice trial, as submitted by counsel for the Respondent. I had authorized the lawyers to submit portions of that transcript along with their posttrial briefs. See Tr. 219-220.

[13] Indeed, Kunz asserted that hiring would not begin until the following March or April. It is highly unlikely that an employer that considers a clean drug test as an essential precondition for employment would voluntarily choose to rely on results that are 4 to 5 months old.

[14] In this connection, I note that urine testing is a distasteful matter that would hardly be performed lightly. This was well illustrated when Cardi was asked if he had ever been present during such testing. He replied that he had not attended the tests because, "it's not a particularly pleasant place to be." (Tr. 665.)

governing such testing. Counsel for the Union then asked him if he was aware that under State law an employer could only require a drug test from someone who had already received an offer of employment.[15] Kunz replied, "That may be." (Tr. 201.)

Examining this record and the inferences that reasonably flow from it in the light of the inherent probabilities in the modern business and employment environment, I find that, in November 2006, Mejia telephoned Kunz to seek further employment with the Company. Kunz instructed him to report at 6 a.m. on Monday morning. When Mejia reported, Kunz performed the Employer's customary "first day, first hour" preemployment orientation, including verification of authorization to work in the United States, verification of OSHA compliance, completion of forms, collection of social security and tax information, and drug screening. The Company subjected Mejia to this process because it had hired him for immediate employment. When, during the course of the orientation, Kunz learned that Mejia did not have a driver's license, he terminated Mejia's employment pursuant to the Company's unlawfully implemented driver's license policy.

While all of these conclusions provide the only consistent and convincing explanation for the events that took place that morning, the truly remarkable feature of this case is the fact that I have yet to address the most compelling piece of evidence presented by the General Counsel. That item, a document admitted into evidence as General Counsel's Exhibit 6(a), page 1, is the proverbial "smoking pistol." It consists of the Employer's payroll record showing that Mejia was paid for 4 hours of "Regular Wages" for the pay period ending on November 18, 2006.[16]

Apart from the obvious, what explanation was offered for the Company's decision to pay Mejia? In his brief, counsel for the Employer is reduced to the assertion that this act must have been a "clerical error." (R. Br. at p. 13.) Although Kunz testified that the Company's payroll system is "very sophisticated," I suppose such a thing is possible. (Tr. 190.) The difficulty with this assertion, however, is the fact that no witness ever testified that Mejia was paid due to someone's clerical error. Counsel's theorizing cannot substitute for evidence. In fact, Kunz' testimony on the matter was what one would expect from a hapless witness being asked to explain away a smoking pistol. Counsel asked him, "[h]ow did that happen?" He was left to respond that "I can't explain that."[17] (Tr. 176.)

Why did the Company pay Mejia wages for his Monday meeting with Kunz? And, why did it pay Mejia for 4 hours when it would be expected that his participation in the "first day, first hour" process would be considerably shorter than that? In my view, the answer is revealed by the terms of the Employer's collective-bargaining agreement with the Union. Article XX of that contract includes a so-called "Employment Guarantee" that provides:

> A carpenter who reports to work on the first day and last day and appears competent, at the beginning of the shift,

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[15] Counsel's assertion as to the requirements of State law is corroborated by the provisions of the Rhode Island statute governing "Urine and Blood Tests as a Condition of Employment." Section 28-6.5-2 of that statute provides, in pertinent part, that an employer may require a job applicant to submit to urine testing for drugs, if "[t]he job applicant has been given an offer of employment conditioned on the applicant's receiving a negative test result." (CP Exh. 2.)

[16] This is confirmed by GC Exh. 9, which is the Company's remittance report to the Union showing that Mejia was paid for 4 hours of work in November 2006.

[17] Counsel then asked Kunz, "Okay. And is that the usual situation?" To which, Kunz replied, "It certainly isn't." (Tr. 176.)

> shall receive four (4) hours pay (minimum) unless he or she quits within the period.

(GC Exh. 3, p. 22.) Thus, the Employer's payment to Mejia reflected its understanding that it directed him to report to work and then terminated his employment within the first 4 hours of his workday.[18]

In sum, I agree with Judge Rosenstein's characterization of the "most significant" circumstance involved in the adjudication of this matter. As he put it, "in November 2006, [Mejia] was put on the payroll and paid for hours worked, conclusive evidence that he was an employee." *Cardi Corp.,* supra., 353 NLRB No. 97, slip op. at 6. [Citation omitted.] It inexorably follows that, having hired Mejia and then unlawfully discharged him, the Company is liable to compensate him for backpay and benefits that he would have received if he had remained employed from November 16, 2006 through his eventual (and brief) reinstatement on July 8, 2008.

Before leaving this topic, I will address two arguments raised by the Company throughout this litigation. In response to the compliance specification, the Company has continually claimed that it never had any job openings for Mejia and that Mejia was unqualified to perform the Company's type of carpentry work. Of course, the ultimate response to these assertions is that they are totally belied by the evidence that shows that the Company did choose to hire Mejia in November 2006.

Despite this, I will assess the Company's two claims. In support of its assertion that there was no carpentry work available for Mejia or anyone else in November 2006 and thereafter, the Employer did not offer any documentary evidence or rely on a specific assessment of it's employment history based on its "very sophisticated" payroll system. (Tr. 190.) Instead, it presented vague testimony from both Kunz and Cardi that was grounded in a claimed presumption that the approach of winter weather rendered further employment prospects highly unlikely. In the unfair labor practice trial, Kunz was examined by the Employer's counsel on this point as follows:

> COUNSEL: Was Cardi hiring in November of 2006 or were you laying off?
>
> KUNZ: Well, that's normally a time where we have layoff.
>
> COUNSEL: So?
>
> KUNZ: So I would say no. Your answer—the answer would be no, it's not a hire time.

(Unfair Labor Practice Trial Tr. 136.)

Kunz' uncomfortable and evasive testimony was matched by that of Cardi during the compliance hearing. He was asked if the Company was hiring in November 2006 and

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[18] In my view, a fair interpretation also includes an acknowledgement that the Employer recognized that its decision to terminate Mejia under its unilaterally imposed driver's license requirement was unauthorized by the collective-bargaining agreement and required, at a minimum, that Mejia be compensated under the terms of that agreement.

responded, "I don't believe so." (Tr. 541.) When asked if the Company hires in November, he replied, "It's a seldom thing." (Tr. 541.) Later in his account, counsel for the Company asked him a much broader question about the hiring history:

> COUNSEL: Now, with this background to your knowledge . . . . were any new carpenters hired in the fall of '06, any time in '07 and for the first six months of '08?
>
> CARDI: I can't recall. I can't say specifically "No," but I can't recall "Yes."

(Tr. 547.)

Under cross-examination, Cardi further undermined any claim that there were no available jobs. Counsel for the Union presented Cardi with the Company's records showing that in November 2006 three carpenters, William Delsanto, Joshua Johnson, and Robert Blanchette, left the Employer. When asked if the Company replaced them, Cardi responded, "Right, three people that left and I don't know if there are any—I have no idea whether or not there were positions available or that we just decided . . . you know, just give more work to [a subcontractor]." (Tr. 659.)

Although the Company did not present documentary evidence or specific testimony regarding any lack of work, it did assert that, generally, the approach of winter in New England eliminated job prospects. Union Business Agent Palmisciano explained that this had been true historically, but that due to a variety of factors this was no longer the case. Interestingly, his opinion was corroborated by Cardi who reported that, "We've had what we call 'open winters' or less rigorous winters that we've been able to work right through. We've had some winters we've had to shut down. We've had some winters that we knew we had to keep working because of a job schedule." (Tr. 537.) From all this, it is evident that the mere approach of winter is far from conclusive evidence, particularly in the face of the actual decision to hire Mejia.[19]

Finally, the Employer made an effort to minimize and belittle Mejia's work experience and qualifications. It contended that Mejia's work background "would have no relevance or application to a complicated highway or bridge job typically performed by Cardi." (R. Br. at p. 7.) Of course, the first difficulty with this line of argument is that the Employer chose to hire Mejia as a carpenter in 2002. Kunz testified that Mejia had been referred for employment by Local 94. In itself, this undermines the Employer's claim as the evidence showed that union officials made such referrals based on their assessment of a member's skills and experience and employers, including Cardi, relied on those assessments.

Kunz also testified that, in 2002, he asked Mejia about his background and that Mejia explained that his experience was in performing drywall work. He was hired and assigned to a project constructing salt barns. The implication from this as advanced by the Company is that Mejia had poor qualifications limited to drywall work involved in the housing industry and was only hired because the particular project was not a highway or bridge job. This was undermined by Kunz' admission that the salt barn project did not involve any drywall work and by Cardi's

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[19] The testimony presented by the Company was a far cry from the conclusive assertion made by counsel in his opening statement, "We're a highway—outside highway bridge contractor. We don't hire in November, December, January or February." (Tr. 53.)

admission that the Company was aware at that time that Mejia had done "some building work" in addition to drywall. (Tr. 578.)

By contrast with Kunz' claim that he asked Mejia about his experience at their initial meeting in 2002, Mejia testified that Kunz' only question was whether he was a journeyman or an apprentice. This would be consistent with the practice of relying on the referral choices made by knowledgeable union officials. I credit it. I also credit Mejia's uncontroverted testimony that during his work on the two salt barns he was never criticized or disciplined by the Company for the quality of his work or any other issue.

Although it hired him in 2002, the Company contended that in the period from 2006 to 2008 he lacked the necessary highway and bridge carpentry skills. This was disputed by Palmisciano and belied by Mejia's actual work record during that period. As will be discussed later in this decision, he was employed on a number of highway and bridge construction projects resulting from union referrals to other contractors. In fact, one of these jobs involved bridge construction carpentry for a subcontractor performing work for Cardi Corporation.

Based on the entire record, including my conclusion that the Company did hire Mejia in November 2006, I find that the Employer did not establish that it had no available openings for carpenters from November 2006 through July 8, 2008. Similarly, I find that the Employer failed to demonstrate that Mejia lacked the qualifications and experience required to perform the carpentry work associated with Cardi's role in the highway and bridge construction industry. To the contrary, I conclude that the General Counsel had established that Mejia was fully qualified to perform such work.

C. The Issue of Intermittency

Having determined that the Employer's unlawful decision to apply its driver's license policy to Mejia resulted in his loss of actual employment, I must assess the methodology for determining the appropriate financial remedy. In addressing that question, it is vital to consider the widely recognized conditions that prevail in the construction industry. The record demonstrates that, in conformity with the general practices in that industry, this Employer takes on a series of individual projects and selects a work force for each such job. As a result, "the fact of intermittency must be taken into account" when calculating the remedy. *Painting Co.,* 351 NLRB 42, 43 (2007), citing *NLRB v. Ironworkers Local 378,* 532 F.2d 1241, 1243-1244 (9th Cir. 1976).[20]

The leading case regarding the treatment of intermittency in the construction industry is *Dean General Contractors,* 285 NLRB 573 (1987). In *Dean*, the Board noted that construction jobs may be of short duration but employers often carry over employees from jobsite to jobsite. As a result, the Board "decline[d] to impose a presumption or a different set of rules . . . based on any theoretical distinction between project-by-project and permanent and stable work forces." Id. at 575, fn. 8. Instead, it placed the burden on the employer to demonstrate that a

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[20] Counsel for the Company cites the *Ironworkers* case in support of his attack on the General Counsel's methodology. In my view, the case is distinguishable in its crucial aspect. In that case, the circuit court took issue with the Board because it concluded that the Board had chosen to treat an average employee as if he were comparable to an elite group of employees. As will be discussed, in the present case, the compliance officer made a reasonable attempt to avoid such an outcome by excluding all employees with hire dates before Mejia's from the group of comparables.

discriminatee would have been terminated instead of transferred from project to project.[21] In assigning the burden of proof to an employer, the Board observed:

> Evidence pertinent to the likelihood of an employee's transfer or reassignment is the type of evidence that ordinarily would tend primarily to be in the possession of the respondent employer which controls the decision whether to transfer or reassign. We perceive no undue hardship in requiring a respondent to maintain such evidence if it seeks to cut off the . . . backpay of an employee whom it has unlawfully discharged.

(Id., at 574-575.)

As I have noted, the evidence in this case did establish that the Company operates in the traditional manner of the construction industry. That evidence also demonstrated that the Company typically maintains multiple contemporaneous ongoing projects and that some of those projects are very large. For the large projects, the work may continue over a period of many months and even years. This was true, for example, regarding the reconstruction of portions of major interstate highways such as I-95.

It is clearly an open question as to how long Mejia would have continued to work on the project to which he would have been assigned on the day he reported for his preemployment orientation had he not been unlawfully discharged. It is entirely possible that this project could have lasted throughout the entire 20-month backpay period. Alternatively, had the project ended before that time, it is equally possible that Mejia would have been transferred to one or more subsequent assignments for the Company. The evidence certainly established that such transfers and reassignments were common.

I appreciate the Company's tactical difficulty in addressing its burden on the issue of intermittency. Having staked out an "all-or-nothing" position that Mejia would never have worked for even a day during the period at issue, it has made it more difficult to present evidence as to intermittency. Thus, because it claims that there was no job for Mejia on the day of his preemployment screening, it has not identified any such project. As a result, I have no basis on which to determine the length of the project to which Mejia was going to be assigned until Kunz discovered that he lacked a driver's license. The project may have been one of short duration or it may have involved many months or even years of ongoing employment. In light of the Company's absolute failure to present evidence on this question, I must find that it did not meet its burden of proving any intermittency.[22]

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[21] Recently, the assignment of this burden to employers has been the subject of some controversy among members of the Board in the context of salting cases. Despite this, the Board continues to apply *Dean* to nonsalting situations. See *Oil Capital Sheet Metal,* 349 NLRB 1348, 1353, at fns. 18, 19 (2007), rev. dismissed 561 F.3d 497 (D.C. Cir. 2009).

[22] While presentation of such evidence may have appeared to undermine its claim that there was never a job for Mejia, it would not have been fatal to the Company's defense. Nothing precluded the Company from contending that there was no work for Mejia but alternatively showing that all of the open projects as of November 2006 terminated before the end of the backpay period and Mejia would not have been eligible for transfer or reassignment. The failure to present any evidence of the Company's actual work history reflects a tactical decision with entirely predictable consequences on the subsidiary issues in this backpay claim.

Because the Employer has failed to present any evidence indicating that the project for which Mejia was hired in November 2006 would not have continued to require his services throughout the backpay period, the Company has not established any defense to the Regional Director's backpay specification based on interruption or termination of Mejia's employment.[23] As the Board has explained, "[s]uspicion and surmise are no more valid bases for decision in [the] backpay hearing than in an unfair labor practice hearing." *Cibao Meat Products,* 348 NLRB 47, 48 (2006).

D. Appropriateness of the Region's Methodology for Computation of the Remedy

In its brief, the Employer candidly observes that "[t]his case is considerably different from the typical Compliance Hearing relating to a backpay claim, as here the initial and main issue is not over the amount of backpay but is, rather, whether Mejia would have been hired at all and whether he lost even a penny of backpay." (R. Br. at p.9.) [Underlining in the original.] Nevertheless, the Company does make a further subsidiary argument that the Regional Director "utilized an improper standard to determine the amount of lost pay." (R. Br. at p. 7.) Having concluded that the Company's "main" defense to the specification lacks merit, I must now assess this secondary contention.

The guiding principles to be applied to this evaluation were articulated by the Board in its leading case of *Alaska Pulp Corp.,* 326 NLRB 522, 523 (1998), enf. in part and remanded 231 F.3d 1156 (9th Cir. 2000):

> Our objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices . . . . Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed wide discretion in selecting a formula. This does not mean, however, that the Board will always approve the General Counsel's backpay formula even if it is reasonably designed to arrive at the approximate amount of backpay due. Rather, where the Respondent, as here, urges the Board to adopt an alternate formula, the Board will determine which is the most accurate way of calculating backpay, in view of all of the facts adduced by the parties. If, due to the variables involved, it is impossible to reconstruct with certainty what would have happened in the absence of a respondent's unfair labor practices, we will resolve the uncertainty against the respondent whose wrongdoing created the uncertainty. [Citation, footnotes, and some internal punctuation omitted.]

I interpret this passage as having delineated two approaches depending on the parties' contentions in a given case. Thus, where a respondent replies to a Regional Director's choice of methodology by proposing its own means of analysis and set of calculations, the Board will

[23] As the Casehandling Manual, Part Three, Sec. 10542.9, describes it, "[w]hen calculating backpay for a non-salting construction industry discriminatee, it is presumed that the discriminatee would have continued to be employed by the respondent employer throughout the backpay period unless the respondent employer demonstrates otherwise." [Footnote omitted.]

carefully explain and justify its ultimate choice of remedial approach.[24] On the other hand, if a respondent challenges the Region's methodological choice but fails to propose an alternative, the General Counsel's approach may be found appropriate so long as it is "reasonably designed to arrive at the approximate amount of backpay due." Id. at 523.

Examination of the Company's posttrial brief reveals that it objects to the compliance officer's choice of comparables used to calculate an amount that Mejia would have been expected to earn if he had been retained on the payroll. The Respondent makes no attempt to propose its own means of determining what this amount would have been. Thus, for example, it does not offer its own set of comparable employees, nor does it calculate the actual earnings for such a set of comparators. As no alternative has been offered, my analysis is necessarily limited to an appraisal of the reasonableness and appropriateness of the choices made by the compliance officer. As the Board explained in *Parts Depot, Inc.,* 348 NLRB 152, 153 (2006), enf. 260 Fed. Appx. 607 (4th Cir. 2008), "[i]t is the General Counsel's burden to establish gross backpay amounts that are reasonable, not arbitrary." [Citation omitted.]

In evaluating the General Counsel's approach, I begin by noting that the underlying methodology chosen is one that is regularly employed by the Board. In fact, it is listed as one of three "basic methods" in the Casehandling Manual, Part Three, Sec. 10540.1. Sec. 10540.3 of the manual outlines the entire process, noting that, with this approach, backpay is calculated based on the actual earnings of "another employee or group of employees, whose work, earnings, and other conditions of employment were comparable to those of the discriminatee both before and after the unlawful action." The manual also notes that the choice of a group of comparators rather than a single individual is also useful for providing "an objective basis for calculating earnings in the event there is a dispute over . . . how well the discriminatee would have performed during the backpay period." Sec. 10540.3. Finally, the manual explains that the most accurate method is "to assume that each discriminatee would have worked the annual average number of workdays and earned the same annual wages as the average employee in their classification." Sec. 10540.3.[25]

The manual's approach is consistent with the Board's jurisprudence regarding the use of comparable employees. As the Board once explained, "[w]e find no merit in the Respondent's general attack on the comparable employee formula and adopt the judge's finding that the comparable or representative employee approach is an accepted methodology, and appropriate here."[26] *Performance Friction Corp.,* supra. at 1117.

Having noted that the comparable employee method is an entirely valid approach to the calculation of backpay in circumstances such as exist for this Employer, I must next decide whether the compliance officer applied the method correctly and fairly. To begin, I note that counsel for the Union has provided an excellent summary of the compliance officer's procedure. That summary is worthy of extensive quotation:

> The [compliance officer] utilized the following methodology

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[24] The Board has expressed this view in *Performance Friction Corp.,* 335 NLRB 1117 (2001) (where parties present conflicting backpay formula arguments, the Board must determine most accurate method).

[25] The revised manual cites *Painting Co.,* 351 NLRB 42 (2007), for this proposition. I agree that this precedent is crucial and will discuss it shortly.

[26] See also, *NLRB v. Overseas Motors, Inc.,* 818 F.2d 517, 520 (6th Cir. 1987) (representative employee method is "a reasonable means of calculating back pay").

> to calculate Mejia's back pay. She started with the entire universe of Cardi's 29 carpenter employees during the November 13, 2006 through July 8, 2008 back pay period. From that larger group, she excluded those carpenters who commenced working for Cardi before Mejia did. Thus, the long term employees who one would expect to have more work opportunities than Cardi's other employees, were excluded from the calculation. Similarly, foremen and carpenters with special skills, like welding, that are recognized with premium pay in the collective bargaining agreement, were also excluded. Finally, apprentices, who have different work opportunities than journeymen like Mejia, were also excluded.
>
> After excluding these employees, the [compliance officer] was left with a subgroup of eight, non-specialized carpenters who were hired after Mejia. For each week of the back pay period, she calculated the average number of hours worked per week by these eight remaining employees. For example, if an employee in the subgroup was laid off for a week, his hours would be zero for the week and the average for the group as a whole would be decreased accordingly. The [compliance officer] then assumed that on a week-to-week basis Mejia would have worked the average number of hours worked by this group of eight employees . . . . The [compliance officer] then multiplied the average number of hours worked by these eight employees by the collective bargaining agreement's hourly wage and benefit rates. From that total, the [compliance officer] subtracted Mejia's interim earnings for each quarter in the back pay period, but only after deducting Mejia's interim expenses from the interim earnings. [Footnotes and extensive citations to the record omitted.]

(CP Br. at pp. 4-5.)

I have compared this method of computation with the requirements outlined by the Board in the key precedent, *Painting Co.,* 351 NLRB 42 (2007). In that case, the Board found the Region's calculations to be unreasonable because they assumed that the discriminatees would have worked the same number of annual hours as the top 5-12 employees out of a total work force of 350. In recalculating the backpay amounts, the Board observed that:

> Absent some evidence to suggest that a given discriminatee would have exceeded the average number of workdays each year, the most accurate method for determining the amount of backpay due is to assume that each discriminatee would have worked the annual average number of workdays and earned the same annual wages as the average painter employed by the Respondent during that year.

(Id. at 43.)

In this case, the Employer contends that the Region has made a similar error by choosing eight comparators who were part of its elite, core group of employees.[27] In my view,

[27] Counsel for the Company cites *NLRB v. Ironworkers, Local 378*, 532 F.2d 1241 (9th Cir.

Continued

the compliance officer took pains to avoid such an error. In the first place, she relied on the Employer's own pay classification system to choose only journeymen carpenters who were paid under the same payroll classification as Mejia.[28] This represented a meaningful and appropriate effort to eliminate carpenters with superior skills and qualifications from the set of comparators.

Even more significantly, the compliance officer restricted her subset of comparators to only those identically-classified journeymen carpenters who were hired after Mejia's fateful meeting with Kunz. Counsel for the Company fails to acknowledge the importance of this choice. He criticizes this limitation as an indication that the compliance officer was wedded to the principle of seniority despite the fact that this Employer does not use seniority in making its hiring and retention decisions.[29] This argument fails to come to grips with the true rationale for selecting only later hires. Such a policy choice served to effectively screen out the potential comparators who were actually members of the Employer's prized group of valued carpenters who were given priority in retention. This conclusion is based on the logical assumption that persons who were either initially hired or rehired after Mejia's hire date could not have been considered part of that core group. If they had formed part of that core group, their employment would not have been interrupted such that they needed to be rehired.

I recognize that the Employer, through the testimony of its witnesses, made a valiant attempt to show that the comparators were highly prized employees who formed the core group that should be excluded from the calculation process. Of course, such testimony is purely partisan, subjective, and conveniently timed.[30] When compared to the objective and logical probative value of the fact that they were hired after Mejia's date of employment, the proffered opinions that they should be exempted from the comparison group must be rejected. Indeed, I think it fair to say that by arguing that every one of the eight chosen comparators was wrongfully included due to membership in a core group, the Employer has proven too much. If that contention were true, then the ranks of the Employer's core group must have been so depleted that it would have been anxious to retain the services of any competent carpenter, including Mejia.

I must also observe that, in addition to proving too much, paradoxically the Employer has also proven too little. While it rejects each and every one of the compliance officer's

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1976), for the same proposition. I agree that the circuit court reversed the Board for the same reason, the choice of 17 out of the 22 highest earners as comparators out of a total work force of 150.

[28] The Employer used the code "121" to designate employees who were so classified.

[29] Actually, while the Employer does not mechanically apply seniority in these situations, Cardi testified that its decisions are based on "length of service and what we feel is the quality of the employee." (Tr. 541.) This is consistent with the compliance officer's choice of methodology.

[30] A good example of the caution with which this testimony should be treated concerns one of the eight comparators, Jason Rosa. Cardi contended that Rosa was one of the prized core employees. Despite this claim, Rosa was hired after Mejia and had never before been employed by the Company. Cardi reported that he referred Rosa to his project supervisors for consideration as a new hire as a favor to Rosa's father. He had no prior experience at highway or bridge construction, having specialized in building work. Cardi's claim that Rosa was a core employee is either false or compelling proof that the Company's need for new core employees was so great that Mejia would likely have become one as well had he not been unlawfully discharged.

comparators, it fails to offer any alternative set of comparable employees or any different method of calculating backpay. In that sense, the situation is quite similar to that in *South Coast Refuse Corp.,* 337 NLRB 841 (2002), where the Board granted summary judgment against a respondent that "failed to provide alternative figures or calculations," noting that this was particularly troubling since "the data at issue is within the Respondent's knowledge and control."

Having carefully examined the compliance officer's methodology and choice of comparators, along with the failure of the Respondent to offer any concrete alternatives, I conclude that the amended compliance specification complies with the Board's standards and requirements and represents a reasonable and appropriate calculation of the accurate amount needed to place Mejia in the financial position he would have had absent the Company's unlawful enforcement of the driver's license rule against him.

E. Evaluation of Mejia's Interim Earnings and Expenses

Having concluded that Mejia's unlawful discharge resulted in an obligation to make him whole through compensation for backpay and benefits and that the compliance officer used an appropriate method to calculate those amounts due, I must finally examine Mejia's efforts to mitigate the damages, including the reasonableness of any claimed deductions from those interim earnings. As the Board has observed:

> A discriminatee must make reasonable efforts to secure interim work to be entitled to backpay . . . The sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the back-pay period as a whole and not based on isolated portions of the backpay period . . . It is the respondent's burden to prove that the discriminatee failed to exercise reasonable diligence in searching for work. [Internal quotation marks and citations omitted.]

Grosvenor Resort, 350 NLRB 1197, 1198 (2007), appeal dismissed 2008 WL 435516 (D.C. Cir. 2008).

Counsel for the Company characterizes Mejia's work record during the backpay period as "lackadaisical" and less than "minimal." (R. Br. at p. 36.) I take this as a reference to the fact that Mejia was not continuously employed throughout the period at issue. Having deployed the factor of intermittency in the construction industry as a shield to limit or eliminate its backpay obligation, the Company now seeks to wield the same condition as a sword against Mejia. Just as I previously concluded that the compliance officer gave due weight to the effect of intermittency when calculating the backpay obligation, I now find that she gave proper consideration to its effect on Mejia's interim earnings.

Turning to Mejia's job history since November 2006, it is clear that his principal efforts to find work consisted of his prompt registration with the Union's referral system on every occasion when he became unemployed. The uncontroverted evidence showed that he maintained current status on that registry at every such period of unemployment and that he accepted all offers of employment that resulted from referrals by the Union.[31] In utilizing this method of seeking interim employment, Mejia was in compliance with the Board's requirements. I base

[31] In addition to carpentry work, a small portion of the Union's referrals consisted of picketing duties. The compliance officer correctly treated the income from such picketing as interim earnings. See *Domsey Trading Corp.,* 351 NLRB 824, 826 (2007).

this conclusion on the Board's assessment of similar efforts to secure interim employment:

> The Board has long held that, in seeking interim employment, a discriminatee need only follow his regular method for obtaining work. See *Tualatin Electric, Inc.,* 331 NLRB 36 (2000) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment through the union's hiring hall), enf'd 253 F.3d 714 (D.C. Cir. 2001). [Discriminatee] . . . was entitled to go through the Union in seeking interim employment.

Midwestern Personnel Services, 346 NLRB 624, 626 (2006), enf. 508 F.3d 418 (7th Cir. 2007).

Interestingly, Mejia actually did considerably more than what has been required by the Board. Leaving his home and family ties, he traveled over 1000 miles to an unfamiliar part of the country in order to find work in his occupation. He presented testimony and documentary evidence showing that he contacted the Union's local in Louisiana in the hope that industry conditions after Hurricane Katrina would be favorable to gaining employment. That local did refer him for jobs, including a fairly lengthy stint as a carpenter involved in the reconstruction of the long bridge on Interstate 10 that crosses Lake Pontchartrain.[32] It is true that Mejia voluntarily left that job due to the total breakdown of his vehicle and his financial inability to purchase a replacement. Given that the entire Louisiana episode represents an extraordinary effort to mitigate his economic losses, I find that his decision to return to Rhode Island was not unreasonable. See *IMCO/International Measurement & Control Co.,* 277 NLRB 962, 963 (1985), enf. 808 F.2d 837 (7th Cir. 1986) (decision to quit job due to involuntary loss of means of transportation does not constitute a willful loss of earnings justifying limitation of backpay).

After examining all of Mejia's efforts to seek and maintain employment during the backpay period, I concur in the Region's conclusion that they fell entirely within the Board's standards, particularly with reference to the intermittency of work assignments in the construction industry. The Employer has not met its burden of showing any deficiency in Mejia's interim earnings history.

Lastly, the Employer contests certain of the expenses that the compliance officer deducted from Mejia's interim earnings. In examining this contention, I begin with the fact that Mejia presented complete and rather meticulous documentation of his interim earnings and expenses. His thoroughness in this regard was impressive and bolsters the reliability of his testimony as to these points. The compliance officer provided persuasive testimony as to her reasoning in giving Mejia credit for these expenses. She testified that "if the mileage is greater than what their commuting mileage would be, parking expenses, tolls, tools and uniforms they need for the job, expenses if they have to relocate, such as room and board and other expenses, say if they have to rent a mailbox as Mr. Mejia had to do in this case," then she deems it appropriate to deduct the resulting costs from interim earnings. (Tr. 81-82.) Her analysis is well supported by the Casehandling Manual, Part Three, Sec. 10556, and the cases cited therein.

I conclude that Mejia's expenses arose from the extraordinary needs he experienced due to his praiseworthy decision to seek available highway carpentry work in Louisiana. In a

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[32] It is noteworthy that Mejia's extraordinary effort to locate and secure employment of the same nature as that offered by the Company stands at stark contrast with the Employer's attempt to characterize him as a mere drywaller.

decision adopted by the Board, another administrative law judge noted, "[w]here it is found that a discriminatee's move in order to seek better opportunities is not a willful loss of earnings, the expenses of the move are fully deductible as expenses of seeking employment." *Be-Lo Stores,* 336 NLRB 950, 954 (2001). I find that Mejia's decision to move was an appropriate effort to improve his lot and that his expenses were reasonable and deductible.[33] As a result, the Employer has failed to meet its burden of demonstrating any error in the compliance officer's treatment of those expenses.

Conclusions

1. The period for which the Employer is liable for payment of backpay and benefits commenced on November 16, 2006 and terminated on July 8, 2008.

2. The General Counsel has employed a reasonable method of computing the gross and net backpay and benefit obligations incurred by the Respondent and that method is both consistent with the Board's requirements and designed to produce an accurate determination of those obligations.

3. The Employer has failed to establish that any reduction in the computed backpay and benefit obligations is appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Cardi Corporation, of Warwick, Rhode Island, its officers, agents, successors, and assigns, shall forthwith pay to Eddie Mejia the sum of $69,152.02, plus interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), accrued to the date of payment and minus tax withholding required by law, and the additional sum of $31,149.98 to the Union's benefit funds on behalf of Eddie Mejia.

Dated, Washington, D.C. June 4, 2010

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Paul Buxbaum
Administrative Law Judge

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[33] The Employer takes particular issue with Mejia's claim for reimbursement for tools that he purchased in Louisiana, noting that carpenters customarily provide their own tools. I credit Mejia's testimony that he needed to buy certain tools because he was unable to transport them from Rhode Island.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.