Pessoa Construction Company *and* Laborers' International Union of North America. Cases 05–CA–034547, 05–CA–034761, and 05–CA–035083

December 15, 2014

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On December 24, 2013, Administrative Law Judge Geoffrey Carter issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The Respondent and the General Counsel each filed an answering brief and a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board orders that the Respondent, Pessoa Construction Company, Fairmont Heights, Maryland, its officers, agents, successors, and assigns, shall make whole William Membrino by paying him $95,046.07, plus interest accrued to the date of payment as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. December 15, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Chad M. Horton and *Theresa A. Lenz, Esqs.,* for the General Counsel.

Michael Avakian, Esq., for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This supplemental proceeding was tried before me in Washington, D.C., on September 4–6, 9–10, 2013,[1] pursuant to a compliance specification and notice of hearing that issued on May 31, 2013, and was amended on August 1, 2013.

In the underlying administrative law judge (ALJ) decision, Judge Arthur Amchan found (among other violations not at issue here) that Pessoa Construction Company (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) when it discharged employee William Membrino. Judge Amchan recommended that Respondent be required to offer Membrino full reinstatement to his former job and also make Membrino whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. In a Decision and Order dated May 19, 2011, the Board adopted Judge Amchan's recommended Order, with the slight modifica-

[1] The Respondent excepts to the judge's ruling granting certain portions of the General Counsel's motion for partial summary judgment and finding that some of the Respondent's answers to the compliance specification and amendments were deficient under the Board's Rules and Regulations. We find it unnecessary to decide whether the judge's ruling was correct. Even if the judge was mistaken, it was, at most, harmless error: the judge also ruled on the merits of the allegations in the compliance specification and amendments, and we are affirming those findings.

The Respondent also argues that the judge erroneously excluded evidence of the discriminatee's prior criminal convictions. We find that the judge did not abuse his discretion in excluding this evidence.

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

No party asks us to revisit or overrule *St. George Warehouse*, 351 NLRB 961 (2007), but the General Counsel excepts to the judge's determination that the Respondent showed that substantially equivalent jobs were available during the backpay period as required by *St. George*. We find it unnecessary to pass on this exception. A finding that the Respondent failed to carry its burden would not affect the outcome because the judge found, and we agree, that the General Counsel demonstrated that the discriminatee engaged in a reasonable effort to find work.

In affirming the judge's order, we do not rely on his citations to *Latino Express*, 359 NLRB No. 44 (2012), or *Life's Connections*, 359 NLRB No. 85 (2013). We nevertheless agree that the Respondent should not be ordered to compensate the discriminatee for the adverse tax consequences of his backpay award or to file a report with the Social Security Administration allocating backpay to the appropriate quarters. These remedies are not appropriate because they were not included in the Board's Order in the unfair labor practice case, which has since been enforced by the United States Court of Appeals for the Fourth Circuit. 356 NLRB No. 157 (2011), enfd. 507 Fed. Appx. 304 (4th Cir. 2013). Compare *Interstate Bakeries Corp.*, 360 NLRB No. 23, slip op. at 1 fn. 3 (2014) (finding Board no longer possesses jurisdiction to modify Order enforced by court of appeals).

[1] All dates are from 2008 to 2013, as specified where appropriate in this decision.

tion that any backpay or monetary awards would be paid with interest compounded on a daily basis. *Pessoa Construction Co.*, 356 NLRB No. 157, slip op. at 1 & fn. 5 (2011). On January 25, 2013, the U.S. Court of Appeals for the Fourth Circuit enforced the Board's order. *Pessoa Construction Co.v. NLRB*, 507 Fed. Appx. 304 (4th Cir. 2013) (per curiam).

The compliance specification at issue here alleges the amount of backpay due under the terms of the Board's Decision and Order. The General Counsel alleges that Respondent owes $107,929 in backpay to Membrino, plus interest compounded daily and Respondent's share of FICA contributions. (GC Exh. 1(k).) Respondent maintains that it only owes $912 in backpay to Membrino. (GC Exhs. 1(i) and 1.)

General Counsel's Motion for Partial Summary Judgment

A. Background

On August 23, 2013, the General Counsel notified Respondent by email that the General Counsel believed Respondent's answers to paragraphs 4(e) and (g) of the amendment to the compliance specification were insufficient and not in compliance with Section 102.56(b) and (c) of the Board's Rules and Regulations. Later that same day, the General Counsel also notified Respondent that it believed Respondent's answers to paragraphs 3 and 4(h) of the compliance specification were not sufficiently specific to comply with the applicable Board Rules. The General Counsel asked Respondent to file an amended answer by August 30 that provided more specificity about its assertions and calculations, and warned that if Respondent did not file an amended answer, the General Counsel would consider filing a motion for summary judgment or a motion to strike before the hearing. Respondent's counsel replied by email that he was tied up for the afternoon (on August 23), but did not take further action to respond to the concerns that the General Counsel raised about Respondent's answers to the compliance specification. (Motion for Partial Summary Judgment, Exh. 7.)

On September 4, 2013, the first day of trial in this matter, the General Counsel filed a motion for partial summary judgment in which it asserted that Respondent's answers to the compliance specification and amendments thereto were deficient under applicable Board Rules and Regulations. In a discussion held off the record with all parties, the General Counsel requested that we proceed with the trial (instead of continuing the trial to allow Respondent the opportunity to file a brief in response to the motion for partial summary judgment), and that I consider its motion when preparing my supplemental decision and order on the merits. I agreed, and now turn to the General Counsel's motion for partial summary judgment. In that connection, I note that although Respondent filed a posttrial brief in this matter, it did not address the issues raised in the General Counsel's motion for partial summary judgment.

B. Applicable Legal Standards—Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states as follows regarding the type of information that a respondent needs to provide when submitting an answer to a compliance specification:

> (b) *Contents of answer to specification*.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—
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> . . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

Consistent with these rules, the Board has granted motions for partial summary judgment when a respondent files a deficient answer (e.g., an answer that fails to deny certain allegations with the specificity required by Board Rule 102.56(b)) to a compliance specification. See, e.g., *SRC Painting, LLC*, 356 NLRB No. 74, slip op. at 2 (2011).

C. Analysis—Motion for Partial Summary Judgment

In its motion, the General Counsel requested that I: (a) find that Respondent admitted paragraphs 2, 3, and 4 of the compliance specification, and paragraphs 4(e) and (g), and 7 of the amendment to the compliance specification, because Respondent's answers to those paragraphs were deficient; (b) strike the affirmative defenses stated in paragraphs 1–3 and 5–6 of Respondent's answers; and (c) grant partial summary judgment. As discussed below, I find that several aspects of the General Counsel's motion have merit.

1. Should any allegations in the compliance specification and amendment thereto be deemed admitted?

a. Paragraph 2—The backpay period

The General Counsel alleged that the backpay period runs from October 24, 2008, to February 8, 2013. Respondent agreed that the October 24, 2008 start date is correct, and acknowledged that it offered to reinstate Membrino on February 8, 2013. However, Respondent also asserted that "the

backpay period terminated no later than December 1, 2008." (GC Exh. 1(f).)

The Board's decision in *Aneco, Inc.*, 330 NLRB 969 (2000), is instructive as to whether Respondent's bare assertion of an alternative end date to the backpay period was sufficient. In that case, which involved a compliance specification based on an unlawful refusal to hire the discriminatee, the respondent asserted in its answer that the backpay period would have only lasted 2 weeks because the discriminatee only needed that amount of time to either organize the respondent's employees or determine that such efforts were futile. Id. at 970. The Board denied the General Counsel's motion for summary judgment on this point, finding that respondent's answer was sufficiently specific insofar as it specified both an alternative date for when the backpay period closed, and the basis for the alternative date. Id. at 971.

Based on the Board's analysis in *Aneco, Inc.*, supra, I find that Respondent's answer to paragraph 2 of the compliance specification was deficient. Although Respondent provided an alternative date (December 1, 2008) for the end of the backpay period, Respondent did not state a basis for that alternative date, thereby forcing the General Counsel to speculate about what theory or evidence Respondent relied upon for its claim. Since Respondent did not explain adequately its failure to deny the allegations in paragraph 2 of the compliance specification in a manner consistent with Board Rule 102.56(b), I will grant the General Counsel's motion for partial summary judgment as to paragraph 2, and deem paragraph 2 of the compliance specification as admitted as true.[2]

b. Paragraphs 3 and 4—Gross backpay formula and calculation

In paragraph 3 of the compliance specification, the General Counsel alleged that an appropriate measure of gross backpay would be the amount that Membrino would have earned had he been employed by Respondent throughout the backpay period. (GC Exh. 1(d), par. 3.) Respondent asserted in its answer that the appropriate measure of gross backpay was: the difference in wages that Membrino would have earned until he became unavailable for work under U.S. Department of Transportation (DOT) regulations; the difference in wages that Membrino would have earned until he would have been laid off by Respondent; the amount of wages that Membrino would have earned based on work performed with employee S.M.; and/or the amount of wages that replacement employee R.S. earned. (GC Exh. 1(f), par. 3.)

The parties disagreed along similar lines regarding how to calculate gross backpay. Specifically, in paragraph 4 of the compliance specification, the General Counsel alleged gross backpay should be calculated by adding Membrino's average regular earnings per calendar quarter to his average overtime earnings per calendar quarter, using a regular wage rate of $22/hour and an overtime rate of $33/hour (time-and-a-half). The General Counsel also alleged that Membrino's average regular and overtime hours should be based on the three calendar quarters prior to Membrino's discharge, and calculated that Membrino worked an average of 444.6 regular hours and 61.1 overtime hours per calendar quarter, and was entitled to $108,397.90 in net backpay (after deducting interim earnings from gross backpay of $199,285.90).[3] (GC Exhs. 1(d), par. 4; 1(g).) Respondent denied virtually all of those allegations, maintaining that: Membrino's regular and overtime earnings and hours should be determined based on when he was available to work, when he would have worked with employee S.M. until laid off, and/or the hours that replacement employee R.S. (or other unspecified comparable employees) worked; and that the regular and overtime wage rates were $18/hour and $27/hour, respectively. Respondent also asserted that Membrino worked an average of 425.5 regular hours and 34.2 overtime hours per calendar quarter, and further contended that Membrino's gross backpay figure was only $912 (all of which was based on the fourth quarter of 2008). (GC Exh. 1(i), par. 4; id. (Exhibit 1).)

I agree with the General Counsel that Respondent's answer is deficient as to the claims that gross backpay should be measured based on when Membrino would have been laid off, the wages that Membrino would have earned had he continued working with employee S.M., and the amount of wages that employee R.S. earned as Membrino's alleged replacement. Although these claims raise issues that are within Respondent's knowledge, Respondent provided no supporting dates or figures, again leaving the General Counsel to speculate as to what countervailing gross backpay formulae or amounts Respondent believes are accurate.

I also agree that Respondent's answer is deficient as to the calculations that Respondent proffered for Membrino's wage rate, the average regular and overtime hours that Membrino worked, and the amount of gross backpay. Respondent did not state the basis for its assertion that Membrino's regular wage rate would only have been $18/hour during the backpay period, nor did it state the basis for its calculations of Membrino's average regular and overtime hours worked per calendar quarter, or its calculation of gross backpay. Once again, Respondent should have stated the bases for its calculations in its answer, since issues such as Membrino's wage rate and hours worked are within Respondent's knowledge. See *Shenandoah Coal Co.*, 312 NLRB 30, 31 (1993) (granting motion for partial summary judgment regarding the amount of hourly wage increases because the respondent did not propose an alternative figure or state the basis for such a figure).

On the other hand, I find that Respondent satisfied the requirements of Board Rule 102.56(b)–(c) with its claim that gross backpay should account for the "difference in wages that [Membrino] would have earned until he was unavailable for work pursuant to [DOT] regulations." (GC Exh. 1(f), par. 3.) The Board has held that a general denial is sufficient in a respondent's answer when the respondent is addressing an issue beyond its knowledge. See *Urban Constructors*, 327 NLRB 1220, 1221 fn. 3 (2000). That is precisely the situation here

[2] To the extent that Respondent raised an affirmative defense based on par. 2 of its answer, I will also grant the General Counsel's motion to strike that defense.

[3] On the first day of trial, the General Counsel revised its net backpay figure to $107,929. (GC Exh. 1(k).)

regarding Membrino's availability to work during the backpay period pursuant to DOT regulations, because Respondent did not have access to records that (among other possible areas) would shed light on Membrino's medical clearance to work and the validity of Membrino's CDL during the backpay period until that information was disclosed at trial pursuant to subpoena. Accordingly, I deny the General Counsel's motion for partial summary judgment on this issue.

In sum, in light of the deficiencies in Respondent's answer to paragraphs 3 and 4 of the compliance specification, as well as Respondent's failure to explain adequately why it did not deny the allegations in paragraphs 3 and 4 of the compliance specification in a manner consistent with Board Rule 102.56(b), I will grant the General Counsel's motion for partial summary judgment, and deem admitted as true the General Counsel's allegations, on the following issues:

> (i) The appropriate formula for calculating gross backpay (see GC Exh. 1(d), par. 3, but note that the gross backpay figure remains subject to modification based on periods of time that Membrino was unavailable to work pursuant to DOT regulations);
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> (ii) The formulae for calculating regular and overtime earnings per calendar quarter (see GC Exhs. 4(b)–(c));
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> (iii) The average regular and overtime hours that Membrino worked in the three quarters before he was discharged (see GC Exh. 1(d), pars. 4(d), (f); GC Exh. 1(g), pars. 4(e), (g)); and
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> (iv) Membrino's regular wage rate (see GC Exh. 1(d), par. 4(h).[4]

See *Urban Constructors*, 327 NLRB at 1220–1221 (granting motion for summary judgment because the respondent's answer to the compliance specification gave no alternative wage rates, backpay periods, or gross backpay totals even though those issues concerned matters within the respondent's knowledge); *Structural Finishing*, 296 NLRB 439, 440–441 (1989) (same).

c. Paragraph 7—net backpay calculation

In paragraph 7 of the amendment to the compliance specification, the General Counsel alleged that Respondent would make whole Membrino as required by the Board's order by paying $108,397.90, plus interest compounded daily and Respondent's share of FICA contributions. (GC Exh. 1(g), par. 7.) Respondent offered a general denial to the General Counsel's net backpay calculations, and asserted that Membrino would be made whole with a net backpay amount of $912.[5] (GC Exh. 1(i), par. 7.) The General Counsel asserts that Respondent failed to supply a rationale for its calculation of net backpay as $912. While that point is valid, I nonetheless deny the General Counsel's motion for summary judgment on this issue because the amount of net backpay is not within Respondent's knowledge since net backpay is affected by (among other things) Membrino's interim earnings during the backpay period. Respondent's general denial of the net backpay figure in paragraph 7 of the amendment to the compliance specification was therefore sufficient under the Board's case law. See *Urban Constructors*, 327 NLRB at 1221 fn. 3.

Finally, I note that while I have granted portions of the General Counsel's motion for partial summary judgment, I will still address those issues on the factual merits, which are discussed below. Turning, therefore, to the factual merits, on the entire record,[6] including my observation of the demeanor of the wit-

[4] To the extent that Respondent raised affirmative defenses based on these aspects of pars. 3 and 4 of its answers (with the exception of defenses based on Membrino's alleged unavailability to work pursuant to DOT regulations), I will also grant the General Counsel's motion to strike those defenses.

[5] Respondent also asserted that interest should not be compounded daily, and that the General Counsel's net backpay figure did not account for Membrino's Federal, State, and social security taxes that would need to be deducted. (GC Exh. 1(i), par. 7.) I have not addressed those portions of Respondent's answer because I am bound to follow the Board's ruling that interest on any backpay owed to Membrino must be compounded daily, and Respondent's arguments about applicable taxes are not relevant to the compliance specification.

[6] The trial transcripts and exhibits generally are accurate, but I make the following transcript corrections to clarify the record: p. 7, L. 15: the speaker was Mr. Horton; p. 301, L. 8: "self" should be "salt?"; p. 327, L. 23: the speaker was Mr. Avakian; p. 328, L. 1: the speaker was Mr. Avakian; p. 348, L. 8: "paid" should be "applied"; p. 375, L. 18: the speaker was Mr. Avakian; and p. 661, L. 14: "redacted" should be "rejected."

I note that on November 20, 2013, I issued an order directing the parties to file corrected versions of certain exhibits to redact personal identifiable information and provide pages that were omitted. Pursuant to that order, the parties submitted the following corrected exhibits: GC Exhs. 9, 25(a)–(b); R. Exhs. 16–19, 32, 34. I have replaced the original copies of those exhibits in my exhibit file with the corrected versions, and I have placed the original copies in a sealed envelope in case they are needed for review. Since the electronic file still contains both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the original exhibits in the electronic file are handled in a way that will ensure they (and the personal identification information they contain) remain confidential.

I also note that after reviewing the trial transcripts, I determined that I prematurely ended a line of questioning during trial related to whether Membrino's character for truthfulness could be challenged based on certain evidence under Rule 609 of the Federal Rules of Evidence. (Tr. 392–394.) Accordingly, on December 4, 2013, I issued an order directing the General Counsel to provide information to complete the record on that issue. The General Counsel complied, and after reviewing the supplemental information and arguments of the parties', I determined (as explained in more detail in an order that I issued on December 19, 2013) that the information is not admissible under Rule 609 because of the passage of time, the fact that any probative value of the evidence does not substantially outweigh its prejudicial nature, and the fact that Respondent did not provide reasonable written notice of its intent to use Rule 609 evidence such that the General Counsel would have a fair opportunity to oppose the request. (See FRE 609(b).) I also found that to the extent that Respondent might wish to use the proffered Rule 609 evidence to establish that Membrino made false statements on job applications to interim employers, I note that the evidence is cumulative and irrelevant in light of the admissions that Membrino made elsewhere in the record. (See, e.g., R. Exh. 1, p. 7.) The pleadings related to my Rule 609 inquiry are part of the record in this case, but shall remain under seal (except as needed for possible review on appeal or for other valid purposes). I also recommend that the Board take appropriate steps to ensure that any pleadings in the electronic file that are

nesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

A. William Membrino—Background

For the most part, William Membrino has worked as a commercial truckdriver since 1992 or 1993. In connection with that profession, Membrino obtained a class A commercial drivers license (CDL) that enabled him to drive a variety of commercial vehicles. (Tr. 302–303.)

In 2007, Julio Pessoa (Respondent's owner) asked Membrino to return to Respondent (a highway construction contractor and subcontractor) as one of its commercial drivers.[7] Membrino agreed, and joined Respondent in June 2007, as a salaried truckdriver, earning $25 per hour and maintaining a standard 40-hour workweek (with no overtime paid). (Tr. 37, 564, 593, 736–737, 739; GC Exh. 27.) In January 2008, however, Membrino became an hourly employee, and thus was not guaranteed a fixed number of work hours per week. With the new, hourly arrangement, Membrino earned $22 per hour, but also earned time-and-a-half overtime pay for any hours that he worked above the standard 40-hour workweek.[8] (Tr. 37–38, 564, 739–740; GC Exh. 27.)

As a driver with a class A CDL, Membrino was authorized to drive (and did drive) a variety of commercial vehicles for Respondent, including the following vehicles (among others) that could only be driven with a class A CDL: tractor trailers; lowboys;[9] and flatbeds. (Tr. 73–74, 420–421, 569–570, 606, 640–643, 645–646, 656, 735–738; GC Exhs. 20(b), 21, 23(a), (c).) Starting in March 2008, however, Respondent most often asked Membrino to drive one of its dump trucks (truck 5067), even though that vehicle only required a class B CDL. (Tr. 74–78, 425, 428–430, 608–609; R. Exh. 2.)

On August 11, 2008, a Maryland District Court judge suspended Membrino's CDL because he failed to pay a fine. Membrino's CDL remained suspended until October 24, 2008. (R. Exh. 4.) Nevertheless, Membrino continued working for Respondent as a commercial truckdriver despite having a suspended CDL. (GC Exh. 27.) There is no reliable evidence that Respondent learned that Membrino's license was suspended during this time period.[10] However, when Respondent has learned that other drivers on its payroll had suspended CDLs (e.g., for failure to pay child support), Respondent's practice has been to prohibit those drivers from working until they resolved the problems with their license. (Tr. 144, 414–418, 444, 628.)

B. October 23, 2008—Respondent Discharges Membrino in Violation of the Act

On October 23, 2008, Respondent discharged Membrino. The Board has ruled that Respondent discharged Membrino for discriminatory reasons (specifically, because of Membrino's union activities) in violation of Section 8(a)(3) and (1) of the Act. *Pessoa Construction Co.*, 356 NLRB No. 157, slip op. at 1, 8–9, 11 (2011).

C. Membrino's Job Searches, Unemployment Benefits, and Illness

1. October 2008 through March 2010—Membrino's search for employment and Membrino's application for unemployment benefits

After being terminated by Respondent, Membrino experienced his first day of unemployment on October 24, 2008. (Tr. 26.) That same day, Membrino also began searching for a new job, relying on sources such as the Washington Post, the internet, job listings at the State of Maryland unemployment agency, job leads from family and friends, and occasional referrals from the Union. Membrino checked for jobs in the Washington, DC area, in and around Jessup, Maryland, and occasionally in Virginia. (Tr. 157–158, 229–230, 250, 260–265, 276, 359–360, 383.) Every quarter, Membrino completed and submitted a "Claimant Expense and Search for Work Report" to the Board, on which he listed multiple employers that he contacted to inquire about and apply for job openings.[11] (R. Exh. 1; see also

related to my Rule 609 inquiry are handled in a way that is comparable to maintaining those documents under seal.

Finally, although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

[7] Membrino also worked for Respondent from 2003 or 2004 to June 2006, when Membrino took a job with another employer. (Tr. 639, 735.)

[8] To illustrate, if Membrino worked 45 hours in 1 week as a salaried employee, he would only be paid for 40 hours at the $25 per hour rate. By contrast, if Membrino worked 45 hours in 1 week as an hourly employee, he would be paid for 40 hours at the regular $22 per hour rate, and $33 per hour for the additional 5 hours of overtime.

[9] A lowboy is used to transport equipment from one jobsite to another. (Tr. 606.)

[10] I do not credit Membrino's testimony that he paid the fine "well in advance" of October 24, 2008, the date that the suspension was lifted. Membrino asserted that there must have been a delay in processing his payment of the fine, but that testimony was speculative and uncorroborated. (Tr. 315–316.)

I also do not credit Membrino's assertion that Respondent knew his CDL was suspended. Membrino testified (without corroboration) that he borrowed money from Pessoa to pay the fine underlying the suspension. Even if that testimony is accurate, it does not follow that Respondent knew that Membrino's CDL was suspended, or that Respondent authorized Membrino to drive despite having a suspended CDL. (Tr. 316–318.)

[11] I credit Membrino's testimony that he actually applied for a broad variety of jobs when he could not secure a job as a truckdriver (including job applications that he did not list in his reports to the Board), but still had trouble finding a job even after expanding his search. Membrino was clear and forthright in explaining that he was in dire need of employment because he lacked alternated sources of income, and accordingly I have credited his testimony on this issue in full. (Tr. 368–373, 380–381, 383, 391, 399.)

I also credit Membrino's testimony that he used a notebook to document his efforts to find work, but lost the notebook when someone broke into his car. Membrino's testimony about the notebook was straightforward and plausible, and was not rebutted by any evidence that cast doubt on his explanation of what happened to the notebook. (Tr. 220–224, 229–230, 381.)

Tr. 222–223.) Despite these efforts, Membrino did not find a job until April 2010.[12]

In the same time period, Membrino also applied for unemployment compensation. Initially, the State of Maryland denied Membrino's application. In February 2009, however, Membrino won his appeal of the initial decision to deny benefits, and the State of Maryland awarded him unemployment compensation retroactive to October 26, 2008. Thereafter, Membrino was subject to, and complied with, the State of Maryland's requirement that recipients of unemployment compensation demonstrate that they are actively searching for work. Membrino's unemployment benefits ran out in March 2010. (Tr. 45, 157–158, 273, 552; R. Exh. 34.)

2. November 3–25, 2008—Membrino unavailable to work due to illness[13]

On November 3, 2008, Membrino went to the emergency room at Doctors Community Hospital because he was experiencing chest pain and numbness in his arms. Doctors Community Hospital medical personnel diagnosed Membrino with: angina pectoris—unstable; hypertension—malignant; ischemic heart disease—acute; and obesity. (Tr. 163–164; GC Exh. 9, p. 1.)

Later on November 3, Doctors Community Hospital personnel transferred Membrino to Washington Adventist Hospital, where he underwent a coronary angiography (a test to examine a patient's coronary arteries for possible blockage). During the procedure, doctors performed a percutaneous coronary intervention (a/k/a PCI or angioplasty) and placed a drug-eluting (drug coated) stent in his circumflex artery, which was totally occluded. Another lesion was treated medically. (GC Exh. 11; Tr. 164, 166–167, 242–243.)

On November 4, 2008, Membrino was discharged from Washington Adventist Hospital, with the direction to follow up with a physician in 1–2 weeks, and the following restrictions: no heavy lifting or bathing for 2 weeks; and no driving for 2 days. Membrino was also prescribed medication to address (among other things) high blood pressure and cholesterol. (GC Exhs. 10–11; see also Tr. 168–169, 227–228.) Membrino admitted to the Board (on his quarterly search for work report) that he was unable to work from November 3–25, 2008, due to illness. (R. Exh. 1, p. 1.)

3. April 9–27, 2009—Membrino's CDL suspended

On April 9, 2009, a Maryland District Court judge suspended Membrino's CDL because Membrino failed to pay a fine. The District Court judge lifted the suspension on April 27, 2009. (R. Exh. 3 (initial notice of possible suspension was sent on March 17, 2009).)

4. April 22, 2009—Membrino's followup doctor visit

On April 22, 2009, Membrino went to Baden Medical Services to follow up on his November 2008 hospital stay.[14] Medical personnel refilled Membrino's blood pressure and cholesterol medications (which he had stopped taking because he ran out). The office visit was otherwise uneventful.[15] (GC Exh. 12; see also Tr. 172.)

D. April 2010—February 2013: Membrino's Interim Employment

1. April 2010—Portable Storage of Maryland

On or about April 23, 2010, Membrino applied for a truck driving position with Portable Storage of Maryland (a/k/a Smartbox), a company that leases portable storage containers. On his job application, Membrino falsely answered "no" to questions asking whether his driver's license had ever been suspended or revoked, and whether he had a criminal record.[16] (Tr. 333–334, 493–494, 497; R. Exh. 16; see also Tr. 175–176 (noting that Membrino learned of the job opening when he saw a job listing in the Washington Post); R. Exh. 1, p. 7.))

In connection with Membrino's job application, Portable Storage required Membrino to complete a physical and a drug test. Membrino passed both requirements, and on April 23, 2010, received a medical examiner's certificate (a/k/a Depart-

[12] On or about March 27, 2009, Membrino tried to start an auto sales business under the name "Cee-Moni Auto." Membrino filed a trade name application (for a $75 fee) as part of this business venture, but abandoned the idea because he did not have a physical address on which to locate the business (one of the requirements for obtaining an automobile dealer's license). Membrino did not earn any income from the Cee-Moni Auto business venture. (Tr. 160–163, 250–251; GC Exh. 8; see also R. Exh. 12 (noting that Cee-Moni Auto is still "active" as an entity, but that status expires on March 27, 2014).)

[13] In reviewing and discussing the medical records in this section, I took judicial notice of information on the National Institute of Health's website (www.nlm.nih.gov/medlineplus/medlineplus.html) regarding the meaning of certain medical terms.

[14] Membrino did not see a doctor at an earlier date (as had been recommended, see GC Exh. 11, p. 2) because he did not have insurance or sufficient funds to pay for a doctor's office visit. (Tr. 171, 244–245.) Membrino subsequently became eligible for Medicaid, and thereafter made an appointment at Baden Medical Services. (Tr. 172.)

[15] Medical records from Baden Medical Services state that Membrino's November 2008 hospital stay occurred after a myocardial infarction (MI, or heart attack), but I do not give weight to those entries because they were based on Membrino's own inaccurate report about the nature of his hospital stay. Indeed, Membrino inaccurately told Baden Medical Services medical staff that he had a coronary artery bypass procedure at Washington Adventist Hospital, when no such procedure was noted in the discharge paperwork that Washington Adventist Hospital prepared in November 2008. (Compare GC Exh. 12, pp. 2, 5 with GC Exh. 11; see also Tr. 174 (Membrino explained that he told the doctor at Baden Medical Services that he had a bypass procedure because he (Membrino) "did not know the difference"), 248, 280–281.)) For similar reasons, I do not give weight to Membrino's statements (made in two Board affidavits, and to a former coworker) that he had a heart attack in November 2008. (See Tr. 126–127, 241, 557.) Membrino does not have medical training (see Tr. 175), and as a result he unintentionally mischaracterized the nature of his hospital stay on multiple occasions.

In short, I find that the records that medical professionals at Doctors Community Hospital and Washington Adventist Hospital prepared on November 3–4, 2008, regarding Membrino's medical condition and care (see GC Exhs. 9–11) to be the most reliable sources of information regarding the nature of Membrino's November 2008 hospital stay, and I have accordingly relied on those documents to make the factual findings set forth herein.

[16] There is no evidence that Portable Storage took any adverse employment action against Membrino because of false statements that he made on his job application.

ment of Transportation (DOT) card) in which the medical examiner certified that Membrino was qualified to work as a commercial driver. The temporary DOT card that Membrino received was valid for 3 months (until July 23, 2010) instead of a longer period because Membrino had high blood pressure readings that would require some followup.[17] (Tr. 176–178; GC Exh. 13.)

On or about April 27, 2010, Portable Storage hired Membrino as a commercial truckdriver. Although he applied at the company's facility in Maryland, the company asked Membrino to work out of one of its warehouses in northern Virginia. Specifically, Membrino was expected to pick up a truck in Maryland, and then drive to northern Virginia, where he would be available to deliver or pick up storage containers to/from customers. (Tr. 182–183.)

After approximately 4 workdays, a Portable Storage manager advised Membrino that the company was going to eliminate his position because the company did not think it was cost-effective for Membrino to be in northern Virginia all day since there was no guarantee that customers would need assistance at that location.[18] Membrino's employment with Portable Storage therefore ended on April 30, with Membrino earning a gross income of $490. (Tr. 183–184, 258–259; GC Exhs. 2, 32–33.)

2. May 2010—Aggregate Industries

On or about May 14, 2010, Membrino applied for a ready-mix truck driving position with Aggregate Industries (Aggregate), a building materials company that provides "aggregates" such as crushed stone, sand, gravel, ready-mixed concrete, recycled concrete, and asphalt. On his job application, Membrino falsely answered "no" to a question asking whether his driver's license had ever been suspended or revoked, and also falsely stated that he had worked as the self-employed owner of Membrino Trucking from October 2008 through February 2010.[19] (Tr. 184, 187, 671; GC Exh. 14 (noting that Membrino applied for the position after seeing it listed in the Washington Post).)

Aggregate required Membrino to complete a DOT physical before commencing work with the company. Membrino passed his DOT physical, and accordingly, on May 27, 2010, received a DOT card in which the medical examiner certified that Membrino was qualified to work as a commercial driver. The temporary DOT card that Membrino received was valid for 3 months (until August 27, 2010) because Membrino's blood pressure continued to be high. (Tr. 188–190; GC Exh. 15.) Membrino also passed a preemployment physical that Aggregate directed him to complete. (Tr. 188, 190.)

On or about June 2, 2010, Membrino began working for Aggregate. (See Tr. 106; R. Exh. 1.) His employment with the company, however, was not incident-free. For example, on August 31, Aggregate suspended Membrino for 2 days without pay because he reported to work without a valid DOT card (since his temporary card expired on August 27). (GC Exh. 16 (Membrino's suspension applied to September 2–3, 2010); see also Tr. 191–193, 254, 686 (noting that Membrino subsequently obtained a new, 3-month DOT card and returned to work).)[20] In addition, on October 11, Membrino received a verbal warning because he left a truck water valve on and thereby made a load of concrete too wet, and because he cleaned dry concrete off of his truck chute in a location at the facility that was not appropriate for that task. (Tr. 194–195; GC Exh. 17.)

On August 30, 2010, a Maryland District Court judge suspended Membrino's CDL because of child support noncompliance. The District Court judge lifted the suspension on December 2, 2010.[21] (Tr. 311; R. Exh. 3 (initial notice of possible suspension was sent on August 9, 2010).)

[17] At the time, Membrino did not have the money to purchase his blood pressure medication. (Tr. 178.)

[18] Respondent attempted to establish (via Christina Norwood, a representative from Portable Storage) that Membrino voluntarily quit his job at Portable Storage by simply failing to report for work. I do not credit that testimony because Norwood was not Membrino's supervisor and did not have personal knowledge about the circumstances that led to the end of Membrino's employment, and no business records were offered (e.g., from Membrino's personnel file) to support proposition that Membrino voluntarily stopped reporting for work. (Tr. 502–508.) Membrino's explanation for how his employment at Portable Storage ended therefore was not rebutted by any reliable evidence.

[19] Membrino did own and operate Membrino Trucking from 1998 to 2002, but admitted that he did not do so from 2008 to 2010 as stated on the job application that he submitted to Aggregate Industries. Membrino explained that he listed this false self-employment information on his application because he thought his application would look better if it did not include gaps in his employment. Membrino did not earn any money from Membrino Trucking from October 24, 2008, to February 8, 2013. (Tr. 159, 186.)

There is no evidence that Aggregate Industries took any adverse employment action against Membrino because of false statements that he made on his job application. (Tr. 706.)

[20] The parties did not introduce any additional DOT cards into evidence for subsequent portions of the backpay period. Membrino explained, however, that he threw away his copies of expired DOT cards because if he accidentally showed an expired DOT card to a DOT officer, the officer could prohibit Membrino from driving for 24 hours and also impose a fine. (Tr. 181–182, 255.) In addition, I note that there is no evidence that Membrino failed any DOT physicals required by his subsequent employers, or that Membrino worked for any subsequent employer without a valid DOT card. (See Tr. 79, 130 (the General Counsel's compliance officer recalled seeing DOT cards that were valid through 2012); see also Tr. 190–192 (indicating that Respondent never required Membrino to complete a DOT physical or provide a valid DOT card); Tr. 520–522 (Respondent did not normally check DOT cards to ensure they were up to date, and instead relied on its drivers to keep track of their records).)

[21] Membrino testified that when he learned that his license was suspended, he notified a supervisor at Aggregate, and that supervisor did not allow him to drive. (Tr. 313.) I do not credit Membrino's testimony on this point. Membrino admitted that he had trouble remembering whether he notified Aggregate that his license was suspended, and Membrino's testimony that he notified a supervisor at Aggregate about the issue is not corroborated by any documentation (such as Membrino's termination letter) from his personnel file from Aggregate.

I also do not credit Membrino's testimony that the judge in his child support case authorized him to drive for work purposes notwithstanding having a suspended license. At best, Membrino's uncorroborated testimony only established that the judge in his child support case authorized him to drive for work purposes on a suspended license in 2005, well before the suspensions at issue here occurred. There is no evidence that the purported authorization to drive on a suspended license extended to any suspension occurring after 2005, nor is there evidence

Ultimately, Aggregate decided to terminate Membrino on December 17, 2010, stating the following rationale for its decision:

> Dear Mr. Membrino:
>
> We regret to inform you that the Company has decided to terminate your employment effective immediately. We have come to this difficult decision because you have repeatedly violated our work rules with regard to safety and cooperation since starting with the Company in June of this year.
>
> On December 17, 2010, you backed your mixer truck into a parking space at the plant, pinning your concrete chute between a tree and the truck, damaging the chute bearings. You also left the chute down, which is further violation of standard operating procedures. A few days before, you had a flat spot on the rollers, which would have been avoided had you conducted a proper pre-trip inspection. The importance of conducting a pre-trip and looking for this particular problem was addressed during driver meetings as recently as last month. These incidents highlight our concerns with regard to your ability to operate safely.
>
> On July 29, 2010 your load of concrete was rejected by the ICC for being too wet. Had you followed proper plant operating procedures, this would not have occurred.
>
> On August 31, 2010, you received a two day suspension for reporting to work without a valid DOT physical card. Following your return, you failed to report to work or to call for a scheduled night pour, which the Dispatch office had discussed with you just hours before.
> In October 2010, you received two violations of work rules; one for chipping concrete into the grass at the plant, instead of in the designated washout/disposal area and the other for failure to close the water valve on your mixer truck, which resulted in a wet load.
>
> The incidents outlined above suggest that you have failed to meet the essential functions of the job within your first six months of employment. We regret that this decision had to be made, but feel it is in the best interest of the Company. Please return all company-issued items to your immediate supervisor. You are not eligible for rehire.
>
> Sincerely,
> Terri L. Coomaraswamy
> Human Resources Generalist
> Mid-Atlantic Region

(R. Exh. 5; see also Tr. 680–682, 686.) Membrino generally did not dispute that the incidents that Aggregate listed in the termination letter occurred as described, but he did assert that the incidents were unintentional. (Tr. 195–202.) Nothing in the evidentiary record contradicts Membrino's characterization of the incidents as unintentional or accidental.

Membrino earned a gross income of $19,361.62 from his employment with Aggregate. (GC Exh. 2; see also Tr. 60 (noting that Membrino's W-2 form for Aggregate uses the company name "Bardon," but lists the same address).)

3. December 2010—Cylos, Inc.

On December 20, 2010 (the next business day after he was terminated by Aggregate), Membrino applied for a ready-mix truck driving position with Cylos, Inc (Cylos), a construction and ready-mix concrete company. In completing his job application, Membrino did not respond to a question that asked whether any driver's license had ever been suspended or revoked, and falsely answered "no" to a question asking if he had a criminal record.[22] Cylos sent Membrino on a delivery run with another driver to demonstrate that he (Membrino) could do the job, and when Membrino returned, Cylos hired him, with Membrino's official starting date being December 21. (Tr. 203–204, 342, 463–464, 471; R. Exh. 18; see also R. Exh. 1, p. 7.)

On or about December 29, 2010, Membrino was at the Cylos facility in a standby driver capacity when the dispatcher asked him to take a spare truck out for a delivery. When Membrino returned, the dispatcher advised Membrino that he should clean the truck and leave for the day because there was no more work available. Membrino complied, but advised the dispatcher that he was not able to drain the truck's water system because of a problem with the water pressure. At the dispatcher's direction, Membrino brought the truck to Cylos' mechanic, advised the mechanic of the water drainage problem, and then left after the mechanic indicated that he would take care of the problem. When Membrino reported for work the following day, Cylos personnel called him to the office and informed him that he was being terminated because he left water in the truck lines overnight, which caused the truck water lines to freeze and the turnoff valve to crack.[23] (Tr. 205–206, 255–258; R. Exh. 7 (noting that truck "down time" was required to repair the damage).) Membrino earned a gross income of $519.40 from his employment with Cylos ($431.20 of that amount was paid in 2010, and $88.20 was paid in 2011). (GC Exh. 2.)

4. January/February 2011—Membrino unemployed

In January 2011, Membrino applied for unemployment insurance benefits. In response to Membrino's application for benefits, Cylos indicated that Membrino worked to the best of his ability, but was terminated because he was not qualified for the job. Membrino ultimately was denied benefits, however,

that Aggregate (or Respondent, for that matter) would have permitted Membrino to drive had it been aware that Membrino's license was suspended (even if the suspension was due to child support issues). (See Tr. 378, 386–387; see also Tr. 678–679 (noting that Aggregate would not permit an employee to drive for them if the employee had unresolved issues regarding a suspended CDL).)

[22] Susan Steadman, Cylos' office manager, noticed that Membrino did not answer the question about driver's license suspensions on his job application, but did not raise the issue before Membrino was terminated. (Tr. 474, 476.) There is no evidence that Cylos took adverse employment action against Membrino based on the content of his job application.

[23] I have credited Membrino's explanation of the events that led to his termination by Cylos. Membrino's account was essentially unrebutted, because the Cylos representative who testified did not have personal knowledge of the incident. (See Tr. 479–480, 481–483.)

because he exhausted his benefits at an earlier date. (Tr. 206, 484–487; GC Exhs. 30–31.)

Membrino also searched for a new job, using (among other sources) the Washington Post and tips from friends and family to find leads on available jobs. Membrino's quarterly report to the Board indicates that Membrino submitted multiple job applications in the January to March 2011 time period. (Tr. 206, 259–263; R. Exh. 1.)

5. February 2011—A, D & C Management Company

On or about February 25, 2011, Membrino started working as a part-time, temporary commercial driver with A, D & C Management Company (A, D & C), a construction company. Membrino worked for A, D & C (earning a gross income of $6966) until he voluntarily decided to take a position with another company (Reddy Ice, discussed below) in hopes that he would be assigned more hours of work. (Tr. 206–209, 232; GC Exhs. 2, 18; see also Tr. 210 (noting that as hoped, Membrino did in fact receive more work hours at Reddy Ice than he was getting at A, D & C).)

On May 31, 2011, a Maryland District Court judge suspended Membrino's CDL because of child support noncompliance. The District Court judge lifted the suspension on July 11, 2011. (Tr. 312; R. Exh. 3 (initial notice of possible suspension was sent on May 9, 2011).)

6. June 2011—Reddy Ice

Membrino began working for Reddy Ice as a tractor-trailer driver (transporting loads of ice) on or about June 1, 2011. Membrino did not take any time off between leaving his job with A D & C and starting his job at Reddy Ice (on a seasonal basis). On his job application, Membrino falsely answered "no" to questions asking whether his driver's license had ever been suspended or revoked, and whether he had a criminal record. Membrino also falsely asserted that he worked for Membrino Trucking from December 2008 to December 2010. (Tr. 209–210, 345; R. Exh. 19; see also Tr. 159, 239 (Membrino admitted that Membrino Trucking ceased all operations in 2002); R. Exh. 1, p. 7.) There is no evidence that Reddy Ice took any adverse employment action against Membrino because of false statements that he made on his job application.

While working for Reddy Ice, Membrino received an interview for a job with the Washington Suburban Sanitary Commission (WSSC), a company that he contacted about job openings in January 2011.[24] WSSC subsequently offered Membrino a job, with a start date of August 1, 2011. (Tr. 211.)

When Membrino notified Reddy Ice that he would be leaving for a new job, Reddy Ice assigned Membrino's route to another driver, and made Membrino a standby driver that would only cover "open" routes that became available (and return home without working if all routes were covered). Membrino worked in the new, standby driver role for approximately 4–5 days, and then voluntarily resigned since he was slated to begin a new job with WSSC. Membrino accordingly did not work for approximately a week-and-a-half until his new job began. (Tr. 211, 270–271.) Membrino earned a gross income of $6,426.83 from his employment with Reddy Ice. (GC Exh. 2.)

7. August 2011 to the present—Washington Suburban Sanitary Commission (WSSC)

Membrino began working for WSSC on August 1, 2011, and has worked for WSSC continuously since that date. (Tr. 212.)

During Membrino's employment with WSSC, a Maryland District Court judge suspended Membrino's CDL on the following dates:

> September 27, 2011 to March 1, 2012 (suspension due to child support noncompliance)
> December 12, 2012 to January 30, 2013 (suspension due to "failure to comply")

(Tr. 312; R. Exh. 3 (initial notices of possible suspension were sent on September 7, 2011, and November 19, 2012, respectively).) There is no reliable evidence that Membrino notified WSSC about these suspensions, or that WSSC took any adverse employment action against Membrino because of the suspensions.[25]

Membrino earned a gross income of $13,131.69 in 2011, and $39,377.74 in 2012, from his employment with WSSC. (GC Exh. 2.) In addition, Membrino earned a gross income of $7099 from his work for WSSC in the first quarter of 2013, but the General Counsel concedes that Membrino is not owed any net backpay for that quarter. (See GC Exh. 1(k) (calculating Membrino's gross backpay and net backpay for the first quarter of 2013 as $5,080.90 and $0, respectively).)

E. Pessoa's Workload and Work force During the Backpay Period (2008–2013)

In the months before and during the backpay period, Respondent was struggling financially because of the poor economy. Indeed, in the summer of 2008, Respondent laid off several employees, although notably, Membrino survived those

[24] On his job application to WSSC, Membrino falsely stated that he was self-employed as the owner and operator of Membrino Delivery Service from December 2008 to May 2010. Membrino also falsely: stated that he left Aggregate because work was slow (instead of stating that he was terminated); did not list Cylos as one of his former employers; and answered "no" to a question asking whether he had a criminal record. Membrino explained that he made these false statements and omissions because he desperately needed work. (Tr. 212, 349–355; R. Exh. 20; see also Tr. 159, 239 (Membrino admitted that Membrino Trucking ceased all operations in 2002); R. Exh. 1, p. 7.) There is no evidence that WSSC took any adverse employment action against Membrino because of false statements or omissions in his job application.

[25] Membrino testified that during his summer 2011 job interview with WSSC, he provided a copy of his driving record (which indicated that his license was suspended for child support) and a letter from the child support office stating that Membrino's "driving privilege with them was fine." (Tr. 353–354.) No such letter was introduced into evidence at trial, however, and in any event, Membrino's May 31, 2011 CDL suspension was resolved before he started working for WSSC.

Membrino also testified that if he learned that his CDL was suspended, then he would let his employers know. Membrino did not identify an occasion where he notified WSSC that his CDL was suspended. (Tr. 310, 313–314.)

layoffs.[26] (Tr. 593, 595, 600–601, 648; see also R. 38 (showing that Respondent turned a profit in 2008 and 2011, but lost money in 2009 and 2010); Tr. 622–623 (same).)

Membrino's discharge in 2008, as well as employee N.C.'s discharge in the same month,[27] left Respondent with four CDL drivers: employees B.L., J.M., J.R., and P.S. Respondent, however, did not stand pat with that number of drivers. Instead, Respondent made the following additional hires that generally maintained its complement of drivers at five or higher:

CDL Driver Personnel Changes from November 1, 2008, to February 8, 2013

Employee Name	Hire Date	Departure Date	Total Drivers on Staff[28]
M.R.	11/17/2008		5
M.R.		12/19/2008	4
B.B.	1/5/2009		5
L.P.	1/13/2009		6
G.V.	5/18/2009		7
G.V.		6/5/2009	6
B.L.		8/28/2009	5
J.M.		9/4/2009	4
B.B.		9/11/2009	3
R.S.	9/16/2009		4
A.T.	10/7/2009		5
A.T.		11/6/2009	4
J.S.	12/10/2009		5
I.C.	9/13/2010		6
R.S.		12/23/2010	5
L.P.		06/10/2011[29]	4
R.P.	7/20/2011		5
F.A.	8/16/2011		6
I.C.		9/2/2011	5
J.S.		9/9/2011	4
F.A.		9/9/2011	3
J.G.	9/9/2011		4

(R. Exh. 26; see also 609–610, 651–655.)

Respondent's CDL drivers also continued to work a steady amount of hours during the backpay period. As indicated in the chart below, although hourly drivers (like Membrino) saw their schedules fluctuate from week to week, none of the hourly employees saw their average hours worked change significantly during the backpay period.

Employee	Average Hours Worked per Week in 2008	Average Hours Worked per Week in 2009	Average Hours Worked per Week in 2010	Average Hours Worked per Week in 2011
Membrino	34.2 reg; 4.7 OT	n/a	n/a	n/a
B.B.	n/a	34.3 reg; 2.3 OT	n/a	n/a
B.L.	28.5 reg; 2.5 OT[30]	28.3 reg; 1.1 OT	n/a	n/a
L.P	n/a	35.9 reg; 4.5 OT	34.7 reg; 3.0 OT	n/a[31]
J.R.	35 reg; 2.4 OT	33.2 reg; 2.1 OT	35.9 reg; 7.0 OT	35.9 reg; 5.9 OT
R.S.	n/a	31.1 reg; 0.6 OT	31.1 reg; 0.4 OT	n/a

(Tr. 50–51, 96–99; GC Exhs. 5, 7; R. Exh. 33; see also Tr. 543 (noting that in the summer of 2009, employee B.L. had fewer hours because he was "seeing a doctor quite a bit" because of a "medical issue").)[32] There is no evidence that Respondent laid off any CDL drivers during the backpay period. (Tr. 49.)

F. February 8, 2013—Pessoa Offers Membrino Reinstatement

On February 8, 2013, Respondent made a valid offer to reinstate Membrino to his truck driving position at the Company. Membrino declined the offer. (Tr. 26.)

[26] Respondent also asked some of its office staff to accept pay cuts in the summer of 2008. Respondent, however, did not ask Membrino to take a pay cut. (Tr. 648–649, 752.) I also note that in October 2010, Respondent raised employee R.S.'s hourly rate from $18 to $22 per hour, which was consistent with Respondent's normal practice of giving raises when drivers are dependable and doing a good job. (Tr. 551, 615–616 (noting that employee R.S. had a class A CDL but primarily drove a dump truck for Respondent); R. Exh. 32.)

[27] Employee N.C. was only employed by Respondent from October 6–31, 2008. (R. Exh. 26.)

[28] This figure includes employees B.L., J.M., J.R., and P.S., each of whom were hired before the backpay period began, until those employees left the company.

[29] On or about June 10, 2011, employee L.P. stopped working as a truckdriver for Respondent, and instead took a position in Respondent's office. Employee L.P. returned to a truck driving position for Respondent on or about April 13, 2012. (Tr. 435, 443–444, 528–529; R. Exh. 30 (showing the corresponding changes in L.P.'s wages and hours); see also Tr. 545; R. Exh. 30 (showing that between February and June 2011, employee L.P. periodically worked in the office, but primarily worked as a driver).)

[30] Employee B.L. was paid as a salaried employee from June 27 to November 21, 2008. I accordingly excluded those weeks when calculating employee B.L.'s average hours worked for 2008. (Tr. 537, 542; R. Exhs. 29, 33; see also Tr. 577 (explaining that a salaried employee is paid for 40 hours every week).)

[31] The General Counsel calculated the average hours that employee L.P. worked for the first half of 2011, but I have not relied on those calculations because (as noted above) employee L.P. began working in the office part time in February 2011, and the General Counsel included those "office" hours in its calculations. (See GC Exh. 7; fn. 29, supra.)

[32] I excluded employees P.S. and J.M. from the chart because they are salaried employees. (Tr. 577 (salaried employees are paid for 40 hours every week); GC Exh. 34 (employee P.S. work hours show that he worked 40 hours every week, and thus was a salaried employee); Tr. 35 (same).)

Applicable Legal Standards

A. Compliance Specifications

It is well established that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *The Lorge School*, 355 NLRB 558, 360 (2010); *Laborers Local 158 (Worthy Bros.),* 301 NLRB 35, 36 (1991), enfd. 952 F.2d 1393 (3d Cir. 1991). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due to each discriminatee. The General Counsel has discretion in selecting a formula that will closely approximate backpay, and may use any formula that approximates what the discriminatee would have earned had he or she not been discriminated against, as long as the formula is not unreasonable or arbitrary under the circumstances. *The Lorge School*, 355 NLRB at 360; *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001) (noting that where the Board is presented with conflicting backpay formulas, the Board must determine the most accurate method for determining backpay).

Once the General Counsel meets its burden of showing the gross backpay owed, the burden shifts to the respondent to establish facts that negate or mitigate its liability. *St. George Warehouse*, 351 NLRB 961, 963 (2007); *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), enfd. 260 Fed. Appx. 607 (4th Cir. 2008). Any uncertainty about how much backpay should be awarded to a discriminatee should be resolved in the discriminatee's favor, and against the respondent whose violation caused the uncertainty. *The Lorge School*, 355 NLRB at 360.

B. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 12 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Relco Locomotives,* 358 NLRB No. 37, slip op. at 12. My credibility findings are set forth above in the findings of fact for this decision.

Analysis

A. The Backpay Period

As noted above, I resolved this issue when I decided to grant the General Counsel's motion for partial summary judgment, as well as the General Counsel's motion to strike. However, in the interest of making a complete record, I have analyzed the factual and legal merits of this issue below.

The backpay period for Membrino runs from October 24, 2008, through February 8, 2013 (i.e., from the day after Respondent unlawfully discharged Membrino to the day that Respondent made a valid offer to reinstate Membrino). (Findings of Fact (FOF), secs. B, F.)

B. Gross Backpay Calculation

I resolved many of the issues related to gross backpay when, as noted above, I decided to grant the General Counsel's motion for partial summary judgment, as well as the General Counsel's motion to strike. However, in the interest of making a complete record, I have analyzed the factual and legal merits of Membrino's gross backpay below.

The General Counsel calculates that Membrino would have earned gross wages in the amount of $199,285.90 had he worked for Respondent during the backpay period. To calculate that figure, the General Counsel determined the average number of regular and overtime hours that Membrino worked in the first three quarters of 2008 (444.6 regular and 61.1 overtime hours per quarter), and projected that Membrino would have continued to work that amount of hours for each quarter during the backpay period.[33] (Tr. 27–28, 38–42, 44, 92; GC Exhs. 1(k), 6, 27; see also Casehandling Manual, Section 10540.2 (describing the backpay formula based on the average hours/earnings of the discriminatee before the unlawful action); see also FOF, sec. A (noting that Membrino initially was a salaried employee, but became an hourly employee in January 2008).)

Respondent raises three primary objections to the General Counsel's calculations, none of which hit the mark. First, Respondent implicitly questioned whether Membrino would have worked continuously for Respondent during the backpay period.[34] (R. Br. at 54–57.) As noted above, I do not find that

[33] I do not find merit to Respondent's argument that the General Counsel should have deducted certain Federal holidays from each quarter (instead of assuming that each quarter included 13 full workweeks). (R. Br. at 58–60.) As the General Counsel's compliance officer observed, no adjustment is necessary for intervening holidays because those nonwork days are incorporated into the average hours that Membrino worked in 2008. (Tr. 41.)

[34] I note that Respondent did not explicitly proffer an alternative backpay formula (such as a formula based on the hours and earnings of comparable or replacement employees) that it believed would be more accurate than the formula that the General Counsel used. I also note that during the compliance investigation, the General Counsel's ability to consider alternative formulae for gross backpay was hampered by the fact that Respondent only provided the General Counsel with Membrino's employee ledger, and not the ledgers of other drivers who worked for Respondent during the backpay period. (Tr. 139–140; see also Tr. 35–36, 93–95 (noting that Respondent provided the employee ledgers for other CDL drivers on the first day of the hearing in this matter, and that the General Counsel considered the additional materials at that time and determined that the other drivers were not comparable employees to Membrino).) In any event, to the extent that Respondent suggested that the General Counsel should have calculated backpay based on the hours worked by replacement employee R.S., I do not find that such a formula would be appropriate since employee R.S. only worked for Respondent during a portion of the backpay period (from September 2009 through December 2010—see FOF, sec/ E), and the evidentiary record does not show that Membrino's work with

argument to be persuasive. The evidentiary record shows that after Respondent discharged Membrino, Respondent hired a series of new drivers to maintain its complement of drivers at five or higher (where it would have been had Membrino not been unlawfully discharged). None of the hourly drivers that Respondent employed saw their average hours worked change significantly during the backpay period. (FOF, sec. E; see also Tr. 28.)

Second, Respondent questioned whether Membrino would have continued to be paid at the same hourly wage rate throughout the backpay period, or rather would have been expected to accept a pay cut during the backpay period (e.g., because he would have spent a fair amount of time driving a dump truck, which only required a class B license). (R. Br. at 60.) That argument, however, is undermined by the fact that: Respondent did not ask Membrino to accept a pay cut before Membrino was discharged in 2008, even though Membrino primarily drove one of Respondent's dump trucks from March 2008 onward, and Respondent obtained pay cuts from other employees in the same time period; and Respondent gave employee R.S. a raise in October 2010 to $22 per hour even though employee R.S. also primarily only drove a dump truck. (FOF, secs. A, E.) Based on those facts, I infer that Respondent would have continued to pay Membrino his $22/hour rate during the backpay period because Respondent valued (among other things) the fact that Membrino had a good track record with the Company and had a class A CDL that enabled him to drive a variety of Respondent's vehicles when needed.

Third, Respondent contends that the General Counsel should have calculated Membrino's average hours in 2008 based on 39 weeks of work, instead of 37. (See R. Br. at 9–10.) The General Counsel used the 37-week figure because it excluded a 2-week period that Membrino did not work in July 2008 because he was on a vacation that the General Counsel determined was an extraordinary, nonrecurring event. (Tr. 38–40, 62–69, 238–239 (Membrino did not take a similar vacation after commencing work for Respondent in June 2007, or at any point during the backpay period); GC Exh. 6; see also Casehandling Manual, Section 10540.2 (explaining that calculations of average earnings or hours generally should exclude time periods in which extraordinary, nonrecurring events temporarily affect earnings/hours).) Although Respondent contests the General Counsel's decision to exclude that 2-week period, I find that the evidentiary record supports that General Counsel's determination that the 2-week vacation was essentially an anomaly because there is no evidence that Membrino ever took a similar vacation before or during the backpay period. It was therefore reasonable for the General Counsel to exclude that 2-week vacation from its calculation of the number of weeks that Membrino worked before he was discharged in 2008.[35]

In sum, I credit the General Counsel's gross backpay calculation and the facts in the evidentiary record (some of which are referenced above) on which the General Counsel's calculation is based. The General Counsel used a reasonable formula to calculate what Membrino would have earned had Respondent not discharged him unlawfully, and thus I have accepted the General Counsel's calculation that Membrino's gross backpay figure is $199,285.90.

C. Membrino's Interim Earnings and Efforts to Mitigate Backpay

With the gross backpay figure established, the burden shifts to Respondent to establish facts that negate or mitigate its liability, with the caveat that any uncertainty will be resolved against Respondent, since its unlawful action against Membrino caused the uncertainty.

As a preliminary matter, the General Counsel acknowledges that Membrino worked six jobs during the backpay period that produced interim earnings from the second quarter of 2010 to the end of the backpay period.[36] (FOF, sec. D.) Based on those

Respondent (had he not been discharged unlawfully) would have been limited to the period of time that employee R.S. worked.

[35] During the trial, Respondent presented evidence that established that Membrino's CDL was suspended from August 11 to October 24, 2008, while Membrino worked for Respondent. There is no evidence, however, that Respondent learned, or would have learned, about this issue with Membrino's CDL during the backpay period. Perhaps more important, there is no evidence that Respondent would have terminated Membrino had it learned that Membrino's CDL was suspended. Instead, it is clear that Respondent at most would have suspended Membrino until he cleared up the problems with his license. (FOF, sec. A.) Thus, there is no basis for terminating backpay based on the fact that Membrino worked for Respondent while he had a suspended CDL. See *First Transit, Inc.*, 350 NLRB 825, 829 (2007) (explaining that if an employer learns that an employee engaged in misconduct that would have caused the employer to discharge any employee, then reinstatement is not available and backpay is terminated as of the day that the employer learned of the misconduct); id. (finding that employee misconduct that the employer discovered would not change the backpay award because the employer learned of the misconduct after the backpay period ended).

I do not find that Membrino's CDL suspension in 2008 affects the General Counsel's gross backpay calculation, because that calculation is based on a reasonable projection of the number of hours that Membrino would have worked for Respondent during the backpay period (using the average hours that Membrino actually worked for Respondent in 2008, irrespective of any misconduct that Respondent did not know about). To the extent, however, that Membrino's CDL was suspended *during* the backpay period, I address how those suspensions affect the net backpay figure later in this decision.

[36] The evidentiary record does not support a finding that Membrino willfully concealed other interim earnings (such as earnings from alleged self-employment) during the backpay period. Membrino only had earnings from the six jobs discussed in the findings of fact; although Membrino contemplated opening an auto sales business (Cee-Moni Auto) during the backpay period, he abandoned the idea and did not earn any money from it. Further, although Membrino stated on job applications that he worked for "Membrino Trucking" and/or "Membrino Delivery Service" during the backpay period, the evidentiary record establishes that those job entries on Membrino's applications were false (Membrino listed them with the hope that the lack of "gaps" in his job history would increase his chances of being hired). (FOF, secs. C(1), D.)

The evidentiary record also does not support Respondent's argument that Membrino willfully failed to report his earnings from Portable Storage and Reddy Ice to the Board. (See R. Br. at 84–85.) Although Membrino did not report those jobs to the Board on his quarterly search for work reports (see R. Exh. 1), Respondent did not demonstrate, and thus I do not find, that Membrino's failure to report those jobs was willful or part of a scheme for unjustified personal gain. See

quarterly interim earnings, and on the fact that Membrino's interim earnings in the first quarter of 2013 exceeded his gross backpay for that quarter (meaning that no net backpay is owed for that quarter), the General Counsel calculated the total net backpay figure as $107,929. (GC Exh. 1(k).) I now turn to the question of whether Respondent demonstrated (based on any of the theories that it proffered) that the net backpay figure should be reduced to an amount lower than that proposed by the General Counsel.

1. Was Membrino unavailable to work due to health-related reasons?

The record is clear that on November 3, 2008, Membrino experienced chest pain and numbness in his arms that led to an overnight hospital stay that included a coronary angiography and angioplasty procedure to address a blockage in one of his coronary arteries. (FOF, sec. C(2).) The parties disagree, however, about how long Membrino was unavailable to work because of that procedure and the underlying medical problems that led to it. The General Counsel maintains that Membrino was only unavailable to work from November 3–28, 2008, based on Membrino representations on one of his "search for work" reports to the Board. (GC Br. at 30; FOF, sec. C(2) (noting that Membrino reported that he was unavailable to work from November 3–25, 2008, due to illness).) Respondent, by contrast, maintains that Membrino was unavailable from November 3, 2008, to April 23, 2010 (the day that Membrino passed his DOT physical before starting his first interim job with Portable Storage). (R. Br. at 78; see also FOF, sec. D(1).) To resolve this dispute, I first address what medical conditions Membrino encountered in November 2008, and then address the extent to which those conditions rendered Membrino unavailable to work.

a. What medical conditions did Membrino have in November 2008?

Initially, the parties disagree about what actually befell Membrino in November 2008. Although Respondent seizes upon Membrino's own characterizations of what led to his hospital stay (a "heart attack" or a coronary bypass procedure), I did not credit those descriptions because Membrino is not a medical professional and his descriptions are not consistent with the medical records that hospital personnel prepared at the time of Membrino's hospital stay. Instead, as noted above, I found that Membrino was diagnosed with angina pectoris (unstable), hypertension (malignant), ischemic heart disease (acute), and obesity, and I further found that medical personnel treated those conditions by: (a) performing a coronary angiography and angioplasty, and placing a stent in one of Membrino's coronary arteries; and (b) prescribing medication. (FOF. sec. C(2), (4).)

b. How long was Membrino unavailable to work due to his November 2008 medical problems?

The parties agree, and I find, that the Federal Motor Carrier Safety Administration (FMCSA) of the U.S. Department of Transportation has issued regulations that establish the physical qualifications and medical examinations that an individual must satisfy to drive a commercial vehicle safely. Generally speaking, to operate a commercial motor vehicle, an individual must meet the physical qualification requirements set forth in the regulations (unless certain exceptions apply), and also must pass a medical examination (the "DOT physical" discussed above in the findings of fact) performed by a medical examiner listed on the National Registry of Certified Medical Examiners. See 49 CFR § 391.41 (discussing physical qualifications for drivers); 49 CFR § 391.43 (discussing the medical examination require-ment); see also 49 CFR § 391.45(b)(1), (c) (explaining that a driver must complete a medical examination if he or she has not been certified within the preceding 24 months, or if the driver's ability to perform his or her normal duties has been impaired by a physical or mental injury or disease); see also R. Exh. 21 (the General Counsel's compliance officer acknowledged that Membrino needed to complete a medical examination to operate a commercial vehicle)).

Respondent contends that Membrino is ineligible for backpay from November 3, 2008, to April 23, 2010, because Membrino did not take or pass a DOT physical in that timeframe to establish that he could operate a commercial motor vehicle safely after his November 2008 hospital stay.[37] (R.

Grosvenor Resort, 350 NLRB 1197, 1198, 1236–1237 (2007) (discussing *American Navigation Co.*, 268 NLRB 426 (1983), and explaining that a showing of willful perfidy and deception is required to justify reducing a backpay award because of earnings that were not reported to the Board). To the contrary, Membrino was generally diligent in reporting his interim employment, and stood little to gain in concealing the brief periods that he worked for Portable Storage and Reddy Ice (which produced interim earnings of $490 and $6,426.83, respectively). I therefore deny Respondent's request that I reduce Membrino's backpay award under this theory.

[37] In connection with this argument, Respondent implies that Membrino had a medical condition that precluded him from being physically qualified to drive under FMCSA regulations. (See R. Br. at 73.) Specifically, Respondent cited to 49 CFR § 391.41(b), which states, in pertinent part, that:

(b) A person is physically qualified to drive a commercial motor vehicle if that person

. . . .

(4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.

. . . .

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely

. . . .

(7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his/her ability to control and operate a commercial motor vehicle safely

The evidentiary record, however, does not show that any medical professional (much less a medical examiner who performed a DOT physical) determined that Membrino: has a current clinical diagnosis of

Br. at 78.) That argument fails because the evidentiary record shows that neither Respondent nor potential interim employers (such as Portable Storage and Aggregate) required Membrino to present a current DOT card as a precondition to considering him for vacant CDL positions. Instead, potential employers allowed Membrino to apply for vacant CDL positions, and then sent him for a DOT physical only as a final step to fulfill before starting work. Membrino complied with that procedure when asked to do so, and passed his DOT physicals when they were required. (FOF, sec. D(1)–(2).) Since there is no evidence of a period of time where Membrino would not have been able to pass a DOT physical if requested (apart from November 3–28, 2008, for which the General Counsel requested no backpay due to Membrino's illness), I reject Respondent's request to toll the backpay period on that basis.[38]

c. Membrino's August 2010 suspension for having an expired DOT card

Notwithstanding my analysis above, I do find that the backpay period should be tolled from August 30 through September 3, 2010, because Membrino allowed his DOT card to expire while he was employed by Aggregate. (See FOF, sec. D(2).) Although Aggregate only suspended Membrino for 2 days for his failure to obtain a new DOT card, I do not find it equitable to require Respondent to pay Membrino backpay for a time period when FMCSA regulations prohibited Membrino from working because his DOT card was expired.[39] At the same time, however, I will not grant Respondent an offset for any interim earnings that Membrino accrued from August 30 through September 3, 2010, because Respondent should not receive a windfall offset for earnings that Membrino brought in while the backpay period was tolled.

2. Should the backpay period be tolled when Membrino's CDL was suspended?

As one would expect, FMCSA regulations prohibit CDL drivers who have been "disqualified" from operating a commercial motor vehicle. 49 CFR § 391.15(a). Regarding CDL drivers who have been disqualified because they have lost their driving privileges, the FMCSA has stated as follows:

> A driver is disqualified for the duration of the driver's loss of his/her privilege to operate a commercial motor vehicle on public highways, either temporarily or permanently, by reason of the revocation, suspension, withdrawal, or denial of an operator's license, permit, or privilege, until that operator's license, permit, or privilege is restored by the authority that revoked, suspended, withdrew, or denied it.

49 CFR § 391.15(b)(1).

Relying on these FMCSA regulations, Respondent argues that the backpay period should be tolled during each period of time when Membrino's CDL was suspended. I find merit to Respondent's argument. Simply put, Membrino had an obligation to maintain a current and valid CDL to operate a commercial motor vehicle. Despite that obligation, Membrino repeatedly failed to respond to notices from the Maryland District Court that he risked having his CDL suspended (e.g., due to failing to pay a fine, or failing to pay child support), and thus repeatedly allowed that court to suspend his CDL for weeks (and sometimes months) at a time.[40] Indeed, as noted in the findings of fact, Membrino's CDL was suspended during the backpay period at the following times:

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angina pectoris or cardiovascular disease that is accompanied by syncope, dyspnea, collapse or congestive cardiac failure; or that Membrino's high blood pressure or vascular disease interferes with his ability to control and operate a motor vehicle safely. (See FOF, sec. C(2) (noting that Washington Adventist Hospital personnel only directed Membrino to refrain from driving for 2 days), C(4), D(1)–(2); see also 49 CFR § 391.43 (noting that DOT medical examiners must evaluate the driver's heart and blood pressure, and note whether any history of cardiovascular disease is accompanied by syncope, dyspnea or collapse).)

[38] Respondent attempted to draw support from the ALJ's decision in *First Transit, Inc.*, 352 NLRB 896 (2008), but that decision is distinguishable. In *First Transit*, the ALJ terminated the discriminatee's backpay period as of the date that the discriminatee suffered a stroke. The record in that case, however, showed that the discriminatee avoided obtaining any type of medical certification that he could drive despite suffering a stroke, and also showed that the discriminatee still displayed stroke-related limitations at the time of trial. Id. at 901–902 (noting that under California law and federal regulations, the discriminatee was subject to being evaluated to determine whether he remained competent to drive a motor vehicle after his stroke, but concealed his medical condition from state and federal authorities); see also id. at 896 fn. 2 (the parties did not appeal this aspect of the ALJ's decision). Membrino did not engage in that type of misconduct here—instead, he submitted to DOT physicals when requested as a precursor to starting a new job, and passed those physicals.

[39] I have considered the fact that Respondent may have unwittingly allowed Membrino to drive with an expired DOT card because Respondent did not check DOT cards to ensure that they were current and valid. That fact does not determine the outcome here, however, because the fact remains that, consistent with FMCSA regulations, Respondent expected its drivers to maintain current DOT cards. (See FOF, sec. D(2).) Since Respondent expected its drivers to comply with FMCSA regulations regarding DOT cards (and the medical examinations that come with them), I find that Respondent does not owe backpay during periods when FMCSA regulations made it unlawful for Membrino to work as a CDL driver because his DOT card expired.

I emphasize that Membrino allowing his DOT card to expire when he was gainfully employed as a CDL driver is a different circumstance than Membrino applying for jobs without a valid DOT card in-hand (an issue that I discussed in sec. 1(b), above). Nothing in the FMCSA required Membrino to pass a DOT physical as a precondition to applying for CDL jobs.

[40] There was some evidence presented at trial that Membrino did not receive mail in a timely manner (or consistently) because he stayed in a variety of locations and used the home addresses of certain relatives as his mailing addresses. (See, e.g., Tr. 388–390.) Regardless, I find that Membrino was obligated to ensure that he received correspondence (and particularly correspondence from courts of law) in a timely manner, and I further find that Membrino is charged with any adverse consequences (including CDL suspensions) that resulted from his failure to provide the courts with a reliable mailing address.

Notice of Possible Suspension Mailed	CDL Suspension Begins	CDL Suspension Ends	Length of Suspension (weekdays)
March 17, 2009	April 9, 2009	April 27, 2009	12
August 9, 2010	August 30, 2010	December 2, 2010	68
May 9, 2011	May 31, 2011	July 11, 2011	29
September 7, 2011	September 27, 2011	March 1, 2012	112
November 19, 2012	December 12, 2012	January 30, 2013	35

(FOF, secs. C(3), D(2), (5), and (7); see also R. Exh. 3.)[41]

As stated in the FMCSA regulations, I find that Membrino was disqualified from working as a CDL driver during each of the time periods when his CDL was suspended. I also find that Membrino is not eligible for backpay for the times that his CDL was suspended—the record is clear that Respondent would not have allowed Membrino to work either as a driver or in a nondriving capacity while his CDL was suspended (see FOF, sec. A), and thus it follows that Respondent does not owe backpay for periods that Membrino had a suspended CDL.[42] See *Cliffstar Transportation Co.*, 311 NLRB 152, 157 (1993) (finding that because the discriminatee was unavailable to work as a driver because his driver's license was suspended, and because the evidentiary record did not show that the employer was obligated to offer the discriminatee some type of alternative employment when the discriminatee could not drive, the discriminatee was not eligible for backpay for the period when his license was suspended); see also *NLRB v. Browne*, 890 F.2d 605, 608–609 (2d Cir. 1989) (finding that a discriminatee whose driver's license was suspended because he did not pay traffic summonses or insure his vehicle voluntarily forfeited not only his driving privileges, but also his eligibility for backpay at a driver's rate). To the extent that Membrino had interim earnings during periods when he had a suspended CDL, I will not give Respondent an offset for those earnings because to grant an offset under those circumstances would afford Respondent an unnecessary windfall.

3. Would Respondent have laid off Membrino during the backpay period?

As noted above, I resolved this issue when I decided to grant the General Counsel's motion for partial summary judgment, as well as the General Counsel's motion to strike. However, in the interest of making a complete record, I have analyzed the factual and legal merits of Respondent's layoff argument below.

The Board has held that a respondent may limit its backpay liability by showing that an employee who was discharged or laid off for unlawful reasons would have been laid off for lawful reasons at a later date. However, the respondent has the burden of proving with certainty when the discriminatee would have been laid off had there been no discrimination. *Weldun International, Inc.*, 340 NLRB 666, 674 (2003).

In this case, Respondent suggests that the backpay period should end on an unspecified date in fall 2008 because Respondent would have laid off Membrino for legitimate reasons (lack of work due to the poor economy) at that time. (See R. Br. at 14, 54–57.) I find that Respondent failed to meet its burden in proving that theory. Although Respondent made general points about the poor economy and its effect on Respondent's amount of work, it did not establish that it would have laid off Membrino due to lack of work, or establish precisely when that layoff would have occurred. Instead, contrary to Respondent's theory, the evidentiary record shows that Respondent retained Membrino despite laying off a significant number of employees in 2008, and further shows that Respondent hired additional CDL drivers shortly after Membrino's discharge to generally maintain its complement of drivers at five or higher (where it would have been had Membrino not been discharged unlawfully). (FOF, sec. E.) In light of that evidence, I find that there is no basis for me to conclude that Respondent would have laid off Membrino before February 8, 2013 (the date that Respondent offered to reinstate Membrino).

4. Was Membrino's job search adequate?

"Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings." *St. George Warehouse*, 351 NLRB at 963. Thus, "[a] discriminatee must make reasonable efforts during the backpay period to seek and hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate[.]" Id. (quoting NLRB Casehandling Manual, Part Three, Compliance Sec. 10558.1).

To assert, as a defense to backpay liability, that a discriminatee conducted an inadequate job search and thus willfully failed to mitigate, a respondent has the initial burden of presenting evidence showing that there were suitable and substantially equivalent jobs available in the relevant geographic area for an individual with the discriminatee's qualifications. *St George Warehouse*, 351 NLRB at 963–964. The burden then shifts to the General Counsel to present evidence concerning the discriminatee's job search. Once the General Counsel satisfies that burden of production, the respondent has the ultimate burden of proving that the discriminatee did not mitigate damages by using reasonable diligence in seeking alternate employment. Id. at 964. Notably, the test for mitigation is not measured by a discriminatee's success in gaining employment, but rather by the efforts made to seek work. *Lorge School*, 355 NLRB No. 94, slip op. at 3 (2010); see also id. at 3–4 (explain-

[41] I do not accept Respondent's calculations of the number of days that Membrino was unavailable to work due to CDL suspensions. Respondent included Saturdays in its count of "unavailable" days (see R. Br. at 71), but there is no basis in the evidentiary record for me to find that Membrino's workweek with Respondent customarily included Saturdays (or Sundays).

[42] The General Counsel's compliance officer candidly admitted at trial that Membrino would not be entitled to backpay for periods that his CDL was suspended if Respondent had a practice of prohibiting its drivers from working under those circumstances. (Tr. 80–81.) The evidentiary record establishes that the scenario that the compliance officer identified applies in this case. (See FOF, sec. A.)

ing that the reasonableness of a discriminatee's search for work should be evaluated in light of all of the circumstances, and over the backpay period as a whole).

Turning, then, to the facts at hand, I find that Respondent met its initial burden regarding the adequacy of Membrino's search for work because Membrino admitted that there were (and that he applied for) suitable and substantially equivalent CDL driver positions available in the relevant geographic area during the backpay period. I also find that the General Counsel met its burden to produce evidence about Membrino's job search, because Membrino testified credibly and extensively about: his efforts to find alternate employment; the job search requirements that he had to meet to qualify for unemployment compensation in the State of Maryland (at least until March 2010, when Membrino exhausted his unemployment benefits);[43] the quarterly reports that he (Membrino) submitted to the General Counsel (and that were admitted into evidence) to document some of the numerous job openings that he pursued during the backpay period;[44] and, of course, the six jobs that he actually obtained during the backpay period (the last of which Membrino has held since August 2011). (FOF, secs. C(1), D.)

Given the considerable evidence about Membrino's efforts to find work throughout the backpay period, Respondent fell well short of meeting its ultimate burden of proving that Membrino did not use reasonable diligence in seeking alternate employment. Although Respondent correctly pointed out that Membrino made false statements on some of his job applications (see R. Br. at 49–53), Respondent did not present any evidence that those false statements prevented Membrino from obtaining or retaining employment during the backpay period. Similarly, Respondent failed to show that Membrino's job search was unreasonably narrow or limited in any respect. Accordingly, I reject Respondent's argument that Membrino's job search was inadequate, and decline to adjust Respondent's backpay liability on that basis.

[43] The Board has held that the receipt of unemployment compensation under the applicable eligibility rules for such benefits constitutes prima facie evidence of a reasonable search for interim employment. *Taylor Machine Products, Inc.*, 338 NLRB 831, 832 (2003), enfd. 98 Fed. Appx. 424 (6th Cir. 2004). In its posttrial brief at 61–63, Respondent makes much of the fact that Membrino did not begin receiving unemployment benefits until February 2009 (approximately 4 months into the backpay period), but other evidence in the record (including Membrino's testimony and the reports that he submitted to the Board about his efforts to find work) establishes that Membrino diligently searched for work between October 2008 and February 2009.

[44] Respondent faults Membrino for not having the notebook that he used to keep track of job inquiries and applications during the backpay period. I do not find that issue to warrant any adjustment to Membrino's backpay award. Membrino credibly explained that the notebook was stolen (along with other items) when someone broke in to Membrino's car. And, in any event, discriminatees do not have an obligation to keep original documentation of their job searches, and discriminatees are not disqualified from backpay because of poor recordkeeping. *Lorge School*, 355 NLRB No. 94, slip op. at 4 & fn. 6.

5. Did Membrino unreasonably quit any interim jobs?

It is well established that when a discriminatee voluntarily quits interim employment, the burden shifts from the respondent to the General Counsel to show that the decision to quit was reasonable. *First Transit, Inc.*, 350 NLRB 825, 826 (2007). If the decision to quit was unreasonable, then the respondent may (depending on what happened during the rest of the backpay period) be entitled to an offset for the interim earnings that the discriminatee would have earned had he or she not quit the job in question. Id. at 827; see also *Grosvenor Resort*, 350 NLRB 1197, 1201 (2007).

Respondent asserts that the backpay figure should be adjusted because Membrino voluntarily quit two jobs in 2011: A, D & C Management Company; and Reddy Ice. (R. Br. at 78–81.) Regarding Membrino's departure from A, D & C, Respondent's argument fails because Membrino immediately began working for Reddy Ice without a break in service, and Reddy Ice provided Membrino with more work hours. (FOF, sec. D(5)–(6).) The General Counsel therefore established that Membrino's decision to quit his position at A, D & C was reasonable.

As for Membrino's departure from Reddy Ice, the record shows that Membrino voluntarily left his position at that company because Reddy Ice made Membrino a standby driver once it learned that Membrino would be leaving the company to start a new job at WSSC. Thus, rather than continue working at Reddy Ice in a standby driver capacity with no guarantee that he would be assigned work each day, Membrino quit his position at Reddy Ice and remained out of work for 1.5 weeks until he began working at WSSC. (FOF, sec. D(6).)

Given those circumstances, I find that the General Counsel also demonstrated that Membrino's decision to quit his standby driver position at Reddy Ice was reasonable. Membrino had a new job with WSSC already in hand at the time, and Reddy Ice's decision to make Membrino a standby driver meant that Membrino would be assigned little, if any, work had he remained with Reddy Ice for the 1.5 week period in question. Since the standby driver position at Reddy Ice was not comparable to the full-time CDL driver position that Membrino's held with Respondent, Membrino was not obligated to continue working at Reddy Ice, and did not incur a willful loss of earnings when he decided to quit (until his new job with WSSC began 1.5 weeks later). See *Glover Bottled Gas Corp.*, 313 NLRB 43, 43 (1993) (finding no willful loss of earnings when a discriminatee quit a position that offered only sporadic employment and moved to another State where he found work 2 weeks after moving), enfd. 47 F.3d 1230 (D.C. Cir. 1995), cert. denied 516 U.S. 816 (1995). I therefore decline to adjust the backpay figure based on the occasions where Membrino voluntarily quit interim employment.

6. Was Membrino terminated from any interim jobs due to willful misconduct?

The Board consistently has held that a discriminatee's discharge from interim employment, without more, is not enough to constitute willful loss of employment. Instead, a respondent must show deliberate or gross misconduct on the part of the

discharged discriminatee to establish a willful loss of employment, and hence, a failure to mitigate. *Ryder System*, 302 NLRB 608, 610 (1991) (explaining willful misconduct would include, for example, an offense on the job that involved moral turpitude, or misconduct that was so outrageous as to suggest that the discriminatee was courting discharge), enfd. 983 F.2d 705 (6th Cir. 1993).

Respondent asserts that Membrino engaged in willful misconduct that led to his discharge from three jobs: Portable Storage; Aggregate Industries; and Cylos, Inc. (R. Br. at 81–82.) The evidentiary record does not support Respondent's contention. Regarding Portable Storage, I found that the company ended Membrino's employment because it reevaluated its needs and decided it did not need a full-time driver to work in northern Virginia. I did not credit the testimony that Respondent presented that Membrino voluntarily stopped showing up for work at Portable Storage because the witness who offered that testimony lacked personal knowledge about how Membrino's employment with the company ended, and the witness' testimony was not corroborated by any contemporaneous business records. (FOF, sec. D(1).) Membrino's loss of employment at Portable Storage because the company reassessed its staffing needs falls well short of a "willful loss of employment" that would warrant terminating the backpay period.

As for Aggregate and Cylos, the evidentiary record shows that those companies discharged Membrino for poor job performance. Specifically, Aggregate discharged Membrino because he violated certain work rules and procedures (e.g., causing truck damage on one occasion, not keeping his DOT card current, and not following certain procedures to maintain his truck and mix concrete properly) over a 6-month period, leading Aggregate to conclude that he was not meeting the essential functions of his job. (FOF, sec. D(2).) Cylos, meanwhile, discharged Membrino because he left water in the truck lines overnight (albeit due to an apparent miscommunication with the company's mechanic), and consequently the truck water lines froze and the turnoff valve cracked. (FOF, sec. D(3).) Thus, although the facts show that Membrino's job performance at Aggregate and Cylos was subpar at times, the facts do not show that Membrino engaged in willful misconduct that would warrant terminating the backpay period based on his discharges from those companies.[45]

D. Net Backpay

In sum, I find that Membrino is entitled to backpay for the entire backpay period, with the exception of the following times where I determined that the backpay period should be tolled:[46]

April 9–27, 2009;
August 30–December 2, 2010;
May 31– uly 11, 2011;
September 27, 2011–March 1, 2012; and
December 12, 2012–January 30, 2013.

(Analysis, sec. C(1)(c), (2).) Taking those dates into account (by deducting 0.2 from the relevant 13-week quarter for every weekday that Membrino was unavailable to work),[47] I have determined that Membrino is owed $95,046.07 in net backpay, as indicated in the following chart:

Year	Calendar Quarter	Regular Hours	Overtime Hours	Gross Backpay	Interim Earnings	Net Back-pay
2008	4	205.2	28.2	$5,445.00	$0	$5,445.00
2009	1	444.6	61.1	11,797.50	0	11,797.50
	2	362.5	49.8	9,618.40	0	[48]9,618.40
	3	444.6	61.1	11,797.50	0	11,797.50
	4	444.6	61.1	11,797.50	0	11,797.50
2010	1	444.6	61.1	11,797.50	0	11,797.50
	2	444.6	61.1	11,797.50	3,182.00	8,615.50
	3	280.4	38.5	7,439.30	5,257.46	[49]2,181.84
	4	143.6	19.7	3,809.30	2,805.12	[50]1004.18

[45] I also reject Respondent's argument that the backpay period should be limited because Membrino made false statements on his job applications to various companies. (See R. Br. at 82–84; see also FOF, sec. D(1)–(2), (6)–(7) (describing false statements made in Membrino's job applications to Portable Storage, Aggregate, Cylos, Reddy-Ice, and WSSC).) As previously noted, there is no evidence that any company refused to hire, or discharged, Membrino because of any false statements that he made on his job applications. Nor is there any evidence that Respondent would not have hired, or would have discharged, Membrino because of the false statements. Further, I credited Membrino's explanation that he made the false statements on his job applications because he was desperate to find employment. While I do not condone Membrino's decision to make the false statements, I find that the false statements do not constitute willful misconduct that would warrant limiting the backpay period. See *First Transit, Inc.*, 350 NLRB at 829 fn. 24 (although the Board did not condone the discriminatee's untruthful statements at trial and in her application for employment with the respondent, the Board still allowed the normal backpay remedy because there was no evidence that the respondent would not have hired, or would have discharged, the discriminatee because of the untruthful statements).

[46] Most of these tolling periods correspond to times when Membrino's CDL was suspended. My decision to toll the backpay period from August 30 to September 3, 2010, corresponds to two reasons why Membrino was unavailable to work—specifically, that his CDL was suspended and his DOT card was expired. (Analysis, sec. C(1)(c), (2).)

[47] The General Counsel used a similar method to account for Membrino's unavailability in November 2008. (Tr. 42–43.) I find that method to be reasonable, and do not accept the convoluted alternate method that Respondent proposed in its posttrial brief at 71–72 because, among other shortcomings, Respondent docked Membrino's backpay for "unavailability" on weekends when there is no evidence that Membrino customarily worked weekends when he was employed by Respondent.

[48] I deducted 12 days (2.4 weeks) from the second quarter of 2009 because the backpay period was tolled from April 9–27, 2009 (the final day of the period counts as a working day because Membrino's CDL suspension was lifted that day). Gross backpay = (10.6 weeks x regular hours at $22/hour) + (10.6 weeks x overtime hours at $33/hour).

[49] I deducted 24 days (4.8 weeks) from the third quarter of 2010 because the backpay period was tolled in that quarter from August 30 to September 30, 2010. Interim earnings for that quarter were prorated at a 8.2 week/13 week ratio to avoid giving Respondent an unwarranted offset for interim earnings that accrued while the backpay period was tolled.

[50] I deducted 44 days (8.8 weeks) from the fourth quarter of 2010 because the backpay period was tolled in that quarter from October 1 to December 2, 2010. Interim earnings for that quarter were prorated at a 4.2 week/13 week ratio.

2011	1	444.6	61.1	11,797.50	1,727.00	10,070.50
	2	287.3	39.5	7,624.10	5,518.15	[51]2,105.95
	3	376.24	51.7	9,982.50	7,298.10	[52]2,684.40
	4	0	0	0	0	[53]0
2012	1	150.5	20.7	3,994.10	3,347.30	[54]646.80
	2	444.6	61.1	11,797.50	9,845.00	1,952.50
	3	444.6	61.1	11,797.50	9,845.00	1,952.50
	4	348.8	48.0	9,257.60	7,679.10	[55]1,578.50
2013	1	54.7	7.5	$1,450.90	$4,472.37	[56]$0
Total Net Back-pay						$95,046.07

Conclusion

Based on the findings and analysis set forth above, and on the entire record, I issue the following recommended supplemental

ORDER

Respondent, Pessoa Construction Company, Fairmont Heights, Maryland, its officers, agents, successors, and assigns, shall make whole discriminatee William Membrino by paying him $95,046.07 in net backpay, plus interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), accrued to the date of payment, and minus tax withholding required by Federal and State law.[57]

Dated, Washington, D.C. December 24, 2013

[51] I deducted 23 days (4.6 weeks) from the second quarter of 2011 because the backpay period was tolled in that quarter from May 31 to June 30, 2011. Interim earnings for that quarter were prorated at a 8.4 week/13 week ratio.

[52] I deducted 10 days (2 weeks) from the third quarter of 2011 because the backpay period was tolled in that quarter from July 1–11 and September 27–30, 2011. Interim earnings for that quarter were prorated at an 11 week/13 week ratio.

[53] The backpay period was tolled for the entire fourth quarter of 2011. Respondent did not receive an offset for the $7,760 in interim earnings that Membrino received that quarter.

[54] I deducted 43 days (8.6 weeks) from the first quarter of 2012 because the backpay period was tolled in that quarter from January 1 to March 1, 2012. Interim earnings for that quarter were prorated at a 4.4 week/13 week ratio.

[55] I deducted 14 days (2.8 weeks) from the fourth quarter of 2012 because the backpay period was tolled in that quarter from December 12–31, 2012. Interim earnings for that quarter were prorated at a 10.2 week/13 week ratio.

[56] After tolling the backpay period from January 1–30, 2013, Membrino worked 8 days (1.6 weeks) before the backpay period ended on February 8, 2013. Interim earnings were prorated at an 8.2 week/13 week ratio (Membrino worked 8.2 weeks in the first quarter of 2013, not counting the period that backpay was tolled).

[57] Neither the Board's enforced order nor the compliance specification includes a remedy for the adverse consequences of the multiyear lump sum backpay award to Membrino. See *Latino Express*, 359 NLRB No. 44 (2012), which issued after the Board's order in this case. Accordingly, I have not included such a remedy in the recommended supplemental order. See *Life's Connections*, 359 NLRB No. 85, slip op. at 2 fn. 5 (2013).