UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2836

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

MIDWESTERN PERSONNEL SERVICES, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

The jurisdictional statement of Midwestern Personnel Services, Inc. ("the Company") is not complete and correct. This case is before the Court upon the application of the National Labor Relations Board ("the Board") to enforce a Board Order against the Company. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"), which empowers the Board to

prevent unfair labor practices affecting commerce. The Court has jurisdiction, and venue is proper, under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices underlying this supplemental proceeding occurred in Indiana.

The Board's Supplemental Decision and Order issued on February 28, 2006, and is reported at 346 NLRB No. 58. (A 1-13.)[1] The Board's Order is final under Section 10(e) and (f) of the Act. The Board filed its application for enforcement on July 5, 2006. The application is timely; the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined the amount of backpay owed to 26 discriminatees for loss of earnings suffered as a result of the Company's unlawful actions against them.

STATEMENT REGARDING ORAL ARGUMENT

Although this case involves the application of settled legal principles to well-supported factual findings, the Company relies on inappropriate legal standards to obscure this classic case of the Board calculating the amount of

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[1] "A" references are to the joint appendix submitted by the Company with its brief. "SA" references are to the supplemental appendix submitted by the Board with this brief. "Br" refers to the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

backpay owed to discriminatees for the loss of earnings that they suffered as a result of the Company's unlawful refusal to reinstate them. Accordingly, the Board believes that oral argument will assist the Court, and that 10 minutes per side will suffice for the parties to present their views.

STATEMENT OF THE CASE

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

The Company leases cement and transport truckdrivers to various businesses. On June 21, 2000, the Board issued its Decision and Order in *Midwestern Personnel Servs., Inc.*, 331 NLRB 348 (2000), finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by instructing employees to designate Chauffeurs, Teamsters and Helpers Local Union No. 836 ("Local 836") as their collective-bargaining representative and threatening them with discharge if they did not, and violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by assisting and supporting Local 836 and by recognizing it in the absence of the uncoerced support of a majority of employees. (SA 23, 29.) Thereafter, a majority of the Company's employees expressed support for Chauffeurs, Teamsters and Helpers Local Union No. 215 ("the Union") as their collective-bargaining representative. (SA 23, 29.) After the Company refused to recognize and bargain with the Union, the employees engaged in a strike. (SA 23, 29.)

The Board subsequently found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening employees with discipline, loss of employment, and legal action if they engaged in a strike, and Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing and refusing to reinstate unfair labor practice strikers immediately upon their unconditional offer to return to work. (SA 23, 29.) The Board's Order directed the Company to offer reinstatement to all of the striking employees and to make each whole for any loss of earnings suffered as a result of the Company's unlawful conduct. (SA 23, 29.) On March 11, 2003, the Court entered judgment enforcing the Board's Order in full. *NLRB v. Midwestern Personnel Servs., Inc.*, 322 F.3d 969, 972 (7th Cir. 2003).

II. THE COMPLIANCE PROCEEDING

The Board's General Counsel instituted compliance proceedings, pursuant to the Board's Rules and Regulations, Series 8, as amended (29 C.F.R. 102.52 et seq.), to determine the amount of backpay due, and to consider the Company's other contentions regarding compliance with the enforced order. On June 30, 2003, the Board's Regional Director for Region 25 issued a compliance

specification on behalf of the General Counsel, alleging the amount of backpay due to the discriminatees.[2]

The Board held a 4-day hearing before an administrative law judge. The judge, in a supplemental decision issued on July 19, 2004, determined the specific amount of backpay due each of the discriminatees. (A 8-13.) The judge reviewed the circumstances of each affected discriminatee to consider the nature of any interim employment secured, and whether the employee had engaged in a reasonably diligent job search during each quarter of the backpay period in which he did not have interim employment. The judge found that all of the affected discriminatees had engaged in reasonably diligent job searches for all of their backpay periods. The judge tolled backpay for periods in which he found particular discriminatees to have been unavailable for work or to have been employed. The Company filed exceptions to the judge's findings and conclusions. (SA 31-35, 38-40.)[3]

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[2] The compliance specification was amended to include company contributions to employee 401(k) plans that the discriminatees would have received during the backpay period. (A 25-26.) References made in this brief are to the amended compliance specification, which is included in the Company's appendix. (A 25-56.)

[3] The Board's General Counsel excepted to the judge's failure to include interest on the backpay sums identified in his order. The judge issued an Amended Order on August 5, 2004, which ordered the Company to pay interest. (SA 36-37.) The Board affirmed the Amended Order. (A 1 n.4.)

After considering the Company's exceptions to the administrative law judge's supplemental decision and order, the Board (Chairman Battista and Members Schaumber and Walsh) issued its Supplemental Decision and Order on February 28, 2006. (A 1-13.) The Board affirmed the judge's supplemental decision and adopted his order regarding the amount of backpay due to the 26 discriminatees. (A 1.)

SUMMARY OF ARGUMENT

This Court enforced the Board's initial Order in this case, which found that the Company unlawfully refused to reinstate 26 striking employees after they made an unconditional offer to return to work. That finding is, according to the law of this Circuit, presumptive proof that some backpay is owed.

The Board acted well within its broad remedial discretion in determining the amount of backpay owed to the 26 discriminatees for the loss of earnings that they suffered as a result of the Company's unlawful refusal to reinstate them. The Company does not challenge the Board's individual computations for 14 of the 26 discriminatees and the Board is thus entitled to summary enforcement of its backpay computations for those 14 discriminatees. With respect to the remaining 12 discriminatees, the Company argues that those discriminatees failed to make a reasonably diligent effort to secure interim employment. However, it is the Company's burden to demonstrate that the discriminatees failed to exercise

reasonable diligence in searching for work, and the Company has utterly failed to meet that burden.

The Board reasonably rejected the Company's contention that certain discriminatees were not entitled to any backpay for all or some of the backpay period because they relied solely on the Union's looking-for-work list which resulted in only sporadic and brief employment. Contrary to the Company's claim, the Board found that no discriminatee relied exclusively on the list. Rather, most discriminatees sought work on their own, with the help of friends, and through the state unemployment agency, in addition to relying on the Union's list, even taking jobs that offered less than substantially equivalent employment when such employment was available. Other discriminatees engaged in self-employment as a means of successfully mitigating their losses. In any event, the Union's list proved to be an adequate means of seeking employment for many of the discriminatees.

The Board also reasonably rejected the Company's contention that several discriminatees were not entitled to backpay for certain periods of time because they failed to respond to the Company's letter purportedly offering reinstatement approximately 1 year after the Company's initial refusal to reinstate them. As the Board found, and the Company admittedly does not contest, the Company's letter did not offer the discriminatees substantially equivalent employment and thus was

not a valid offer of reinstatement. Accordingly, no discriminatee was obligated to respond to the Company's offer.

The Company makes a litany of contentions concerning many of the discriminatees individually. However, none of these claims has merit. It is settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate his loss of earnings need not comport with the highest standard of diligence; he need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. Furthermore, the existence of job opportunities by no means compels the inference that the discriminatees would have been hired if they had applied. It is, instead, the Company's obligation to show a clearly unjustifiable refusal to take equivalent employment.

Finally, the Board reasonably rejected the Company's argument that the administrative law judge refused to allow company counsel to question its expert witness and develop the facts surrounding its expert's report. Rather than excluding any probative evidence, the record shows that the judge simply prohibited company counsel from eliciting cumulative testimony on information already contained in the expert's report. In so doing, the judge acted well within his discretion.

ARGUMENT

I. THE BOARD REASONABLY DETERMINED THE AMOUNT OF BACKPAY DUE TO MAKE WHOLE 26 DISCRIMINATEES FOR ANY LOSS OF EARNINGS AND OTHER BENEFITS SUFFERED AS A RESULT OF THE COMPANY'S DISCRIMINATION AGAINST THEM

A. The Board Has Discretion to Devise Remedies that Effectuate the Policies of the Act, Subject Only to Limited Judicial Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to fashion appropriate remedial orders to expunge the effects of unfair labor practices. This section provides that the Board, upon finding that an unfair labor practice has been committed, shall order the violator "to take such affirmative action including reinstatement . . . with or without backpay, as will effectuate the policies" of the Act. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *NLRB v. R.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969); *Golden Indiana Bottling Co. v. NLRB*, 414 U.S. 168, 176-77 (1973).

It is well settled that the Board's exercise of its discretion in formulating backpay remedies is subject only to limited judicial review. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 207 (1964); *accord J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616, 622 (7th Cir. 1991); *NLRB v. My Store, Inc.*, 468 F.2d 1146, 1149 (7th Cir. 1973). As the Supreme Court has explained, "in fashioning its remedies under [the Act] . . . the Board draws on a fund of knowledge all its own, and its choice of

remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). Accordingly, "[w]hen the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346-47 (1953) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)); *accord My Store, Inc.*, 468 F.2d at 1149. Moreover, the Board's determination that an employer has failed to meet its burden of showing facts that would mitigate or negate its backpay liability may be overturned on appeal only if the record, considered in its entirety, does not disclose substantial evidence to support the Board's findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see J. Huizinga Cartage*, 941 F.2d at 619.

B. The Board is Entitled to Summary Enforcement of Its Uncontested Calculations of Backpay Liability

The Company chose not to except to the administrative law judge's individual computations of backpay for 14 of the 26 discriminatees. (A 2 n.9.) In the absence of exceptions, the Board adopted those findings. (A 1 n.1.) It follows that, under Section 10(e) of the Act (29 U.S.C. § 160(e)), those findings cannot be challenged before this Court, and the Board is entitled to summary enforcement of

its Order except for the portion that was challenged below.[4] Summary enforcement of the unchallenged portion of the Board's order is also appropriate because the Company does not contest (Br 9) the Board's backpay computations before this Court. *See Masiongale Elec.-Mech., Inc. v. NLRB*, 323 F.3d 546, 557 (7th Cir. 2003) (citing *Beverly California Corp. v. NLRB*, 227 F.3d 817, 831 (7th Cir. 2000) (granting summary enforcement of that portion of the Board's order not challenged before the Court)).

C. The Board's Backpay Determinations Were Reasonable

The Company challenges the Board's backpay determinations with respect to 12 of the 26 discriminatees. In so doing, the Company asserts (Br 32-46) that the 12 discriminatees failed to reasonably mitigate their damages during various quarters throughout the backpay period.[5] The Board reasonably rejected (A 1, 12) those arguments.

Discriminatees are required to mitigate their damages by seeking interim employment after their unlawful discharge. See *Phelps Dodge Corp. v. NLRB*,

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[4] Section 10(e) provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court . . . ." 29 U.S.C. § 160(e).

[5] The discriminatees commenced an unfair labor practice strike on January 17, 1998. (A 1.) The backpay period began on March 27, 1998, when the Union made an unconditional offer to return to work on behalf of the discriminatees, and the Company refused to reinstate them in violation of Section 8(a)(3) and (1) of the Act. (A 1.) The backpay period ended on December 31, 1999, when the Company ceased doing business in the relevant geographic area. (A 1.)

313 U.S. 177, 198-200 (1941). That duty, however, requires only that discriminatees make a "reasonable effort to obtain interim employment" in order to minimize their own losses. *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); *accord NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985); *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422-23 (1st Cir. 1968). They are not held to the highest standard of diligence in their job search efforts and need not exhaust all possible job leads. *Mining Specialists, Inc.*, 335 NLRB 1275, 1283 (2001) (citation omitted). "Success or failure in securing interim employment is not a measure of the sufficiency of the employee's search [for interim employment;] the law requires only an 'honest good faith effort.'" *Kawasaki Motors*, 850 F.2d at 527 (citations omitted); *accord NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-76 (5th Cir. 1966); *Golay & Co. v. NLRB*, 447 F.2d 290, 295 (7th Cir. 1971).

A good faith effort requires conduct "consistent with an inclination to work and to be self-supporting;" such an inclination "is best evidenced not by a purely mechanical examination of the number and kind of applications for work which have been made," but rather by "the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment." *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), *enforced*, 354 F.2d 170 (2d Cir. 1965). Reasonableness of effort is

"preeminently a question of fact," *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 630 (4th Cir. 1988), which "is determined by . . . the economic climate in which the worker finds himself, the worker's skill and qualifications, and the worker's age and personal limitations." *Id.* at 629.

"[T]he 'finding of an unfair labor practice . . . is presumptive proof that some backpay is owed.'" *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976) (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965)). And the burdens placed on the parties in a backpay proceeding are clear. "[T]he burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is upon the [wrongdoer] to establish facts which would negative the existence of a liability to a given employee or which would mitigate that liability." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *accord NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 513 (7th Cir. 1991); *NHE/Freeway*, 545 F.2d at 593. That burden is not met by merely presenting evidence of a lack of success or low interim earnings. *Kawasaki Motors*, 850 F.2d at 527; *Miami Coca-Cola Bottling*, 360 F.2d at 575-76. Any doubts arising with respect to alleged affirmative defenses are to be resolved against the wrongdoer, who committed the unfair labor practice. *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972); *Kawasaki Motors*, 850 F.2d at 527.

Governed by these principles, the Board's Order was reasonable, and is therefore entitled to enforcement.

1. Henry Langdon

The Company contends (Br 32-33) that discriminatee Henry Langdon failed to mitigate his damages throughout the entire backpay period and therefore is not entitled to any backpay. In support of its claim, the Company asserts (Br 32) that Langdon relied solely on the Union's looking-for-work list which provided him with only sporadic and brief employment opportunities. As we now show, however, Langdon did not rely solely on the list, but rather sought and obtained work on his own when the list appeared to be insufficient to him, even accepting a more onerous job than he held while employed with the Company. In any event, the list proved to be an effective method of seeking employment for Langdon and several other discriminatees; Langdon secured multiple jobs through the Union's list.

Immediately after the Company refused to reinstate Langdon following the unfair labor practice strike, Langdon signed the Union's looking-for-work list. (A 3, 10; SA 132-33.)[6] Through the Union's list, he secured 6 jobs in 1998, one of

[6] Most of the discriminatees used the Union's looking-for-work list as a means for seeking employment. The list was maintained at the union hall for members seeking work as truckdrivers in the construction industry. (A 3, 9; SA 51-54.) In order to receive referrals through the Union's list, discriminatees were required to sign the list at least once every 30 days, though some signed more frequently. (A

which lasted 6 months. (A 3, 10; SA 134.) Thus, there is no merit to the Company's claim that Langdon "knew early on" that the list was ineffective; he remained employed for more than 6 of the first 9 months of the backpay period through union referrals alone. *See Local 3, IBEW (Fischbach & Moore, Inc.)*, 315 NLRB 1266, 1266 (1995) (finding that discriminatee made a reasonably diligent effort to seek work where he applied to several employers and actually worked for more than half of the backpay period).

More generally, the Company contends (Br 25) that Langdon, and other discriminatees, relied solely on the Union's looking-for-work list, and that the Board erred in finding that this satisfied their duty to mitigate lost wages. The Company argues (Br 26-28) that, under Board law, seeking work through a union hiring hall is sufficient only when the discriminatee has demonstrated a past practice of securing work in this manner, or when the discriminatee does so out of a desire to be a "loyal union member." It is only in these limited circumstances, the Company asserts (Br 27), that a discriminatee can satisfy his obligation to mitigate his losses by confining his job search efforts to a union hiring hall.

The Company's argument is misplaced, however, for the Board expressly found (A 11) that no discriminatee relied solely on the Union's list. Rather, in

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3, 9; SA 52-53.) When employers called the Union looking for drivers, the Union contacted discriminatees, starting at the top of the list. (A 3, 9; SA 52-53.)

addition to signing the Union's list, discriminatees applied to employers on their own, with the help of relatives, and through the Indiana unemployment agency. In addition, a few discriminatees engaged in self-employment. Langdon, in particular, signed the Union's list but sought work through the local help wanted ads when the list appeared to be insufficient to him, ultimately accepting a more onerous job than the one he held while working for the Company. (A 10; SA 132-33, 135, 137-38, 140.) Even so, the Board has long held that seeking employment through a union's referral system may constitute a reasonably diligent search. *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1198 (1982); *Seafarers Int'l Union (Isthmian Lines, Inc.)*, 220 NLRB 698, 698-99 (1975). As the Board found (A 3), the Union's list proved to be a successful means of securing work for several discriminatees, including Langdon.

In any event, there is no merit to the Company's claim (Br 26-28) that only discriminatees with a past practice of seeking work through a union hiring hall, or discriminatees acting out of a desire to remain loyal to their union, can rely on a union hiring hall as a means of seeking employment. In support of its claim, the Company cites *Wright Electric, Inc.*, 334 NLRB 1031 (2001), *enforced*, 39 Fed. Appx. 476 (8th Cir. 2002), and *Local 90, Operative Plasterers and Cement Masons' Int'l Assoc. (Southern Illinois Builders)*, 252 NLRB 750 (1980). In *Wright Electric*, the Board found that the discriminatee successfully mitigated his

losses where he relied on the union's hiring hall as was his usual practice during his 16 years as a union member. *Wright Electric*, 334 NLRB at 1031. Similarly, in *Southern Illinois Builders*, the Board found that a discriminatee made a reasonably diligent search for employment where he limited his search to unionized employers, as required by union rules. *Southern Illinois Builders*, 252 NLRB at 750, 754.

Fatal to the Company's claim, however, nowhere in either of those cases does the Board state that those are the only circumstances under which an employee can rely on a union hiring hall as a means of seeking employment. Rather, as the Board held, and the case law supports, Langdon and the other discriminatees, as union members, were entitled to seek work through the Union's list, the same as any union member. *See Seafarers Int'l Union*, 220 NLRB at 698-99 (finding that discriminatee (a seaman) had successfully mitigated his losses by relying on the union's hiring hall where he merely "did what was the custom of other seamen"). Thus, the Board reasonably rejected the Company's arguments that Langdon's, and the other discriminatees', utilization of the Union's services for interim employment relieves it of its liability.

The Company mistakenly argues (Br 32) that Langdon did nothing to find a job until mid-1999. Throughout early 1999, Langdon remained on the Union's list, and, in April, he again secured a job through the list, this time driving a truck for

Spencer County Cooperative. (A 10; SA 68, 135.) Soon after Langdon began working for Spencer County Cooperative, however, work stalled due to an unusually wet rainy season. (A 10; SA 135, 137-38, 140.)

By July 1999, having received no additional referrals from the Union's list, Langdon feared losing his house and began searching for jobs in the local newspaper ads. (A 10; SA 135, 137-38, 140.) Through his own efforts, he secured a job as an over-the-road truckdriver for a company located in Alabama. (A 10; SA 133.) Although that job required him to spend his nights on the road away from home, covering a 10-state area and traveling as far as Georgia, Langdon maintained that job for the remainder of the backpay period. (A 10; SA 138.) Langdon did so even though a wrongfully discharged discriminatee need only seek employment that is "substantially equivalent to" his former job, and therefore is not required to "seek or retain a job more onerous than the job from which he or she was discharged." *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988) (citing *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972)). Under these circumstances, the Board reasonably found (A 3, 11-12) that Langdon made a reasonably diligent effort to seek employment by relying on the Union's list, searching for work on his own when it appeared to him that the list was not

sufficient, and accepting more onerous work when such work became available to him.

Throughout the entire backpay period, Langdon also registered with the Indiana unemployment agency. (A 3.) The Company argues (Br 32) that registering with the Indiana unemployment agency should not be considered in evaluating the reasonableness of Langdon's job search. Ordinarily, the Indiana unemployment agency requires discriminatees to document their job search efforts with the agency on a weekly basis in order to receive unemployment benefits. However, because the agency waives this requirement for discriminatees who have signed up for work through a union hiring hall, the Company contends that the Board should not have relied on a discriminatee's registering with the agency as evidence of a discriminatee's job search efforts.

As the Board noted (A 4), it is settled that a discriminatee's registering with a state unemployment agency is prima facie evidence of a reasonable job search. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), *enforced sub nom.*, *Package Serv. Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *United Aircraft Corp.*, 204 NLRB 1068, 1071 n.6 (1973). The fact that, in this case, the Indiana unemployment agency acknowledges that signing the Union's looking-for-work list is an adequate means of seeking employment, and requires no additional validation from a discriminatee, does not bolster the Company's claim. Instead, it

further demonstrates the reasonableness of the Board's reliance on the Union's list as an adequate means of a discriminatee's efforts to mitigate his losses. *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1198 (1982) (finding discriminatee's reliance on the union's hiring hall as his basic means of employment to be a reasonable means of obtaining interim employment).

2. Gregory Harris

The Company claims (Br 33-34) that discriminatee Gregory Harris "did nothing" to seek employment other than rely on the Union's list during the fourth quarter of 1998 and the first quarter of 1999 and thus is not entitled to any backpay during this time.[7] The Company also asserts (Br 33-34) that Harris is not entitled to backpay following his employment at DMI, which he voluntarily quit during the second quarter of 1999. However, contrary to the Company's claim, Harris never relied solely on the Union's list, but also applied to jobs on his own, with the help of friends, and through the Indiana unemployment agency's veteran's assistance program throughout the backpay period. Furthermore, Harris was not required to take the job at DMI cutting timber—a dangerous job far more onerous than the one

[7] As explained above (p. 11 n.5), the backpay period began on March 27, 1998, and ended on December 31, 1999. (A 1.) Thus, the first backpay quarter of 1998 runs from March 27, 1998, until March 31, 1998; the second backpay quarter of 1998 spans from April 1, 1998, to June 30, 1998; and so on, with the backpay period ending on December 31, 1999, the last day of the fourth backpay quarter of 1999. (*See, e.g.,* A 42.)

he held with the Company prior to the strike—and thus cannot be penalized for quitting.

After the Company refused to reinstate Harris, he searched for work by signing the Union's looking-for-work list, registering with the Indiana unemployment office, networking with friends, and submitting applications on his own. (A 10; SA 88-89, 92-94, 96.) Through the Union's list, he was able to secure work with three different employers. (A 10; SA 89-92, 94-95, 97.) Harris also obtained employment with three employers on his own. (A 10; SA 89-91, 97.)

Specifically, in the fourth quarter of 1998, Harris worked for J.H. Rudolph and Industrial Contractors, both jobs which he obtained through the Union's list. (A 10, 11; SA 90, 94-95.) Also during this quarter, Harris registered with the veterans' assistance program through the Indiana unemployment agency. (A 10, 11; SA 92.) Through this program, discriminatees are referred to employers that are actively seeking to hiring veterans. (SA 92.) Harris received several interviews, but no job offers, through this program. (SA 92-94.)

In the first quarter of 1999, Harris continued to search for work through the Union's list and the veterans' assistance program at the Indiana unemployment agency. (SA 99.) In addition, Harris applied for jobs on his own, and sought help from friends. (SA 94.) Thus, the record shows that far from "doing nothing," during the fourth quarter of 1998 and the first quarter of 1999, as the Board

reasonably found (A 3, 11), Harris made a good faith effort to seek employment. *Amshu Assocs., Inc.*, 234 NLRB 791, 794 (1978) (finding a reasonably diligent search for work where discriminatee consulted friends, relatives, and associates, contacted a local union, registered with the state unemployment agency, and read want ads and responded by telephone).

In the second quarter of 1999, because Harris, in his own words, "had a family to support," Harris took a non-union job cutting timber for DMI Furniture. (SA 91.) As that job was far more dangerous than the one he held with the Company prior to the strike, Harris was not required to take it. Therefore, the Board reasonably rejected (A 3, 11) the Company's argument that he is not entitled to backpay after he quit that job. *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988) (citing *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985)); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972) ("[a] wrongfully discharged employee is expected to seek only new employment that is substantially equivalent to the position lost[,]" and "is not required to seek or retain a job more onerous than the job from which he or she was discharged").

3. Randy Leinenbach

The Company claims (Br 34-36) that discriminatee Randy Leinenbach failed to mitigate his damages throughout the entire backpay period, and therefore is entitled to no backpay.[8] The record, however, does not support that claim.

Throughout the relevant backpay period, Leinenbach applied for work with a number of employers, and specifically recalled the names of eight employers with whom he had inquired. (A 3-4, 10; SA 103-04, 108-12.) At one of these employers, Leinenbach inquired five or six times during the backpay period, and at another, he inquired once a month. (SA 109-13.) In addition, Leinenbach registered with the Indiana unemployment agency. (A 4, 10; SA 102.)

The Company contends (Br 34-35) that Leinenbach failed to find any meaningful work for the entire backpay period. However, the record shows that Leinenbach earned some income in each quarter of 1999. During this time, he performed truck detailing—a job that required a commercial driver's license—both through self-employment and for his parents' company. (A 4; SA 106-07, 113-16.) Thus, based on his continuing efforts to obtain employment, and his success in mitigating his damages throughout every quarter of 1999, the Board reasonably found (A 3-4, 10-11) that the Company failed to meet its burden of showing that Leinenbach failed to make a reasonable effort to obtain interim employment. *See*

NLRB v. Mastro Plastics Corp., 354 F.2d 170, 179 (2d Cir. 1965) ("[u]nless in taking substantially equivalent or self-employment the discriminatee willfully forwent greater earnings, his backpay should not be reduced beyond the interim earnings he in fact received").[9]

The Company further contends (Br 35) that, because Leinenbach did not respond to the Company's recall offer, it shows that he was not interested in working. However, as the Board found (A 1-2, 10) and the Company does not dispute (Br 35 n.2), the Company's April 12 letter offering reinstatement was not valid because the positions offered were not substantially equivalent. *See Weldun Int'l, Inc.*, 340 NLRB 666, 667 (2003); *Thalbo Corp.*, 323 NLRB 630, 637-38 (1997). Thus, Leinenbach had no obligation to respond. *CleanSoils, Inc.*, 317 NLRB 99, 110 (1995) (citing *Consolidated Freightways*, 290 NLRB 771 , 773 (1988), *enforced in relevant part*, 892 F.2d 1052, 1057 (D.C. Cir. 1990) ("[it] is . . . incumbent on the [employer] to extend to the injured employee a facially valid

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[8] Leinenbach was removed from the workforce for the last 4 months of 1998. (A 7 n.4; SA 105.) The Board excluded those months from its backpay computations.

[9] The Company contends (Br 33-34) that Leinenbach is not entitled to any backpay because he did not, at a minimum, sign the Union's looking-for-work list. However, whether or not Leinenbach signed up on the Union's list is only one factor to be considered by the Board in determining the reasonableness of an employee's job search and is not dispositive. *Cf. Avon Convalescent Center, Inc.*, 219 NLRB 1210, 1211 (1975) (citing *Southern Silk Mills, Inc.*, 116 NLRB 769, 770 (1956) ("[a]lthough registration or the failure to register [with a local unemployment agency] will be considered by the Board, it is not determinative of the issue of willful loss of earnings")).

offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer")).[10] Thus, the Company, having failed to make a valid offer of reinstatement after the strike ended, cannot in good faith now rely on its unlawful conduct to deny discriminatees the backpay they are due under the Act.

4. Scott Taylor

The Company claims (Br 36) that discriminatee Scott Taylor failed to mitigate his damages during the fourth quarter of 1998 and the first quarter of 1999. The Company asserts (Br 36) that, during this 6-month period, Taylor was unable to identify "any job search effort made." As the record shows, however, Taylor diligently sought employment throughout this time, and was successful in securing one job.

Specifically, Taylor recalled no less than eight different employers that he applied to during this 6-month period, either on his own or through the Indiana unemployment agency. (A 11; SA 173-75.) In addition, Taylor secured employment with Sterling Boilers during this time. (A 10; SA 175.) Thus, the Board reasonably found (A 3, 11-12) that Taylor made a reasonably diligent effort to seek employment throughout both quarters.

[10] The Board found (A 1-2, 10) that the positions offered were not substantially equivalent because the discriminatees would not have retained their rates of pay or seniority.

Furthermore, in so arguing, the Company seeks to isolate this 6-month period, when work was admittedly slow due to the seasonal nature of work in the construction industry, from the remainder of the backpay period in which Taylor successfully mitigated nearly all of his damages. It is settled, however, that the Board looks to the backpay period as whole. *Local 3, IBEW* ("*Fischbach and Moore, Inc.*"), 315 NLRB 1266, 1266 (1995). Throughout the first three quarters of 1998, Taylor successfully mitigated all of his losses. (A 52.) In addition, in the second quarter of 1999, Taylor secured employment with Concrete Supply, where he remained employed through the remainder of the backpay period. (SA 176-78.) Under these circumstances, the Board justifiably found (A 3, 11-12) that Taylor made a reasonably diligent effort to seek employment throughout the backpay period as a whole.

5. Randall Underhill

The Company contends (Br 36-37) that discriminatee Randall Underhill is not entitled to any backpay for the second, third, and fourth quarters of 1999 after he turned down the Company's offer to return to work at the Boonville plant. Because Underhill turned down their offer due to a lack of transportation, the Company asserts, he effectively removed himself from the job market at that time, and thus is not entitled to backpay for the remainder of the backpay period. As we now show, however, the Company's offer was not a valid offer of reinstatement.

Thus, Underhill was not obligated to accept the Company's offer and the Company cannot rely on his refusal to demonstrate a failure to mitigate. Furthermore, despite his lack of transportation, Underhill never stopped looking for work, and even worked at one employer during that time.

Underhill received a letter from the Company in April 1999, purportedly offering to reinstate him at the Owensboro plant. (A 9, 10; SA 41, 75.) However, as explained above (p. 25 n.10), because the position offered was not substantially equivalent to the one Underhill held prior to the strike, it was not a valid offer of reinstatement, and thus Underhill was not obligated to respond. (*See* cases cited above, p. 24.)

Nonetheless, Underhill contacted the Company and asked if he could instead return to the Boonville plant—the facility where he had worked prior to the strike. (SA 76.) Underhill explained that he did not have a vehicle at that time and, because the Boonville plant was only a mile or two from his house, he could walk to work at the Boonville plant. (SA 76, 79.) The Company agreed, but told Underhill that he would have to "start at the bottom." (SA 76-77, 84). Because Underhill would lose the seniority he held prior to the strike, the job at the Boonville plant was also not substantially equivalent employment, and Underhill was under no obligation to accept it. (*See* cases cited above, p. 24.) Nevertheless, Underhill was willing to accept the job. However, before he could start, the

Company required that he take a drug test in Evansville, a location that was too far away for Underhill to walk to. (SA 78-83.) Therefore, Underhill had to decline the job offer. (SA 82-83.)

The Company does not advance its case by relying on *Coronet Foods, Inc.*, 322 NLRB 837 (1997), *enforced in relevant part*, 158 F.3d 782, 800-01 (4th Cir. 1998), for that case is readily distinguishable. In *Coronet Foods*, the Board held that a discriminatee was not entitled to backpay for a 2-month period in which he failed to seek or accept employment because he lacked transportation. 322 NLRB at 845. The Board found that there was no evidence in the record that the discriminatee "made any effort to seek employment during this period." *Id.* Unlike in *Coronet Foods*, Underhill never stopped looking for work. Indeed, during the second quarter of 1999, Underhill successfully secured employment at Metzger Construction Company. (A 10; SA 85-86.) At that time, he was able to share a ride with a friend to and from work. (SA 86-87.) Thus, the Board reasonably found that Underhill made a reasonably diligent effort to seek employment even while he lacked transportation.

6. David Wyatt

The Company claims (Br 37-38) that discriminatee David Wyatt failed to mitigate his damages throughout all four quarters of 1999.

First, the Company contends (Br 37), Wyatt relied solely on the Union's list during the first quarter of 1999, and thus is not entitled to any backpay for that quarter. Contrary to the Company's claim, however, the record shows that, after the Company refused to reinstate Wyatt, he searched for work by signing the Union's list, registering with the Indiana unemployment agency, and submitting job applications on his own. (A 10, 11; SA 166-67.) Wyatt specifically recalled the names of 10 employers at which he inquired, either on his own or through the unemployment office. (A 10, 11; SA 166-68.) In addition, throughout the first quarter of 1999, Wyatt was on the recall list at J.H. Rudolph, an employer for whom he had worked from April 1998 until he was laid off in December 1998 because the slower winter season had set in. (SA 170-71.) During this time, Wyatt also remained on the Union's list and registered with the Indiana unemployment agency, and even applied at Wal-Mart "for whatever [work] they had." (SA 169.)

Second, the Company disingenuously argues (Br 37-38) that Wyatt failed to accept its invalid offer of reinstatement in the second quarter of 1999, and therefore, "as a matter of law," is not entitled to backpay for that quarter or the remainder of the backpay period. The Company, however, cites no case law to support its claim. As already discussed (see pp. 24-25 above), the Board found (A 1-2, 10) that the Company's offer was not a valid offer of reinstatement because it did not offer discriminatees substantially equivalent employment, and therefore,

the discriminatees were not obligated to accept the Company's offer. The Company concedes that it no longer challenges that finding (Br 35 n.2), yet seeks to backdoor its argument and hold discriminatees liable for the Company's own unlawful refusal to reinstate the discriminatees. The Board reasonably rejected the Company's argument and refused to rely on Wyatt's failure to respond to the invalid letter in deciding whether he made a reasonably diligent effort to secure interim employment.

In any event, Wyatt continued to seek employment throughout the last 3 quarters of 1999, securing employment at Concrete Supply during this time, and ultimately returning to J.H. Rudolph when work picked up again. (SA 170-72.) In light of his continuing efforts to seek employment in 1999 and the backpay period as a whole, the Board reasonably found (A 3, 11-12) that Wyatt made a reasonable effort to seek employment and is therefore entitled to backpay.

7. Gerald Fickas

The Company claims (Br 38-39) that discriminatee Gerald Fickas failed to mitigate his damages during the second, third, and fourth quarters of 1998, and the first quarter of 1999, and therefore is disqualified for backpay in those quarters. The record, however, does not support that claim.

After the strike ended, Fickas searched for work by signing the Union's list, talking to friends, submitting at least one application on his own, and reading help

wanted ads in local newspapers. (A 10; SA 141-42.) Within one month, Fickas was referred by the Union to a job at D.J. Transportation. (A 10; SA 141, 144.) However, at that time, D.J. Transportation did not have a lot of work. (SA 144.) So, when Fickas learned through the Union of a job at J.H. Rudolph, he left D.J. Transportation and went to work for J.H. Rudolph. (A 10; SA 144.) Later, when Fickas was laid off by J.H. Rudolph due to the Spring rainy season, he returned to D.J. Transportation. (SA 145-46.) He was later recalled to J.H. Rudolph in the third quarter of 1998. (SA 145-46.)

In addition to signing the Union's list once a week, Fickas also searched the newspaper help wanted ads. (A 10; SA 142.) He responded to a few of the ads, but his search was limited because he was not willing to take over-the-road jobs which would require him to be away from home 6 to 10 weeks at a time. (A 10; SA 142-43.)[11] Fickas also recalled submitting at least one application on his own. (SA 143.)

The Company contends that Fickas earned "practically nothing" during the second and fourth quarters of 1998 and that his only meaningful earnings in 1998 resulted from his third quarter earnings at J.H. Rudolph. As the Board found (A 3,

[11] Over-the-road truck driving is not substantially equivalent to the local truckdriving that Fickas and the other employees engaged in for the Company prior to the strike. *Coronet Foods, Inc.*, 322 NLRB 837, 845 (1997). Therefore, Fickas was not required to seek such employment. (See p. 18 above.)

11), however, far from doing nothing, Fickas relied on the Union's list throughout this time, read the help wanted ads, and applied to employers on his own. Similarly, the Company argues that Fickas relied solely on the Union's list during the first quarter of 1999. However, as already discussed (see p. 16 above), the Union's list was an effective means of seeking employment for many of the discriminatees, and Fickas secured two jobs through the Union in 1998. The Company bears the burden of showing that a discriminatee failed to seek employment, and this burden cannot be met by merely pointing to a lack of success or a lack of earnings. *See Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-76 (5th Cir. 1966); *see also Golay & Company. v. NLRB*, 447 F.2d 290, 295 (7th Cir. 1971) (citing *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955) ("[t]he test is not whether an employee worked in the period or what he earned, per se, but whether in mitigation of his loss of earnings he made an 'honest good faith effort'")).

What is more, the Company ignores Fickas' substantial interim earnings for the last three quarters of 1999. (A 39.) Thus, based on Fickas' continuing efforts to seek employment, both through the Union's list and on his own, the Board reasonably found (A 3, 11) that Fickas sufficiently mitigated his damages throughout the backpay period. *Allegheny Graphics*, 320 NLRB 1141, 1145

(1996), *enforced sub nom.*, *Package Serv. Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997) (looking at the backpay period as a whole, discriminatee made a good faith effort to mitigate his damages even though he failed to find employment during the first year of a 2-year backpay period).

8. Wade Carter

The Company contends (Br 39-40) that discriminatee Wade Carter failed to mitigate his damages during the entire backpay period and thus is not entitled to any backpay. Specifically, the Company claims (Br 40) that Carter chose to start his own business instead of seeking work as a truckdriver, and that, by allowing him to offset his interim earnings with his business expenses, the Company is unfairly required to finance that choice. However, self-employment is an accepted means of mitigating lost wages, and the Board properly offset Carter's business expenses from his interim earnings.

After the strike ended, Carter decided to go into the construction business for himself. (A 9; SA 98-99.) Throughout 1998, his business generated $35,167 in gross income. (A 9-10; SA 100.) However, after paying subcontractors and subtracting for equipment depreciation, his business did not net any money that year. (A 9-10; SA 100.) This lack of income was reflected on his income tax returns. (A 10; SA 100-01.) In the first two quarters of 1999, Carter's business similarly netted very little after accounting for expenses and equipment

depreciation. However, in the last two quarters of 1999, Carter's business netted $13,795. (SA 101.)

It is settled that "'self-employment is an adequate and proper way for the injured employee to attempt to mitigate his loss of wages.'" *F.E. Hazard, Ltd. v. NLRB*, 917 F.2d 736, 737 (2d Cir. 1990) (quoting *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968)). Thus, self-employment is treated the same as any other employment for the purposes of evaluating whether or not a discriminatee has satisfied his duty to mitigate his lost wages. *Sioux Falls Stock Yards*, 236 NLRB 543, 564 (1978) (citing *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 179 (2d Cir. 1965)); *Brown & Root, Inc.*, 132 NLRB 486, 500 (1961). The Company does not challenge (Br 39) the Board's finding in that respect, but instead argues that Carter's backpay calculations must reflect his "actual" earnings, and not his net earnings calculated after paying subcontractors and subtracting for equipment depreciation.

However, contrary to the Company's claim, ordinary operational expenses, such as wages paid to employees and equipment depreciation, are allowable offsets against interim earnings. *See Ryder System, Inc.*, 302 NLRB 608, 610 (1991) ("as a general rule, depreciation is an allowable deduction"); *accord C.R. Adams Trucking, Inc.*, 272 NLRB 1271, 1277 (1984) ("tools and equipment . . . may be depreciated"); *cf. Velocity Express, Inc.*, 342 NLRB 888, 889 (2004), *enforced*,

434 F.3d 1198, 1203 (10th Cir. 2006) (calculating net interim earnings by subtracting discriminatees' interim expenses resulting from their self-employment from their interim gross receipts). Accordingly, the Board appropriately accounted for Carter's business expenses in calculating his interim earnings. *K&W Trucking, Inc.*, 257 NLRB 902, 909-10 (1981) (discriminatee made a good-faith effort to mitigate his loss while self-employed as an independent owner-operator despite the fact that his income tax filings showed that he suffered a net loss in income during this time).

9. Robert Linendoll

The Company claims (Br 40-42) that discriminatee Robert Linendoll removed himself from the job market in the fourth quarter of 1998 and, as a result, is not entitled to backpay for that quarter. However, aside from a 3-week vacation which the Board subtracted (A 12) from his backpay period, the record shows that Linendoll continued to seek employment through the Union's list and on his own, and, in fact, worked two different jobs during this time.

Immediately after the strike ended and the Company refused to reinstate Linendoll, he signed the Union's looking-for-work list. (A 12; SA 358.) Through the Union, he received work at Sergeant Electric where he remained employed through the third quarter of 1998. (A 12; SA 55-57.) After being laid off from Sergeant Electric, Linendoll continued to look for work through the Union. (A 12;

SA 57.) During the fourth quarter of 1998, Linendoll remained in contact with the Union and continued to receive job referrals from the Union, although he did not go to the union hall and sign the list. (A 12; SA 61-62.) He worked several weeks at Huebner Trucking, a job he secured through his own efforts, and several days at Jacobi Sod. (A 12; SA 57-60.) He also took a 3-week vacation which the Board subtracted from the Company's backpay liability. (A 12; SA 60.) After his vacation ended, Linendoll immediately resumed his search for work. (A 12; SA 62-63.)

The Company disingenuously argues (Br 40-42) that Linendoll removed himself from the job market, pointing to his testimony that he was not "on the looking-for-work log." (SA 60.) As already discussed, however, Linendoll further testified that, although he "didn't go down and sign up everyday," he remained in contact with the Union and continued to receive referrals from the Union's list. (SA 61-62.) Based on his continuing efforts to seek employment on his own and through the Union's list throughout the fourth quarter of 1999 and the backpay period as a whole, the Board reasonably found (A 3, 12) that Linendoll satisfied his obligation to seek interim employment.

10. Christopher Pentecost

The Company claims (Br 42-43) that discriminatee Christopher Pentecost failed to mitigate his damages throughout the entire backpay period. The record

shows, however, that Pentecost successfully obtained jobs through the Union's list as well as on his own and with the help of relatives, all the while working menial jobs to support his ongoing search efforts.

Immediately after the strike ended, Pentecost signed the Union's looking-for-work list. (A 4, 10; SA 147.) He worked several jobs through the Union, lasting anywhere from 1 day to 6 weeks. (A 4-5, 10; SA 156, 159.) In addition, Pentecost put in various applications on his own and registered with the Indiana unemployment agency. (A 4-5, 10; SA 147, 150, 152, 160-61, 165.) Pentecost also cleaned up trash at various farms, and did "anything he could," in order to afford transportation to and from employers to put in applications. (A 5; SA 148.) In the second quarter of 1998, Pentecost secured a job with the help of a relative. (A 5; SA 149-50.)

Pentecost remained on the Union's list throughout 1999, and continued to receive sporadic work through the Union. (A 5, 10; SA 150, 153-59.) He also signed up at five other Teamsters locals' hiring halls and two additional non-Teamsters hiring halls. (A 5, 10; SA 163-65.) In early 1999, Pentecost returned to work for the Company, but justifiably quit after he realized he would be paid less and would have to travel farther than before the strike, and would lose his seniority. (A 10; SA 69-70, 162.) *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988) (citing *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130

(6th Cir. 1985); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972)) (discriminatee not required to "retain a job more onerous than the job from which he or she was discharged"). Pentecost also secured a job offer at Central City Produce, but turned it down because it only paid minimum wage and the Union promised him that union work would be available soon. (A 10; SA 151-52.) In sum, Pentecost worked at five different employers throughout the backpay period.

The Company argues that Pentecost should not receive any backpay because he relied solely on the Union's list. As already shown, however, Pentecost did not rely solely on the Union's list, but instead applied for work on his own and with the help of relatives. Furthermore, the list proved to be an effective means of securing employment for Pentecost, as well as several other discriminatees. Thus, the Board reasonably found that Pentecost made a reasonably diligent effort to obtain interim employment throughout the backpay period. *Amshu Assocs., Inc.*, 234 NLRB 791, 794 (1978) (discriminatee made a reasonably diligent search for work where discriminatee consulted friends, relatives, and associates, contacted a local union, registered with the state unemployment agency, and read want ads and responded by telephone).

The Company also argues that Pentecost is not entitled to backpay because he had no interim earnings for the last three quarters of 1999. However, the fact

that Pentecost's efforts to find work were not successful has no bearing on the question of whether he properly mitigated his losses. *NLRB v. Mining Specialists, Inc.*, 326 F.3d 602, 605 (4th Cir. 2003) (citing *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 800 (4th Cir. 1998)); *see also* cases cited on p. 32. Furthermore, as explained above (p. 26), the sufficiency of his efforts to mitigate are determined with respect to the backpay period as a whole and is not based on isolated portions of the backpay period. *Wright Electric, Inc.*, 334 NLRB 1031 (2001), *enforced*, 39 Fed. Appx. 476 (8th Cir. 2002) (citing *Local 3, IBEW (Fischbach & Moore, Inc.)*, 315 NLRB 1266, 1266 (1995)). Based on his continuous efforts to seek employment throughout the backpay period as a whole, the Board reasonably found (A 3, 12) that Pentecost satisfied his obligation to mitigate his damages.

11. Gary Williams

The Company claims (Br 43-45) that discriminatee Gary Williams failed to mitigate his damages for the entire backpay period and therefore is not entitled to any backpay. The Company argues (Br 44) that, because Williams only sought employment outside the trucking industry that paid substantially less than what he made while working for the Company, it should not be required to make up the difference. As the record shows, however, Williams continued to work as a truckdriver, and took lower paying jobs only after he failed to secure better paying

work. Furthermore, Williams never stopped looking for work, switching jobs whenever a better paying job became available.

Immediately after the strike ended, Williams signed the Union's list and registered with the Indiana unemployment agency. (SA 185.) He initially received a referral from the Union which he had to decline because he had the flu. (A 10; SA 185-87.) By the end of March 1998, Williams had secured a job working as a mechanic, operator, and basic laborer for Miles Farm Supply. (A 10; SA 179-80, 182.) And although this job paid less than $10 an hour, it required a commercial driver's license ("CDL"). (A 10; SA 179-80, 182.)

Williams continued to look for work, even while he was employed at Miles Farm Supply. (A 10; SA 179-82.) Later in 1998, while working for Miles Farm Supply, he secured a better paying job with BSMI. (SA 181.) However, Williams ultimately turned down that offer after Miles Farm Supply offered him more money to stay. (SA 181.) Also in July 1998, he quit the job at Miles and took a better paying job, though still less than $10 an hour, at Evansville Marine Supply. (A 10; SA 181-83.) There, he drove a truck, although the job did not require a CDL because he hauled coal inside the yard instead of on the highway. (SA 183-84.)[12] Based on Williams' constant employment throughout the backpay period

[12] The Company mischaracterizes Williams' testimony, contending (Br 44) that Williams did not seek better paying jobs throughout the backpay period because he was "happy where he was at and making good money." (SA 184.) Williams

and his continuing efforts to obtain higher paying jobs, the Board was reasonable in finding (A 3, 12) that Williams successfully mitigated his lost wages. *Tilden Arms Mgmt. Co.*, 307 NLRB 13, 15 (1992) ("[i]t is well-settled that an employee who accepts appropriate employment at lower pay is not required to search for a better job"); *Sioux Falls Stock Yards*, 236 NLRB 543, 570 (1978) ("[i]t is well established that an employee who accepts appropriate interim employment, even at a lower rate of pay, is not required to search for better employment").

12. Timothy Cronin

The Company claims (Br 45-46) that discriminatee Timothy Cronin voluntarily quit his employment at J.H. Rudolph in the third quarter of 1998, and that he is not entitled to any backpay following that quit. The record shows that, rather than shirking his responsibility to seek employment, Cronin quit his job at J.H. Rudolph to pursue steadier, more lucrative work elsewhere in the trucking industry.

After the strike ended, Cronin went to work for J.H. Rudolph. (A 10; SA 122.) There, he was paid over $13 an hour. (SA 122.) However, the hours he worked varied from week to week according to the weather. (SA 122-23.) During

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actually testified that, while working for Evansville, he continued to receive a dollar-a-year raise, and eventually, after the backpay period ended, he earned $14 an hour. (SA 184.) Thus, he testified, he ultimately was "happy where he was at and making good money." (SA 184.)

a good week, when the weather cooperated, he might work as many as 40 to 50 hours. (SA 122-23.) But during a bad week, he might not work any hours at all. (SA 122.) Thus, because Cronin never knew from day to day whether there would be work available for him and he had "a family to support," Cronin quit his job at J.H. Rudolph to take a job driving a truck for the Spencer County Highway Department. (A 10; SA 124.) Although the pay started out at only $8 an hour, it was a reliable, "everyday" job closer to home that guaranteed him 40 hours a week. (SA 124-27.) After only 3 months working for the highway department, Cronin again quit, taking a better paying job at Caddick Poultry. (SA 125-26.) There, he made $9 an hour delivering poultry to grocery stores. (SA 126.) It also guaranteed him at least 50 hours a week, every week, and sometimes more. (SA 126-27.)

Cronin remained at Caddick Poultry until he returned to work for the Company in the Spring of 1999. (A 9; SA 127-28.) He stayed with the Company for 3 months, then quit because he was only receiving half as many hours as he had prior to the strike. (A 9, 10; SA 64-67, 131.) He then took a job as a mechanic for a Ford dealer making $9 an hour initially, and later $10 an hour. (A 10; SA 129-31.)

The Company erroneously contends (Br 45-46) that Cronin is not entitled to any backpay because he quit interim employment "for no justifiable reason."

Specifically, the Company argues (Br 45), Cronin quit his job at J.H. Rudolph and took a job that paid $4 an hour less. As shown above, however, Cronin testified that he quit J.H. Rudolph because he was working too few hours and the work was unpredictable. (SA 124.) Instead, he took a job driving a truck for the Spencer County Highway Department, a job that guaranteed him 40 hours a week, regardless of the weather. (SA 124-27.) Thus, the Board reasonably rejected (A 3, 11-12) the Company's argument that Cronin is not entitled to any backpay for the remainder of the backpay period.

D. The Board Reasonably Rejected the Company's Claim that the Administrative Law Judge Unreasonably Restricted Testimony of the Company's Expert Witness, Finding that the Company Failed to Show that the Expert Could Have Provided Probative Testimony Beyond the Contents of His Report

To further negate its backpay liability, the Company adduced expert testimony in an attempt to show that because work was plentiful in Indiana and Kentucky, the 12 challenged discriminatees could not have exercised reasonable diligence in seeking work. The Company contends (Br 19-20) that it was denied due process because the administrative law judge did not allow company counsel to "explain or expound upon [its expert's report] in any way." The Company, however, had ample opportunity to question its witness concerning probative evidence not contained in the report. In any event, as shown below, the Board reasonably rejects expert testimony regarding generalized labor market analysis

and statistical compilations, as well as newspaper advertisements, as evidence that discriminatees failed to perform a reasonably diligent search.

1. The Board reasonably found that Expert Witness Cohen's report and testimony failed to demonstrate that discriminatees did not perform a reasonably diligent search for interim employment

At the compliance hearing, the Company presented an expert witness, Dr. Malcolm Cohen, who testified concerning employment opportunities available to the discriminatees during the relevant backpay period. Cohen presented a report purportedly outlining the job opportunities available to the discriminatees that was based on general labor market statistics in Indiana and Kentucky, as well as help wanted ads in local newspapers. (A 11; SA 42, 71-74.) Cohen concluded in his report that "there were sufficient opportunities for an individual with a CDL to find a truckdriver position in the Owensboro-Evansville-Henderson areas during the time period of March, 1998, to December, 1999." (SA 42.)

The Board, however, has consistently refused to rely on expert testimony such as Cohen's, relating "general market conditions in a segment of the job market to the particular circumstances affecting [discriminatees'] success or lack thereof." *UFCW, Local 1357*, 301 NLRB 617, 621 (1991); *see also Delta Data Sys. Corp.*, 293 NLRB 736, 737 (1989). As the Board has explained, such testimony fails to relate general conditions in a segment of the job market to the particular circumstances affecting discriminatees' success or lack thereof and thus

is of no value in evaluating an individual discriminatee's efforts to seek interim employment. *UFCW, Local 1357*, 301 NLRB at 621.

Like the expert testimony in those cases, the Board found that Cohen's report and testimony were insufficient to meet the Company's burden of showing that each individual discriminatee failed to make a reasonably diligent search for employment. (A 2-3, 11.) First, the Board found that the data collected was statewide and thus the report failed to provide specific data for the geographic area where the discriminatees had worked. (A 2-3, 11.) Second, Cohen's analysis of general labor market conditions in Kentucky and Indiana failed to included any data as to the pool of applicants or any analysis of whether the discriminatees would have been able to secure positions had they applied. (A 2-3, 11.)

The Board has similarly rejected an employer's reliance on newspaper advertisements to show the availability of jobs. *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988); *accord Coronet Foods, Inc.*, 322 NLRB 837, 842 (1997), *enforced in relevant part*, 158 F.3d 782, 800-01 (4th Cir. 1998). This is because, "[t]he existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied." *Lundy Packing Co.*, 286 NLRB 141, 142 (1987), *enforced*, 856 F.2d 627, 630 (4th Cir. 1988); *accord Acme Bus Corp.*, 316 NLRB 1447, 1448-49 (1998) (citing *Coronet Foods, Inc.*, 322 NLRB at 842, *enforced in relevant part*, 158 F.3d 782,

800-01 (4th Cir. 1998)). What is more, the Board found (A 2-3, 11) that the expert report in this case failed to specify what qualified as a suitable job and would be counted in the report, and whether the advertised jobs were comparable in wages, hours, and location to the discriminatees' former positions. In addition, as with the analysis of general market conditions discussed above, the report lacked an analysis of the pool of potential applicants and how specific discriminatees would have fared had they applied for the advertised jobs.

Thus, given the report's failure to relate general conditions in a segment of the job market to the particular circumstances affecting discriminatees' success, and the inherent difficulty of using want ads, the Board reasonably found (A 2-3, 11) that the Company failed to meet its burden of demonstrating that discriminatees did not mitigate their damages.

2. The Board reasonably found that the administrative law judge acted within his discretion in limiting Cohen's testimony based on its probative weight

The Company contends (Br 19-20) that the Board denied it due process because the administrative law judge did not allow company counsel "to fully develop the facts surrounding Dr. Cohen's investigation and to elicit details to flesh out what is a 'bare bones' report." Had the judge allowed Cohen to expound upon the report, the Company asserts (Br 22-24), his testimony "may" have dispelled the Board's misgivings concerning the report. As we now show,

however, the Company was given ample opportunity to demonstrate that its expert witness could offer probative evidence beyond what was contained in its report, but was unable to do so.

In support of its contention that the administrative law judge unreasonably limited company counsel's ability to develop the testimony of Cohen, the Company cites (Br 19) to 10 pages of Cohen's testimony. However, nowhere in the pages cited by the Company does the judge prevent company counsel from eliciting information that would save the expert's report from its fatal flaw. As already discussed (*see* pp. 44-46 above), the Board found (A 2-3, 11) that Cohen's analysis failed to include data as to the pool of applicants, analysis as to the ability of the discriminatees to secure the positions identified, and information on whether the jobs were substantially equivalent in terms of wages, hours and location. As the record clearly shows, the judge only prevented Cohen from testifying cumulatively about his conclusions, which were already contained in his report. (A 17-21.) Thus, there is no merit to the Company's claim that, had it been allowed to question Cohen more fully, his testimony "may" have dispelled the Board's misgivings concerning the report.

In any event, the Company's failure to establish before the Board, or this Court, just how it was prejudiced by the judge's ruling is equally fatal to its claim. It is settled that "[h]e who seeks to have a judgment set aside because of an

erroneous ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *see also* 28 U.S.C. § 2111; Fed. R. Evid. 103(a)(2); *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (applying harmless error rule to cases arising under the Administrative Procedure Act (5 U.S.C.A. § 702)). The Company, however, never even attempted to show that the excluded testimony would have required a different result. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). No principle of administrative law or common sense requires a court to remand a case unless there is reason to believe that remand would lead to a different result. *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989). The Company never made a proffer apprising the judge of the substance of the excluded testimony, and showing how it would have established that the discriminatees failed to mitigate their damages. Accordingly, the Board properly found (A 2-3, 11) that the judge acted within his discretion when he excluded testimony based on its probative value.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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