

A A Superior Ambulance Service and Automotive and Special Services Union No 461, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO ¹ Case 19-CA-13365

January 31, 1989

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On August 17, 1982, the National Labor Relations Board issued a Decision and Order in this proceeding² in which it adopted an administrative law judge's findings and conclusions that the Respondent had violated, inter alia, Section 8(a)(3) and (1) of the Act by terminating employee Richard Skinner because of his union activities. The Board also adopted the judge's recommended Order directing the Respondent to reinstate Skinner and to make him whole for any loss of earnings caused by the Respondent's discrimination against him. The Board's Order was enforced by the United States Court of Appeals for the Ninth Circuit on October 13, 1983.³ The court, however, conditioned its enforcement of Skinner's reinstatement on Skinner's possession of a valid license to be a paramedic in the State of Washington. The court noted that "the absence of such a license will also be relevant to the amount of backpay due Skinner."

Subsequently, pursuant to a backpay specification and notice of hearing issued by the Regional Director for Region 19, a hearing was held before Administrative Law Judge Clifford H. Anderson to determine, inter alia, the amount of backpay due Skinner.⁴ On January 16, 1985, the judge issued the attached Supplemental Decision recommending that the Board issue an Order requiring the Respondent to pay Skinner \$17,018, plus interest. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in opposition to the Respondent's exceptions. On April 15, 1985, the Board remanded the case to the judge for further factual determinations consistent with the court's Order regarding Skinner's possession of a Washington State paramedic's license. Thereafter, on May 16, 1985, the judge issued the attached Second Supplemental Decision finding,

inter alia, that Skinner had possessed a valid Washington State paramedic's license throughout the backpay period and that the court's decision did not indicate that the Board should apply a legal standard different from that the Board ordinarily applies in determining here the relevance of Skinner's possession of the paramedic's license. Accordingly, the judge recommended that the Board award Skinner the backpay amount set out in his earlier decision. The Respondent filed exceptions to the Second Supplemental Decision and a supporting brief, and the General Counsel filed a motion to strike and an answering brief in opposition to the Respondent's exceptions.

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

The Board has considered the record and the supplemental decisions in light of the exceptions⁵ and briefs and has decided to affirm the judge's rulings, findings,⁶ and conclusions⁷ and to adopt the recommended Order as modified.

⁵ We grant the General Counsel's motion to strike those portions of the Respondent's exceptions that refer to the Respondent's alleged compliance with the reinstatement order. A review of the record establishes there is no evidence to support the Respondent's assertions in this respect.

⁶ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding in his Second Supplemental Decision that the court's order mandating that Skinner possess a valid Washington State paramedic license in order to be reinstated did not mean that Skinner needed to possess such a license at the time of the court's opinion in order to be eligible for backpay. In this regard, we note that the parties have stipulated that Skinner possessed a valid Washington State paramedic license at all times during the period alleged by the General Counsel to be the backpay period, i.e., March 17, 1981 to April 30, 1982.

⁷ The Respondent argues that Skinner's misconduct in the backpay period warrants denial of all backpay. The evidence here does not show that the Respondent knew of the misconduct before the end of the backpay period. At the hearing, the judge ruled that misconduct on Skinner's part could not toll the Respondent's backpay obligation unless and until it was made known to the Respondent. However, the judge went on to address the Respondent's argument in his supplemental decision in light of its citation to *Western Pacific Construction*, 272 NLRB 1393 (1984) which provided support for the Respondent's remedial approach tolling backpay based on misconduct not known to the Respondent during the backpay period.

In *Axelson Inc.*, 285 NLRB 862 (1987) the Board overruled *Western Pacific* and adopted the remedial approach of *East Island Swiss Products*, 220 NLRB 175 (1975) insofar as that case held misconduct will not automatically bar backpay but will limit it by cutting the backpay off at the time the respondent acquires knowledge of the misconduct. Thus, we agree with the judge that Skinner is entitled to backpay although he may well have engaged in reprehensible conduct during the backpay period. In this regard, we will refer the record in this proceeding to the appropriate licensing and drug enforcement agencies. However, consistent with Board precedent discussed above, we will not deny backpay to the discriminatee based on conduct of which the Respondent was unaware during the relevant backpay period. The record clearly demonstrates that had Skinner refrained from engaging in protected activity, he would have remained employed by the Respondent at least until the Respondent became aware of his misconduct.

¹ On November 1, 1987, the International Brotherhood of Teamsters was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

² 263 NLRB 499.

³ *A A Superior Ambulance Service v. NLRB*, 720 F.2d 683 (mem.).

⁴ We note that the General Counsel did not seek Skinner's reinstatement in this backpay proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A A Superior Ambulance Service, Tacoma, Washington, its officers, agents, successors, and assigns, shall make whole Richard P Skinner by paying him \$17,018.48 backpay, plus interest,⁸ less tax withholdings required by Federal and state laws

⁸ In accordance with our decision in *New Horizons for the Retarded* 283 NLRB 1173 (1987) interest on and after January 1 1987 shall be computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 Interest on amounts accrued prior to January 1 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.* 231 NLRB 651 (1977)

Martha Barron Esq, for the General Counsel
O W Hollowell Esq (*Hollowell Pisto Kalenius & Bully*)
of Federal Way, Washington, for the Respondent
Pamela Bradburn Esq (*Hafer Price Reinhart & Schwerin*), of Seattle, Washington for the Charging Party

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H ANDERSON, Administrative Law Judge
On 9 April 1982, Administrative Law Judge Roger B Holmes issued his Decision and Order in consolidated Cases 19-CA-13253 and 19-CA-13365 The Board adopted the judge's decision without relevant modification on 17 August 1982¹ The United States Court of Appeals for the Ninth Circuit enforced that Order in an unpublished opinion on 13 October 1983² The court's opinion, at page 5, addressed the issue of Skinner's reinstatement as follows

The employer contends that even if Skinner was discharged unlawfully, reinstatement is inappropriate because Skinner is incompetent and a danger to public health and safety See *NLRB v Western Clinical Laboratory Inc* 571 F.2d 457 460-62 (9th Cir 1978) The Board has broad discretion to order reinstatement of unlawfully discharged employees *Ferberboard Corp v NLRB*, 379 U.S. 203, 216 (1964) Because Skinner was a paramedic, however, our concern for the public welfare requires special care here See, *Western Clinical*, 571 F.2d at 460-62

In the State of Washington, a paramedic must have a state license The Board concedes, and we affirm that concession, that the order to reinstate Skinner is expressly conditioned upon Skinner now having a current license to be a paramedic in the State of Washington The absence of such a license will also be relevant to the amount of backpay due Skinner

Controversy having arisen, inter alia, over the amount of backpay due Skinner, a backpay specification was issued by the Regional Director for Region 19 and the matter came before me for hearing On 16 January 1985, I issued a Supplemental Decision on the backpay specification concerning Skinner³ In my Supplemental Decision, I held that the backpay period for Skinner commenced on 17 March 1981 and ended on 30 April 1982 I further held that for the first 4 months of the backpay period Skinner sought employment in Washington State but thereafter continued his employment search outside of Washington State and did not return to or seek employment in Washington The decision held that Skinner was entitled to backpay during the backpay period and included a recommended backpay order

Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to my Supplemental Decision On 15 April 1985, the Board issued an order remanding proceeding to administrative law judge In its order, the Board noted the language of the Ninth Circuit Court of Appeals quoted supra, concerning the relevance of Skinner's possession of a Washington State paramedic license The Board noted that my Supplemental Decision did not discuss the quoted language of the Court's opinion and stated further, nor does the record contain evidence regarding Skinner's possession of a license to be a paramedic in the State of Washington Having considered the matter the Board concluded that the disposition of the issues arising out of the Board's original order as enforced by the court required specific findings of fact regarding Skinner's possession during the backpay period of a license to be a paramedic in the State of Washington Accordingly the Board directed me to reopen the record and prepare and issue a second Supplemental Decision setting forth specific findings of fact regarding Skinner's possession during the backpay period of a Washington State paramedic license and a recommended backpay order in light of such findings of fact and the opinion of the Court

On 18 April 1985 I issued an order reopening the record for receipt of evidence consistent with the Board's remanding order In response to that order the parties submitted an all party stipulation concerning Skinner

Findings and Conclusions

On the entire record, including the record and briefs in the original backpay proceeding the Board's remanding order and the postremand stipulation of the parties I make the following findings and conclusions⁴

³ Reinstatement of Skinner was not in issue at the time the case came to hearing in August 1984

⁴ To the extent not expressly amended herein the findings and conclusions of my Supplemental Decision in this matter are reaffirmed and form the predicate to the additional findings and conclusions herein

¹ 263 NLRB 499 (1982)

² 720 F.2d 683 (9th Cir 1983) (mem)

1 Factual findings regarding Skinner's possession of a paramedic license in Washington State during the backpay period

Following the Board's remand the parties submitted a stipulation of fact which includes the following

1 Richard Skinner had a Washington State Certified Intensive Care Paramedic license from April 1980 to April 30, 1982

2 Richard Skinner was not suspended or decertified during the period that he was so licensed in the State of Washington

Based on the above, there is no dispute and I find that Skinner possessed a valid Washington State paramedic license from April 1980 through 30 April 1982, i.e. throughout the entire backpay period

2 Analysis and conclusions

Under normal Board decisional law, the burden of proving that a backpay claimant failed to mitigate his damages by not seeking work is assigned the employer. *NLRB v Miami Coca Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966). If Skinner was unable to work as a paramedic during the backpay period because he did not have a valid paramedic license, this evidence would be relevant to show he failed to mitigate his damages. There was no evidence in the record of the backpay proceedings suggesting Skinner did not have a Washington State paramedic license during the backpay period or that such a license had been lost through adverse action.⁵ Given the absence of evidence and the burden on Respondent, I did not find Skinner disqualified during the backpay period from accruing backpay as a result of a failure to mitigate damages due to inability to qualify for paramedic employment because of an absence of a paramedic license.⁶ Accordingly, to the extent normal Board law applies to the calculation of Skinner's backpay, the additional finding of fact made does not require modification of my 16 January 1985 Supplemental Decision.

My original decision construed the court of appeals enforcing opinion as requiring no more than the application of normal Board backpay law to the issue of Skinner's backpay. A threshold determination must be made whether the language of the court's enforcing opinion quoted supra, requires a different standard be applied to Skinner's backpay as the law of the case. If a different standard is required, that standard must be applied to the facts and a new analysis of Skinner's backpay undertaken.

For the reasons that follow I conclude that the language of the circuit court's enforcing memorandum as it applies to the issue of Skinner's backpay does not require or even fairly suggest a legal standard different from

⁵ Indeed the record contains R Exh 4 which is Skinner's 24 August 1981 job application submitted to American Ambulance Service a Texas employer. Skinner represented in that application that he possessed a Washington State paramedic license due to expire April 1982.

⁶ Respondent also advanced other evidence and argument in an attempt to prove Skinner was not entitled to backpay. I rejected this evidence as insufficient. See my Supplemental Decision.

those applied in normal Board backpay cases. Thus when the court states "The absence of a license will also be relevant to the amount of backpay due Skinner" the court is doing no more than reiterating the normal Board standard, discussed supra, that the lack of a license to be a paramedic is relevant to a backpay determination, i.e., is relevant to the issue of the backpay claimant's good faith search for work and his ability to accept that work.

I reject the argument that the court's opinion must be read to mean that if Skinner did not have a Washington State paramedic license on the date the court's opinion issued, 13 October 1983, he is entitled to no backpay whatsoever. I read the court's opinion as addressing Skinner's reinstatement and backpay as separate, but related, issues. I find no basis for concluding that the court's opinion requires Skinner to forfeit backpay during any period in which his Washington State paramedic license was current.

Under the court's opinion, reinstatement would be required if Skinner had a valid paramedic license throughout the backpay period. Skinner's license was undisputedly valid.⁷ Backpay accrues during the period that an employer is obligated to reinstate a backpay claimant but wrongfully fails to do so. Thus, the court's opinion offers no basis for concluding that Skinner should be denied backpay during the backpay period, during which period he held a valid license.

3 Summary

I have found that Skinner possessed a Washington State paramedic license throughout the backpay period. I further find that the United States Court of Appeals memorandum opinion enforcing the Board's underlying unfair labor practice case in this matter does not modify Board standards regarding the calculation of backpay for the backpay claimant herein. Having applied standard Board decisional law in my Supplemental Decision I conclude it is unnecessary to amend the recommended Supplemental Order contained in my Supplemental Decision of 16 January 1985.

ORDER

On the basis of the foregoing and pursuant to Section 10(c) of the Act it is recommended that the Board issue the Order recommended in my Supplemental Decision of 16 January 1985.⁸

⁷ The stipulation further makes clear that the license was not lost through suspension or decertification.

⁸ The Board's Order remanding proceeding to administrative law judge dated 15 April 1985 provides that following the service of my Second Supplemental Decision the provisions of Sec. 102.46 of the Board's Rules and Regulations shall be applicable. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Board's Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order and all objections shall be waived for all purposes.

Martha Barron Esq., for the General Counsel
O W Hollowell Esq. (Hollowell Pisto Kalenius & Bully),
of Federal Way, Washington for the Respondent

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. On 9 April 1982, Administrative Law Judge Roger B. Holmes issued his Decision and Order in consolidated Cases 19-CA-13253 and 19-CA-13365. The Board adopted the judge's decision without relevant modification on 17 August 1982.¹ The United States Court of Appeals for the Ninth Circuit enforced that Order in an unpublished opinion on 13 October 1983.² The Order *inter alia*, required Respondent to make whole Richard Skinner for loss of pay together with appropriate interest resulting from Respondent's termination of him.

A controversy having arisen over the amount of backpay due Skinner and certain other matters under the terms of the Board's Order as enforced by the court, on January 20, 1984, the Regional Director for Region 19 of the National Labor Relations Board issued a backpay specification and notice of hearing regarding Cases 19-CA-13253 and 19-CA-13365. Respondent filed an answer to the backpay specification January 30, 1984, and an amended answer May 24, 1984. Following initial postponement and relocation of hearing site by the Regional Director, I heard the consolidated cases on August 23, 1984, in Houston, Texas. At the commencement of the consolidated hearing, and with the agreement of all parties, I severed the consolidated cases. Only Case 19-CA-13365 is decided herein.³

On the entire record, including posthearing briefs submitted by the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE GROSS BACKPAY FORMULA AND AMOUNT

There is no dispute that the backpay period for Skinner commenced on March 17, 1981, and ended on April 30, 1982. Further, there was no dispute, and Respondent's amended answer specifically admits, the formula for calculation of gross backpay during the period and the actual calculations themselves. Accordingly, consistent with Respondent's amended answer, I find that the total gross backpay for Skinner, on a quarterly basis, is that amount alleged in the General Counsel's amended backpay specification.

II. ADMITTED AND ARGUED REDUCTIONS IN BACKPAY CLAIM

A. *Interim Earnings*

The General Counsel alleged in the backpay specification, as additionally amended orally at the hearing, that Skinner received certain quarterly interim earnings, which sums Respondent does not dispute. Consistent

with the backpay specification and the answer, I find Skinner received the interim earnings set forth in the amended backpay specification as further amended orally at the hearing.

B. *Alleged Failure to Mitigate Damages*

1. Skinner's employment search and loss of employment during the backpay period

Skinner testified that soon after his discharge from Respondent as an emergency medical technician, he sought similar employment in the Tacoma, Washington area over time extending his job search throughout the entire western part of Washington State. He testified he visited companies in the area in person, inquired about available employment opportunities, and where vacancies were extant or foreseeable, he submitted applications. Skinner also testified that he utilized the public library and, consulting numerous out-of-area telephone books, mailed professional resumes to employers that had placed ads in the yellow pages specifying paramedics or advance life support services. He estimated that he sent out approximately 120 resumes to employers located in at least 20 States coast to coast. In mid-July 1981, Skinner received a letter from American Ambulance Service in Houston, Texas, dated July 17, 1981, signed by the general manager. The letter indicated the company had examined Skinner's resume and was "very pleased with your qualifications." The letter indicated that "our company would like to help you get settled in Houston with a job." Skinner followed up the letter with a telephone call to the general manager. He testified he was told American Ambulance would assist him with temporary employment, but that permanent employment would be conditioned on obtaining licenses and certificates required by state and local governments in Texas.

Having received no other affirmative responses to his resumes or personal job search, Skinner rented a U-Haul trailer and moved with his family to Houston, Texas, arriving about August 20, 1981.⁴

Skinner testified that he commenced work at American Ambulance about August 24, 1981. He worked for approximately 10 days, at which point he was assigned by the general manager, Ann Wanzer, to transport a patient approximately 400 miles during which trip the patient was to receive certain medical injections. Skinner testified that the ambulance assigned for his use was a new van recently received by the company and as yet without outside lettering, or lights, and other necessary inside equipment. He testified it was "essentially a van with a stretcher mounted in the back of it," and that it "did not meet my specifications to be an ambulance." Skinner testified he had the following conversation with Wanzer:

From that point I disagreed with both administering the medications on the ground that I was not yet certified in the State of Texas to administer the

⁴ The parties stipulated that Skinner paid a rental fee of \$302.21 for the trailer. The parties further stipulated that the appropriate mileage expense for this move, if otherwise compensable, was \$476.22.

¹ 263 NLRB 499 (1982).

² 720 F.2d 683 (9th Cir. 1983) (mem.).

³ My decision in Case 19-CA-13253, JD-(SF)-160-84, issued on August 29, 1984, and was approved by the Board in the absence of exceptions by unpublished order dated October 4, 1984.

medications required and also that the ambulance which was just purchased by the company was not set up and identified as an ambulance, and therefore did not meet the qualifications for transport of the patient

I was informed by [Wanzer] that if I disagreed with the assignment I would have to take it up with the owner of the company

Immediately thereafter Skinner met with owner Billy Ray East Skinner testified that he discussed his objections with East, who told him that he could either under take the assignment as required or abandon his employment In response, Skinner departed⁵ East testified that he met with Skinner who expressed dissatisfaction with his assignment to a van style ambulance as opposed to a modular ambulance East recalled Skinner told him, 'He wasn't going to ride in anything but a module,' and that East told him that he "didn't have to work for me ' At East's direction the following entry was made on a company form containing Skinner's confidential employee history in the box marked "Reason for resignation"

Mr Skinner worked 1 week & 1 day—did not like the person nor ambulance he was put in so he walked off the job at 8 30 a m September 1981 without any notice

East also testified that the ambulance he operates have at all times been complete, state approved, and adequate for their assignments He testified he was unaware that Skinner had been assigned a '400 mile trip' or assigned to "administer drugs" Rather, East testified Skinner complained he did want to work 24 hours in a van

Skinner thereafter obtained employment with Medical Center Ambulance in Houston, Texas, from September 12-28, 1981, as an independent contractor utilizing Medical Center Ambulance immediately after being accused by owner, Ramson Bill of a theft of supplies from the company Jack D Lee, sergeant with the Houston, Texas police department testified that he was assigned the investigation of a theft of Medical Center Ambulance supplies and spoke to Bill and on Bill's informing him of his suspicion of Skinner, contacted Skinner and informed him he was under suspicion of theft Skinner denied any knowledge of or participation in any theft involving the employer to police officials during the investigation and at the hearing Lee testified that Houston police department has never solved the mystery of the missing equipment and no charges have ever been filed

During the time Bill suspected Skinner of misconduct, Bill reviewed Skinner's job application and checked the references indicated previous employers had experienced losses during Skinner's employ He testified he spoke to a female employee at American Ambulance who also expressed dissatisfaction with Skinner's employment He also spoke to Moselle Hancock of Medic I, a separate Texas ambulance company, who informed him that they

were 'in the required a lie detector test of Skinner and concluded that Skinner was "absolutely confused" and that Medic I did not want him

Skinner testified that on the evening of September 29, he had occasion to stop by the office Bill in Skinner's recall accused him of theft inferred that checked his references and that people had "nothing good to say about me,' and that Skinner had better leave Texas before somebody kills me" Bill testified that although the theft and his suspicion of Skinner left him emotionally upset—"I was so mad I could have died"—he testified he was unable to contact Skinner after the theft and that Skinner simply ceased all contact with the employer Subsequently, his assigned duties were filled by others Bill denies having any conversation with Skinner about the incident, having threatened Skinner in any way, or otherwise indicating to him that his employment relationship was terminated

Skinner testified that in his conversation with Bill he was not made aware of what specifically had occurred and in fact never understood the details of the apparent theft until the police detective questioned him about the matter at his home sometimes later

On August 28, 1981, Skinner submitted an employment application to Medic I Ambulance of Houston, Texas He also submitted a resume at the time As part of the application process, the company checked references and administered a written test Skinner was also given a preemployment polygraph examination by E L Goad & Associates on September 1, 1981 During the pretest interview, Skinner made various statements admitting prior serious misconduct The lie detector examiner, by written memorandum dated September 1, 1981, reported his findings and conclusions to Medic I Ambulance Mozell Hancoc, Medic I Ambulance's general manager, testified that the report on Skinner's polygraph examination 'just as it is' would not have caused her to refuse to hire Skinner Rather she testified that, although his not holding Texas certification for ambulance operation rendered him immediately unemployable, she had determined he was hireable when he obtained the certification She further testified that not until 6 months after Skinner's submission of the employment application without notifying them of the obtaining of Texas certification did she decide he was not eligible for hire

Skinner did not return to work for Medical Center Ambulance following his having been accused of stealing and being told by the police he was under investigation Thereafter, Skinner moved to Columbus, Ohio where he resided with his family while seeking work Skinner later found employment with Carro Road Medical Group and continued in that employment until April 24, 1982 He then quit his employment and moved to California⁶

2 Legal standards regarding mitigation

The Board, with the approval of the courts, has long held that once the General Counsel has established gross

⁶ No claim for moving expenses was made by the General Counsel for either the move to Ohio or to California but the backpay period extends to the end of April 1982

⁵ At the December 10 1981 unfair labor practice hearing Skinner testified that he had never met East that he was discharged by American Ambulance and further that his references had been checked by them and they were unable to use someone with the type of references that I got

backpay figures, the burden of proof is on Respondent to establish appropriate reductions in those sums. *Dodson's Market v. NLRB*, 553 F.2d 617 (9th Cir. 1977); *NLRB v. Pilot Freight Carriers*, 604 F.2d 375 (5th Cir. 1979); *Flite Chief, Inc.*, 258 NLRB 1124 (1981); *Wayne Trophy Corp.*, 254 NLRB 881 (1981).

An individual, during the backpay period, has a duty to mitigate his or her loss by making "reasonable efforts" to find and keep alternate work. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). In making findings regarding good-faith efforts to seek employment, the entire record covering the entire backpay period should be scrutinized and any findings be made in light of all the surrounding circumstances. *Cornwell Co.*, 171 NLRB 342, 343 (1968). As Respondent correctly argues on brief, while the burden of proof is on Respondent to prove the affirmative defense that a discriminatee quit an interim job, once such a quit has been established, the burden shifts to the General Counsel to "demonstrate that the decision to quit was, in the circumstances, reasonable." *Big Three Industrial Gas Co.*, 263 NLRB 1189, 1199 (1982).

3. Backpay period to commencement of employment with American Ambulance

Skinner testified, without contradiction, to his employment search during the period preceding his employment with American Ambulance. He further testified that he complied with and received unemployment compensation pursuant to Washington State Laws and regulations which required, inter alia, regular job search. Respondent challenges Skinner's testimony primarily based on Skinner's lack of specification of particular employers contacted and on the basis of its general attack on Skinner's credibility. Finally, Respondent argues that the passage of a month's time between Skinner's initial communications with American Ambulance Service and his moving to Texas indicate Skinner did not engage in good-faith, diligent search for employment. I find no basis for discrediting Skinner's testimony regarding his efforts during this period and, accordingly, find his search for employment to be reasonable. It is not inherently implausible that the nonbinding commitments of American Ambulance Service were not acted on immediately by Skinner during a period of time when he was actively seeking employment with other employers. Accordingly, I find the delay between his initial contacts with American Ambulance and his move to Texas and acceptance of employment were not inherently unreasonable. Further given the uncontradicted facts that the American Ambulance offer was the sole job offer in his profession that Skinner had received at that time, it was reasonable for him to move to Texas to accept such employment and, accordingly, I find his job search and move to Texas reasonable and the stipulated moving expenses reasonable and proper.⁷

⁷ The General Counsel correctly argues on brief that employees are entitled to compensation for reasonable expenses incurred in seeking and maintaining interim employment. Citing *Reynolds Pallet & Box Co.*, 155 NLRB 384, 397 (1965), enfd. 399 F.2d 688 (6th Cir. 1968); *Herman Bros. Pet Supply*, 150 NLRB 1419, 1422-1424 (1965), enfd. 360 F.2d 176 (6th Cir. 1966); *W. C. Nabors Co.*, 134 NLRB 1078 (1961); *Pugh & Barr, Inc.*,

4. Loss of employment with American Ambulance

It is unnecessary to decide whether Skinner's employment with American Ambulance ended by termination or quit. In Skinner's version of events, he was asked to perform work in violation of his state certifications and that he declined to do the work when given the option to undertake the assignment or cease employment. East, on behalf of the employer, testified that Skinner complained of the duration of his shift and was told to undertake his assignment or cease his employment. It is immaterial whether an employee unreasonably quits his employment or is fired for misconduct, either may constitute a failure to mitigate injury. If, however, an employee is unreasonably terminated or quits reasonably, that cessation of employment will not toll backpay. Thus, the issue is not whether Skinner was terminated or quit his employment at American Ambulance, but rather whether Skinner's cessation of employment occurred as a result of Skinner's unreasonable refusal to accept a job assignment, or whether the assignment itself was unreasonable and improper. The determination of this question is one of fact, requiring the resolution of the conflicting testimony of Skinner and East.

Assigning the burden of proof on this question to the General Counsel consistent with the Board's holding in *Big Three Industrial Gas & Equipment Co.*, supra, I find that Skinner's loss of employment should not be held against him for purposes of backpay calculations. I make this finding on the basis of a resolution of the conflicting testimony in favor of Skinner and against East. Although I base this resolution primarily on an evaluation of the relative demeanor of Skinner and East, I also do so in part because Skinner's testimony regarding his initial conversations with General Manager Wanzer of American Ambulance were not contradicted. It is unlikely that East, who had little knowledge of Skinner and admitted he did not know of the initial work assignment that provoked Skinner's refusal to work, would be likely to understand or recall Skinner's rationale for refusing to perform. Rather, I find it would be much more likely that East would simply remember Skinner's refusal to accept his assignment as simply an act of insubordination and thus fail to recall the specific details as testified to by Skinner. Equally, Skinner, long without employment and only recently in the area, would be unlikely to quit his job or defiantly refuse an assignment based merely on the identity of his colleague or the duration of the work shift as East claims. Further, Skinner's detailed testimony regarding his conversations with Wanzer, which immediately preceded his meeting with East, were not challenged. In all the circumstances I credit Skinner and therefore find he made a professional judgment that it would be improper for him to accept the assignment as given and communicated his view to management. Faced with an ultimatum that he must either accept the assignment or cease employment, he stood firm. I decline to

102 NLRB 562, 566 (1953), remanded on other grounds 207 F.2d 409 (4th Cir. 1953), supplementing 110 NLRB 1356 (1954), enfd. 231 F.2d 588 (4th Cir. 1956). These moving expenses therefore count as a deduction from interim earnings. *Florida Steel Corp.*, 234 NLRB 1089 (1978).

find that the exercise of this option, be it resignation or termination, should end or limit Respondent's backpay obligation under the circumstances presented here

5 The loss of employment with Medical Center Ambulance

It is clear that Skinner's employment at Medical Center Ambulance ceased as a result of Skinner's falling under suspicion of stealing the company's equipment. About the contradictions in the versions of events as testified to by Skinner and Bill regarding the occurrence of a conversation in which Bill accused Skinner of thievery and threatened him with adverse consequences if he remained in the State, I credit Skinner. Bill was admittedly very upset at this time and his admittedly strong belief that Skinner was a thief leads me to believe that Bill simply did not recall his conversation with Skinner. Accordingly, I do not find, as testified by Bill, that Skinner merely disappeared following the theft and was in no post-theft contact with the company. I find rather, that Bill accused and threatened Skinner and as a consequence Skinner had no further contacts with the company. Thus, I find that Skinner was terminated for theft from Medical Center Ambulance.

Given that Skinner was discharged for theft, the issue for resolution is whether in fact he did engage in the misconduct that resulted in his termination. Under any resolution of conflicting testimony and under any assignment of the burden of proof, there is insufficient evidence to discredit Skinner's certain testimony that he did not engage in the misconduct attributed to him. Indeed, the testimony of Bill is simply that circumstances cast suspicion on Skinner. The police did not arrest Skinner nor was he ever charged with the crime. Suspicion is not proof of misconduct and cannot sustain a finding here. Given that Skinner did not commit the crime, his loss of employment cannot be attributed to any unreasonable action on his part. Thus, his loss of employment does not constitute a failure to mitigate backpay in the circumstances presented here.

6 Respondent's other defenses

Respondent argues initially on brief that the backpay claimant's misconduct, as reflected in part by his statements to the polygraph examiner, indicate he has

Engaged in a prolonged course of conduct which is known to any prospective employer of paramedics would result in his being denied unemployment.

Such social unavailability, like physical unavailability, would cut off all claims for backpay from and after the date of disability.

Respondent advances the testimony of Hancock of Medic I Ambulance that, while in my judgment clearly evasive and incredible, suggested that the misconduct admitted by Skinner, while not immediately disabling on the part of a potential employee, would cause Medical I Ambulance to question the applicant regarding the areas of misconduct before any hire. I do not find that Skinner tolled his backpay through his previous conduct nor that he abandoned his search for employment by his conver-

sations with a polygraph examiner regarding Medic I Ambulance. Rather, examining the record as a whole and Skinner's conduct during that period, I find that Skinner reasonably sought employment and was not in any conventional way unemployable in the industry or the profession he espoused. Accordingly, I reject this aspect of Respondent's defense.

A second defense raised by Respondent was that Skinner's conduct, as noted in his admissions to the polygraph examiner, would have supported Skinner's discharge by Respondent had Skinner remained in their employ and had Respondent's managing agents been aware of his unlawful conduct. Respondent supported this argument in part with two circuit court decisions denying enforcement to Board cases⁸ and further relying on the testimony of Darlene Palmas, a relative of the owners and a statutory supervisor of Respondent's. She testified that if she had known of the misconduct of Skinner, as related in his admissions to the polygraph claimant, she would have recommended Skinner's termination to her parents.

While at the trial I ruled that misconduct could not toll Respondent's backpay obligation unless and until made known to Respondent, the two circuit court cases to the contrary notwithstanding a recent case, *Western Pacific Construction*, 272 NLRB 1393 (1984), arguably supports Respondent's position. Accordingly, it is appropriate to consider if Respondent's factual argument has merit.

Based on Palmas' testimony and the record as a whole, I reject Respondent's defense that had it known of Skinner's earlier misconduct it would have let him go. Examination of the Board's decision in the underlying unfair labor practice case reveals that it is not at all clear that Skinner would have been discharged by Respondent even if his admissions regarding his conduct made to the polygraph examiner were taken at face value unmitigated by his explanatory testimony. Simply put, Respondent on many occasions simply elected to accept and retain Skinner despite his numerous apparent failings and despite the strong contrary recommendations of Respondent's agents. I find that Skinner's misconduct, if it had been made known to Respondent, would not necessarily have caused his discharge and hence should not be regarded as having tolled backpay in his case. This entire defense is hypothetical and uncertain in the extreme. The Board has long held, with circuit court approval, that uncertainties will be assessed against the wrongdoer. *NLRB v Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966) and here it was Respondent's wrongdoing in terminating Skinner that made it impossible to determine with certainty if Skinner's apparent later misconduct would have caused his termination. Accordingly, I reject Respondent's additional defense here.

⁸ Respondent cites *NLRB v Mutual Maintenance Service Co.* 632 F.2d 33-38-39 (7th Cir. 1980) *Alumbaugh Coal Corp v NLRB* 635 F.2d 1380 1385-1386 (8th Cir. 1980).

7 Skinner's employment following Medical Center Ambulance

Following cessation of services for Medical Center Ambulance about September 29, 1981, Skinner moved to Columbus, Ohio.⁹

There was little testimony regarding Skinner's search for work in Ohio. Ultimately he obtained employment for Carro Road Medical Group, which employment he left on April 24, 1982, to move to California. Skinner testified his reason for leaving his interim employment was to find employment in a geographical area more to his liking.

Consistent with my findings supra, and here in the absence of any specific attack by Respondent, I find Skinner's Ohio efforts to find employment were reasonable and, hence, Skinner did not in any way fail to mitigate Respondent's backpay obligations. There is no dispute that Skinner's interim employment earning with Carro Road Medical Group are an offset to Respondent's backpay obligation. Skinner's abandonment of his employment to seek greener pastures is not a reasonable basis for a quit. Accordingly, Skinner's April 24, 1982 quit tolls Respondent's backpay obligation for the

final week of the backpay period. Accordingly, backpay for the final quarter of the backpay period will be accordingly reduced.

III COMPUTATION OF BACKPAY

Based on the backpay specification and answer, as amended at the hearing, the stipulation of the parties with respect to the amount of expenses, and in light of my rulings supra, the table in the Appendix reflects the quarterly sums due Skinner.

On the basis of the foregoing, it is recommended that the Board issue the following:¹¹

ORDER

It is ordered that Respondent, A A Superior Ambulance Services, Tacoma, Washington, its officers, agents, successors, and assigns, pay to Richard P Skinner backpay in the amount of \$17,018.48, plus interest in the manner set forth in *Florida Steel Corp*, 231 NLRB 651 (1977), and *Olympic Medical Corp*, 250 NLRB 146 (1980),¹² less tax withholding required by Federal and state laws.

⁹ Skinner testified without contradiction that following cessation of employment with Medical Center Ambulance in Houston, Texas, he was without reasonable prospects for employment or financial means. His parents were residents in Ohio and for that reason Skinner and his immediate family returned there.

No claim is made for moving expenses. It is not contended the move was made in bad faith and I find the move does not terminate Skinner's backpay claim.

¹⁰ The General Counsel's gross backpay figure for April 1982 has been reduced by twelve and a half cents to reflect a one week earlier tolling of backpay.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall as provided in Sec. 102.48 of the Board's Rules and Regulations be adopted by the Board and become its findings, conclusions, and order, and all objections shall be waived for all purposes.

¹² See generally *Isis Plumbing Co*, 138 NLRB 716 (1962). The specification of earnings by calendar quarter shall be used for purpose of interest calculation.

APPENDIX

Yr /Qtr	Gross Backpay	Expenses	Interim Earnings	Net Backpay
1981/1	\$ 637.20	0-	-0-	\$ 637.20
1981/2	3 758.40	-0-	-0-	3 758.40
1981/3	3 758.40	\$778.43	\$800.00	3 736.83
1981/4	4 593.60	0	-0-	4 593.60
1982/1	4 593.60	-0-	753.00	3 840.60
1982/2	¹⁰ 1 177.85	-0-	726.00	451.85
Total net backpay				\$17 018.48