

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 98-4399(L); 99-4009(XAP)

ACME BUS CORP.

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Acme Bus Corp., Brookset Bus Corp., Baumann & Sons Buses, Inc., and Alert Coach Lines, Inc. (jointly, "the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's supplemental decision and order issued against the Company. The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction

over the case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Board's supplemental decision and order issued on September 30, 1998, and is reported at 326 NLRB No. 157. (A 345-48.)¹ The order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Company filed its petition for review on December 29, 1998, and the Board filed its cross-application for enforcement on January 20, 1999. Both were timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

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

STATEMENT OF THE CASE

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

On December 22, 1995, the Board issued its decision and order in Acme Bus Corp., 320 NLRB 458 (A 173-98), finding in part that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employees Joseph Anderson and Tommy Edmond because of their union activities. In addition to other appropriate relief, the Board's order directed the Company to offer reinstatement and to pay backpay to the two discriminatees. (A 174, 197.) Thereafter, the Company expressly

¹ "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

waived its right under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) to contest either the propriety of the Board's order or the findings of fact and conclusions of law underlying that order. The Company reserved the right to contest the amount of backpay owing.

II. THE COMPLIANCE PROCEEDING

The Board's General Counsel instituted a compliance proceeding pursuant to the Board's Rules and Regulations, Series 8, as amended, (29 C.F.R. § 102.52 et seq.), for the purpose of determining the backpay owing. After conducting a review of relevant personnel and Social Security records, the Regional Director for Region 29 issued a compliance specification and notice of hearing, later amended, alleging the gross and net backpay owing to the discriminatees.² (A 201-15, 236-50.) In its answer and amended answer to the compliance specification, the Company challenged the Regional Director's calculation of both backpay figures. (A 219-28, 253-62.)

A hearing was held before an administrative law judge to resolve the issues. At the hearing, the parties resolved their dispute over gross backpay. After the hearing, the judge issued

² Gross backpay is "the amount the employees would have received but for the employer's illegal conduct." Fugazy Continental Corp., 276 NLRB 1334, 1336 (1985), enforced, 817 F.2d 979, 982 (2d Cir. 1987). Net backpay is the difference between gross backpay and the wrongfully discharged employee's actual earnings from the time of discharge until the employer makes an offer of reinstatement, subject to other defenses. See, e.g., Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968).

a supplemental decision, recommending that the Company pay net backpay to Joseph Anderson, in the amount of \$36,171.47, plus interest, and to Tommy Edmond, in the amount of \$21,664.00, plus interest. The judge rejected the Company's contentions that the discriminatees had willfully concealed tip income. The judge also rejected the Company's contentions that the discriminatees failed to make reasonable efforts to secure interim employment. (A 346-48.) The Company filed exceptions to the supplemental decision and order. (A 339-44.)

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On September 30, 1998, the Board (Members Fox and Liebman; Member Hurtgen, dissenting in part) issued its supplemental decision and order, adopting the administrative law judge's recommended findings and conclusions of law. The Board found that the Company failed to establish that the employees did not make reasonable efforts to mitigate the financial losses suffered as a result of their unlawful terminations. Accordingly, the Board ordered the Company to pay each employee the amount specified in the judge's decision. (A 345.)

SUMMARY OF ARGUMENT

The Company failed to sustain its burden of showing that the discriminatees failed to make reasonable efforts to secure interim employment after the Company wrongfully discharged them. The Board, with court approval, has long held that an employer does not carry its burden of proof where a discriminatee has made

a good faith effort to secure interim employment. A good faith effort "requires conduct consistent with an inclination to work and to be self-supporting." Mastro Plastics Corp., 136 NLRB 1342, 1359 (1962), enforced, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). It does not require either a completely successful effort or the highest degree of diligence.

Here, employee Edmond secured a job as a spare driver within 1 week of being discharged. Similarly, employee Anderson quickly found other employment as a part-time driver, and then continued to search diligently for a job that would give him more hours. Accordingly, the Board reasonably found that both Edmond and Anderson made good faith efforts to mitigate the Company's damages.

The Company nevertheless contends that the discriminatees failed diligently to search for alternative employment; refused to accept substantially equivalent employment; and voluntarily removed themselves from the job market. The Company also asserts that Anderson left alternative employment without a good reason. The Company, however, failed to present evidence to establish those defenses, and the Board properly rejected them.

The Board also properly rejected the Company's contention that Anderson is ineligible to receive backpay because he failed to report receipt of tip income to the Board in a timely manner. As a matter of policy, the Board denies backpay to a discriminatee who intentionally withholds information about

interim earnings from the Board, but does not apply that sanction where the employee's failure to report income was inadvertent. American Navigation Co., 268 NLRB 426, 427-28 (1983). Because the Company failed to show that Anderson's failure to report tip income earlier was indicative of fraud or deceit, the Board was not compelled to deny Anderson backpay.

ARGUMENT

THE BOARD REASONABLY DETERMINED THE AMOUNT OF
BACKPAY OWED TO TWO EMPLOYEES FOR LOSS OF
EARNINGS SUFFERED AS A RESULT OF THE COMPANY'S
UNLAWFUL ACTIONS AGAINST THEM

A. Applicable Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor practices. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-99 (1984). Accord NLRB v. Fugazy Continental Corp., 817 F.2d 979, 982 (2d Cir. 1987). That section provides that, upon finding that an employer has committed an unfair labor practice, the Board may direct the violator "to take such affirmative action[,] including . . . backpay, as will effectuate the policies of the Act." Accordingly, "[t]he legitimacy of back pay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute" (NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-63 (1969)), and a finding of a discriminatory discharge "is presumptive proof that some backpay is owed." NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). Accord NLRB v. Seven-Up Bottling

Co., 344 U.S. 344, 346 (1953); Master Iron Craft Corp., 289 NLRB 1087, 1087 (1988), enforced, 898 F.2d 138 (2d Cir. 1990).

The purpose of the backpay remedy under the Act is twofold. An award of backpay is designed primarily to restore "the economic status quo that would have obtained but for the wrongful [discharge]." Golden State Bottling Co. v. NLRB, 414 U.S. 168, 188-89 (1973) (citing NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265 (1969)). See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) ("Phelps Dodge"). Backpay also deters the commission of unfair labor practices by preventing the wrongdoer from gaining advantage from his unlawful conduct. Mastro Plastic Corp., 354 F.2d 170, 175 (2d Cir. 1965), cert denied, 384 U.S. 972 (1966). Accord J.H. Rutter-Rex Mfg. Co., 396 U.S. at 265.

To restore the economic status quo, the "wrongfully discharged employee is normally entitled to the difference between what he would have earned but for the wrongful discharge and his actual interim earnings from the time of discharge until he is offered reinstatement." Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968). Once that figure is established, the burden is on the employer to "establish facts which would negative the existence of liability . . . or which would mitigate the liability." Id. (quoting NLRB v. Brown & Root, 311 F.2d 447, 454 (8th Cir. 1963)). Accord NLRB v. Madison Courier, Inc., 472

F.2d 1307, 1318 (D.C. Cir. 1972).³ Any "doubts [as to the alleged affirmative defenses] must be resolved against the employer[,] who committed the unfair labor practice." Kawasaki Motors Corp. v. NLRB, 850 F.2d 524, 527 (7th Cir. 1988). See NLRB v. Aeronautical Indus. Dist. Lodge No. 91, 934 F.2d 1288, 1297 (2d Cir. 1991) ("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong conduct has created") (internal quotation marks and citation omitted); NLRB v. Remington Rand, Inc., 94 F.2d 862, 872 (2d Cir. 1938) (L. Hand, C.J.) ("it rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune").

In accordance with those principles, an employer may reduce his backpay liability by an affirmative showing that the discriminatee "willfully incurred" a loss of earnings during the

³ Although the General Counsel is required to show only the "gross amount of backpay due," he normally goes further, pursuant to Section 102.53 of the Board's Rules and Regulations (29 C.F.R. § 102.53), and includes in the backpay specification a deduction from gross backpay of all those amounts in mitigation that have been discovered through personal interviews and Social Security records. The General Counsel performs this service in the public interest, to provide full information to the employer and to limit backpay claims when he is aware of sums in mitigation. The General Counsel, however, does not thereby assume "the burden of establishing the truth of all the information supplied or of negating matters of defense or mitigation." NLRB v. Brown & Root, 311 F.2d 447, 454 (8th Cir. 1963). Accord NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 n.32 (D.C. Cir. 1972); Fugazy Continental Corp., 276 NLRB 1334, 1334, 1336 (1985), enforced, 817 F.2d 979 (2d Cir. 1987).

backpay period, by a "clearly unjustifiable refusal to take desirable new employment." Phelps Dodge, 313 U.S. at 198-200 (1941). Accord Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968); Canova v. NLRB, 708 F.2d 1498, 1506 (9th Cir. 1983). Indeed, "[i]t is accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965).

Proof of a claimant's search for interim employment is, however, "in no sense a part of the [General Counsel's] case." NLRB v. J.G. Boswell Co., 136 F.2d 585, 597 (9th Cir. 1943). Instead, it is the affirmative duty of the employer "to carry the burden of proof and to point out what evidence in the record sustains [its] claim, as against the presumptive proof of the Board's findings that the employees did not sustain willful losses." NLRB v. Reynolds, 399 F.2d 668, 670 (6th Cir. 1968). Accord Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148 (2d Cir. 1968); NLRB v. Madison Courier, Inc., 472 F.2d at 1318. For "[i]t is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period." NLRB

v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966).

The employer does not meet its burden where the wrongfully discharged employee has made a good faith effort to mitigate damages. See Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 149 (2d Cir. 1968) (discriminatee required to make only "an honest and diligent" effort to seek alternative employment); NLRB v. Arduini Mfg. Co., 394 F.2d 420, 422-23 (1st Cir. 1968) (discriminatee held "only to reasonable exertions . . . not the highest standard of diligence"). Accord NLRB v. Westin Hotel, 758 F.2d 1126, 1131 (6th Cir. 1985); Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB, 850 F.2d 524, 529 (9th Cir. 1988).

In evaluating the employee's efforts, the Board does not undertake a "mechanical examination of the number or kind of applications," but rather examines "the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment." Mastro Plastic Corp., 136 NLRB 1342, 1359 (1962), enforced, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). Because the ultimate test of a discriminatee's efforts is whether they are "consistent with an inclination to work and to be self-supporting" (id.), the Board has long held that those efforts must be viewed over the backpay period as a whole, and not piecemeal or in isolated portions of that period. Kawasaki Motors Corp. v. NLRB, 850 F.2d 524, 527 (9th Cir. 1988).

It is settled that the Board's discretion in formulating remedies, including backpay, is "a broad one, subject to limited judicial review." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 208, 216 (1964). Accord Achilles Constr. Co., 290 NLRB 240, 241 (1988), enforced mem. 875 F.2d 308 (2d Cir.), cert. denied, 493 U.S. 823 (1989). For that reason, "when the Board . . . makes an order of restoration by way of backpay, the order 'should stand unless . . . 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. Fugazy Continental Corp., 817 F.2d 979, 982 (2d Cir. 1987) (quoting Virginia Elec. and Power Co. v. NLRB, 319 U.S. 533, 540 (1943)). Accord NLRB v. Electrical Workers IBEW Local 3, 730 F.2d 870, 879 (2d Cir. 1984). The Board's determination as to whether an employee reasonably mitigated damages is a factual one, and should be upheld if supported by substantial evidence. See Section 10(e) of the Act (29 U.S.C. § 160(e)); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951). Accord Electrical Workers IBEW Local 3, 730 F.2d at 879.

We now show that the Board's computation of Edmond's and Anderson's backpay was supported by the evidence, and that the award of backpay fell well within the Board's broad remedial authority.

B. The Board Reasonably Determined the Amount of
Backpay Owed to Employees Edmond and Anderson

1. Background facts

The Company provides bus transportation services to various school districts, private organizations, and the general public. It is located in Ronkonkama, New York, with bus yards in Bohemia, Jericho, Northport, and Westhampton, New York.

Tommy Edmond began working for the Company in 1981. He left in 1987 to work as a nursing assistant at the V.A. Hospital in Northport, New York, where he worked the midnight to 8 a.m. shift. In 1989, he returned to the Company as a spare driver, while maintaining his night job at the hospital. To manage the 2 jobs, Edmond told the Company that he would be available only after 8:30 a.m. From 1989 until his unlawful discharge in 1993, Edmond averaged 30 hours of work per week for the Company and earned about \$17,000 a year. (A 175, 185, 347-48; 16-19, 174, 244-46.)

The Company terminated Edmond on September 17, 1993. (A 185.) Thereafter, Edmond remained in his night job at the hospital. About 1 week after the termination, Edmond found a job as a spare driver for United Bus Corporation ("United"), averaging 4 to 12 hours per week and paying about \$9,000 a year. (A 347-48; 16-19, 244-46.) Edmond's new job with United was substantially similar to his former job with the Company, but for the hours. (A 59.) United determined which hours in particular Edmond worked; Edmond had no control other than his condition

that he work only after he had completed his night shift at the V.A. Hospital. (A 29, 31-33.) On March 4, 1996, the Company offered reinstatement to Edmond, thereby cutting off the backpay period. (A 348; 237, 266-91.)

Joseph Anderson came to work for the Company in 1986, after his retirement from the New York City Transit Authority. Anderson, an older man, worked full time as a bus driver for the Company for about 7 years, until his unlawful discharge in 1993. During that time, Anderson averaged 39.07 hours per week and earned about \$22,000 a year. (A 185, 345-48, 62-63, 109.)

The Company terminated Anderson on September 13, 1993. Anderson immediately began his search for employment as a bus driver by checking newspaper advertisements daily, making job inquiries of friends, relatives, and neighbors, and applying to various bus companies. (A 63-64, 100-06, 292-93.) Anderson found a job with Educational Bus Company ("Educational"), a competitor of the Company's, about 2 weeks after being discharged. At Educational, Anderson served as a school bus driver for spare charter jobs—primarily school field trips. Anderson voluntarily left that job about 2 weeks later, because Educational was able to provide him with only 2 to 6 hours of work per week. (A 345, 347; 64-65, 86-91, 100-07, 292-93.)

Anderson continued his search for employment by the means he had used prior to his employment with Educational. He also utilized the computer search facilities at the state unemployment

office. (A 63-64, 100-06, 292-93.) In addition, Anderson learned about a new company, Charity Bus Company ("Charity"), that was being formed. He made several applications to Charity. When Charity commenced operations, Anderson began working there 1 to 2 days per week. Eventually, his workload increased to about 3 days a week. At Charity, Anderson did "coach work," operating charter buses to Atlantic City, Foxwoods, the theater in New York City, and clothing outlet shops in Lancaster, Pennsylvania. He was paid by the trip, earning a fee from the employer plus tips from passengers. He worked for Charity for about 1 year, and earned about \$6,300. (A 345, 347-48; 63-69, 91-95, 292-93.)

While Anderson was still with Charity, Anderson's sister-in-law recommended him for a job with another employer, Allen AME Bus Company ("Allen"), which promised to give Anderson more working hours. There, too, Anderson drove charters, similar to his work at Charity. Anderson was eventually able to increase his workload to as many as 4 days per week. As in his previous job, Anderson earned a fee for each trip from the employer, plus tips from passengers. (A 347; 95-100.) Anderson continues to work for Allen, earning between \$15,000 and \$16,000 a year. (A 348.) On March 4, 1996, the Company offered reinstatement to Anderson, thereby cutting off the backpay period. (A 348; 237, 297-320.)

2. Edmond and Anderson Made Reasonable Efforts
To Secure Alternative Employment

Applying the foregoing principles, substantial evidence supports the Board's finding that both Edmond and Anderson made reasonable efforts, "consistent with an inclination to work," to secure alternative employment after their wrongful termination. Mastro Plastics Corp., 136 NLRB at 1359. Just 1 week after being discharged, Edmond secured a job as a spare driver for United, a competitor of the Company's. Uncontradicted record evidence supports the finding that Edmond's job with United was substantially similar to his old job at the Company--both were spare bus driver jobs. Employee Anderson's efforts were also reasonable. The record establishes that he made a diligent search for employment immediately after the Company discharged him. After leaving his initial interim job at Educational, he also utilized the computer search facilities at the state unemployment office. As the Company concedes (Br 12 (citing United Aircraft Corp., 204 NLRB 1068, 1068 (1973))), efforts to find alternative employment such as those are reasonable. See also Allegheny Graphics, Inc., 320 NLRB 1141, 1145 (1996) (registration with state unemployment office is "prima facie evidence of reasonable search for employment"). Accordingly, the Board properly awarded Edmond and Anderson the amounts of backpay determined by the administrative law judge.

3. The Company Failed To Establish Any Basis
for Reducing Its Backpay Obligation to the
Discriminatees

The Company argues that the Board erred in rejecting the Company's contentions regarding the employees' alleged failure to mitigate their damages. The Company presents several variations on that argument: it contends that the discriminatees (1) failed diligently to search for interim employment (Br 11, 12); (2) refused to accept substantially equivalent employment (Br 11, 13, 14); and (3) voluntarily removed themselves from the job market, by obtaining "easier part-time interim employment" and by failing to seek additional jobs to make-up full-time work (Br 11, 13-15). The Company also argues (Br 11, 13-15) that Anderson quit his interim employment without a good reason. We now show that, under the applicable standards, the Company has failed to substantiate those contentions.

The Company first contends (Br 12) that the discriminatees did not make reasonably diligent efforts to secure interim employment. In support of its contention, the Company cites (Br 12) cases in which either the Board or the court found that a discriminatee's failure to make reasonable efforts to find employment was in part evidenced by a dearth of job applications.

The Company's reliance (Br 12) on those cases is misplaced. As the Board has held, with the approval of this Court, the good faith of an effort to secure alternative employment is not simply a matter of "mechanical examination of the number or kind of

applications" the discriminatee has made. Mastro Plastic Corp., 136 NLRB 1342, 1359 (1962), enforced, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). The factfinder must also take account of the particular circumstances, "includ[ing] the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations." Id.

Here, when Edmond was discharged from the Company, he was also working the midnight to 8 a.m. shift at the V.A. Hospital. He needed to find a job that would fit into his schedule. Anderson, a New York City Transit Authority retiree, is an older man. Both had been with the Company for a number of years before being unlawfully discharged. Despite their limitations, both found alternative employment soon after being discharged. Further, after Anderson left his first interim employer, Educational, he continued to search and eventually found another employer, Charity, who promised him more hours. Even then, however, Anderson did not remove himself from the job market. About 1 year later, he found another employer, Allen, who promised him even more hours. Those actions support the Board's findings that both Edmond's and Anderson's efforts to secure interim employment were reasonable. See Golay & Co. v. NLRB, 447 F.2d 290, 295 (7th Cir. 1971) (discriminatees in their 50s and lacking high school education, who applied to various businesses and who finally obtained jobs, were diligent in their search for employment).

In any event, the cases that the Company cites (Br 12) are factually distinguishable. In Mercy Peninsula Ambulance Serv., Inc., 589 F.2d 1014, 1018-19 (9th Cir. 1979), for example, the discriminatee made at most 3 attempts a month to secure employment over a 10-month period, and either failed to follow up on job opportunities or followed up only after several months. Some of the cases cited by the Company actually support the Board's position. In Arlington Hotel Co. v. NLRB, 876 F.2d 678, 680 (8th Cir. 1989), for example, the court refused "to establish a mathematical benchmark for measuring [the discriminatee's] diligence in looking for work," because the employer failed to show the number of substantially equivalent positions in the geographic area for which the discriminatee could have applied. In so doing, the court upheld the Board's determination that the employer failed to carry its burden of demonstrating that three employment contacts per month were insufficient.

In a related argument, the Company appears to suggest (Br 3 n.1, 14) that the length of Anderson's unemployment evidences a lack of diligence in securing interim employment. To support that proposition, the Company asserts that the Board was mistaken in finding that Anderson secured his position with Charity "a month" after leaving Educational. (A 345.) According to the Company, "the record clearly indicates [that] Anderson remained unemployed . . . for five months" after he left Educational. (Br 3 n.1.)

The Company's attack on that finding, however, is barred by Section 10(e) of the Act (29 U.S.C. § 160(e)), because the Company failed to raise its contention before the Board.⁴ Because the Company could have, but did not, file a motion for reconsideration objecting to the Board's finding, this Court is without jurisdiction to consider the issue. See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982) (Section 10(e) bar is "jurisdiction[al]"); Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 281 n.3 (1975). Accord KBI Sec. Serv., Inc. v. NLRB, 91 F.3d 291, 294 (2d Cir. 1996); NLRB v. Arthur Sarnow Candy Co., Inc., 40 F.3d 552, 561 (2d Cir. 1994).

In any event, the Company cites no case even suggesting that a failure to secure employment for 5 months while searching for a job would compel the Board to come to a different conclusion. Indeed, the case law is to the contrary. See Mastro Plastics Corp., 136 NLRB 1342, 1349 (1962) ("there is no requirement that [a discriminatee's] efforts must meet with success") (emphasis in original); NLRB v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955) ("the principle of mitigation of damages does not require success; it only requires an honest good faith effort").

The Company next contends (Br 13, 14, 15) that the discriminatees failed to seek or find substantially equivalent

⁴ Section 10(e) of the Act states, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances."

employment. In support, the Company highlights the fact that both Edmond and Anderson worked fewer hours in their new jobs than they had worked for the Company. According to the Company, that fact alone demonstrates a willful loss of earnings.

The Company's argument does not withstand scrutiny. The fact that the two discriminatees worked fewer hours in their interim employment is not probative of whether their efforts to obtain alternative employment were unreasonable or lacking in good faith. The Company points to no evidence that either Edmond or Anderson voluntarily chose to work fewer hours. Rather, the evidence shows that Edmond, who both before and after his termination worked as a spare driver,⁵ had little control over his hours, and that the number of hours he worked "depend[ed] on what [wa]s available." (A 29.) With respect to Anderson, who worked full time before his termination, the evidence shows that he searched diligently for employment, and then continued his search in order to increase his hours. Taking account of the discriminatees' lack of seniority in their new jobs, it is not surprising that they were unable to attain more hours.

Nor, contrary to the Company's related argument (Br 13-15), was it reasonable to expect Anderson to work simultaneously for both Charity and Allen—his second and third interim employers—in order to increase his hours. As the Board explained (A 345),

⁵ The Company's newly minted assertion (Br 15) that Edmond had been a full-time driver for the Company is not properly before the Court (see above, p. 19) and, in any event, is simply wrong.

because Anderson "could not predict or control when he would be assigned to a particular charter . . . he could not reasonably be expected to attempt to juggle both the Charity and Allen jobs at the same time."

The Company's reliance (Br 13-17) on McCann Steel Co., Inc. v. NLRB, 570 F.2d 652, 654-55 (6th Cir. 1978), is misplaced. There, the court held that, if the Board took account of overtime in its calculation of gross backpay, it should take account of the discriminatee's refusal to accept overtime from an interim employer in determining whether there had been a willful loss of earnings. Id. at 655. Here, both Edmond and Anderson offered uncontested testimony that they asked their interim employers for more hours but that the hours were simply not available.

Nor is there merit to the Company's unsupported suggestion (Br 17) that Edmond and Anderson were "idle" or passive in their search for more hours. Edmond testified, without contradiction, that he called his current employer every day "to see what [he is] doing," and that he is considered by that employer to be a "regular" spare driver, as he was with the Company. (A 34-35.) Similarly, by continuing to look for jobs and switching employers during the backpay period, Anderson made several successful attempts to increase his working hours. (A 91-100.)

The Company's reliance (Br 13-17) on NLRB v. Seligman and Assocs., Inc., 808 F.2d 1155, 1168 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988) ("Seligman"), also does not advance its

argument. In Seligman, the discriminatees, a couple who shared an apartment complex caretaker/manager position at the time of their unlawful discharge, conceded that for 4 years after their discharge they did not search for any comparable employment. Id. at 1166-68. Moreover, it was undisputed that employment opportunities for caretaker couples were advertised routinely in the local newspapers. Id. at 1166. In those circumstances, the court determined that the discriminatees' "refusal to seek comparable and substantially equivalent employment when it was so clearly available can[not] be characterized as anything other than willful." Id. at 1168. Here, by contrast, there was no evidence that Anderson or Edmond ignored known job openings for bus drivers in the geographic area. Indeed, as shown above, both Anderson and Edmond sought and found employment in their field within weeks of their discharge.

The Company's reliance (Br 13-14) on Twistex, Inc., 291 NLRB 46, 49 (1988), is also misplaced. There, the Board found that the employer had met its burden of showing that a discriminatee incurred a willful loss of earnings where she halted her job search once she found casual work, which amounted to only 100 hours over an 8-month period. Here, although Anderson voluntarily left his job at Educational--which he found almost immediately after his discharge, but which proved to offer him only a very few hours a week--he continued, and was ultimately successful, in his efforts to secure a better paying position.

In that regard, there is no merit to the Company's contention (Br 13-14) that Anderson's decision to leave Educational, his first post-termination job, was unjustifiable, and that the Board should therefore have denied Anderson backpay for the remainder of the backpay period. As the Board and several reviewing courts have pointed out, the key question is whether the discriminatee had a justifiable reason for leaving the interim job. Here, Anderson left Educational quickly when it became apparent that that employer was unable to provide him with enough hours to earn a living. The Board, with court approval, has repeatedly held that a voluntary resignation in that circumstance is justifiable. See, e.g., Alamo Express, Inc., 217 NLRB 402, 405 (employee is "justified in quitting a job at which earnings had deteriorated to a level below that of suitable employment," even though he did not have other employment at the time he quit), enforced, 523 F.2d 1053 (5th Cir. 1975); Lozano Enters., 152 NLRB 258 (1965), enforced, 356 F.2d 483 (9th Cir. 1966). Shell Oil Co., 218 NLRB 87, 90 & n.13 (1975), enforced sub nom. Weitzel v. NLRB, 551 F.2d 314 (9th Cir.), cert. denied, 434 U.S. 920 (1977), upon which the Company relies (Br 12), is not to the contrary. There, the Board found that the discriminatee's reasons for leaving comparable employment were either not supported by the record or were unjustified.

Finally, in its opening brief (Br 17-19), the Company contends, for the first time in this litigation, that the Board

should have adopted this Court's holding in Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998) ("Greenway"), concerning burdens of proof with respect to mitigation of losses. Accordingly, that claim is barred by Section 10(e) of the Act (29 U.S.C. § 160(e)). See discussion above, p. 19, citing Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 666 (1982).

In any event, Greenway is not applicable here. In Greenway, a case involving the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., the Court found that, where the district court has made a finding that the discriminatee "made no reasonable efforts to seek [suitable] employment," the employer is relieved of its obligation of showing that comparable employment existed. Id. at 54. Here, there is no such finding; indeed, the Board expressly found that both discriminatees made reasonable efforts to seek interim employment.

C. The Board Reasonably Found that Anderson Did Not Intentionally Withhold Information About His Earnings

The Company claims (Br 20-24) that Anderson is ineligible to receive backpay because he allegedly withheld information from the Board about receipt of tip income. For the reasons stated below, the Company has failed to present sufficient evidence to establish this defense.

It is the Board's well-established policy to determine, in a compliance proceeding, whether a discriminatee's failure to report all interim earnings to the Board is indicative of fraud

or deceit. If the Board concludes that a discriminatee willfully concealed interim earnings, it will deny backpay for all quarters in which the concealed income was earned.⁶ American Navigation Co., 268 NLRB 426, 427-28 (1983) (citing NLRB v. Flite Chief, Inc., 640 F.2d 989 (9th Cir. 1981)). The purpose of this sanction is not to punish the discriminatee, but to protect the integrity of the Board's compliance process. See Ad Art, Inc., 280 NLRB 985, 990 (1986) ("[W]hen a discriminatee attempts to abuse the Board's process by withholding relevant information, by testifying falsely, by destroying records to cover up his misstatements, and by attempting to prevent a witness from testifying truthfully, it is necessary for the Board to protect itself against such abuse."). Cf. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 322-25 (1994) (discriminatee entitled to reinstatement with backpay notwithstanding his intentionally false testimony at Board hearing).

In American Navigation Co., the Board explained, however, that it would not apply this sanction "where the claimant, through inadvertence, fails to report earnings." Id. at 428 n.7. See also Allegheny Graphics, Inc., 320 NLRB 1141, 1145 (1996) ("employees are not automatically disqualified from backpay because of poor recordkeeping"). The Board further noted that it was "fully confident" that administrative law judges, "who are

⁶ The Board computes all backpay on a quarterly basis. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 345-46, 352 (1953).

entrusted to make reasoned evaluations of witnesses' credibility," "are capable of distinguishing honest error from deceit" American Navigation Co., 268 NLRB at 428 n.7. See NLRB v. Flite Chief, Inc., 640 F.2d 989, 991-92 (9th Cir. 1981) (adopting administrative law judge's finding of willful concealment).

Applying that doctrine to the facts of this case, the Board found that Anderson did not intentionally fail to disclose his tip income to the Board. Rather, the Board found that any such omission was inadvertent. Thus, Anderson fully cooperated with the Company's requests for information at the hearing: He produced his tax returns, W-2 forms, a 1099 form, and insurance documents, and readily admitted his tip income in response to questioning.⁷

Contrary to the Company's assertions (Br 22), the Company presented no evidence to show that Anderson lied on his tax returns. Nor does the Company cite any case that compels the Board to take account of whether a claimant has been truthful with another government agency. The Board's American Navigation doctrine is limited to whether the claimant has willfully deceived the Board.

⁷ Contrary to the Company's claim (Br 22), Anderson acknowledged (A 113) that he received tip income before the employer presented one of its managers, who testified (A 163-65) that drivers in the charter business tend to receive tips of about \$1 from their passengers.

Anticipating the foregoing response, the Company complains (Br 23 n. 11) that the Board does not generally allow discovery in backpay proceedings. That claim is patently false. Section 10622.6 of the Board's Casehandling Manual (Part 3) Compliance Proceedings states that the Board will make available, upon the employer's request and after issuance of the compliance specification, "all factual information or documents obtained or prepared by the Regional Office that are relevant to the computation of net backpay. . . . This disclosure policy extends to information contained in documents . . . concerning discriminatee interim employment and earnings, search for employment, or availability for employment."⁸

Accordingly, once the Regional Director issued the compliance specification in this case, the Company had the opportunity to request and receive all documents concerning Anderson's interim employment, including his tax returns. It did not avail itself of that opportunity; rather, it waited until Anderson's cross-examination at the hearing to ask him about tip income. When asked the specific question, "Did you get any

⁸ The Company's analogy (Br 23 n.11) to Title VII litigation in the district courts, where discovery within the scope of the Federal Rules of Civil Procedure is permitted, is unpersuasive. "[P]retrial discovery in N.L.R.B. proceedings is neither constitutionally nor statutorily required." NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978, 980 (2d Cir. 1975) (per curiam). Accord NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1245 (2d Cir. 1990). Cf. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236-43 (1978) (Freedom of Information Act does not compel prehearing disclosure of potential witness statements from Board files).

gratuities from anyone when you acted as a bus driver, a charter driver, sir," Anderson readily answered, "Yes," and acknowledged receiving tip income in the amount of \$20-\$30 per chartered trip. (A 113-15.) After the hearing, the General Counsel submitted an amended backpay computation taking account of that testimony.

The administrative law judge found (A 347) that "Anderson did not engage in willful or intentional conduct in failing [initially] to disclose his tip income to the Board. Rather, such omission was due to inadvertence." The Board affirmed that finding. On this record, the Company has no argument that the Board was compelled to find otherwise.⁹

⁹ See Ad Art, Inc., 280 NLRB 985, 990 (1986) ("By necessity, much of the material contained in a backpay specification is based on the assertions of the discriminatee. Though there is some countercheck with regard to social security payments, only the discriminatee is in the position to have information with regard to "off the record" interim earnings. . . . The General Counsel must rely heavily on the discriminatee's representations. In a normal case that reliance is well-founded. The discriminatee is the innocent wronged party and his representations are quite properly relied on. . . . [I]t is up to [the employer] to come forward with evidence to refute the representations of the discriminatee that are contained in the backpay specification. [The employer] is, after all, the adjudicated wrongdoer and the only issue in a backpay hearing is the amount of money that is required to make the wronged party whole.").

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and enter a judgment enforcing the Board's order in full.

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