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Lucky Cab Company and Industrial, Technical and Professional Employees Union, Local 4873 affiliated with Office and Professional Employees International Union, AFL-CIO. Case 28-CA-023508

April 4, 2018

**SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN KAPLAN AND MEMBERS PEARCE
AND MCFERRAN**

On September 18, 2017, Administrative Law Judge Jeffrey D. Wedekind issued the attached Supplemental Decision and Order. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the discriminatees were not required to search for work as cab drivers, we emphasize that the judge correctly found that the discriminatees sought and obtained interim employment that made appropriate use of their past work experience and skills and paid comparable wages to their positions with the Respondent. See, e.g., *Colders Furniture*, 307 NLRB 1442, 1444 (1992) (discriminatee engaged in a good-faith search for interim employment by applying for jobs that were "comparable with [the discriminatee's] past work history" and "consistent with the broad area of skills" the discriminatee possessed), enfd. sub nom. *NLRB v. Henry Colder Co.*, 9 F.3d 113 (7th Cir. 1993).

For the reasons stated in the judge's decision, we agree that his finding that the second amended backpay specification erroneously counted commissions and fees paid by Elias Demeke as income rather than expenses did not violate the Respondent's due-process rights. Before making this finding, the judge issued a Notice to Show Cause giving the parties an opportunity to explain why commissions and fees should not be treated as expenses when they were plainly listed as such on Demeke's tax return. The Respondent filed a response arguing that this would violate its due-process rights, that there was no evidence Demeke actually paid those commissions, and that it was entitled to a negative inference on that issue. The judge considered each of those arguments and explained his reasons for rejecting them in the decision. On these facts, we find no merit to the Respondent's due-process argument.

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge and orders that the Respondent, Lucky Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns shall:

1. Make whole the individuals named below by paying them the amounts following their names, plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State law.

Employee	
Almethay Geberselasa	\$37,312
Elias Demeke	\$65,131
Edale Hailu	\$21,736
Malaku Tesema	\$32,559
Mesfin Hambamo	\$25,437
TOTAL	\$182,175

2. Reimburse Geberselasa, Demeke, Hailu, Tesema, and Hambamo for the adverse tax consequences of the multiyear lump sum backpay award to each of them, as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Dated, Washington, D.C. April 4, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

Contrary to the judge, we find that the record establishes that Edale Hailu took month-long vacations to Florida in the summers during the backpay period. However, we agree with the judge's finding that Hailu was entitled to backpay during those vacations, as there is no evidence establishing that Hailu's vacations during the backpay period exceeded his customary absences and use of paid vacation time during the base period. See *Hickman Garment Co.*, 196 NLRB 428, 430 (1972) (no basis for reducing backpay award of employee Burcham "in the absence of evidence tending to show that these intermittent absences during the backpay period greatly exceeded absences during the base period"), enfd. mem. 471 F.2d 655 (6th Cir. 1972). Member McFerran observes that the Respondent's vacation and personal leave policies, together, would have enabled Hailu to accumulate enough paid time off to spend 4 weeks in Florida, and that the Respondent has not proven anything to the contrary.

Elise F. Oviedo, Esq., for the General Counsel.
Matthew T. Cecil, Esq (Littler Mendelson PC), for the Respondent Company.
Sidney H. Kalban, Esq., for the Charging Party Union.

SUPPLEMENTAL DECISION AND ORDER

JEFFREY D. WEDEKIND, Administrative Law Judge. In early 2011, Lucky Cab Company, a taxi service in Las Vegas, unlawfully terminated six of its employees because they tried to secure union representation for themselves and their fellow drivers. See *Lucky Cab Co.*, 360 NLRB 271 (2014), enfd. mem. 621 Fed. Appx. 9 (D.C. Cir. Nov. 3, 2015). Unfortunately for the terminated employees, unemployment in the Las Vegas area was at historic highs at the time, over 13 percent, more than triple what it had been just a few years earlier prior to the great recession.¹ And all six remained unemployed or earned less in their new jobs for much of the subsequent 4 1/2-year backpay period.²

The issue addressed in this supplemental decision is whether five of the six unlawfully terminated employees—Almethay Geberselasa, Elias Demeke, Edale Hailu, Malaku Tesema, and Mesfin Hambamo—are entitled to backpay to compensate for their lost or lower wages during that time. (The backpay due the sixth terminated employee, Assefa Kindeya, was resolved pursuant to a settlement on or about the fifth day of the backpay hearing, after Kindeya had completed his testimony on both direct and cross-examination.) The General Counsel contends that the Company owes the five terminated employees a total of \$194,912 in backpay, plus excess taxes and interest, and has described in detail how this total amount, and the sub-totals for each employee, were calculated in a second amended backpay specification and supplemental “joint stipulations.”³

¹ See Tr. 196; and the U.S. Bureau of Labor Statistics (BLS) unemployment rate data for the Las Vegas-Paradise, Nevada metropolitan statistical area from January 2007 through May 2017, available at https://www.bls.gov/eag/eag_nv_lasvegas_msa.htm. Judicial notice is taken of the BLS unemployment rate data pursuant to FRE 201. See *Vanguard Oil & Service, Inc.*, 231 NLRB 146, 150 (1977).

² The backpay period ended November 10, 2015, when the Company made valid offers of reinstatement to the unlawfully terminated employees pursuant to the court of appeal’s decision enforcing the Board’s reinstatement order.

³ The original backpay specification issued on May 27, 2016, and asserted that the Company owed the five employees a total of \$293,498, plus excess taxes and interest (GC Exh. 1(a)). It was thereafter amended by motion dated July 20, 2016 (GC Exh. 1(h)). The hearing commenced the same day and continued over a total of 10 days ending September 23, 2016. However, on October 27, the General Counsel (GC) filed an unopposed motion to reopen the record to admit a second amended backpay specification. The motion was granted by order dated November 3, and the second amended backpay specification was admitted into the record as GC Exhibit 1(i). Pursuant to the joint request of the GC and the Company, the order also provided that the record would remain open to receive stipulations related to the second amended backpay specification. Approximately 6 months later, on May 16, 2017, the GC and the Company submitted the “joint stipulations.” The stipulations described how the backpay amounts in the second amended specification were calculated by the NLRB compliance officer; however, the Company reserved the right to challenge the calculations. In the absence of any objection, by order dated May 19,

The Company, however, contends that the five employees forfeited any backpay for all or most of the backpay period because they failed to make reasonable efforts to mitigate their losses. Among other things, the Company contends that three of the employees (Geberselasa, Demeke, and Tesema) unreasonably failed to seek employment with other cab companies, and that the other two employees (Hailu and Hambamo) unreasonably quit after being hired by other cab companies, and instead sought work in the trucking and/or hotel-casino industries.⁴ Alternatively, the Company argues that the General Counsel’s interim-earnings calculations for three of the employees (Demeke, Hailu, and Hambamo) are too low and that their net backpay should therefore be reduced.

As discussed below, the Company’s arguments that the five unlawfully terminated employees forfeited any backpay are without merit. As for its challenges to the interim-earnings calculations, some have merit and others do not. After all appropriate corrections have been made consistent with the facts and law, Lucky Cab owes the five terminated employees a total of \$182,175 in net backpay, plus interest and excess taxes.⁵

I. ALMETHAY GEBERSELASA

Geberselasa was the first to be unlawfully terminated, on February 24, 2011. She had worked at Lucky Cab for 3 years, was assigned a regular shift, and received full medical and other benefits.

Prior to Lucky Cab, Geberselasa worked for 2 years at Frias Transportation, another taxi service in Las Vegas. She lost that job and applied to Lucky Cab in 2008 because she had gone to Ethiopia for an emergency, and when she returned Frias refused to give her the job back.

Before working for Frias, Geberselasa worked as a gas station and grocery store cashier for about a year, and a food runner for about 6 months. She also attended a dealer school and

the stipulations were admitted into the record as Joint Exh. 1, and the record was closed. See ALJ Exhs. 1–3. The GC and the Company thereafter filed posthearing briefs on July 10. Upon invitation, they also filed additional statements of position on August 24 regarding the calculation of Demeke’s average weekly interim earnings in 2012 and 2013.

⁴ The Company does not contend that the terminated employees should have applied to drive for ridesharing companies Uber or Lyft, which did not operate in Las Vegas until late 2015.

⁵ Unless otherwise stated, the employees’ testimony concerning their search for work and interim earnings has been credited applying all relevant credibility factors, including their interests and demeanor, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. Appropriate consideration has also been given to the long passage of time since the relevant events, the employees’ imperfect English skills (all spoke Ethiopian as their primary language), and the occasional difficulties interpreting or translating their testimony (all but Tesema testified through an Ethiopian-language interpreter). See, e.g., *International Baking Co.*, 342 NLRB 136, 153 (2004), enfd. 185 Fed. Appx. 691 (9th Cir. 2006); *Daikichi Corp.*, 335 NLRB 622, 623, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997); and *Lundy Packing Co.*, 286 NLRB 141, 143 (1987), enfd. 856 F.2d 627 (4th Cir. 1988).

was offered a job as a blackjack dealer at one of the older, small hotel-casinos on the Strip (Barbary Coast). However, prior to her start date Frias offered her the cab driver job and she took that instead.

Following her discharge from Lucky Cab, Geberselasa applied for unemployment compensation. Her application was granted and she received unemployment through the end of December 2011. As required, she regularly searched and applied for jobs during that time. Beginning in mid-March, she applied, online and/or in person, for cashier jobs at various hotel-casinos and gas stations. She also applied for positions as a food runner, gourmet busser, and housekeeper at the hotel-casinos. In addition, between June and September, she returned to dealer school, attending 3 mornings a week, and began applying for dealer positions at most of the casinos in Vegas. She was not hired, however, and had no interim earnings during 2011 except for a brief period prior to the May 6 union election when the Union compensated her for helping with the campaign.

In January 2012, Geberselasa reapplied for unemployment compensation and received it for about 4 months. Again, she regularly searched and applied for work. Between January and August, she applied to cashier jobs at various gas stations and markets. She also continued to apply for various positions at hotel-casinos, including dealer, cashier, housekeeper, porter, food runner, cocktail server, and limo driver. Thereafter, from early August to mid-October, she went to Ethiopia. When she returned, she resumed her search, both online and in person, and continued to apply for gaming and non-gaming jobs at hotel-casinos. She also took refresher courses at the dealer school for about 2 weeks, and attended job fairs at several of the major casinos. She also had an agent looking for her, who got her an interview for a poolside dealer job at a casino. Nevertheless, she was not hired and had no earnings during 2012.

Eventually, however, in February 2013, Geberselasa's efforts paid off, and she was hired as a \$14.75/hour housekeeper at one of Caesars Entertainment's newer, large hotel-casinos on the Strip (The Cosmopolitan). Moreover, after working there just 7 days, she was offered and accepted an even better paying (\$17/hour) job as a beverage ambassador at another Caesars property on the Strip (The Quad).

Nevertheless, Geberselasa continued to search and apply for an even better paying position. In February 2014, after returning from 3-months maternity leave, she applied for a tipped position as a cocktail server job at another Caesars property. Although she was not selected at the time, by early July, and continuing through the remainder of the backpay period, she made at least as much in the beverage ambassador position as she did as a cab driver for Lucky Cab.⁶ And she eventually did obtain the cocktail server position.⁷

Based on the above history, the General Counsel contends

⁶ Accordingly, no backpay is sought for Geberselasa after early July 2014. Nor is any backpay sought for the periods in 2012 and 2014 when she was in Ethiopia and on maternity leave.

⁷ The foregoing summary is based on Geberselasa's testimony (see volumes 1, 3 and 7 of the transcript), supporting documentation (see, e.g., GC Exhs. 13–15, 21, 38), and the parties' "joint stipulations" (Jt. Exh. 1).

that the Company owes Geberselasa a total of \$37,312 in net backpay for those periods between February 2011 and July 2014 that she had either no earnings or less earnings than at Lucky Cab. The Company, on the other hand, contends that no backpay whatsoever is owed to Geberselasa.

As indicated above, the Company's primary argument is that Geberselasa unreasonably failed to apply for driver jobs at other cab companies after her termination. However, there are several problems with this argument.

First, as the failure to mitigate is an affirmative defense, the Company had the initial burden to present evidence that substantially equivalent cab driver jobs with other Las Vegas-area companies were actually available to Geberselasa during the relevant period. See *St. George Warehouse*, 351 NLRB 961 (2007) (discussing the parties' respective burdens of production and proof). The Company failed to do so.

The Company presented testimony from two managers, an HR director and an operations director, at two other, relatively large taxi services in Las Vegas: Frias Transportation (which includes five cab companies, Union Cab, Ace Cab, ANLV Cab, Vegas Western Cab, and Virgin Valley Cab) and Whittlesea (which includes two cab companies, Whittlesea Blue Cab and Henderson Taxi). Both managers testified that their respective companies were hiring drivers during the relevant backpay period (February 2011–December 2015). Frias's HR director testified that her company was "always" hiring "the whole time" between February 2011 and December 2015, and advertised job openings (Tr. 811, 822). And Whittlesea's operations director testified that his company was hiring "every day" during the relevant period, and hired hundreds of drivers every year (Tr. 851–852, 864). Both also testified that applicants were not automatically disqualified from hire simply because they had been terminated by another cab company (Tr. 811, 853).⁸

Although the foregoing testimony was somewhat vague and lacking in detail,⁹ both managers generally presented as reliable and credible witnesses, testifying without contradiction about their respective companies' hiring practices and history based on their personal knowledge and involvement in the hiring process throughout the relevant period. Further, at the time they were called to testify by the Company (on the eighth and ninth days of hearing), Hailu and Hambamo had already testified that they were hired by Whittlesea and Frias after being

⁸ The Company presented no evidence that any of the numerous Las Vegas taxi services other than Frias and Whittlesea were hiring during the relevant period.

⁹ For example, as indicated by the General Counsel, Frias's HR director provided no specific information about how many applicants were interviewed or hired, or how often and when job openings were advertised, during the relevant period (counsel never asked her). Similarly, Whittlesea's operations director admitted that he had no idea or recollection whether the company actually interviewed or hired anyone in February 2011, exactly how many drivers the company was short each year, or exactly how many drivers the company hired each year (Tr. 851–852, 863–865). Further, he provided no information about whether the company advertised openings (counsel never asked him). Compare, the substantially more detailed testimony and documentary evidence of hiring by other companies presented by the employer in *M.D. Miller Trucking*, 365 NLRB No. 57, slip op. at 4 (2017).

terminated by Lucky. Hailu was hired by Whittlesea in April 2011 (Tr. 378). And Hambamo was hired by Frias in August 2011 (Tr. 198). As noted by the Company (Br. 10–12), the sixth terminated employee, Kindeya, had also previously testified that he was hired by both Whittlesea and Frias. He was hired by Whittlesea in August 2011. And he was later hired by Frias in December 2013, after being terminated by Whittlesea. (Tr. 243, 248.) In these circumstances, the managers' testimony was adequate to satisfy the Company's burden of production that Frias and Whittlesea were hiring cab drivers during the backpay period.

However, substantial equivalence is determined, not just by whether the jobs have the same title or duties, but by a consideration of all the circumstances, including their respective working conditions and wages and benefits. See *Pennsylvania State Correction Officers Assoc.*, 364 NLRB No. 108, slip op. at 5 (2016); and *T.E. Briggs Construction Co.*, 349 NLRB 671, 673 (2007). See also *Arlington Hotel*, 287 NLRB 851 (1987) (available job as a hotel cook that paid 25 percent less than the discriminatee's prior job as a hotel cook was not substantially equivalent), enfd. in part and reversed in part on other grounds (8th Cir. 1989).

Here, the overwhelming weight of the evidence indicates that the available cab driver positions at Frias and Whittlesea during the relevant period were not substantially equivalent to Geberselasa's position at Lucky Cab. As indicated above, Geberselasa had worked for Lucky for 3 years, and was assigned a regular shift. However, due to their low seniority, new hires at both Frias and Whittlesea were placed on a so-called "extra board." Thus, they were not assigned a regular shift. Further, they sometimes would wait for up to an hour or more for a cab to become available, and were paid nothing or the minimum wage while doing so.¹⁰ Moreover, the cab they were often assigned had restricted medallions (license plates), which prohibited them from picking up passengers in the busiest areas of Las Vegas, such as the Strip and the airport. As a result, they would usually make substantially less money per week. See Tr. 198–201, 494–495 (Hambamo); Tr. 276–277, 284–286 (Kindeya); Tr. 400, 431–432 (Hailu); Tr. 814, 821–822, 828–832 (Frias's HR Director); and Tr. 857–859, 867, 871–874, 879–883 (Whittlesea's Operations Manager).

As indicated above, Geberselasa also had full benefits at the time she was terminated by Lucky Cab. However, new hires at Frias and Whittlesea did not receive medical benefits until after they had completed 6–9 months (and a sufficient number of complete shifts per month at Frias), or paid vacation leave until after a full year (Tr. 813, 823–824, 859).

Second, even assuming arguendo that the available positions at Frias and Whittlesea were substantially equivalent to

¹⁰ The extra-board drivers at Whittlesea would sometimes wait for up to 30 minutes for a cab, and were not paid while waiting. As for Frias, the record is not altogether clear or consistent regarding how long extra-board drivers would wait for a cab, and whether they were paid while waiting. However, it appears that they were required to wait 45 minutes for a cab before being released to go home, and that they would be paid the minimum wage during that time. However, the drivers could choose to stay longer and continue waiting for a cab with no pay, and would sometimes do so, for up to several hours.

Geberselasa's position at Lucky Cab, that is not by itself sufficient to deny Geberselasa backpay. There is no requirement that unlawfully terminated employees search for interim employment in the same industry. See, e.g., *De Jana Industries*, 305 NLRB 845, 846 fn. 6 (1991) ("Backpay rights are not dependent on efforts to seek precisely the same type of employment from which the discriminatee was discharged."); *Fugazy Continental Corp.*, 276 NLRB 1334, 1341 (1985) ("[A] discriminatee's failure to seek the same type of employment from which he was discharged does not make him ineligible for backpay."); enfd. 17 F.2d 979 (2d Cir. 1987); and *Southeastern Envelope*, 246 NLRB 423, 431 (1979) ("The Board has held that failure to seek precisely the same type of interim employment as that from which an employee is discriminatorily discharged is not a determinative factor in assessing eligibility for backpay.").

Cases cited by the Company to the contrary are clearly distinguishable because they involved employees with special skills, such as EMTs (*Aero Ambulance Service, Inc.*, 349 NLRB 1314, 1316 (2007)), collection agents (*EDP Medical Computer Systems, Inc.*, 302 NLRB 54, 54–55 (1991)), and nurses aides (*NHE/Freeway, Inc.*, 218 NLRB 259, 261–262 (1975)). See also *Associated Grocers*, 295 NLRB 806, 810–811 (1989) (such cases require only individuals "with extensive experience in a specialized field" to seek interim work within the specialty), enfd. mem. 672 F.2d 892 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982). The Company's own witness, Frias's HR director, testified that cab driving is not skilled work and that prior experience is irrelevant (Tr. 811, 819–820). And its other witness, Whittlesea's operations director, testified that Whittlesea actually prefers to hire individuals "that never drove before" so that it can "teach them [its] way of doing things" (Tr. 852, 860–861).¹¹

Thus, the mere fact that Geberselasa did not apply for cab driver jobs at Frias and Whittlesea (or other companies) is not determinative. Rather, "the entire circumstances" must be considered to determine whether she made an "honest, good faith effort" to "mitigate the loss of earnings flowing from" her unlawful discharge. *Rainbow Coaches*, 280 NLRB 166, 187 (1986), enfd. mem. as modified 835 F.2d 1436 (9th Cir. 1987), cert. denied 487 U.S. 1235 (1988); and *Lozano Enterprises*, 152 NLRB 258, 263 (1965), enfd. 356 F.2d 483 (9th Cir. 1966). See also *J.J. Cassone Bakery*, 356 NLRB 951, 956 (2011) ("What constitutes reasonable efforts depends upon the circumstances of each case . . . not . . . upon a purely mechanical examination of the number or kind of applications for work made by the discriminatees."); and *The Lorge School*, 355 NLRB 558, 560 (2010) ("Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances.").

As summarized above, Geberselasa engaged in a diligent search for various types of work, commensurate with her experience, training, and/or abilities, which despite her recently tarnished employment history, imperfect English skills, and the

¹¹ Unlike Frias's director, Whittlesea's director testified that cab driving is a skilled job; however, the only skills he identified were safety and good people skills (Tr. 861, 874).

exceptionally high unemployment rate,¹² was eventually successful and provided her with earned income for well over half the backpay period (Feb. 2013–Nov. 2015).¹³ Further, she gave a reasonable explanation for why she did not also seek or apply for cab driver positions, credibly testifying, consistent with the record evidence, that she knew, based on both her prior experience at Frias and conversations with other drivers, that her working conditions and wages and benefits as a new hire would be substantially worse than those in her former position at Lucky Cab (Tr. 155–157, 160–161, 352, 734–735).

The Company also argues (Br. 30–31) that Geberselasa should be denied any backpay because the General Counsel failed to show that the jobs Geberselasa did search and apply for were substantially equivalent to her prior job at Lucky Cab. However, Geberselasa was not required to search and apply for only substantially equivalent jobs. See *The Lorge School*, 355 NLRB at 562 fn. 10; and *KSM Industries, Inc.*, 353 NLRB 1124, 1165 fn. 84 (2009), reaffd. 355 NLRB 1344 (2010), enfd. 682 F.3d 537, 547 (7th Cir. 2012), citing *Fugazy Continental Corp.*, 276 NLRB at 1336. Further, as the Company acknowledges (Br. 33), the beverage ambassador job she eventually obtained paid her only 5 percent less per week than her old job at Lucky Cab, and subsequently paid her more. Cf. *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1208 (1982) (Judd) (finding that a pipefitter did not incur a willful loss of earnings by seeking and accepting a retail sales job that paid as much or more after the first 6 months as his pipefitting job).

In any event, it was not the General Counsel's burden to make such a showing. As indicated in *St. George Warehouse* and the subsequent cases cited above, assuming the Company satisfied its initial burden of presenting evidence that other substantially equivalent cab driver jobs were available, the General Counsel's only burden was to present evidence of the nature and extent of Geberselasa's job search, including her efforts to obtain those jobs or her reasons for not applying for them (which the General Counsel did).¹⁴ There is nothing in those cases indicating that the General Counsel was also required to subpoena and put on evidence of the specific duties, wages, benefits, and working conditions of the jobs she applied for. Rather, the cases indicate that it was the Company's burden to establish that Geberselasa's job search was unreasonably

restricted or inadequate (which it did not).¹⁵

Accordingly, as the Company does not assert any other grounds for denying or reducing the specified amount of backpay for Geberselasa, the Company must pay her the full \$37,312, plus interest and excess tax.

II. ELIAS DEMEKE

Demeke was the second to be unlawfully terminated, on February 25, 2011 (Jt. Exh. 1, p. 4). He had worked at Lucky Cab for 6–7 years, twice as long as Geberselasa. Prior to that, he had worked as a gas station cashier for 3 months.

Following his termination from Lucky Cab, Demeke applied for cashier positions at numerous gas stations and markets. He also applied for cashier or stocker positions at Walmart, and porter, valet, and parking attendant positions at numerous hotel-casinos. However, he was not hired and he had no interim earnings through June 2011 except for compensation he received from the Union between early March and early April to assist in the election campaign.

However, during the same period, from mid-April to mid-May 2011, Demeke also attended trucking school, and began applying to different trucking companies. He was eventually hired by one of them, Swift Transportation, on July 14, about 2 months after he completed his training.

Demeke drove a truck for Swift for the following 4–5 months. However, in early December 2011, he decided to quit because he was not earning enough money to make a living and he wanted to try going out on his own, i.e. to drive as an independent contractor. He purchased a Freightliner truck and a trailer a few weeks later, and was hired by another company, Habesha/This Transportation, about a month after that, in January or February 2012.

Demeke drove for Habesha/This for the following 9–10 months, earning 90 percent of each load. However, in mid-November 2012, he decided to leave because he was not making enough money after paying all of his expenses (gas, truck maintenance, permits, insurance, registration, etc.) and he had recently obtained the necessary DOT certification of authority to establish his own business as an interstate common carrier. He completed the necessary paperwork to set up his own company (Nahom Transportation, LLC) about 3–4 weeks later, and resumed hauling shortly thereafter, in mid-December 2012.

Demeke continued operating Nahom over the following 2 years. He hired numerous independent contractors, three in 2013 and 11 in 2014 (including Hambamo),¹⁶ paying them the same way that Habesha/This had previously paid him (90 percent of the haul). He also continued driving for Nahom himself through April or May of 2013. He thereafter focused solely on dispatching the other drivers and performing other necessary work to market and maintain the company until it eventually

¹² The unemployment rate steadily declined after 2011, but was still above 10 percent in March 2013, more than twice what it was in 2007.

¹³ As noted by the General Counsel, Geberselasa's receipt of unemployment benefits in 2011 and 2012 is itself prima facie evidence that she made a reasonable search for work during that time. See, e.g., *M.D. Miller Trucking*, 365 NLRB No. 57, slip op. at 5, and cases cited there.

¹⁴ The General Counsel put on such evidence during the case in chief, before the Company presented any evidence to support its initial burden of production, apparently because the General Counsel anticipated that the Company would present such evidence. See the parties' opening statements, Tr. 11–15. The General Counsel does not, however, concede that the Company actually satisfied its initial burden of production. On the contrary, the General Counsel's posthearing brief contends that the Company failed to do so for various reasons, including those discussed above.

¹⁵ See also the Board's supplemental decision following the initial remand in *St. George Warehouse*, reported at 353 NLRB 497 (2008), reaffd. 355 NLRB 474 (2010), enfd. 645 F.3d 666 (3d Cir. 2011).

¹⁶ Demeke testified that he hired 12 independent contractors in 2014 (Tr. 608). However, only 11 1099-Misc forms (not counting one that has his own name on it) are attached to his 2014 tax return (GC Exh. 52).

closed in May 2015.¹⁷

Based on the above history, the General Counsel contends that the Company owes Demeke \$62,775 in net backpay for the periods from February 2011 through December 2014 when he either had no earnings or earned less than at Lucky Cab. (No backpay is sought after December 2014 because Demeke was unavailable to work after that date through the end of the backpay period.) The Company, however, contends that no backpay whatsoever is owed Demeke because he failed to make a reasonable search for work. Alternatively, the Company contends that Demeke's net interim earnings in 2012, 2013, and 2014 were incorrectly calculated, and that his net backpay should therefore be reduced.¹⁸

A. Demeke's Search for Work

As with Geberselasa, the Company's primary argument is that Demeke unreasonably failed to apply for cab driver jobs with other companies after his termination. However, as discussed above, Demeke was not required to search or apply for other cab driver jobs. See also *The Lorge School*, 355 NLRB at 558 fn. 2 ("Pursuit of self-employment can be an adequate and proper way for a discriminatee to attempt to mitigate lost wages, even when it is outside the field in which the discriminatee was previously employed."). Further, the Company failed to show that any other substantially equivalent cab driver jobs were available during the relevant period.

In any event, even assuming *arguendo* the Company did show that other substantially equivalent cab driver jobs were available, it failed to satisfy its ultimate burden of establishing that Demeke did not make an honest, good faith effort to mitigate his losses. As summarized above, like Geberselasa, Demeke engaged in a diligent search for various types of work, commensurate with his experience or abilities following his termination. Further, because he took the extra initiative to get truck driving training, he was able to find a job within just 5 months of his discharge.

As for his reason for not seeking cab driver jobs, Demeke testified that he did not want to drive a cab after his termination because he "was protesting against the system" (by engaging in union activity) and did not think any other cab companies would hire him (Tr. 623, 685, 693). This was not an entirely baseless or unreasonable explanation given that Frias's HR director and Whittlesea's operations director both testified that if Demeke had applied they would have contacted Lucky Cab before deciding whether to hire him. (See Tr. 823, 861).¹⁹ Although they hired three of the other six terminated employees (Hailu, Hambamo, and Kindeya), they did not do so until April and August 2011 and December 2013, well after Demeke was terminated (and with respect to the latter two dates, after Demeke already had a truck driving job). Further, there is no evidence Demeke knew about it. Cf. *Taylor Machine Products*,

338 NLRB 831, 834 (2003) (Russell) (finding that an unlawfully terminated factory worker made a reasonable search for interim work even though she only sought jobs in retail stores and some of her fellow discriminatees found interim employment at another factory), *enfd.* 98 Fed. Appx. 424 (6th Cir. 2004). Finally, as discussed above, even if Demeke had sought and obtained a cab driver job with Frias or Whittlesea, the record indicates that he would have earned substantially less than what he earned at Lucky Cab.

As with Geberselasa, the Company also argues that the General Counsel failed to show that the truck driving and other jobs he did apply for were substantially equivalent to his former job at Lucky Cab. However, as discussed above, this argument is likewise without merit.

B. Demeke's Interim Earnings

The Company does not challenge the General Counsel's calculations regarding Demeke's interim earnings or the total net backpay due him for 2011 (\$27,691). However, the Company contends that the General Counsel incorrectly calculated Demeke's interim earnings in 2012, 2013, and 2014, when he worked as a self-employed truck driver, and that his net backpay for those years should be reduced accordingly.

It is a respondent employer's burden to establish how much its backpay liability should be reduced by a discriminatee's interim earnings. *J.J. Cassone Bakery*, 356 NLRB at 955–956; and *Rainbow Coaches*, 280 NLRB at 169. Where interim earnings are derived from self-employment, this burden includes establishing that any claimed business expenses should not be deducted in calculating the total net amount earned. *Cliffstar Transportation Co.*, 311 NLRB 152, 169–170 (1993); and *Photographers Local 659 (MPO-TV of California, Inc.)*, 216 NLRB 633, 638 (1975). Further, as the employer created the dispute by its unlawful actions, doubts or uncertainties in the evidence are generally resolved against it. *California Gas Transport, Inc.*, 355 NLRB 465 fn. 1 (2010). See also *Kawasaki Motors Mfg. Corp., USA v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988).

As discussed below, the Company satisfied its burden as to some of the disputed interim-earnings calculations but not others.

1. 2012 interim earnings

a. *Commissions.* The second amended backpay specification states that Demeke averaged \$568 in net interim earnings in 2012. The parties' posthearing "joint stipulations" state that the General Counsel calculated this amount by adding the amounts reported as net profit on line 31 (\$15,542) and as commissions and fees on line 10 (\$19,000) of Demeke's 2012 IRS Form 1040 Schedule C (GC Exh. 50(d)).

There are two obvious problems with this, however. First, as indicated in the Company's posthearing brief, the foregoing weekly and total numbers don't match; the sum of Demeke's reported net profit and commissions and fees (\$34,542) divided by 52 weeks equals \$664 not \$568. Second, line 10 on Schedule C appears under "Expenses." Thus, the \$19,000 in commissions and fees was plainly reported as an expense not income. And if that amount is excluded, and only the \$15,542 is counted, the average weekly earnings would be only \$299.

¹⁷ The foregoing summary is based on Demeke's testimony (Tr. 592–654, 663–696), supporting documentation (see, e.g., GC Exhs. 48 and 53), and the parties' "joint stipulations" (Jt. Exh. 1).

¹⁸ The Company does not directly challenge Demeke's economically motivated decisions to quit driving for Swift and Habesha/This.

¹⁹ Lucky Cab's asserted reason for firing Demeke was that he did not record meal breaks on his trip sheet. See 360 NLRB at 276.

By posthearing order dated August 17, the parties were invited to file position statements addressing this puzzle, and they did so on August 24. The General Counsel acknowledged that the \$19,000 in reported commissions and fees should not be counted as income, and that Demeke's correct 2012 weekly average interim earnings were \$299. The Company, on the other hand, argued that excluding the reported commissions and fees at this point would violate its due process rights and lack any evidentiary support in the record.

Neither of the Company's arguments has any merit. As discussed above, it was the Company's burden to establish interim earnings. Although the General Counsel included known interim earnings and other offsets to gross income in the specification, this was done only as an "administrative courtesy." *KSM Industries, Inc.*, 353 NLRB at 1172; *Cable Car Advertisers, Inc.*, 336 NLRB 927, 931 (2001), *enfd.* 53 Fed. Appx. 467 (9th Cir. 2002), *cert. denied* 539 U.S. 958 (2003); *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995); and *Ryder System, Inc.*, 302 NLRB 608, 613 *fn.* 7 (1991), *enfd.* 983 F.2d 705 (6th Cir. 1993). See also *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). Indeed, Section 101.16(b) of the Board's Statements of Procedure provides that a Regional Director may alternatively issue a notice of hearing, without a specification, containing only a brief statement of the matters in controversy.²⁰

Further, the Company acknowledges in its position statement (p. 2 *fn.* 1) that it did not know during the hearing how the General Counsel calculated the net interim earnings. As indicated above, the first time the General Counsel represented that commissions were added to net income in calculating the total amount was in the parties' "joint stipulations," which were not filed until May 16, 2017, approximately 8 months after the hearing ended.²¹ Thus, the Company plainly did not detrimentally rely on the General Counsel's representations at the time of the hearing.²²

As for the evidentiary record, Demeke's tax return, which was offered and admitted without objection, is itself evidence that the commissions were paid and deducted as a business expense from gross income. See *Velocity Express, Inc.*, 342 NLRB 888, 890 *fn.* 6, 893 (2004), *enfd.* 434 F.3d 1198 (10th Cir. 2006); and *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159–1160 (1980), *enfd.* 683 F.2d 1296 (10th Cir. 1982).²³

²⁰ See also *Steelworkers (Doxsee Food)*, 281 NLRB 1275, *JD.* *fn.* 1 (1986). This is not to suggest, of course, that little attention need be given to accuracy in drafting a backpay specification. An inaccurate backpay specification is a courtesy to no one.

²¹ See *fn.* 3, above. As noted there, although described as "joint stipulations," the Company reserved the right to challenge the General Counsel's calculations.

²² The lone case cited by the Company, *Paul Mueller Co.*, 332 NLRB 1350 (2000), is therefore clearly distinguishable, as it involved an initial unfair labor practice proceeding in which the General Counsel had the burden of proof, and the General Counsel's representation about the scope of the complaint allegations was made during the hearing.

²³ See also *Green v. U.S.*, 2016 WL 5876030, *2 (W.D. Okla. Oct. 7, 2016) ("Under proper foundation, tax returns may be admissible under exceptions to the hearsay rules including Rule 803(6) (business records) and Rule 803(8) (public records). . . . And if a party seeks to offer

Further, it is not the only evidence. Demeke specifically testified on direct examination that he had to pay commissions while he was working at Habesha/This in 2012 (Tr. 604). And the Company never cross-examined him about that testimony or presented any other evidence contradicting it.

The Company argues that the foregoing evidence should nevertheless be rejected because Demeke admitted that he did not give the actual receipts regarding his claimed expenses to his tax preparer, and that he generally discarded such "perishable" receipts after a year, retaining only the summary of expenses that he provided the tax preparer.²⁴ Indeed, the Company argues that Demeke's failure to retain the receipts should result in a so-called "negative spoliation inference"²⁵ that he did not actually pay any commissions.

However, the Company cites no supporting Board authority for these arguments. It is true that the IRS advises self-employed taxpayers to retain records for at least 3 years, the typical limitations period to conduct an audit.²⁶ And the failure to do so will effectively place the burden of proof on the taxpayer to show that claimed deductions were proper and accurate under the federal tax laws and regulations. See, e.g., *Power v. Commissioner of Internal Revenue*, T.C. Memo 2016-157, 2016 WL 4442555 (Aug. 22, 2016) and authorities cited there. However, the Board has never adopted or applied this rule in its backpay proceedings. On the contrary, the Board has made clear that the burden remains on the respondent employer to show fraudulent concealment of interim earnings. See *Cibao Meat Products*, 348 NLRB 47 (2006). See also *Synergy Gas Corp.*, 302 NLRB 130, 131–134 (1992) (finding that the respondent failed to satisfy its burden notwithstanding the discriminatee's poor recordkeeping and failure to file a tax return for his business), *enfd.* per curiam 951 F.2d 1324 (D.C. Cir. 1992); *Croan, Mel, Motors, Inc.*, 174 NLRB 1189, 1191–1992 (1969) (same, notwithstanding that the discriminatee's records were incomplete and insufficient to perform an audit); and *Photographers Local 659*, 216 NLRB at 636–638 (same, notwithstanding that the discriminatee's testimony and his records indicated that his bookkeeping methods were casual and unsophisticated).

The Company has failed to satisfy that burden here. There is no direct evidence that Demeke willfully destroyed his receipts or other documents to prevent them from being discovered in this backpay proceeding. Nor is there sufficient circumstantial evidence to infer such a fraudulent intent. Demeke was neither

his own tax return, adopts it while testifying and is subject to cross-examination, any hearsay danger is substantially mitigated.") (citations omitted).

²⁴ See Tr. 663–674, 681–682; and GC Exh. 50(n). As noted above, Demeke testified through an Ethiopian-language interpreter.

²⁵ See generally *Gerlich v. U.S. Dept. of Justice*, 711 F.3d 161 (D.C. Cir. 2013) (describing when a negative spoliation inference is warranted for failure to preserve evidence).

²⁶ See <https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records>. The tax preparer who completed Demeke's 2013 and 2014 tax returns testified that he advised his clients, including Demeke, to retain their records for as long as they have the business (Tr. 908, 910, 915). As indicated above, Demeke closed his company in May 2015.

an experienced businessman nor an experienced discriminatee. As indicated above, before driving a truck and starting his own business, he had only worked in the U.S. about 6–7 years, as a gas station cashier and a taxi driver. And there is no evidence he had ever been involved in NLRB litigation before. Further, he was both the sole owner and the sole manager of the new business, performing, on a daily basis, all of the paperwork for the business out of his home office or truck. In these circumstances, it is equally if not more reasonable to infer that his failure to retain old receipts was innocent.

Accordingly, consistent with the record and the General Counsel’s revised calculations, Demeke’s 2012 average weekly net interim earnings will be corrected to \$299. See generally *CSC Worldwide*, 362 NLRB No. 90, slip op. at 12, fn. 13 (2015).

b. *Business expenses.*

(1) *Truck.* Demeke paid \$22,000 for the truck that he purchased in 2012. On his 2012 IRS Form 4562 (Depreciation and Amortization), he claimed a \$3360 deduction for depreciation on the truck under the IRS modified accelerated cost recovery system (MACRS).²⁷

The Company does not dispute that the IRS generally allowed taking annual MACRS deductions for depreciation of motor vehicles used in a business, or that the deduction was properly taken for depreciation of Demeke’s truck, in 2012.²⁸ However, it argues that deducting depreciation as an expense in calculating interim earnings is inappropriate under Board precedent.

The Company is mistaken. As indicated by the General Counsel, Board precedent generally permits deducting depreciation in calculating interim earnings. See *Ryder System, Inc.*, 302 NLRB at 610 (“[W]e agree that as a general rule depreciation is an allowable deduction”). See also *Cliffstar Transportation Co.*, 311 NLRB at 169 (finding that a self-employed discriminatee’s interim earnings were properly offset by MACRS depreciation of a tractor he purchased and placed in use during the backpay period). And the Company cites no evidentiary basis why it should not be permitted here.

(2) *Trailer.* Demeke paid about \$3300 for the trailer that he purchased to use with his truck in 2012, and expensed the full cost of the trailer as Section 179 property on his 2012 Form 4562. Again, the Company does not dispute that the IRS generally allowed expensing the entire cost of Section 179 property as an alternative to capitalizing it and taking annual MACRS depreciation deductions, or that Demeke properly expensed the full cost of the trailer, in 2012.²⁹ However, the Company con-

tends that deducting the entire cost from interim earnings is contrary to Board precedent.

The Company appears to be correct. In *Ryder System*, 302 NLRB at 610 & 611 fn. 14, the Board stated, regarding the purchase of a truck, that, “Such a capital expense is not normally made a part of backpay calculations where the item has a resale value and the use of the item potentially extends beyond the backpay period.” Like a truck, a trailer would normally have a resale value and a life of at least a few years. Indeed, Demeke testified that he eventually sold both the truck and the trailer in March 2014 for a total of \$12,000 (Tr. 638, 686, 688).

However, as discussed above, Board precedent does permit deducting for annual MACRS depreciation. Utilizing a 3-year recovery period,³⁰ half-year convention, and 200% declining balance method, the depreciation for the trailer would be \$1100 (.666666667 x \$3300 x .5).³¹

Accordingly, the difference between \$3300 and \$1100 (\$2200) will be added to Demeke’s interim earnings in 2012.

(3) *Tools.* Demeke spent \$1950 on tools in 2012, and claimed the full cost of the tools under “other expenses” on his 2012 Schedule C (line 27a and Part V). Here again, the Company does not dispute that the IRS allowed deducting the cost of tools used in a business in certain circumstances, or that the deduction was properly taken by Demeke, in 2012.³² Rather, the Company argues that deducting the cost of the tools in calculating interim earnings is contrary to Board precedent. In support, the Company cites *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644, 650 (1976), a case where the ALJ disallowed deducting the \$1950 cost of new tools and equipment used to maintain and rebuild helicopters because they had a resale value.

There are two problems with this argument, however. First, *Aircraft & Helicopter* is of questionable precedential value. The General Counsel did not file exceptions to the ALJ’s finding and thus the Board did not pass on it.³³ Second, there is no

placed in service during the tax year and used predominately (more than 50%) in your trade or business.”)

³⁰ See discussion of Hailu’s trailer, *infra*.

³¹ See p. 13 of the 2012 IRS instructions for Form 4562.

³² See p. 3 of IRS Publication 535, above (“Unless the uniform capitalization rules apply, amounts you spend for tools used in your business are deductible expenses if the tools have a life expectancy of less than 1 year or their cost is minor.”).

³³ See, e.g., *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 fn. 1 (2000) (“It is well settled that the Board’s adoption of a portion of a judge’s decision to which no exceptions are filed is not precedent for any other case.”). *Aircraft & Helicopter* was subsequently cited by another ALJ to disallow deducting the principal payments on a truck. See *C.R. Adams Trucking*, 272 NLRB 1271, 1277 (1984), *enfd. per curiam* 767 F.2d 1276 (8th Cir. 1985). Again, the General Counsel did not file exceptions to the ALJ’s adverse finding. Nevertheless, the Board in another case subsequently cited both cases as precedent to disallow deducting the cost of a truck. See *Ryder System*, discussed above, 302 NLRB at 610 fn. 11 and 611 fn. 14. However, *Aircraft & Helicopter* has not been cited by the Board as precedent to disallow deducting the cost of a tool. And cf. *Famet, Inc.*, 222 NLRB 1180, 1184 (1976) (finding that the cost of a crescent wrench was properly deducted from the discriminatee’s interim earnings as “it is well settled that the cost of tools required to maintain interim employment is allowable.”)

²⁷ See GC Exh. 50(f). The form indicates that Demeke’s tax preparer used a 5-year recovery period, half-year convention, and 200% declining balance to calculate the amount of depreciation.

²⁸ See p. 3 of IRS Publication 535 (March 4, 2013), available at <https://www.irs.gov/pub/irs-prior/p535--2012.pdf> (“You usually capitalize the cost of a motor vehicle you use in your business” and “[y]ou can recover its cost through annual deductions for depreciation.”).

²⁹ See p. 3 of the 2012 IRS instructions for Form 4562 (Jan. 16, 2013), available at <https://www.irs.gov/pub/irs-prior/i4562--2012.pdf> (“You can elect to expense part or all of the cost [up to \$500,000] of Section 179 property [including “tangible property . . . used as . . . [a]n integral part of . . . furnishing transportation . . . services”] that you

basis in the record to find or infer that any of the tools here actually had any resale value. Demeke testified that the tools he purchased ranged from “the heavy duty to just the minimum” (Tr. 693). But the Company never inquired any further into whether the tools were new or used, how many tools were purchased, what each tool cost, what the tools were used for, or what their life expectancy was. As discussed above, any such doubts or uncertainties are resolved against the Company.

(4) *Meals*. Demeke deducted \$14,160 as an allowable business expense on his 2012 Schedule C for meals (line 24b). The Company contends that deducting this amount from interim earnings was inappropriate because employer-provided or paid meals are a benefit to employees and should be counted as employee income, citing NLRB Casehandling Manual (Compliance), Sec. 10552.5. However, as indicated above, Demeke was working as an independent contractor not as an employee in 2012, and there is no evidence he was compensated for his meals.

The Company also contends that deducting the amount claimed on Schedule C from interim earnings is inappropriate because Demeke admitted that it was not the actual amount he spent on meals but the IRS allowable per diem for truck drivers (Tr. 668). However, exactitude in calculating interim earnings is not required; reasonable estimates and approximations are sufficient. See, e.g., *A.P.A. Warehouse, Inc.*, 307 NLRB 838, 841 (1992); *Lundy Packing Co.*, 286 NLRB 141, 148, 164 (1987), *enfd.* 856 F.2d 627 (4th Cir. 1988); *American Pacific Pipe Co.*, 290 NLRB 623 fn. 4, 632 (1988); and *Nabors W.C., Co.*, 134 NLRB 1078, 1095 (1961), *enfd.* 323 F.2d 686 (5th Cir. 1963), *cert. denied* 1156 fn. 8, 1162 (1980). See also *Kansas Refined Helium*, 252 NLRB at 1161 (rejecting the employer’s argument that actual receipts and disbursements should be used in calculating a car allowance deduction from interim earnings rather than the estimated amount on the tax return, as the method used to estimate the amount was acceptable for tax purposes).

Finally, the Company contends that the calculation based on the IRS per diem is incorrect; that it should be at most \$11,657. The Company calculates this lower amount by multiplying the IRS per diem meal rate (\$59/day) x .8 (the deductible portion for carriers) x 273 days (the number of calendar days in the 9-month period February through October 2012 that Demeke drove for Habasha/This).³⁴ However, the Company’s math is off; the total using its numbers is \$12,886. Further, the record indicates that Demeke actually drove a total of 300 days in 2012; an additional 13 days through November 13, when he received his own certificate of authority, for Habasha/This (Tr. 642), and another 14 days at the end of December for other companies (Tr. 644). See also the summary worksheet Demeke gave to his tax preparer (GC Exh. 50(n)), which specifically indicates that he drove out of state for 300 days during the year. Substituting this correct number of days into the calculation, the total per diem amount for the year is \$14,160, the same total

amount claimed on the tax return.

(5) *Telephone, internet, and office expenses*. On his 2012 Schedule C, Demeke deducted \$1100 under “office expense” (line 18). He also deducted another \$1800 for telephone and internet under “other expenses” (line 27a and Part V). And the total of both (\$2900) was deducted in calculating his 2012 net interim earnings.

The Company contends that this total should be reduced because Demeke testified at the hearing that the cost of telephone and internet was included under “office expense” (Tr. 664–665). The Company contends that this testimony indicates that the cost of telephone and internet was claimed twice. However, it is clear that Demeke was simply confused when he gave that testimony. First, the testimony makes no sense; if the \$1800 cost of telephone and internet was included under “office expense,” the amount of office expenses would have been much higher than \$1100. Second, when subsequently asked to clarify his earlier testimony, Demeke explained that he had not completed the tax return himself but had used a tax preparer; that he just assumed the cost of telephone and internet was included under “office expense” when he was first asked about it by counsel; and that he had other substantial office expenses in 2012, including a computer, printer, table, and chair that he bought when he started his business (Tr. 675).³⁵

(6) *Rent*. Demeke advised his tax preparer that he wanted to claim \$6000 in 2012 (\$500 per month) as rent for his home office, which he used to help pay his home mortgage (Tr. 675–678). He specifically included this amount as a “rent/lease” expense on a worksheet he provided to his tax preparer (GC Exh. 50(n)).

The Company contends that this was improper; that the \$6000 constituted income to Demeke and it was inappropriate to deduct it. However, there is no evidence that Demeke’s tax preparer did not include the \$6000 in gross income or deducted it from gross income. The 2012 Schedule C claims “0” in expenses on line 30 (expenses for business use of home), and there is no indication that it was claimed as any other type of allowable expense.³⁶ Nor is there any evidence that the \$6000 was deducted as an expense in calculating Demeke’s 2012 net interim earnings.

(7) *Tickets/fines*. Demeke claimed \$450 in expenses for “tickets fines” on his 2012 Schedule C under “other expenses.” As indicated by the Company, however, Internal Revenue Code 162(f) prohibits deducting such fines as an expense. See also *Howard v. C.I.R.*, T.C. Memo 2015-38, 2015 WL 1060434, *7 (March 9, 2015), citing *O’Connor v. Commissioner*, T.C. Memo 1986-444 (Sept. 15, 1986). The General Counsel offers no reason why this longstanding federal tax policy should not apply in calculating net interim earnings. Accordingly, the \$450 will be added to Demeke’s 2012 total net interim earnings.

In sum, incorporating the corrections above, Demeke’s total

³⁴ See p. 8 of the IRS 2012 Instructions for Schedule C, available at <https://www.irs.gov/pub/irs-prior/i1040sc--2012.pdf>; and IRS Bulletin 2011-42 (Oct.17, 2011), available at https://www.irs.gov/irb/2011-42_IRB/ar09.html#d0e760.

³⁵ The Company’s posthearing brief notes that the 2012 Schedule C also includes an \$850 deduction under “supplies” (line 22), and that Demeke testified that he did not know what the tax preparer included in that amount (Tr. 675). However, the Company does not specifically contend that the \$850 expense for supplies should not have been deducted in calculating Demeke’s net interim earnings.

³⁶ Demeke did not pay himself a salary (Tr. 686).

amount of interim earnings in 2012 was \$18,192 (\$15,542 + \$2200 + \$450), or an average of \$350 per week. Subtracting this average weekly amount from Demeke's average weekly earnings at Lucky Cab (\$802), equals \$452 per week. Demeke's total net backpay for 2012 is therefore \$23,504 (\$452 x 52 weeks).

2. 2013 interim earnings

a. *Commissions.* As with Demeke's 2012 earnings, in calculating Demeke's total net earnings in 2013 the General Counsel added the amount of commissions and fees listed as an expense on line 10 (\$12,800) to the amount of net profit listed on line 31 (\$19,800) of Demeke's 2013 Schedule C (GC Exh. 51(i)), resulting in total net earnings of \$32,600 and average weekly net interim earnings of \$627.³⁷ For essentially the same reasons previously discussed, this was plainly an error; only the \$19,800 should have been counted, and Demeke's correct 2013 average net weekly interim earnings based on that amount was therefore \$381.

b. *Contractor hauls.* As indicated by the Company, the total amount of 2013 net interim earnings calculated by the General Counsel was also incorrect because it fails to include the net earnings generated by the three independent contractors who hauled for Nahom, Demeke's trucking company, that year. As discussed above, Demeke paid the contractors 90 percent of the freight for each of their hauls and Demeke retained the remaining 10 percent. Demeke then paid 4–5 percent to the brokers who gave him the hauls. (Tr. 609–610, 645.)

As noted by the Company, it is clear that the General Counsel did not include Demeke's gross or net earnings from the contractor hauls because it is clear that they were not included on Demeke's 2013 Schedule C (GC Exh. 51(i)), which is what the General Counsel relied on. If they had been, the total amount paid the contractors as nonemployee compensation (\$157,871), which is set forth on the 2013 1099-Misc forms they were given by Nahom (GC Exh. 51(s)–(u)), would have been listed as a "contract labor" expense on line 11 of Demeke's Schedule C.³⁸ Yet, no amount whatsoever is listed. This is a strong indication that the gross receipts/income from the contractor hauls (\$175,412)³⁹ was likewise not included in the total on line 1 (\$190,942).⁴⁰

Demeke's earnings from the contractor hauls can be calculated by adding the compensation paid to the contractors (\$157,871) and the commissions paid to the brokers for the contractor hauls (\$7893),⁴¹ and subtracting these total expenses

³⁷ Demeke confirmed that he claimed commissions and fees as a deductible expense in 2013 (Tr. 682).

³⁸ See p. C-6 of the IRS 2013 Instructions for Schedule C, available at <https://www.irs.gov/pub/irs-prior/i1040sc--2013.pdf>. Compare also Demeke's Schedule C for 2014, which lists \$1,036,441 on line 11 for contract labor (GC Exh. 52(d)).

³⁹ \$157,871 ÷ .90.

⁴⁰ As previously discussed, Demeke himself continued hauling through April or May of 2013. The relatively low amount of commissions and fees reported on line 10 compared to 2012 indicates that the payments to brokers for the contractor hauls were likewise not included as an expense.

⁴¹ \$175,412 x .045. The Company asserts that Demeke only paid the brokers 4–5 percent of his 10 percent, and that the total amount he paid

(\$165,764) from the gross receipts/income from the contractor hauls (\$175,412), which equals \$9648.⁴² This amount will therefore be added to Demeke's 2013 total net interim earnings.⁴³

c. *Business expenses*

(1) *Trailer.* For the reasons previously discussed with respect to Demeke's 2012 earnings, Demeke is entitled to deduct for depreciation of his trailer in 2013. Utilizing the same MACRS 3-year recovery period and 200% declining balance, depreciation on the unrecovered basis for the full year would be \$1467 (.666666667 x \$2200).⁴⁴ Accordingly, that amount will be deducted from Demeke's net interim earnings in 2013.⁴⁵

(2) *Tools.* As in 2012, Demeke claimed the cost of tools under "other expenses" on his 2013 Schedule C. The Company challenges this deduction for the same reasons it challenged the deduction in 2012. However, other than their cost, there is no record evidence whatsoever regarding the tools. Accordingly, for the same reasons previously discussed,⁴⁶ the Company has failed to carry its burden of showing that the deduction from interim earnings was improper.

(3) *Meals.* As in 2012, Demeke claimed a deduction for meals (\$13,208) on his 2013 Schedule C. The Company again argues that it was improper to deduct this amount from interim earnings because employer-provided or paid meals for employees are a benefit and should be counted as employee earnings. However, as in 2012, Demeke was working in 2013 as an inde-

was therefore only \$877 (\$17,541 x .05). However, Demeke's exact testimony was as follows:

Q. Sorry. Let me clarify. How did you and your independent contractors get paid?

A. They take 90 percent and I get the ten and I get the 10 percent. And from the 10 percent I pay sometimes it varies but from 4–5 percent I give to the brokers that give me a [haul].

Q. Okay. That comes out of your percentage?

A. Yes. [Tr. 610.]

An equally if not more reasonable interpretation of this testimony is that, out of his 10 percent of the freight for the haul, he paid the brokers 4–5 percent of the freight for the haul. And, as discussed above, uncertainties are construed in Demeke's favor.

⁴² The same number can also be reached by simply multiplying \$175,412 by .055.

⁴³ The Company does not contend that Demeke willfully or fraudulently concealed from the Board his 2013 earnings from contractor hauls, or that he should be denied any backpay for that year as a result. In any event, the record does not support such a conclusion. See *Cibao Meat Products*, 348 NLR 47 (2006).

⁴⁴ See p. 12 of the IRS 2013 Instructions for Form 4562, available at <https://www.irs.gov/pub/irs-prior/i4562--2013.pdf>.

⁴⁵ Demeke's 2013 Schedule C deducted \$5600 for depreciation, but this amount must have been solely for the truck, as Demeke had expensed the cost of the \$3300 trailer in 2012. The Company's posthearing brief does not contend that the \$5600 depreciation deduction for the truck was improper or that the same amount was improperly deducted from interim earnings.

⁴⁶ The IRS applied the same standard for deducting tools in 2013. See p. 4 of IRS Publication 535 (March 10, 2014), available at <https://www.irs.gov/pub/irs-prior/p535--2013.pdf>.

pendent contractor rather than an employee, and there is no evidence he was compensated for his meals.⁴⁷

(4) *Rent*. Demeke testified that, as in 2012, he paid \$6000 in 2013 (\$500 per month) out of gross income as rent for the home office to help pay his home mortgage (Tr. 679). The Company again argues that this amount was income, should not have been deducted, and should be added to his net earnings. However, as in 2012, there is no evidence that it was not included in gross income or was deducted as an expense, either by the tax preparer in calculating Demeke's net income on his 2013 Schedule C, or by the General Counsel in calculating Demeke's net interim earnings. Indeed, unlike in 2012, it was not even listed on the summary that Demeke gave to his tax preparer in 2013 (R. Exh. 12, p 451).

In sum, incorporating the above corrections, Demeke's total net interim earnings in 2013 were \$27,993 (\$19,812 + \$9648 – \$1467), or an average of \$538 per week. Subtracting this weekly amount from Demeke's average weekly earnings at Lucky Cab (\$802), equals \$268. Demeke's total net backpay for 2013 is therefore \$13,936 (\$268 x 52 weeks).

3. 2014 interim earnings

a. *Contractor hauls and gross earnings*. Like in 2013, the total amount of net income reported on line 31 of Demeke's 2013 Schedule C (\$27,941) appears to have been inaccurate. As indicated by the Company, the reported amount appears to have been based on faulty information or calculations regarding both the amount paid to independent contractors and Demeke's gross receipts/earnings (which as previously discussed were based solely on contractor hauls, as Demeke did not do any driving himself in 2014).

Line 11 on the Schedule C (contract labor) indicates that a total of \$1,036,441 was paid to independent contractors. Demeke's tax preparer testified that he calculated this amount based on what Demeke told him he had reported to the IRS on the 1099 forms as nonemployee compensation.⁴⁸ According to the tax preparer, Demeke told him he had reported a total of \$1,078,498 on the 1099s. However, Demeke said this included \$42,047 on a 1099 for himself, and that the \$1,078,498 therefore constituted the total gross receipts for the business in 2014. So the tax preparer deducted the \$42,047 from the \$1,078,498 to get just the contractors' gross compensation (\$1,036,441). (Tr. 904–906.)

The problem with this is that the 1099s and other record evidence indicate that the contractors' gross compensation actually totaled \$1,056,146.⁴⁹ Further, based on Demeke's testimony

⁴⁷ Unlike with respect to the 2012 meal-expense deduction, the Company does not challenge the 2013 deduction on the grounds that it was based on the IRS per diem rather than actual expenses for meals. Nor does the Company contend that the calculation was incorrect.

⁴⁸ The tax preparer testified that he did not review the 1099s himself.

⁴⁹ The 1099s total \$1,066,441 (GC Exh. 52(q)–(aa)). However, Hambamo, who worked as a contractor for Nahom in January 2014, disputed the amount on his 1099. The 1099 indicated that he grossed \$30,050 (GC Exh. 52(x)). But, based on the "driver pay" reports he received from Nahom, Hambamo believed this amount was too high, and wrote to Demeke in early 2015 asking him to correct the 1099. Demeke did so, changing the amount to \$20,050. (Tr. 227–235, 608–609, 647, 659; GC Exh. 37.) However, this number was also incorrect;

that the contractors were paid 90 percent and he took 10 percent of the freight, this means that his total gross receipts were \$1,173,496. Subtracting from this amount the compensation paid contractors (\$1,056,146), the 4–5 percent that Demeke would have paid to brokers (\$52,807),⁵⁰ and the sum of the other expenses listed in Schedule C (\$14,116), Demeke's total 2014 net income was actually \$50,425.⁵¹

b. *Business Expenses*

(1) *Trailer*. For the reasons previously discussed with respect to 2012 and 2013 interim earnings, Demeke is entitled to deduct for depreciation of his trailer in 2014. However, as previously noted, Demeke sold the trailer in March of 2014. Accordingly, utilizing the same MACRS 3-year recovery period and 200% declining balance method, but applying the mid-quarter convention for property disposed of during the first quarter, depreciation on the unrecovered basis would be \$61 (.666666667 x \$733 x .125).⁵² Accordingly, that amount will be deducted from Demeke's net interim earnings in 2014.

(2) *Rent*. The only other expense in 2014 that the Company challenges is rent. Demeke testified that, as in 2012 and 2013, he paid \$6000 in 2014 (\$500 per month) out of gross income as rent for the home office to help pay his home mortgage (Tr. 679). The Company again argues that the \$6000 constitutes income and was improperly deducted.

Unlike in 2012 and 2013, the record indicates that a little over half of that amount (\$3226) was in fact claimed as an expense on line 16a of Demeke's 2014 Schedule C (GC Exh. 52(d); Tr. 907–908). However, the Company offers no factual or legal basis to conclude that deducting this amount was improper, or that the same amount should not have been deducted in calculating net interim earnings. Although it appears that the expense should have been claimed on line 30 (expenses for business use of home), rather than line 16a (mortgage interest on real property used for business other than main home),⁵³ there is insufficient record evidence to find or infer that the error significantly affected the calculation of net income.

In any event, it ultimately doesn't matter. As indicated above, even including the \$3226 deduction, Demeke's total net interim earnings for 2014 is \$50,364 (\$50,425 – \$61), or an average of \$969 per week. This average weekly amount is well above Demeke's average weekly earnings at Lucky Cab in 2014 (\$802). Thus, no backpay is owed Demeke for 2014.

In sum, adding the specified amount of net backpay for 2011

according to the pay reports (GC Exh. 46), the actual total gross compensation to Hambamo was \$19,755, or \$10,295 less than what was reported on Hambamo's 1099. Subtracting \$10,295 from \$1,066,441, the total is \$1,056,146.

⁵⁰ \$1,173,496 x .045. See fn. 41, above. The 2014 Schedule C does not include any amount as an expense for commissions and fees. However, the Company's posthearing brief acknowledges that, based on Demeke's testimony, the 4–5 percent should be deducted.

⁵¹ Again, the Company does not contend that Demeke willfully or fraudulently concealed his 2014 total net earnings from the Board, or that he should be denied any backpay for that year as a result. And the record does not support such a conclusion. See fn. 43, above.

⁵² See pp. 11–12 of the IRS 2014 Instructions for Form 4562, available at <https://www.irs.gov/pub/irs-prior/i4562--2014.pdf>.

⁵³ See pp. C-7 and C-9 of the IRS 2014 Instructions for Schedule C, available at <https://www.irs.gov/pub/irs-prior/i1040sc--2014.pdf>.

(\$27,691) and the corrected net backpay amounts set forth above for 2012 (\$23,504) and 2013 (\$13,936), the Company must pay Demeke a total of \$65,131, plus interest and excess tax.

III. EDALE HAILU

Hailu was the third to be unlawfully terminated, on March 8, 2011. He had driven for Lucky Cab for over 6 years, and was assigned a regular shift (5 days per week, 12 hours per day). Prior to that, he had also driven for Yellow Cab in Las Vegas for a brief period, and for one or more cab or limousine companies in Florida for many years. He had also driven a truck for a year, after getting his CDL in 1995.

Shortly after he was terminated by Lucky Cab, Hailu applied for a cab driver position at Whittlesea and was hired on April 4, 2011. He worked there for the following 5 months, until September 9. He decided to quit at that time because he was on the extra board, was not assigned a regular shift, was usually given cabs with restricted medallions, and was therefore making substantially less than what he earned at Lucky.

Immediately thereafter, on September 11, Hailu began taking refresher truck driving courses. He attended 2 hours a day for 2 weeks. Around that time, he also applied for a truck driving position at Swift Transportation, which hired him a couple weeks later, on October 20. However, like Demeke, he quit after a few months, on January 16, 2012, because he was not making enough money.

Within a few days after leaving Swift, Hailu applied for work at Direct Haul, and was hired a month later, in mid-February, as an independent contractor. He continued driving for Direct Haul as an independent contractor for the following 2 years. In the interim, in mid-December 2012, he bought his own Freightliner truck. About a month later, in January 2013, he also bought his own Great Dane trailer.

Around December 2013, Hailu decided to begin the process of starting his own company. He submitted his resignation to Direct Haul the following month, on January 14, 2014, after receiving his permit. Hailu began operating his company (Emun Trucking) a month later, in February 2014, and continued to do so through the remainder of year. He hired about six independent contractors to haul loads for the company and also hauled loads himself for about 200 days during the year.⁵⁴

Based on the above history, the General Counsel contends

⁵⁴ The foregoing summary is based on Hailu's testimony (Tr. 378–381, 387–389, 395, 396–400, 403–406, 430–432, 435–436, 465–466), supporting documentation (see, e.g., GC Exhs. 43–45), and the parties' "joint stipulations" (Jt. Exh. 1). Given the long passage of time since the relevant events occurred, where there are conflicts between Hailu's testimony and the documentary evidence regarding details such as dates and dollar amounts, the latter has generally been given more weight. For example, Hailu testified that he bought his truck in December 2013 (Tr. 381), but the sales receipt indicates that he bought it in December 2012 (GC Exh. 44(a)). Similarly, Hailu testified that he bought his first trailer in December 2013 for \$5500 (Tr. 405), but his tax records indicate that he bought it in January 2013 for \$7000. See GC Exh. 42(cc); and fns. 66 and 67, below. Hailu also testified that he bought a second trailer in December 2014 after his first trailer was totaled in the summer of 2014 (Tr. 406), but the sales receipt indicates that he bought the second trailer in late April 2014 (GC Exh. 44(b)).

that the Company owes Hailu a total of \$30,965 in net backpay for the quarters from March 8, 2011 through December 2014 when he had either no earnings or earned less than at Lucky Cab. (No backpay is sought during the 6-week period between the dates Hailu quit Whittlesea/Henderson and was hired by Swift, or after 2014 when his net interim earnings exceeded his prior earnings at Lucky Cab. Jt. Exh. 1, p. 6.) The Company, however, argues that it owes no backpay to Hailu because he actually averaged more earnings per week at Whittlesea/Henderson than he had at Lucky Cab; that he therefore unreasonably quit Whittlesea/Henderson on September 9, 2011; and that he unreasonably abandoned the cab driver industry thereafter to pursue work as a truck driver. Alternatively, the Company contends that Hailu's interim earnings in 2011, 2012, 2013, and 2014 were incorrectly calculated, and that his net backpay should therefore be reduced.

A. Hailu's Earnings at Whittlesea/Henderson

As indicated above, Hailu testified that, because he was a new hire at Whittlesea/Henderson, he was not given a regular shift, was instead placed on the extra list, had to work the worst hours and drive a cab with restricted medallions most of the time, and made substantially less money as a result. As previously discussed, this testimony is generally consistent with the testimony of both Kindeya, who was hired by Whittlesea/Henderson in August 2011, and Whittlesea's Operations Manager. It is also consistent with and confirmed by other undisputed evidence. The Company stipulated that Hailu earned an average of \$579 per week during the last 6 months he worked at Lucky Cab from early September 2010 to early March 2011 (Tr. 768; Jt. Exh. 1, p. 5). In contrast, Hailu's tax records show that he made a total of \$10,835 in gross earnings at Whittlesea/Henderson during the 23 weeks he worked there from April 4 through September 9, 2011 (GC Exh. 39). Dividing \$10,835 by 23 weeks equals \$471 per week, almost 20 percent less than the \$579 he made per week in his last 6 months at Lucky.⁵⁵

In its posthearing brief, the Company argues that all of the foregoing evidence should be disregarded because Hailu admitted on cross-examination that he took a month-long vacation to Florida in the summer of 2011, and thus was available to work at Whittlesea/Henderson for only 19 weeks rather than 23 weeks.⁵⁶ However, dividing \$10,835 by 19 weeks equals \$570 per week, which is still less than the \$579 per week he averaged at Lucky Cab.

Moreover, it is not as clear as the Company suggests that Hailu admitted taking a month-long vacation to Florida in the

⁵⁵ Although Hailu testified that he made only "half" of what he made at Lucky Cab, this was not necessarily an exaggeration. He may have been comparing his 2011 earnings to his 2010 earnings during the same months (early April to early September 2010), which are not in evidence, rather than to his last 6 months at Lucky Cab (early September 2010 to early March 2011).

⁵⁶ The Company relies solely on Hailu's testimony, as Hailu's complete 2011 pay record from Whittlesea/Henderson is not in evidence. The General Counsel introduced only some of the pay stubs, which were apparently all Hailu still had in his possession at the time of the 2016 hearing. (See GC Exh. 43; Tr. 430–431.)

summer of 2011. Hailu's actual testimony on cross-examination was as follows:

- Q. Did you take any vacations between 2011 and 2014?
 A. Within the US?
 Q. Anywhere. Any vacations.
 A. Yes, I did.
 Q. When did you take a vacation?
 A. Most of the time in the summertime I go to Florida.
 Q. Each year?
 A. Yes, every year.
 Q. And how long do you go to Florida?
 A. For about a month.
 Q. And you do not work when you are there in Florida?
 A. I didn't work because I was spending time with my children. [Tr. 429.]

This testimony is obviously ambiguous. Did Hailu take a month-long summer vacation to Florida "most of the time" or "every year" between 2011 and 2014?

Further, the Company's argument assumes that vacations, sick leave, and other absences from work were accounted for in averaging Hailu's earnings during his last 6 months at Lucky Cab. However, the record fails to support such an assumption. The NLRB compliance officer testified that Hailu's average weekly earnings at Lucky were calculated by averaging the payroll data set forth on an earnings summary that Lucky provided (Tr. 712–713). That earnings summary (R. Exh. 8) only shows Hailu's total "wages" (commissions and tips) in each pay period during the 6-month period ending February 19, 2011 (3 weeks before he was terminated); it does not show the number of hours or days worked in each pay period. Thus, it is clear that vacations, sick leave, and other absences were *not* considered or accounted for in averaging Hailu's prior earnings. Cf. *Hickman Garment Co.*, 196 NLRB 428, 430–431 (1972) (rejecting the respondent employer's argument that the discriminatees' backpay should be reduced to reflect days they were absent from their interim employment, as their prior earnings were averaged over the period they were employed by respondent, it could reasonably be assumed that, in the absence of evidence to the contrary, the discriminatees were absent from time to time during that base period, and there was no evidence that absences during their interim employment greatly exceeded absences during the base period), *enfd. mem.* 451 F.2d 610 and 655 (6th Cir. 1972).⁵⁷

As in *Hickman*, there is no direct evidence here regarding whether or exactly how many days or hours Hailu was absent during the 6-month period prior to his discharge. However, the Company's summary indicates that Hailu's earnings in several of the pay periods (9/19–10/02/10, 11/14–12/25/10, 1/23–2/19/11) were markedly lower than the others. Moreover, they were also markedly lower in several instances than the earnings of other employees in the same periods. For example, Demeke and Hailu had roughly the same earnings from 10/17–10/30/10 (\$1669 and \$1775, respectively), and from 1/09–1/22/11 (\$1573 and \$1480, respectively). However, from 12/01–12/11/10, Demeke earned \$1558, while Hailu earned only

\$757.⁵⁸ And from 1/23–2/05/11, Demeke earned \$1398, while Hailu earned just \$842. Similarly, Tesema and Hailu had roughly the same earnings from 10/3–10/16/10 (\$1404 and \$1373, respectively), and from 12/26/10–1/08/11 (\$1305 and \$1344, respectively). However, from 9/19–10/2/10, Tesema earned \$1345, while Hailu earned just \$1006. And from 2/06–2/19/11, Tesema earned \$1361, while Hailu earned only \$912. Absent any other explanation, this is strong circumstantial evidence that Hailu did not work as many hours or days during those pay periods. And if those hours or days when he did not work were totaled and accounted for (i.e. excluded), his average weekly earnings at Lucky Cab would be higher as well.

B. Hailu's Resignation From Whittlesea/Henderson

Although a respondent employer has the burden to show that a discriminatee failed to make a reasonable search for interim employment, it is the General Counsel's burden to show that a discriminatee's decision to quit interim employment was reasonable. See *Pessoa Construction Co.*, 361 NLRB 1174, 1189 (2014). Contrary to the Company's contention, for the same reasons stated above, the General Counsel satisfied that burden here with respect to Hailu's decision to quit Whittlesea/Henderson. See *Ryder Systems*, 302 NLRB at 609 ("A claimant is not required to continue employment which is not suitable or not substantially equivalent to the position from which he was discriminatorily discharged."); and *Lundy Packing*, 286 NLRB at 144 (A voluntary quit is not a willful loss of earnings "if the interim job is substantially more onerous or is unsuitable or threatens to become so . . . [or] when it is prompted by unreasonable working conditions or an earnest search for better paying employment.").

C. Hailu's Subsequent Search for Work

As indicated above, the Company also argues that Hailu forfeited all backpay because he did not apply to any other cab companies after quitting Whittlesea/Henderson, but instead sought work in the trucking industry. However, as previously discussed with respect to Geberselasa and Demeke, Hailu was not required to search for other cab driver jobs. Further, the Company only presented evidence that one other cab company, Frias, was hiring at the time, and the record evidence indicates that new-hire positions at Frias were no more substantially equivalent than those at Whittlesea. Moreover, Hailu had previous experience as a truck driver, and was able to secure a truck driving job with Swift within 6 weeks after leaving Whittlesea/Henderson.

As with Geberselasa and Demeke, the Company also argues that the General Counsel failed to show that the truck driving jobs Hailu applied for and performed after quitting Whittlesea/Henderson were substantially equivalent to his former job at Lucky Cab. For the reasons previously discussed, this argument is likewise without merit.

D. Hailu's Interim Earnings

As indicated above, the Company alternatively contends that

⁵⁷ See also *Rainbow Coaches*, 280 NLRB at 189.

⁵⁸ See also Hambamo's earnings. Although Hambamo earned less than Hailu in all but one pay period, he likewise had significantly more earnings than Hailu from 12/01–12/11/10 (\$983).

the General Counsel incorrectly calculated Hailu's interim earnings in 2011, 2012, 2013, and 2014, and that his backpay for those years should be reduced accordingly.

1. 2011 interim earnings

The General Counsel calculated Hailu's total net backpay for 2011 (\$6970) based in part on his net backpay in the last quarter of 2011. The General Counsel determined the net backpay in that quarter (\$2497) by subtracting Hailu's total earnings at Swift during the last 11 weeks of the quarter (\$3564) from what his average total earnings at Lucky Cab would have been during the same period (\$6061).⁵⁹ However, as indicated by the Company (Br. 41), the General Counsel's calculation was incorrect. Hailu's 2011 W-2 statement shows that he actually earned \$4207 at Swift during that period. Thus, his correct net backpay for the fourth quarter is \$1854 (\$6061-\$4207), and his correct total net backpay for 2011 is \$6327.

2. 2012 interim earnings

a. *Interim earnings at Swift.* As indicated above, Hailu testified that he did not stop working at Swift until January 16, 2012 (Tr. 380, 466). The Company argues that Hailu's earnings at Swift from January 1 to January 16, 2012, should therefore be included in calculating his total interim earnings in the first quarter of that year. The General Counsel agrees, and therefore includes interim earnings for each of those 2 weeks. (See GC Exh. 1(i), Appx. D.)

However, again, the General Counsel's calculations are incorrect. The General Counsel estimated Hailu's earnings during those 2 weeks based on his weekly average in 2011.⁶⁰ However, as indicated above, the General Counsel miscalculated the 2011 weekly average. The General Counsel divided \$4207 by 13 weeks instead of 11 weeks, which equals \$324 per week (which is how the General Counsel incorrectly concluded that total earnings were only \$3564). The correct weekly average is \$382 (\$4207 ÷ 11 weeks).

b. *Weekly net interim earnings at Direct Haul.* The General Counsel calculated Hailu's 2012 weekly net interim earnings at Direct Haul (\$180) by dividing his total net earnings on line 31 of his 2012 Schedule C (\$8277) by 46 weeks, the number of weeks he was employed there that year (GC Exh. 1(i), Appx. D; Jt. Exh. 1, p. 6). The Company argues that, based on Hailu's testimony about taking month-long summer vacations to Florida between 2011 and 2014, Hailu's total 2012 net earnings at Direct Haul should have been divided by 42 weeks rather than 46 weeks, which results in a higher average weekly interim earnings amount (\$197) and a correspondingly lower weekly net backpay amount due for those weeks.

However, as discussed above, there is no evidence that the General Counsel excluded vacations or other absences in calculating Hailu's average weekly earnings at Lucky Cab during the 6-month base period preceding his unlawful termination; in

⁵⁹ Net backpay due discriminates is calculated on a quarterly basis. See *United Enviro Systems, Inc.*, 314 NLRB 1130, 1132 (1994); *F.W. Woolworth Co.*, 90 NLRB 289 (1950); and NLRB Casehandling Manual (Compliance), Sec. 10564.2.

⁶⁰ No W-2 from Swift is attached to Hailu's 2012 tax return and no wages are reported. See GC Exh. 40.

fact, the record indicates otherwise. Accordingly, the General Counsel likewise properly did not exclude absences in calculating Hailu's 2012 average weekly interim earnings at Direct Haul.

c. *Business expenses.*

(1) *Office expenses.* Hailu claimed \$2850 in office expenses on his 2012 Schedule C (GC Exh. 40(c)). However, as indicated by the Company, Hailu testified at the hearing that he did not have a home office or purchase supplies for it until 2014; that he did not give the tax preparer any documents to support claiming the \$2850 in office expenses on the 2012 return; and that the tax preparer "did that on his own" (Tr. 410, 437, 452-453). Accordingly, the \$2850 will be added to Hailu's net interim earnings in 2012.

(2) *Truck.* Hailu paid \$16,000 for the truck that he purchased in mid-December 2012, and subsequently claimed the full cost of the truck as an expense on his 2012 Schedule C. As previously discussed regarding Demeke's trailer, Board precedent does not permit deducting the full cost of the truck from interim earnings. However, it does permit deducting annual MACRS depreciation. Applying a 5-year recovery period, 200% declining balance method, and mid-quarter convention for property placed in service in the last 3 months of the year, the 2012 annual depreciation on the trailer would be \$800 (.4 x \$16,000 x .125).⁶¹ Accordingly, the difference between \$16,000 and \$800 (\$15,200) will be added to Hailu's net interim earnings in 2012.

(3) *Meals.* Hailu deducted \$14,400 as an allowable business expense on his 2012 Schedule C for meals. As with Demeke, the Company contends that this amount should not have been deducted from his interim earnings because employer-provided or paid meals are a benefit to employees and should be counted as employee earnings. However, like Demeke, Hailu was working as an independent contractor not as an employee, and there is no evidence that he was compensated for his meals.

(4) *Phone.* Hailu deducted \$1000 for phone expenses on his 2012 Schedule C. The Company contends that this amount should be reduced in calculating his interim earnings because Hailu testified that he used his phones (a landline and two cell phones) for both business and personal reasons (Tr. 457-460).

IRS regulations allowed self-employed taxpayers to deduct from their 2012 business income only the business percentage of the charges for phone lines other than the base rate of the first home landline.⁶² There is no evidence that Hailu claimed more on his 2012 Schedule C than what was permissible under that policy. At best, the record is unclear whether he did so. Again, all such uncertainties are resolved against the Company.

In sum, Hailu's total net interim earnings at Direct Haul in 2012 were \$26,327 (\$8277 + \$2850 + \$15,200), or a 46-week average of \$572 per week. Substituting this weekly average, Hailu's net interim earnings in the first quarter of 2012 were \$4770 (\$764 for the first 2 weeks at Swift + \$4006 for the last 7 weeks at Direct Haul). Subtracting this amount from the \$7530 total amount he would have earned at Lucky Cab during the

⁶¹ See p. 13 of the 2012 IRS Instructions for Form 4562.

⁶² See p. C-9 of the IRS 2012 Instructions for Schedule C.

quarter (\$579 x 13 weeks),⁶³ the net backpay due Hailu in the first quarter of 2012 is \$2760.

With respect to the other three quarters of 2012, Hailu's net backpay would be \$7 per week (\$579 – \$572), or a total of \$273 (\$7 x 39 weeks). Thus, Hailu's total net backpay in 2012 is \$3033 (\$2760 + \$273).

3. 2013 interim earnings

a. *Weekly net interim earnings.* The General Counsel calculated Hailu's 2013 weekly net interim earnings (\$549) by adding the amounts listed as net profit on line 31 (\$17,699) and as wages on line 26 (\$10,870) of his 2013 Schedule C, and dividing that total (\$28,569) by 52 weeks.⁶⁴ The Company again argues that, based on Hailu's testimony about taking month-long summer vacations to Florida between 2011 and 2014, his total 2013 net earnings should have been divided by 48 weeks rather than 52 weeks, which results in a higher average weekly interim earnings amount (\$595) that exceeds what he averaged at Lucky Cab during his last 6 months (\$579). However, for the same reasons previously discussed, the argument is without merit.

b. *Business expenses.*

(1) *Truck.* As discussed above regarding Hailu's 2012 interim earnings, it is appropriate to deduct annual MACRS depreciation of the truck from his 2013 interim earnings. Applying the same 5-year recovery period and 200% declining balance method, the 2013 depreciation on the unrecovered basis for the full year would be \$6080 (4 x \$15200).⁶⁵ Accordingly, this amount will be deducted from Hailu's 2013 net interim earnings.

(2) *Trailer.* Hailu paid \$7000 for the trailer he purchased in January 2013. On line 13 of his 2013 Schedule C (GC Exh. 41(d)), Hailu claimed \$4083 for depreciation on the trailer.⁶⁶ The Company does not challenge the amount of this claimed tax deduction, which appears permissible and accurate assuming a 3-year rather than a 5-year recovery period.⁶⁷ However, the Company again argues that it is inappropriate to deduct depreciation from interim earnings. For the reasons discussed above, the Company's argument is without merit.

⁶³ The Company's posthearing brief does not challenge Hailu's decision to quit Swift or his entitlement to full backpay during his subsequent 4 months of unemployment before he was hired by Direct Haul.

⁶⁴ See GC Exh. 1(i), Appx. D; GC Exh. 41(c); and Jt. Exh. 1, p. 6. Hailu testified that he did not have any employees and did not know why the tax preparer claimed \$10,870 in wage expenses on line 26 (Tr. 415).

⁶⁵ See p. 12 of the 2013 IRS Instructions for Form 4562.

⁶⁶ It is not clear from the 2013 tax records themselves that the claimed depreciation was for the trailer. No Form 4562 is attached to the tax return. See GC Exh.41; R. Exh. 12. However, as indicated by the Company, the deduction was obviously for the trailer since, as previously discussed, Hailu had expensed the entire cost of the truck on his 2012 Schedule C. See also the depreciation worksheet attached to Hailu's 2014 tax return (GC Exh. 42(cc)), and fn. 67, below.

⁶⁷ Applying a 3-year recovery period, 200% declining balance, and mid-quarter convention for property placed in service during the first quarter of the year, MACRS depreciation on the trailer comes to \$4083 (.666666667 x \$7000 x .875), the exact amount claimed on Hailu's tax return.

(3) *Tools.* Hailu claimed \$540 in expenses for tools on his 2013 Schedule C. As with Demeke's tools, the Company contends that the expense was improperly deducted from interim earnings. However, there is no record evidence regarding the nature of the tools. Accordingly, for the same reasons previously discussed, the Company has failed to carry its burden of showing that the deduction from interim earnings was improper.

(4) *Repairs and maintenance.* Hailu claimed \$17,325 in expenses for repairs and maintenance on his 2013 Schedule C. The Company contends that it is improper to deduct this entire amount in calculating his 2013 net interim earnings because Hailu admitted that he did not keep any receipts, did not give his tax preparer any supporting documentation, and that the tax preparer therefore came up with the amount on his own, based on what was standard for trucking businesses in his experience (Tr. 413–414). In light of this admission, the Company contends that only the following two repair and maintenance expenditures that Hailu specifically testified about at the hearing should be deducted: \$4800 for new tires, and \$5400 (\$400–500 per month) for monthly oil changes (Tr. 438–439, 449), which total \$10,200.

However, that was not the whole of Hailu's testimony on the subject. When asked if he recalled any other repairs or maintenance that he had to do on his truck in 2013, Hailu testified:

There are a lot of expenses that I incurred for repairs and maintenance. Direct Haul does the repairing themselves, and then they take it out of your paycheck, small amount of maintenance. [Tr. 439.]

Hailu also later testified that he had to change the brakes every 90 days in 2013 (Tr. 451).

The Company argues that this additional testimony should be rejected because Hailu did not testify about how much the other repairs and expenses cost. However, Hailu testified that it cost about \$250 every 90 days to replace just the two front brakes (Tr. 451), and that he assumed he actually spent more than what the tax preparer estimated for all of his repair and maintenance expenses (Tr. 414). Further, as previously discussed with respect to Demeke's business expenses, reasonable estimates and approximations are permitted in calculating interim earnings.

The Company also argues that the foregoing testimony should be rejected because Hailu failed to produce any supporting documents in response to the Company's subpoena.⁶⁸ The Company argues that it is entitled to a "negative inference" that the unproduced documents would support its position that the alleged repairs and maintenance did not actually amount to \$17,325.

However, as indicated above, Hailu testified that he did not keep any receipts. Thus, an adverse inference is clearly unwarranted for his failure to produce them. See *Cobb Mechanical Contractors, Inc.*, 333 NLRB 1168, 1191 and fn. 40 (2001) (denying the respondent's request for an adverse inference for the discriminatees' failure to produce certain tax returns and other records, as the evidence did not support a finding that the

⁶⁸ See R. Exh. 2, pars. 11 and 18. Hailu admitted receiving the subpoena (Tr. 408).

discriminatees withheld any responsive documents in their possession); and *Hansen Bros. Enterprises*, 313 NLRB 599, 608 (1993) (denying the respondent's request for an adverse inference for the discriminatee's failure to produce certain tax returns and other documents because the discriminatee credibly testified that he did not have the tax returns and the other documents did not exist). See also *Coronet Foods*, 322 NLRB 837 (1997) (holding that the judge erred in drawing an adverse inference against several discriminatees for failing to produce any receipts for their claimed expenses), *enfd.* in part 158 F.3d 782 (4th Cir. 1998).

(5) *Meals*. As in 2012, Hailu deducted meal expenses (\$8932) from his gross business income on his 2013 Schedule C. The Company again argues that this amount should not be deducted from interim earnings. For the reasons discussed above, the argument is without merit.

(6) *Phone*. As in 2012, Hailu also deducted phone expenses (\$840) on his 2013 Schedule C. The Company again argues that this amount should be reduced in calculating his interim earnings because Hailu testified that he used his phones for both business and personal reasons. As discussed above, the argument is likewise without merit.

In sum, incorporating the corrections above, Hailu's net interim earnings in 2013 were \$22,489 (\$28,569 – \$6080), or a 52-week average of \$432 per week. Subtracting this average weekly amount from Hailu's average weekly earnings at Lucky Cab (\$579) equals \$147 per week. Hailu's total net backpay for 2013 is therefore \$7644 (\$147 x 52 weeks).

4. 2014 interim earnings

a. *Weekly net interim earnings*. The General Counsel calculated Hailu's 2014 average weekly net interim earnings (\$555) by dividing the amount listed as net profit on line 31 (\$28,833) by 52 weeks.⁶⁹ The Company again argues that, based on Hailu's testimony about taking month-long summer vacations to Florida between 2011 and 2014, his total 2014 net earnings should have been divided by 48 weeks rather than 52 weeks, which results in a higher average weekly interim earnings amount (\$601) that exceeds what he averaged at Lucky Cab during his last 6 months (\$579). However, for the same reasons previously discussed, the argument is without merit.

b. *Business expenses*.

(1) *Truck*. As discussed above regarding Hailu's 2012 and 2013 interim earnings, it is appropriate to deduct annual MACRS depreciation of his truck from his 2014 interim earnings. Applying the same 5-year recovery period and 200% declining balance method, the 2014 depreciation on the unrecovered basis for the full year would be \$3648 (.4 x \$9120).⁷⁰ Accordingly, this amount will be deducted from Hailu's 2014 net interim earnings.

(2) *Trailer*. Hailu deducted \$2917 for depreciation on his 2014 Schedule C (GC Exh. 42(g)). However, this amount equals the entire unrecovered basis of the trailer (the \$7000 cost of the trailer minus the \$4083 depreciation claimed in 2013).

⁶⁹ The Company's posthearing brief notes that no 1099 from Direct Haul is attached to Hailu's 2014 tax return, but does not contend that the amount listed on line 31 of the return is incorrect.

⁷⁰ See p. 11 of the 2014 IRS Instructions for Form 4562.

Further, the record indicates that the trailer was totaled in an accident in early 2014.⁷¹ Applying the same 3-year recovery period and 200% declining balance method used in 2012, and the mid-quarter convention for property disposed of in the first quarter of the year, depreciation on the trailer for 2014 would be only \$243 (.666666667 x \$2917 x .125.)

However, the record indicates that Hailu bought another trailer in late April 2014 for \$5900 (GC Exh. 44(b)). Applying the same recovery period and declining balance method used for the first trailer, and the mid-quarter convention for property placed in service during the second quarter of the year, depreciation on the second trailer for 2014 would be \$2458 (.666666667 x \$5900 x .625).⁷²

The total deduction from Hailu's 2014 interim earnings for depreciation of the two trailers is therefore \$2701 (\$243 + \$2458). The difference between \$2917 and \$2701 (\$216) will therefore be added to Hailu's 2014 net interim earnings.

(3) *Tools*. Hailu claimed \$225 in expenses for tools on his 2014 Schedule C (GC Exh. 42(h)). The Company again contends that the expense was improperly deducted from interim earnings. However, the only record evidence regarding the nature of the tools is Hailu's testimony that they were non-professional "emergency" tools to fix things while out on the road, "like fuses and other minor stuff" (Tr. 442). Accordingly, for the same reasons previously discussed, the Company has failed to carry its burden of showing that the deduction from interim earnings was improper.

(4) *Phone*. As in 2012 and 2013, Hailu deducted phone expenses (\$2880) on his 2014 Schedule C. The Company again argues that this amount should be reduced in calculating his interim earnings because Hailu testified that he used his phones for both business and personal reasons. As discussed above, the argument is without merit.

(5) *Meals*. As in 2012 and 2013, Hailu deducted meal expenses (\$9440) from his gross business income on his 2014 Schedule C. The Company again argues that this amount should not be deducted from interim earnings. For the reasons discussed above, this argument is likewise without merit.

Incorporating the corrections above, Hailu's net interim earnings in 2014 were \$25,401 (\$28,833 – \$3648 + \$216), or an average of \$488 per week. Subtracting this average weekly amount from Hailu's average weekly earnings at Lucky Cab (\$579) equals \$91 per week. Hailu's total net backpay for 2014 is therefore \$4732 (\$91 x 52 weeks).

In sum, adding the corrected amounts of net backpay for 2011 (\$6327), 2012 (\$3033), 2013 (\$7644), and 2014 (\$4732), the Company must pay Hailu a total of \$21,736, plus interest and excess tax.

IV. MALAKU TESEMA

Tesema was the fourth to be unlawfully terminated by the Company, on April 6, 2011. He had worked at Lucky Cab for

⁷¹ Although Hailu testified that the first trailer was totaled in the summer of 2013, the record indicates it was in early 2013. See fn. 54, above, and Tr. 406 (he rented a trailer for 4 months before buying the second trailer). The truck was not damaged in the accident (Tr. 407).

⁷² There is no evidence that Hailu deducted the cost of the second trailer as a business expense on his 2014 tax return.

approximately 3 years. Before that, he had also worked for Frias and Yellow Checker Star, but was terminated by both of them. He also had experience working as a buffet runner at The Mirage hotel-casino for about a year on an on-call basis.

Like Geberselasa, Tesema applied for unemployment compensation following his termination from Lucky Cab. His application was granted, and he received unemployment through the rest of the year. As required, he regularly searched and applied for jobs during that time. He inquired about returning to work at Yellow Checker Star but was told that he was “not rehireable.” He also applied for a bus driving job with the Regional Transportation Commission,⁷³ but was not hired there either. He also looked for various other types of jobs online every 2–3 days, including as a hotel-casino runner-butler, and applied whenever a new job was posted. However, he was not hired.

In an effort to increase his job prospects, beginning in June 2011, Tesema enrolled in a casino gaming (dealer) school. He attended 4–6 hours per day, 5 days a week, for 6 weeks. As the classes were offered in the evening, and the hours were flexible, he was able to continue looking for jobs during that time. He applied for both gaming and nongaming jobs at numerous hotel-casinos. However, he was not hired, remained unemployed, and had no earnings through the end of 2011 except for some compensation he received from the union strike fund between October and December.

Tesema continued to receive unemployment compensation during the first 3 months of 2012. As in 2011, he looked for new job openings every 2–3 days, and applied for both gaming and non-gaming jobs at various hotel-casinos, during that time. Nevertheless, he was not hired and had no earnings during the first quarter of 2012.

Eventually, however, in April 2012, Tesema was hired as a part-time blackjack dealer at the Primadonna (Primm) hotel-casino. He was paid the minimum wage, \$7.25 per hour, plus tips, typically worked 3–4 days a week (8 hours per day), and sometimes worked up to 6 days a week when needed.

After a few months, while still working at Primm, Tesema applied for a similar dealer position at the Flamingo, a Caesars property, and was hired on June 11, 2012. Although it was likewise considered a part-time position, he was paid more, \$8.25 per hour plus tips, and he usually worked 4–6 days per week. Indeed, for about the first year and a half, between the week ending June 16, 2012 and the week ending December 28, 2013, he averaged more earnings per week than he averaged during his last 6 months at Lucky Cab.

Tesema’s average weekly earnings at Primm fell significantly in 2014, however. Accordingly, when a full-time position opened at the Cromwell, another Caesars property, he applied for it. He was hired on July 27, 2014, and his average weekly earnings after that time through the end of the backpay period were again more than his prior earnings at Lucky Cab.⁷⁴

⁷³ Tesema did not have a commercial driver’s license, but applied for one.

⁷⁴ The foregoing summary is based on Tesema’s testimony (Tr. 2, 19–28, 38–39, 45–50, 55–56, 59–78, 83–89, 776–787, 791–801, 804–

Based on this history, the General Counsel contends that the Company owes Tesema a total of \$32,559 in net backpay for the periods in 2011, 2012, and 2014 when he was unemployed or his weekly earnings averaged less than what he averaged at Lucky Cab. The Company, on the other hand, argues that no backpay is due Tesema because he failed to apply to any cab companies other than Yellow Checker Star after he was terminated.

For essentially the same reasons previously discussed with respect to Geberselasa, Demeke, and Hailu, the Company’s argument is without merit. First, Tesema was not required to search and apply for other cab driver jobs. Second, the Company only presented evidence that two of the other taxi services in Las Vegas were hiring, Frias and Whittlesea, and it failed to establish that the new-hire positions at those companies were substantially equivalent to Tesema’s position at Lucky Cab. Third, Tesema provided a reasonable explanation for not applying to Frias and Whittlesea. He had previously been terminated from Frias, and knew, based on his experience there, that, like Yellow Checker Star, it would have refused to rehire him at the time (Tr. 20–21, 38, 81–82, 776). As for Whittlesea, he did not apply there because it was a smaller, more “picky” company, which he believed was unlikely to hire him as well (Tr. 80–82). Given the exceptionally high unemployment rate at the time, and the fact that he had been terminated by three other cab companies, this was certainly not an unreasonable belief.⁷⁵ Finally, as summarized above, Tesema engaged in a diligent search for other types of jobs related to his prior experience. He even took the extra step of getting training as a dealer, which eventually led, not only to a job, but a job that paid more than his prior job at Lucky Cab.

As with Geberselasa, Demeke, and Hailu, the Company also argues that the General Counsel failed to show that the jobs Tesema applied for and performed after his termination were substantially equivalent to his former job at Lucky Cab. For the reasons previously discussed, this argument is likewise without merit.

Accordingly, as the Company does not assert any other grounds for denying or reducing the specified amount of backpay for Tesema, the Company must pay him the full \$32,559, plus interest and excess tax.

V. MESFIN HAMBAMO

Hambamo was the last of the five employees to be terminated, on April 20, 2011.⁷⁶ He had worked at Lucky Cab the longest of them, for 8 years. Before that, he had also driven for about a year and a half for three other cab companies: Whittlesea/Henderson, Western Cab, and Desert Cab. He was terminated by Whittlesea and Western due to accidents, and quit Desert. Prior to driving a cab, he also worked as a dishwasher, housekeeper, porter, and cashier.

807), supporting documentation (see, e.g., GC Exhs. 2–5, 23, 24), and the parties’ “joint stipulations” (Jt. Exh. 1).

⁷⁵ Lucky Cab’s stated (but false) reason for terminating Tesema in April 2011 was that he failed to log a ride. See 360 NLRB at 276. The record does not reveal why he had been previously terminated by Frias and Yellow Checker Star.

⁷⁶ See 360 NLRB at 274.

Immediately after his termination from Lucky Cab, Hambamo applied for unemployment compensation. However, the Company opposed the application and it was denied. The following month, in May 2011, he looked for work every day, both in person and online.

On May 10, Hambamo applied in person at Yellow Cab. However, they said they needed to check with his previous employers, and when he called back they said they would not hire him, without giving any reason. On June 6, he also applied at Nellis Cab, but was not hired by them either. During the same period, he also unsuccessfully applied for various other types of jobs, including a housekeeper position at the Golden Nugget hotel-casino and a cashier position at a 7-11.

In July, Hambamo applied to another cab company, ANLV Cab, one of the five Frias companies. He was hired there the following month, in mid-August 2011. However, he was put on the extra board, had to arrive very early, at 2 a.m., each day, sometimes waited for hours to get a cab, and the cab he eventually got would sometimes break down. He therefore quit a month later, on September 20, and resumed his job search.

As before, Hambamo looked for work every day, and applied for housekeeping jobs at various hotel-casinos. Like Tesema, he also applied at the Regional Transportation Commission. However, he was not hired.

During this time, Hambamo also contacted various employment agencies to inquire about getting job training. He eventually got a Pell grant, and temporarily stopped his job search to attend trucking school from January 23 to February 29, 2012.

Shortly thereafter, on March 20, 2012, Hambamo was hired by Swift Transportation, a trucking company he had applied to in December 2011, before attending school. He worked at Swift for the next 3 months, driving out of its terminal in Salt Lake City, Utah. However, on June 28, he decided to quit because of the low pay (23–24 cents per mile plus expenses), limited number of miles he could drive (1500–1800 per week), and poor working conditions.

About a week later, Hambamo applied to another trucking company, ANF Freight a/k/a Bal Carrier and Cargo Solutions, and was hired on July 13, 2012, as an independent contractor. The pay was better (33 cents per mile plus expenses), and he could drive more miles (3000 or more per week). However, after about a year, in August 2013, he decided to buy his own Freightliner truck and trailer.⁷⁷ He resigned from ANF/Bal Carrier/Cargo Solutions about a month later, on September 28, 2013.

Shortly thereafter, Hambamo applied to Nahom Transportation, Demeke's new trucking company. He was hired on October 23, 2013, again as an independent contractor. He worked for Nahom for the next 3 months, earning 90 percent of the gross. However, he resigned on January 28, 2014 to start his own trucking company.

Hambamo opened his new company (Elnathan Express LLC) about 2 months later, on March 20, 2014, after obtaining the necessary business licenses. He began hauling freight thereaf-

⁷⁷ Hambamo gave conflicting testimony about whether he bought the trailer in 2013 or 2014. See Tr. 545, 557–558, 560. However, a preponderance of the record evidence indicates that he bought it in 2013.

ter, and continued to do so through the end of the year. During that time, he hired one independent contractor on and off as a “team driver” paying him 40 cents for each mile he drove.

Based on the foregoing,⁷⁸ the General Counsel contends that the Company owes Hambamo \$31,301 in net backpay for the period from April 20, 2011 through December 2014 when he was either unemployed or averaged less earnings per week than he did at Lucky Cab, with the exception of the month he stopped looking for work and attended truck driving school. (No backpay is sought for the fourth quarter of 2012, or any quarter after 2014, because Hambamo's earnings exceeded his prior earnings at Lucky Cab during those quarters.)

The Company, on the other hand, argues that Hambamo forfeited any backpay between April 20 and May 10, 2011 because he delayed searching for work until that time. The Company also argues that Hambamo forfeited any backpay, or that his backpay should be reduced, after September 20, 2011 because he unreasonably quit Frias/ANLV cab at that time and abandoned the cab driving industry to look for work as a truck driver.⁷⁹ Finally, the Company alternatively argues that the General Counsel incorrectly calculated Hambamo's net interim earnings in 2012, 2013, and 2014, and that his net backpay should therefore be reduced.

A. Hambamo's Alleged Delay in Seeking Work

As indicated above, backpay normally runs from the date of the discriminatee's unlawful discharge. However, in *Grosvenor Orlando Associates, Ltd.*, 350 NLRB 1197, 1199 (2007), the Board held that, absent special circumstances, a discriminatee who delays any search for interim work for more than 2 weeks after being discharged forfeits any backpay during that period, i.e. backpay does not begin accruing until the discriminatee commences his/her job search. Citing this precedent, the Company argues that Hambamo should be denied any backpay for the approximately 3-week (20-day) period between April 20, when he was discharged, and May 10, 2011, when he first applied for jobs at Yellow Cab and the Golden Nugget.

However, the mere fact that Hambamo did not file an application until May 10 does not establish that he did not begin searching for work until that time. See *Smyth Mfg. Co.*, 277 NLRB 680, 682 (1985) (discriminatee's statement that he did not “apply” for any jobs after his layoff did not necessarily mean that he did not search for work, as “an employee who goes to various employers looking for work may not be permitted to file an employment application if there are no openings.”). Further, as indicated above, Hambamo testified that he did, in fact, “look for work” “every day” in May 2011, “in person plus online” (Tr. 188).⁸⁰ Accordingly, the Company's ar-

⁷⁸ The foregoing summary is based on Hambamo's testimony (Tr. 187–188, 191, 194–220, 478–479, 491–519, 527–528, 545, 555–560, 563), related documentation (see, e.g., GC Exhs. 27–37, 46, 54; and R. Exhs. 3, 7, 9, 10), and the parties' “joint stipulations” (Jt. Exh. 1).

⁷⁹ The Company's posthearing brief does not challenge Hambamo's subsequent decisions to quit Swift, ANF, and Nahom or his entitlement to backpay during his subsequent relatively brief periods of unemployment.

⁸⁰ There is no evidence that Hambamo did not look for work during the last week of April as well (he was never asked).

gument is without merit.

B. *Hambamo's Resignation from ANLV Cab*

As discussed above with respect to Hailu's resignation from Whittlesea, it is the General Counsel's burden to show that a discriminatee's decision to quit interim employment was reasonable. Contrary to the Company's contention, the General Counsel satisfied that burden here with respect to Hambamo's decision to quit Frias/ANLV. As indicated above, Hambamo testified that he quit because he was put on the extra list with all of its associated adverse working conditions. As previously discussed, this testimony is generally consistent with the testimony of Geberselasa, who had previously worked for Frias; Kindeya, who was hired by Frias in December 2013; and Frias's HR Director.⁸¹ It is also consistent with other undisputed evidence. The Company stipulated that Hambamo earned an average of \$455 per week during the last 6 months he worked at Lucky Cab (Tr. 768; Jt. Exh. 1, p. 8). In contrast, Hambamo's tax records show that he made a total of \$1996 in gross earnings at Frias/ANLV during the 6 weeks he worked there from August 10 to September 20, 2011 (GC Exh. 34). Dividing \$1996 by 6 weeks equals \$333 per week, over 25 percent less than the \$455 he averaged per week at Lucky Cab.

C. *Hambamo's Subsequent Search for Work*

As with the other terminated employees, the Company also argues that Hambamo should be denied any backpay after quitting Frias/ANLV because he abandoned the cab driving industry and only looked for other types of work (hotel-casino housekeeper, bus driver, and truck driver). For essentially the same reasons previously discussed, the Company's argument is without merit. First, Hambamo was not required to search and apply for other cab driver jobs. Second, the Company only presented evidence that one other taxi service in Las Vegas was hiring, Whittlesea, and the Company failed to establish that the new-hire positions there were any more substantially equivalent than those at Frias/ANLV. Third, Tesema had already been rejected by two other cab companies, Yellow and Nellis, before working for Frias/ANLV. Finally, as summarized above, Hambamo engaged in a diligent search for other types of jobs related to his prior experience. As with Demeke, he even took the initiative to get training as a truck driver, and was hired for his first truck driving job less than a month later.

D. *Hambamo's Interim Earnings*

Aside from its meritless arguments above, the Company does not challenge the General Counsel's calculation of Hambamo's interim earnings or the total net backpay due him for 2011 (\$14,586). However, the Company disputes the General Counsel's calculations for 2012, 2013, and 2014.

1. 2012 interim earnings

The Company's posthearing brief (p. 56) appears to argue that Hambamo is due no backpay for the third and fourth quar-

⁸¹ Contrary to the Company's posthearing brief (p. 54 n. 36), Hambamo's testimony about sometimes waiting for a cab for several hours without pay is not clearly inconsistent with the testimony of Frias's HR Director or the record as a whole. See fn. 10, *supra*.

ters of 2012 because his average weekly interim earnings from July 21, 2012 through the end of the year (\$517) fully offset his \$455 average weekly earnings at Lucky Cab. However, as previously noted (fn. 59), net backpay is computed on a quarter-by-quarter basis. As indicated in the second amended backpay specification (GC Exh. 1(i), Appx. G, p. 2), Hambamo had no earnings during the first 2 weeks of the third quarter. Thus, notwithstanding his higher earnings in the remaining weeks, his total earnings for that quarter were still \$231 less than what he would have earned during the quarter at Lucky Cab.

Accordingly, as indicated in the specification, Hambamo's total net backpay for 2012 is \$4330.

2. 2013 interim earnings

The second amended backpay specification indicates that Hambamo had \$17,150 in net self-employment earnings in 2013. The Company disputes this amount, contending that several business expenses were improperly deducted.

a. *Car and truck expenses.* Hambamo claimed \$52,997 in car and truck expenses on line 9 of his 2013 Schedule C (GC Exh. 36(c)). The Company argues that this amount should not have been deducted in calculating his net interim earnings because the receipts Hambamo produced at the hearing only totaled \$17,623 (R. Exh. 6). However, Hambamo testified that he only produced what he could find. Further, he testified that he did not store his old receipts in any organized way; that he just put them in plastic bags or on shelves or in drawers around the house; that the house was very cluttered and he was not home most of the time; and that he could not say whether receipts were missing (Tr. 533–540).

In any event, the IRS permitted self-employed taxpayers in 2013 to claim their car and truck expenses—including depreciation, insurance, registration fees, maintenance and repairs, fuel, and oil—using a standard mileage rate (56.5 cents per mile plus parking fees and tolls) instead of their actual expenses.⁸² Hambamo's tax preparer apparently used that standard mileage rate instead of adding up all of Hambamo's receipts.⁸³ This is evident from the absence of any separate deductions for actual expenses, such as repairs and maintenance on line 21 or insurance on line 15, as well as the low amount claimed for depreciation on line 13, which, as discussed below, was far less than what he could have claimed if it was for his truck as well as his trailer.⁸⁴ And as previously discussed, the Board likewise permits using such standard rates or estimates in calculating net interim earnings.

b. *Depreciation.* Hambamo paid \$46,900 for the truck and \$8000 trailer he bought in or around August 2013. On line 13 of his 2013 Schedule C, Hambamo claimed \$4870 in deprecia-

⁸² See the IRS 2013 Instructions for Schedule C, and IRS Publication 535. See also <https://www.irs.gov/newsroom/car-and-truck-expense-deduction-reminders>.

⁸³ Hambamo used a different tax preparer in 2013 than Demeke and Hailu, and the Company did not call her to testify. As previously discussed, it was the Company's burden to show that Hambamo's expenses were improperly claimed and/or deducted, and ambiguities are resolved in favor of Hambamo.

⁸⁴ Compare Hambamo's 2014 Schedule C (GC Exh. 37(g)), discussed below, which was prepared by a different tax preparer.

tion. As indicated above, this appears to have been for the trailer because MACRS depreciation on the truck alone would have been \$7035,⁸⁵ and, as discussed above, Hambamo's tax preparer appears to have used the standard mileage rate for claiming truck expenses.⁸⁶

However, \$4870 is more than the allowable deduction from interim earnings for MACRS depreciation on the trailer. Applying a 3-year recovery period, 200% declining balance, and a mid-quarter convention for property placed in service in the third quarter of the year, MARCS depreciation on the trailer would be only \$2000 (.666666667 x \$8000 x .375). Accordingly, the difference between \$4870 and \$2000 (2870) will be added to Hambamo's interim earnings in 2013.

c. *Meals*. Hambamo claimed a \$13,783 deduction for meal expenses on his 2013 Schedule C. As with Demeke and Hailu, the Company argues that this amount should not have been deducted from his 2013 interim earnings. As previously discussed, the argument is meritless.

d. *Phone*. Hambamo also claimed a \$337 deduction for phone expenses on his 2013 Schedule C. The Company argues that this amount should not have been deducted from his 2013 interim earnings because Hambamo admitted that the expense was for a cell phone under his wife's name and he did not use it much. The Company argues that the phone was therefore "his wife's expense and not a business expense" (Br. 58). However, Hambamo's exact testimony was as follows:

Q. If you will turn the page to [GC Exhibit] 36(d). Looking at the bottom where it says other expenses, first line is cell phone, \$337. In 2013, did you use this cell phone for personal and business reasons?

A. I didn't use it that much.

Q. For what?

A. I was using it, but I was not the one that was paying the contract on the phone.

Q. So did you use this -- you didn't pay the contract on the cell phone?

A. It was under my wife, and she was the one taking care of the cell phone bill that particular year.

Q. So your wife paid the cell phone bill, not you?

A. The ones I paid during that year, I had some receipts. That's what I gave [the tax preparer] and that's what he wrote up there.

Q. Okay. When you were using the phone this year, was that for personal and business use?

A. Yes. [Tr. 548.]

In sum, Hambamo's complete testimony was that, although his wife paid the cell-phone contract in 2013, and he did not use the phone much, he did use it, for business as well as personal reasons, incurred his own expenses for using it, kept receipts of those expenses, and gave them to his tax preparer, who relied on them to claim the \$337 deduction on the 2013 Schedule C.

⁸⁵ This assumes a 5-year recovery period, 200% declining balance, and a mid-quarter convention for property placed in service in the third quarter of the year (.666666667 x \$49,000 x .375). See p. 12 of the IRS 2013 Instructions for Form 4562.

⁸⁶ No Form 4562 is attached to the 2013 tax return.

Further, as previously discussed with respect to Hailu's phones, IRS regulations allowed self-employed taxpayers to deduct from their 2013 business income the business percentage of the charges for phone lines other than the base rate of the first home landline. There is no evidence that the tax preparer claimed more expenses for the cell phone on Hambamo's 2013 Schedule C than what was permissible under that policy.⁸⁷

Accordingly, incorporating the correction for trailer depreciation above, Hambamo's total 2012 net interim earnings were \$20,020 (\$17,150 + \$2870), or an average of \$409 per week (\$20,020 ÷ the 49 weeks he had earnings).⁸⁸ Subtracting this amount from his average weekly earnings at Lucky Cab (\$455), equals \$46 per week. Thus, the Company owes Hambamo a total of \$3619 in net backpay for 2013 (\$2254 for the 49 weeks he averaged \$409 week in earnings + \$1365 for the 3 weeks he had no earnings).

3. 2014 Interim Earnings

The second amended backpay specification indicates that Hambamo had \$17,806 in net self-employment earnings in 2014. The General Counsel calculated this amount by adding the net earnings reported on his Schedule C for the month of January when he worked at Nahom (GC Exh. 37(c)) and the separate Schedule C for the remainder of the year when he worked for his own company, Elnathan Express (GC Exh. 37(g)). As with Hambamo's 2013 earnings, the Company disputes the General Counsel's calculation, contending that several business expenses were improperly deducted from Hambamo's earnings on the Schedule Cs.

a. *Depreciation*. Hambamo claimed \$24,890 in depreciation on his 2014 Schedule C for Elnathan Express. It is unclear how this was calculated, as no Form 4675 is attached. However, as discussed above, it is appropriate to deduct MACRS depreciation on both the truck and the trailer. Applying the same 3-year recovery period and 200% declining balance used in 2013, the 2014 depreciation on the unrecovered basis of the trailer for the full year would be \$4000 (.666666667 x \$6000). As for the truck, assuming a 5-year recovery period and 200% declining balance, depreciation on the unrecovered basis for the full year would be \$15,946 (.4 x \$39,865).⁸⁹ Adding the two amounts, the total allowable depreciation deduction from interim earnings would be \$19,946. Accordingly, the difference between \$24,890 and \$19,946 (\$4944) will be added to Hambamo's 2014 net interim earnings.

b. *Meals*. Hambamo claimed meal expenses of \$4248 on his Nahom Schedule C and \$9440 on his Elnathan Express Schedule C. The Company again argues that meal expenses should not be deducted from interim earnings. As indicated above, the argument is without merit.

As noted by the Company, however, the \$4248 amount appears to be too high. Hambamo testified (Tr. 535–536, 542) that it was not based on actual receipts but the number of days he drove for Nahom, i.e. the tax preparer calculated it based on

⁸⁷ See fn. 83, above.

⁸⁸ As indicated above, Hambamo was unemployed for 3 weeks after leaving ANF.

⁸⁹ This assumes a MACRS depreciation deduction of \$7035 in 2013. See fn. 85 and accompanying text, above.

the IRS standard per diem rate (\$59/day x .8 x the number of days driving).⁹⁰ Hambamo only worked for Nahom until January 28. Applying the standard rate, the most he could claim would therefore be \$1322. The difference between \$4248 and \$1322 (\$2926) will therefore be added to Hambamo's 2014 interim earnings.

c. *Phone.* Hambamo claimed a \$1200 deduction for phone expenses on his 2014 Elnathan Schedule C. The Company argues that this amount should not have been deducted from his 2014 interim earnings because Hambamo admitted that it was for two cell phones and that he used one of them only for personal reasons. However, Hambamo's full testimony was as follows:

- Q. The last entry under other expenses it says telephone, \$1200. Did you give your tax preparer documents to support \$1200 for telephone expenses?
- A. Yes.
- Q. Was this for more than one phone or just one phone?
- A. I have two lines.
- Q. Cell phones lines or are they landlines?
- A. Cell phone lines.
- Q. Do you use, are those telephone lines for personal use as well?
- A. For business and personal use.
- Q. Do you use them equally for business and personal use?
- A. Most of the time I use it for business.
- Q. Both of the phones for business?
- A. One line I use it to just communicate with family.
- Q. Okay.
- A. And this other one, I use it for the business.
- Q. The one that you use mostly for business, do you use that one for a little of bit of personal or almost for all business and no personal?
- A. Most of the time I use it for business, but sometimes because -- there is no limit -- I use it for my personal use as well.
- Q. Okay. Would you say 75 percent for business?
- A. Yes.
- Q. Twenty-five percent personal?
- A. Yes. [Tr. 541–542.]

This testimony is obviously ambiguous. Moreover, the only way to read the testimony the way the Company does is to assume Hambamo contradicted himself. It is more likely that Hambamo was saying that he only communicates with his family using one of the cell phones, not that he uses that cell phone only to communicate with his family. And, as with Hambamo's 2013 phone expenses, there is no evidence that the tax preparer actually claimed more than the business percentage for the two cell phones permitted under IRS regulations.

d. *Outside services.* Hambamo claimed \$8934 for on his 2014 Elnathan Schedule C for "outside services," which was apparently for the team driver he hired on and off during the year (Tr. 540–541). The Company argues that this amount should not be deducted from interim earnings because Ham-

bamo admitted under cross-examination that he hired the driver because the driver "didn't have anything"; that he was "trying to help" the driver; that he didn't make any more or less by hiring the driver; and that "you could say" he was being caring or charitable to a friend by hiring the driver (Tr. 519–520). The Company argues that it "should not be liable to fund Hambamo's charitable ventures for his friends" (Br. 61).

However, the Company cites no precedent supporting this argument. The only case it cites, *St. Barnabas Hospital*, 346 NLRB 731, 734 (2006), is clearly distinguishable as it involved a discriminatee who decided to remove herself from the labor market for several months by volunteering in Sri Lanka. Here, Hambamo simply decided to hire a team driver on and off. Further, Hambamo's payments to the driver were not strictly "charity." The driver actually performed work for Hambamo, driving the truck with him and doing "everything that a driver" does (Tr. 517).⁹¹ He also drove "solo" for other companies when he was not working for Hambamo (Tr. 519). Moreover, there is no evidence or contention that what Hambamo paid him (40 cents per mile he drove) was outside the normal range for such team drivers. In these circumstances, notwithstanding Hambamo's admitted willingness to "help" the driver, there is an insufficient basis to conclude that the payments to the driver were not a legitimate business expense.⁹²

e. *Other expenses.* Hambamo claimed \$1361 for "other expenses" on line 27a of his 2014 Nahom Schedule C. The Company argues that this amount should not have been deducted from interim earnings because the "other expenses" are not itemized (the second page of the Schedule C is not attached),⁹³ Hambamo testified that he did "not have any idea" how the tax preparer arrived at the amount (Tr. 543), and Hambamo failed to produce documents or receipts supporting the claimed expenses in response to the Company's subpoena.

However, there is nothing on the face of the tax return or the record as a whole to indicate that the amount claimed was improper. Consistent with the relatively short time period covered by the return, the amount is substantially lower than the amount claimed on line 27a for "other expenses" on Hambamo's 2014

⁹¹ "Team drivers" generally provide an opportunity to "keep the truck moving" without violating hours-of-service rules. See the Federal Motor Carrier Safety Administration Interstate Truck Driver's Guide to Hours of Service (March 2015), p. 7, available at: https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Drivers%20Guide%20to%20HOS%202015_508.pdf.

⁹² While businesses are typically profit driven, not every business decision is profit driven, at least not in the short term. A business may decide to incur certain expenses, notwithstanding the adverse impact on the immediate bottom line, for other reasons. For example, a business may decide to hire additional workers, or not to lay off workers, in order to divide the workload or to build or maintain "good will" with its workforce and the community. There is no reason why self-employed discriminatees such as Hambamo, who start their own businesses after being unlawfully discharged, would or should make their daily business decisions any differently. In any event, the Board has historically been wary of second-guessing or substituting its judgment for such daily business decisions. See, e.g., *Hospital Cristo Redentor*, 347 NLRB 722, 726 fn. 25 (2006); and *KSLM-AM.*, 275 NLRB 1342, 1343 (1985).

⁹³ Compare Hambamo's 2014 Elnathan Schedule C (GC Exh. 37(g), (h)).

⁹⁰ See pp. 8–9 of the IRS 2014 Instructions for Schedule C; and IRS Notice 2013-65 (2013–2014 Special Per Diem Rates), available at <https://www.irs.gov/pub/irs-drop/n-13-65.pdf>.

Elnathan Schedule C (\$16,964). As for the lack of supporting documents or receipts, as previously discussed, Hambamo testified that he only produced what he could find, and there is good reason to believe many were lost or missing. Finally, the one individual who could best reconstruct or recall how the tax deduction was calculated—the tax preparer—was not called to testify. As noted above, it was the Company’s burden to show that Hambamo’s expenses were improperly claimed and/or deducted, and ambiguities are resolved in favor of Hambamo.

In any event, it wouldn’t make any difference in the outcome. As indicated above, even allowing the \$1361 deduction, Hambamo’s total net interim earnings for 2014 were \$25,676 (\$17,806 + \$4944 + \$2926), or an average of \$493 per week.⁹⁴ This average weekly amount is well above Hambamo’s average weekly earnings at Lucky Cab in 2014 (\$455). Thus, no backpay is owed Hambamo for 2014.

In sum, adding the amounts of net backpay for 2011 (\$14,586), 2012 (\$4330), and 2013 (\$6521), the Company must

⁹⁴ As previously discussed, Hambamo’s 1099 from Nahom (GC Exh. 37(f)), indicates that he was paid \$20,050 in nonemployee compensation by Nahom in 2014, and this is the amount that the General Counsel used in calculating his total net earnings in 2014. However, as noted above (fn. 49), according to the pay reports (GC Exh. 46), the actual total gross compensation to Hambamo was \$19,755. Nevertheless, the result would be the same if this latter amount is substituted in the calculation, as it would only reduce Hambamo’s net earnings by \$295, and his average weekly earnings would be \$488 (\$25,831 ÷ 52 weeks), still more than his average weekly earnings at Lucky Cab.

pay Hambamo a total of \$25,437, plus interest and excess tax.

ORDER⁹⁵

Lucky Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, must:

1. Pay the individuals listed below the amounts specified after their names, plus accrued interest compounded daily to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State law.

Almethay Geberselasa	\$37,312
Elias Demeke	\$65,131
Edale Hailu	\$21,736
Malaku Tesema	\$32,559
Mesfin Hambamo	\$25,437

2. Reimburse Geberselasa, Demeke, Hailu, Tesema, and Hambamo for the adverse tax consequences of the multi-year lump sum backpay award to each of them, as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Dated, Washington, D.C., September 18, 2017

⁹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.