08-4845-ag

08-5165-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

DOMSEY TRADING CORP.

Respondent/Cross-Petitioner

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

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, and the cross-petition of Domsey Trading Corp. ("Domsey") to review, two supplemental Decisions and Orders of the Board issued against Domsey. The Board's original Supplemental Decision and Order issued on September 30, 2007, and is reported at 351 NLRB No. 33.

SPA 180-303.[1] The Board's second Supplemental Decision and Order issued on September 25, 2008, and is reported at 353 NLRB No. 12. SPA 334-349. The Board filed its application to enforce the Board's Supplemental Orders on October 2, 2008, and Domsey filed its cross-petition to review the Board's Supplemental Orders on October 22, 2008. Both filings are timely; the Act places no time limitation on such filings.

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, and Section 10(c) of the Act (29 U.S.C. § 160(c)), which authorizes the Board to award backpay whenever it is an appropriate remedy for the unfair labor practices found. The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because both of the Supplemental Orders are final orders issued, respectively, by properly-constituted, three-member and two-member Board quorums within the meaning of Section 3(b)

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[1] The record references in this final brief are as follows: "SPA" cites are to pages of the Special Appendix, which contains the first and second Supplemental Decisions and Orders of the Board with the decisions of the administrative law judge attached thereto; "A" cites are to pages of the Joint Appendix; "SA" cites are to pages of the Supplemental Appendix.

of the Act, 29 U.S.C. § 153(b). SPA 334 n.1.[2] Venue is proper in this judicial circuit because the events alleged and found to have constituted unfair labor practices occurred in Brooklyn, New York.

STATEMENT OF THE ISSUE

1. Whether Section 10(e) of the Act precludes this Court from entertaining Domsey's primary argument—that the Board should bear the burden of proving each backpay discriminatee's immigration status—because Domsey failed to raise this objection to the Board.

2. Whether the Board properly resolved the immigration status of the 12 discriminatees whose status Domsey put at issue in its exceptions.

3. Whether, for the remaining discriminatees cited in Domsey's brief whose immigration status Domsey failed to dispute in its exceptions to the Board

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[2] In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB*, __ F.3d __, 2009 WL 638248, at *4-5 (1st Cir. Mar. 13, 2009).

The issue has been briefed before this Court in *Snell Island SNF LLC v. NLRB* (2d Cir. Nos. 08-3822-ag and 08-4336-ag), which is scheduled for oral argument on April 15, 2009.

but now hopes to put at issue, Section 10(e) precludes the Court from hearing Domsey's arguments or, in any event, whether these arguments have no merit.

STATEMENT OF THE CASE

The Board previously found that Domsey committed various violations of Section 8(a)(1) and (3) and (4) of the Act (29 U.S.C. § 158(a)(1) and (3) and (4)), and ordered it to make 202 of its employees whole for any loss of wages and benefits that they may have suffered as a result of Domsey's unlawful discrimination against them. *Domsey Trading Corp.*, 310 NLRB No. 127 (1993). This Court enforced the Board's Order in full. *Domsey Trading Corp. v. NLRB*, 16 F.3d 517 (2d Cir. 1994).

Thereafter, the Board issued a compliance specification setting forth the amount of backpay owed the 202 employees named as discriminatees in the Board's underlying unfair labor practice order. A 20-238. Domsey filed detailed answers to the specification, asserting multiple affirmative defenses to the backpay as calculated, including that certain discriminatees were barred from receiving backpay as undocumented aliens not authorized to work in the United States. A 239-327.

An administrative law judge conducted a hearing, and issued a supplemental decision and recommended order. The Board considered Domsey's exceptions to the judge's decision, overruled them in part and granted them in part, and

remanded the case to the Board's Brooklyn Regional Office ("the Region") for a recalculation of the backpay due to the vast majority of the discriminatees, and to the administrative law judge to develop further evidence concerning the immigration status of six discriminatees. SPA 180-202.

The Region filed a motion for summary acceptance of its backpay recalculations and the judge issued a second supplemental decision. The Board considered Domsey's response to the Region's motion, and Domsey's exceptions to the judge's decision, and then issued a second Supplemental Decision & Order accepting the Region's recalculations and affirming the judge's findings and conclusions concerning immigration status. SPA 334-39. The Board has now applied to this Court for enforcement of its Supplemental Orders and Domsey has cross-petitioned for review.

STATEMENT OF FACTS

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

Domsey sold and shipped used clothing from its plant in Brooklyn, New York, utilizing a workforce comprising, in large part, immigrants from Haiti and Latin America. In 1989 and 1990, Domsey threatened, interrogated, and fired certain of its employees in response to an organizing effort by the International Ladies Garment Workers Union ("the Union"). More than 200 of Domsey's employees reacted by going on a strike. The strike was a heated and ugly affair,

characterized by Domsey's managers physically assaulting the union organizers, and verbally assaulting the strikers with racial and sexual slurs such as "stupid niggers," "fucking monkeys," and "whores." 310 NLRB No. 127, 779, 792-93. In August 1990, the Union made an unconditional offer to return to work on behalf of the strikers. Domsey responded with a series of legally insufficient offers of reinstatement that required, among other things, that the returning strikers resubmit work authorization documents. *Id.* at 777-78 n.3. Additionally, Domsey subjected the striking employees who accepted the early offers of reinstatement to extreme verbal and physical abuse—in one case requiring a former striker to leave its facility by ambulance. *Id.* at 805.

The Board found that Domsey's succession of coercive and discriminatory conduct violated the Act. *Id.* at 780-81. Most of those findings were not contested before this Court, as Domsey focused its appeal on whether it had made legally sufficient reinstatement offers immediately following the strikers' unconditional offer to return to work. This Court found no merit in Domsey's arguments, and affirmed the Board's unfair labor practice findings in all respects. *Domsey Trading Corp. v. NLRB*, 16 F.3d 517, 519 (2d Cir. 1994).

II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

Following this Court's enforcement of the Board's order, a controversy arose concerning the amount of backpay due under its terms. As a result, the

Board's Regional Director for Region 29 issued a compliance specification that set forth the amounts of backpay due the 202 discriminatees, and the basis for those calculations. A 20-238. Prior to the hearing, Domsey filed an 89 page answer to the compliance specification detailing, for each individual discriminatee, the multiple affirmative defenses to reduce or bar the backpay awards as calculated. A 239-327. For 24 of the 202 discriminatees, Domsey's answer specifically included a defense that those discriminatees were barred from receiving backpay as undocumented aliens not authorized to work in the United States. At the end of its answer, Domsey included an additional blanket assertion that "in the event that it is determined that any of the employees affected are undocumented aliens, the Answer is intended to include that such employee is not entitled to receive backpay for any period of time that they were not authorized to work in the United States." A 326.

A hearing was held before an administrative law judge over a series of months, during which Domsey cross-examined more than 140 discriminatees concerning their entitlement to backpay. Early in the hearing, a dispute developed concerning Domsey's desire to inquire into certain discriminatees' immigration status. The administrative law judge, following then-current Board law, ruled that immigration status was irrelevant to the discriminatees' entitlement to backpay. A 346-54. Nevertheless, the judge agreed to allow limited questioning into

immigration status to establish whether discriminatees' status may have impeded their mitigation efforts to seek interim employment. A 354-57. In reliance on that ruling, Domsey asked direct questions concerning immigration status of some, but not all, of the discriminatees called during the first few days of hearing. Of those questioned early in the hearing, many confirmed their work authorization during the backpay period. *See, e.g.*, A 370, 377-78, 406.

Less than a quarter of the way through the hearing, the parties revisited the permissibility of questions concerning immigration status after this Court issued its decision in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997), which affirmed the Board's view that immigration status was relevant to reinstatement, but not backpay. The judge acknowledged that the Board was silent on willful-loss issues stemming from discriminatees' ability to mitigate their damages because of their lack of immigration status. Accordingly, he decided to allow Domsey to ask at least two immigration-related questions. Domsey could ask whether the discriminatees' immigration status impacted their search for work, and whether they were offered jobs that they could not accept because of their status. A 440-42.

The judge soon confirmed that Domsey could not simply embark on a fishing expedition in search of potential immigration problems for each and every discriminatee. Rather, Domsey only would be able to ask immigration-related

questions to discriminatees for whom it had knowledge of potential immigration problems. Thus, Domsey could question discriminatees hired before the effective date of the Immigration Reform and Control Act, Pub. L No. 99-603, 100 Stat. 3359 (codified as amended in various sections of 8 U.S.C.) ("IRCA")[3]—discriminatees for whom Domsey had not, at the time of their hire, been legally required to verify their authorization to work in the United States. Domsey could also ask immigration-related questions of post-IRCA hires so long as Domsey could articulate the basis for its belief that the discriminatees had immigration problems. A 466-67**.** Accordingly, if Domsey had a reasonable belief that any particular discriminatee was undocumented, the judge's ruling would allow them to ask that discriminatee at least some questions related to immigration status. Despite the judge's ruling, however, Domsey chose not to ask any immigration-related questions of many of the testifying discriminatees, while in several cases—according to the judge—Domsey questioned discriminatees that it knew had proper documentation for only harassment purposes. *See* SPA 216 n.20.

At the conclusion of the hearing, the judge issued a recommended decision and order making detailed findings concerning the adequacy of many of the

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[3] IRCA was the first federal statute to prohibit the knowing employment of aliens who lacked authorization to work in the U.S. IRCA thus required employers such as Domsey, from 1986 forward, to verify prospective employees' work authorization by examining certain specified documents at the inception of the employment relationship.

discriminatees' searches for interim employment, and resolving multiple other legal issues argued by Domsey. As to immigration status, the judge reasoned that, under the Board's then-current after-acquired-evidence rule, any immigration status issues that emerged during the hearing would not toll backpay for any period that ended years before the hearing began. While the judge's recommended decision was pending before the Board, however, the Supreme Court decided *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) ("*Hoffman*"), denying backpay to an unlawfully discharged worker who had proffered false documents to his employer, and was in fact undocumented during the backpay period.

The Board considered Domsey's far-ranging exceptions to the judge's decision and, in several instances, overruled the judge and required further deductions from many discriminatees' gross backpay. SPA 180-210. Accordingly, the Board remanded the majority of the discriminatees' claims to the Region for a recalculation of the backpay due. SPA 201-02. The Board also considered the judge's recommended order in light of *Hoffman*, and Domsey's specific immigration-related exceptions filed for 12 of the testifying discriminatees. Thus, the Board dismissed the backpay awards of four discriminatees who, according to Domsey's exceptions, admitted that they were undocumented during the backpay period. SPA 184-85. Additionally, the Board remanded to the administrative law judge for further factual development, the

claims of six discriminatees—also specifically excepted to by Domsey[4]—whose testimony strongly suggested that they may have been undocumented during the backpay period. SPA 185-86. However, the Board did not disturb the bulk of the immigration-related evidentiary rulings made by the judge during the course of the hearing, the vast majority of which were unchallenged in Domsey's exceptions.

III. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER

Following the Board's remand, the Region filed a motion for summary acceptance of its recalculations of backpay, which it subsequently amended to correct errors and to make the only changes specifically requested by Domsey. SPA 334. The judge issued a second supplemental decision finding that no backpay was due to two of the remanded discriminatees whose claims the Region withdrew after investigating their immigration status, but that some amount of backpay was due to three other remanded discriminatees who enjoyed work authorization for at least part of the backpay period. SPA 337-38. Finally, the judge ruled that the backpay claim for Rene Geronimo should be held in escrow until such time as he could be found to clarify his immigration status during the backpay period. SPA 338.

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[4] It was unnecessary for Domsey to except to one of the six remanded discriminatees—Bardinal Brice—because the judge noted that he was undocumented, and the only issue left open after *Hoffman* was the date on which he secured valid work authorization. SPA 185, 256.

The Board affirmed the judge's recalculations, which Domsey did not contest. SPA 334. The Board also affirmed the judge's unchallenged disposition of five of the six remanded discriminatees, as well as the claim of Geronimo—the only portion of the judge's decision to which Domsey excepted. SPA 335, 345-46. The Board noted Domsey's restatement of its objections and exceptions in light of *Hoffman*, but found no reason to disturb any additional evidentiary rulings made by the judge. SPA 334 n.8.

SUMMARY OF ARGUMENT

Domsey presents this Court with arguments that it never made to the Board, and therefore, the Court is jurisdictionally barred from reviewing them. Section 10(e) of the Act precludes this Court from considering arguments that a party does not raise to the Board in the first instance—through specific exceptions to the administrative law judge's decision below. Domsey's primary argument runs afoul of 10(e) because Domsey never argued to the Board that immigration status should be the one affirmative defense to a backpay calculation for which the Board—not the employer—should bear the burden of proof. Accordingly, the Court lacks jurisdiction to consider it.

The Court also lacks jurisdiction to consider Domsey's attempt to expand—beyond the 12 dicriminatees whose immigration status Domsey's exceptions raised to the Board—the number of discriminatees that Domsey's immigration-status

arguments can affect, even if those arguments were found to have merit. When Domsey's exceptions presented the Board with 12 discriminatees who allegedly had immigration-related problems affecting their entitlement to backpay, the Board was quite responsive. The Board properly denied backpay or remanded claims to the administrative law judge for the vast majority of them and, we submit, none of Domsey's current arguments put any of these results in dispute. Because Domsey limited its immigration-related exceptions to these 12 discriminatees, however, the Court is barred from considering Domsey's immigration-related arguments concerning any of the additional discriminatees cited in Domsey's opening brief.

Even if Domsey could surmount Section 10(e)'s jurisdictional bar to the Court's consideration of a larger class of discriminatees, Domsey's arguments fail on their merits. First, Domsey's brief, by including 86 separate citations to discriminatees who allegedly may have lacked work authorization, misleadingly expands the class by double counting many of the same discriminatees for different types of supposedly suspicious evidence, and including discriminatees for whom no backpay is currently pending. Then Domsey includes in the class a number of discriminatees for whom Domsey, at the hearing, failed to lay the necessary evidentiary predicate to preserve a dispute before the Board over their immigration status—even if Domsey had raised their immigration status as an issue in its exceptions. For this group, Domsey either failed to elicit any immigration-related

testimony or got testimony at the hearing that actually confirmed the discriminatees' work authorization. Thus, once all this confusion is cleared, the Court would be left—again even if Domsey could surmount the Section 10(e) jurisdictional bar—with only 16 discriminatees' backpay awards to review for potential immigration issues. And, even for those awards, Domsey has failed to show they were the result of an abuse of the Board's remedial discretion.

ARGUMENT

I. DOMSEY'S ARGUMENT THAT THE BOARD SHOULD BEAR THE BURDEN OF AFFIRMATIVELY PROVING EACH DISCRIMINATEE'S IMMIGRATION STATUS IS NOT PROPERLY BEFORE THIS COURT

This Court lacks jurisdiction to consider Domsey's primary argument—that the Board should bear the burden of proving each discriminatee's immigration status before awarding him or her backpay. Br. 4, 33, 35, 41. Domsey's brief opens by describing the issue presented as whether the Board may award backpay "*without ascertaining* whether [the] discriminatees were legally authorized to work in the United States during the backpay period." Br. 4 (emphasis added). Later, in its summary of the argument, Domsey repeats that the case should be "remanded to *the Board to prove* that each and every one of these 192 discriminatees, to whom backpay has been awarded, were legally authorized to work in the United States during the backpay period." Br. 33 (emphasis added). Domsey goes on to close its brief with the same misguided argument—making the grandiose assertion that

none of the discriminatees are entitled to a backpay award "[b]ecause *the Board has failed to prove* that these discriminatees are in fact authorized to work in the United States." Br. 41 (emphasis added).

Domsey never raised such a far-reaching argument in its exceptions to the Board or in a timely motion for reconsideration, despite the Board's pronouncement that Domsey carried the burden in the backpay proceeding "to establish facts that negate or mitigate its liability." SPA 181 n.5 (quoting *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993)). Section 10(e) of the Act provides that "no objection that has not been urged before the Board . . . shall be considered by the Court" absent extraordinary circumstances. 29 U.S.C. § 160(e). Accordingly, this Court lacks jurisdiction under Section 10(e) to consider Domsey's novel claim that the Board erred by failing to introduce affirmative evidence at hearing establishing that each of the discriminatees enjoyed a sufficient immigration status to authorize his or her receipt of a backpay award. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (appellate court lacked jurisdiction over party's challenge to Board decision on issues not expressly presented to the Board below).

This court has not hesitated to foreclose precisely the type of unpreserved argument attempted here. *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 435 (2d Cir. 2001) (applying 10(e) to bar review of employer's new contention, not raised

to the Board, that the General Counsel had not met its burden in a compliance proceeding). Out of circuit precedent is likewise set uniformly against such unpreserved arguments, even when the arguments attempted run generally to areas of concern addressed in a party's exceptions. *See U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 963 (D.C. Cir. 2007); *St. John's Mercy Health Systems v. NLRB*, 436 F.3d 843, 848 (8th Cir. 2006).

Moreover, at every stage of the litigation below, Domsey properly proceeded from the premise that it bore the burden of proving individual discriminatees' lack of immigration status, just as it bore the burden of proving its other affirmative defenses to the Board's backpay calculations. Domsey's brief to the Board repeatedly equated lack of immigration status with a discriminatee's willful loss of earnings, and acknowledged the well settled principle that the employer retains the burden of proving such an affirmative defense. *See* SA 14, 45, 49, 51, 52. In fact, Domsey went so far as to quote approvingly this Court's pronouncement that "the burden of persuasion as to willful loss should remain on the employer." SA 51 (quoting *NLRB v. Mastro Plastics*, 354 F.2d 170, 175 (2d Cir. 1965).[5] In sum, Domsey cannot seek a ruling from this Court that

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[5] Domsey's counsel also failed to object during any of the several points during the hearing when the administrative law judge described the parties' relative burdens—particularly when the judge explained his eventual requirement that the General Counsel forgo direct examination of the witnesses in the interest of

would upset decades of Board law without having clearly articulated its argument to the Board.

II. DOMSEY DID FILE EXCEPTIONS WITH THE BOARD DISPUTING THE IMMIGRATION STATUS OF 12 OF THE DISCRIMINATEES AND THE BOARD PROPERLY RESOLVED THE STATUS OF THE 12 DOMSEY PUT AT ISSUE

Domsey, in its exceptions to the Board, raised specific challenges to the judge's immigration-related rulings with respect to 12 of the discriminatees.[6] And the Board was quite responsive to Domsey's 12 discriminatee-specific, immigration-related exceptions. Indeed, Domsey could not reasonably take issue with the Board's disposition regarding 9 of the 12.

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expediting the hearing "since the burden really is upon the Respondent to come forward with evidence to reduce the gross amounts[.]" A 369. *See also* A 379-80, 423-24, 425.

[6] The discriminatees for whom Domsey asserted immigration-related challenges in its exceptions were: Nilda Matos (Exception No. 111 (A 1668)); Franciso Moreira (Exception Nos. 120, 122 (A 1670-71)); Atulie Balan (Exception No. 277 (A 1711)); Marie Casseus (Exception No. 351 (A 1730)); Michelet Exavier (Exception No. 429 (A 1750)); Marie Jose Francois (Exception Nos. 446-48 (A 1755)); Rene Geronimo (Exception Nos. 505, 507 (A 1770)); Louine Joseph (Exception No. 512 (A 1771)); Leanna Joseph (Exception No. 531 (A 1776-77)); Fritho Laporamede (Exception Nos. 569, 571 (A 1786)); Vincente Suazo (Exception Nos. 657, 659-61 (A 1809-10)); and Rose Marlene St. Juste (Exception Nos. 664-66 (A 1810-11)).

The Board, in its first supplemental decision, denied all backpay to 4 of the 12,[7] who—according to Domsey's exceptions—admitted that they were undocumented. The Board then remanded the backpay claims of five others,[8] who—according to Domsey's exceptions—put their status at issue through testimonial admissions or evasion of Domsey's immigration-related hearing questions.

Then, in its second supplemental decision, the Board affirmed the judge's denial of all backpay for two of the five remanded discriminatees—Michelet Exavier and Rose Marlene St. Juste—whose claims the Region withdrew after investigating their immigration status. SPA 335. The Board further ruled that the immigration status of the third remanded discriminatee—Rene Geronimo, who could not be located after the remand—"shall be resolved by the judge" before Geronimo would be able to collect any backpay. SPA 335. Finally, Domsey did not challenge the reduced backpay awards to the fourth and fifth discriminatees—

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[7] The four discriminatees whose backpay claims the Board denied because they were undocumented were: Francisco Moreira, Louine Joseph, Fritho Laporamede, and Vincente Suazo. SPA 185.

[8] The five discriminatees that the Board remanded for an immigration status determination by the administrative law judge were: Atulie Balan, Michelet Exavier, Marie Jose Francois, Rene Geronimo, and Rose Marlene St. Juste. SPA 185-86.

Atulie Balan and Marie Jose Francois—after the judge confirmed that they held work authorization for some portion of the backpay period. A 335, 338.

Thus, based upon what Domsey preserved in the exceptions that it filed with the Board, the immigration status of only three of the discriminatees—Nilda Matos, Marie Casseus, and Leanna Joseph—potentially remains before the Court. But Domsey has abandoned its arguments as to Matos and Casseus. Their names can be found nowhere in Domsey's opening brief to this Court. Accordingly, Domsey has waived its opportunity to press for a reduction in the backpay due either Matos or Casseus.[9] *See LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (citing *NLRB v. Star Plate Color Serv.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988)) (treating as abandoned an argument that an appellant failed to raise in its opening brief).

The only discriminatee, then, for whom Domsey has adequately preserved its immigration-status affirmative defense, both in its exceptions to the Board and

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[9] Had Domsey continued to assert its arguments concerning these two discriminatees, its arguments could have been easily been overcome on the merits. For Domsey had no basis for its claim (Exception No. 111 (A 1668)) that Matos's immigration status hindered her job search. As the judge observed, Domsey did not ask Matos a single immigration-related question at hearing, and nothing in her testimony suggested a lack of work authorization. SPA 228 n.43. Casseus, on the other hand, confirmed in her testimony that she held a work permit during the backpay period (A 390-91), and the Board reasonably rejected Domsey's sole immigration-related argument (Exception No. 351 (A 1730)) that Casseus's backpay should have been tolled during her brief trip out of state to renew that work permit. SPA 259.

its opening brief to this Court, is Leanna Joseph. However, Domsey misrepresents Joseph's testimony by asserting (Br. 18) that she "confirmed having used multiple Social Security Numbers, and confirmed this hampered her job search during the backpay period." In fact, Joseph's testimony confirmed her immigration status. She explained that she obtained permanent residency status from her U.S. citizen brother and always provided her green card to requesting employers during the backpay period. A 741-46. Additionally, the judge noted that Joseph's testimony and the record evidence—including Domsey's expert testimony—was consistent with Joseph holding a valid social security number and work authorization during the backpay period. SPA 281. In short, there is no reason for this Court to disturb Joseph's backpay award, or the backpay awards of any other discriminatee that Domsey has preserved for court review.

III. SECTION 10(e) OF THE ACT PRECLUDES REVIEW OF THE BACKPAY AWARDS TO ANY OF THE ADDITIONAL DISCRIMINATEES CITED IN DOMSEY'S BRIEF BUT, IN ANY EVENT, DOMSEY HAS NOT SHOWN THAT ANY OF THESE AWARDS WERE IN ERROR

A. Domsey Has Failed To Preserve Immigration-Related Affirmative Defenses to Any of the Discriminatees Cited in Its Brief Whose Backpay Awards It Did Not Challenge on Immigration Grounds

As shown above, Domsey's exceptions to the Board did not advance—and thereby did not preserve for court review—its threshold argument that the Board

should bear the burden of proving each discriminatee's immigration status before awarding him or her backpay. But Domsey's exceptions did advance Domsey's immigration-status objections with respect to 12 of the discriminatees. And, as also shown above, the Board properly resolved those disputes.

Domsey's brief to this Court (Br. 9-25), however, through 86 separate citations to individual discriminatees, attempts to enlarge upon this class of 12 discriminatees. Section 10(e) of the Act prevents this by conferring jurisdiction upon the court to review only those objections that were first raised to the Board. At most, as Domsey acknowledges (Br. 37), it "generally excepted" to the ruling the judge made, during the first several days of hearing, that limited Domsey's ability to inquire into discriminatees' immigration status. But such a "general" exception is insufficient to preserve arguments regarding the multitude of specific evidentiary rulings made by the judge with respect to individual discriminatees that went unchallenged in Domsey's exceptions. *See Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 115, 123 (2d Cir. 2001); *National Maritime Union of America, AFL-CIO v. NLRB*, 867 F.2d 767, 775 (2d Cir. 1989).

Not only did Domsey's general exception fail to preserve its current attempt to put the backpay awards of additional discriminatees at issue, but Domsey also filed a contradictory-sounding exception actually "*supporting* [the judge's] ruling whereby he permitted [Domsey] to question discriminatees that it knew lacked

proper documentation during the backpay period and any discriminatee hired by [Domsey] prior to the effective date of the 1986 Immigration Reform and Control Act." Exception No. 42 (A 1634-35) (emphasis added). Such dueling exceptions only reinforce the point that Domsey never alerted the Board that it was seeking review of the immigration status of more than the 12 discriminatees to whose backpay awards Domsey had specifically excepted.

Thus, Section 10(e) of the Act jurisdictionally precludes this Court from reviewing the backpay awards for any of the remaining discriminatees cited in Domsey's brief whose testimony the Board had no reason to review for immigration-related issues. In any event, as we now show, Domsey's brief to this Court only translates into an argument that could be potentially relevant to the backpay awards of 16 additional discriminatees who Domsey hopes to place at issue, and even as to their awards, there are separate and independent obstacles to Domsey's arguments.

B. Some of Domsey's Citations to Discriminatees' Alleged Immigration Problems are Repetitive and Overbroad

As an initial matter, although Domsey's opening brief contains 86 separate citations to discriminatees with alleged immigration issues, many of those citations reflect double-counting and over-inclusion. The 86 citations can first be reduced by recognizing that many of Domsey's citations double count the same

discriminatees for different types of allegedly problematic evidence. Thus, by subtracting out the double citations that can be attributed to the 29 discriminatees listed by Domsey in both its testimony section (Br. 9-21) and its social security evidence section (Br. 21-25), [10] the total number of discriminatees that Domsey tries to place at issue is trimmed from 86 to 57. Six more discriminatees included in Domsey's citations had their backpay claims withdrawn, dismissed or denied,[11] leaving the Court with nothing to possibly review. Subtracting those six from

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[10] The 29 double-counted discriminatees were: Atulie Balan (Br. 18, 24); Ronald Jean Baptiste (Br. 19, 24); Jean Joseph Eliacin f/k/a Jean Bonny (Br. 18, 24); Bardinal Brice (Br. 18, 24); Marie Camille (Br. 20, 24); Gertha Denaud (Br. 16, 24); Marie Estivaine (Br. 16, 24); Michelet Exavier (Br. 21, 25); Luis Ramos Frederick (Br. 20, 22); Rufino Guity (Br. 20, 22); Rene Geronimo (Br. 19, 25); Louine Joseph (Br. 18, 25); Lenna Joseph (Br. 18, 25); Mureille La Fleur (Br. 20, 22); Maximo Lacayo (Br. 19, 25); Nevius Lambert (Br. 18, 22); Fritho Laponarde (Br. 17, 22); Jean Michelet Louisma (Br. 20, 24); Allan Ramos Melendez (Br. 20, 23); Alta Meuze (Br. 19, 22); Rufino Norales (Br. 17, 22); Oscar Nunez (Br. 17, 23); Marco Pitillo (Br. 17, 23); Romulo Ovado Ramirez (Br. 17, 23); Rene Rochez (Br. 19, 23); Rose Marlene St. Juste (Br. 18, 23); and Vincente Suazo (Br. 19, 23). Also double-counted were Marie Jean Charles (who was actually cited three times—once as Marie Jean Charles (Br. 16), once as Marie Sylvan Jean Charles (Br. 19), and once as Sylvaner Jean Charles (Br. 24) and incapacitated discriminatee Marie Anne Cideufort (Br. 22), on whose behalf her nephew Jean Marcel Raymond testified (Br. 20). Discriminatee Jean Max Adolphe has not been listed as one of the 29 discriminatees above because Domsey's double counting of him (Br. 16, 19) occurred only in the testimonial section of its brief.

[11] The six cited discriminatees for whom backpay claims are no longer pending were: Michelet Exavier (Br. 21, 25) (SPA 335); Milka Guiterrez (Br. 20) (SPA 200); Louine Joseph (Br. 18, 25) (SPA 200); Fritho Laponarde (Br. 17, 22) (SPA 200); Rose Marlene St. Juste (Br. 18, 23) (SPA 335); and Vincente Suazo (Br. 19, 23) (SPA 201).

Domsey's citations brings the total number of discriminatees Domsey can hope to put at issue down to 51.

C. For Other Discriminatees, Domsey Failed To Establish a Factual Predicate at the Hearing for an Immigration Status Affirmative Defense When Testifying Discriminatees Confirmed Their Work Authorization or When Domsey Did Not Ask Others Any Immigration-Related Questions

The number of discriminatees whose immigration status Domsey hopes to put at issue can be further winnowed. To do so, we first explain the foundation that Domsey must lay at the hearing before claiming that it has preserved a challenge to a discriminatee's immigration status. We then show how Domsey failed to establish this foundation for all but 16 of the remaining discriminates.

At the compliance hearing below, even though the judge was operating under pre-*Hoffman* law, his rulings were decidedly in-line with the Board's post-*Hoffman* policy that "[p]roof of a discriminatee's undocumented status, as with any other defense to reinstatement or backpay, must be established through evidence offered by the party making the allegation."[12] Accordingly, the judge

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[12] *See* Memorandum GC 02-06, *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*, 6 (July 19, 2002), *available at* http://www.nlrb.gov in the GC Memos database. The Board's current prosecutorial position, as reflected in the memorandum, indicates that the Board's regional attorneys are to begin their analysis with the presumption that both employees and employers have complied with IRCA—a law that "protects employees against harassment by an employer which seeks to reverify

appropriately limited Domsey's ability to cross-examine discriminatees concerning their immigration status unless Domsey could come forward with evidence to justify that each inquiry was based on something more than prejudice due to the discriminatee's perceived national origin.[13] The judge provided two general means for Domsey to meet its threshold burden. First, Domsey could show that a discriminatee had been hired before IRCA took effect (at a time when Domsey was not required to verify his or her immigration status). Second, Domsey could proffer evidence that it had knowledge of some immigration problems for post-IRCA hires (because it was presumably familiar with their immigration documents). A 467.

Once Domsey had met either of these threshold burdens, the judge then allowed Domsey to ask at least two immigration-related questions. Domsey was allowed to inquire whether the discriminatees had not sought work because of their immigration status, and whether discriminatees were offered jobs that they

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their immigration status without cause." Thus, an employer must lodge a "substantial immigration issue"—more than a mere assertion—to justify an inquiry into a discriminatee's work authorization at a compliance hearing.

[13] *See* IRCA provision 8 U.S.C. § 1324b(a)(6), which prohibits an employer's national-origin discrimination by requesting "more or different documents than are required" by the I-9 form or "refusing to honor documents tendered that on their face reasonably appear to be genuine." *See also* 8 C.F.R. § 274a.2(b)(viii)(A)(4) (defining employees involved in a strike as continuing in their employment, making reverification of their work authorization inappropriate).

couldn't accept because of their immigration status. A 440-42. Notably, however, Domsey never attempted to make these immigration-related inquiries for the majority of the testifying discriminatees. Despite its present claims that the judge prevented Domsey from eliciting testimony, a more careful examination of the record demonstrates that the failure to create an evidentiary record is Domsey's alone.

For 12 of the remaining 51 discriminatees included in Domsey's citations, these questions at the hearing resulted in their immigration status being confirmed, either in the Board's second Supplemental Board Decision[14] or by their hearing testimony.[15] Domsey attempts to suggest otherwise only by affirmatively misrepresenting several of these discriminatees' testimony.

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[14] The three cited discriminatees whose backpay awards Domsey did not challenge after the administrative law judge adduced additional immigration-status evidence upon remand (SPA 335, 338) were: Atulie Balan (Br. 18, 24); Bardinal Brice (Br. 18, 24); and Marie Jose Francois (Br. 9-10).

[15] The nine cited discriminatees whose testimony confirmed that their immigration status authorized them to work in the U.S. were: Ivovia Brutus (Br. 15) (A 392, 393 - green card); Gahislaine Caristhene (Br. 13-14) (A 370-76 - legal alien with a work permit, which she renewed during the backpay period); Marie Jean-Charles (Br. 16) (A 483-84, 485-87 – work permit, but not permanent residency); Leanna Joseph (Br. 18) (A 742-46 – permanent residency/green card), *see also* p. 20-21 *supra*; Marie Rose Joseph (Br. 17) (A 549-55 – work permit); Jean Michelet Louisma (Br. 20, 24) (A 525-26 – green card); Milton Ramos a/k/a, Allan Ramos Melendez (A 995-97, 999-1000 – green card); Nevius Lambert (Br. 18) (A 750-51 – permanent residency); and Monique Samedy (Br. 23) (A 655-59 – permanent residency).

For example, Domsey claims (Br. 15) that Ivovia Brutus "admitted that her immigration status negatively affected her search for employment" when, in fact, Brutus denied that her immigration status affected her search for work and clarified that she possessed a green card during the backpay period. A 393-94. As to Marie Rose Joseph, Domsey pointedly does not acknowledge that the judge found (and was affirmed by the Board) that the issue of whether Joseph's work permit was valid during the backpay period was *res judicata*. Specifically, Domsey is precluded from questioning the validity of Joseph's work permit because the judge in the previous unfair labor practice proceeding explicitly found that Joseph had a valid work permit during the backpay period, and that finding was not contested upon review. SPA 225-26 (citing 310 NLRB 777, 802-03). In any event, Domsey stretches Joseph's testimony to claim that she "admitted [having] employment issues stemming from the expiration of her temporary work permit" (Br. 17), when, in fact, Joseph attempted to clarify in her testimony that she held a temporary work permit that allowed her to find work. A 549-55.

Once these 12 discriminatees are subtracted from Domsey's 51 remaining citations, then the total number of discriminatees Domsey hopes to put at issue is reduced to 39. Furthermore, Domsey includes Rene Geronimo in its citations (Br. 19, 25), yet pursuant to the Board's second Supplemental Decision (SPA 335), Geronimo's immigration status must be definitively determined before Domsey

will be ordered to pay him due to the lingering questions about his work authorization. *See* p. 18, *supra*. Thus, Domsey's immigration defense to Geronimo's claim, along with claims of the other 46 missing discriminatees (SPA 336-37), is not properly before this Court.[16] Subtracting Geronimo's claim from Domsey's citations further reduces the total number of discriminatees Domsey hopes to put at issue to 38.

The last group of discriminatees that must be winnowed from Domsey's citations is the 22 discriminatees that, for reasons known only to itself, Domsey failed to ask either of the judge's pre-approved immigration-related questions.[17] The testimonial circumstances of these unquestioned discriminatees varied

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[16] As the judge acknowledged (A 635-36), the missing discriminatees will also be subject to cross-examination before their backpay is released from escrow. Accordingly, should Domsey have evidence justifying further immigration inquiries, it will have that opportunity should any of the missing discriminatees show up to claim their backpay after this appeal is concluded.

[17] The 22 cited discriminatees to whom Domsey did not pose any immigration-related questions were: Ana Alvarez-Contreras (Br. 20); Ronald Jean Baptiste (Br. 19, 24); Marie Camille (Br. 20, 24); Adrian Castillo (Br. 20); Simion Ramon Castillo (Br. 22); Rose Marie Castor (Br. 20); Bridgette Charles (Br. 13); incapacitated discriminatee Marie Anne Cideufort (Br. 22), on whose behalf her nephew Jean Marcel Raymond testified (Br. 20); deceased discriminatee Eduardo Roman Feliciano (Br. 25) on whose behalf his friend Edwin Freytes testified; Luis Ramos Frederick (Br. 20, 22); Mureille La Fleur (Br. 20, 22); Marie Laconte (Br. 19, 22); Louis P. Jean (Br. 22); deceased discriminatee Marie Narcisse on whose behalf her friend Marie Racine Menard testified (Br. 20); Alta Meuze (Br. 19, 22); Oscar Nunez (Br. 17, 23); Ludovic Pierre-Louis (Br. 20); Feliciano Reyes (Br. 19); Rene Rochez (Br. 19, 23); Richard Simon (Br. 21), Margaret St. Felix, incorrectly cited as Margaret Feliz (Br. 23); and Lourdes Williams (Br. 20).

dramatically, but the failure to ask any immigration-related questions remained the same. For example, Domsey did not raise immigration status as an affirmative defense in its answer regarding Adrian Castillo, did not attempt to ask him either of the judge's pre-approved immigration questions, and also did not attempt a single social security number question[18] after establishing that the Board lacked a social security earnings report for Castillo (A 870-71)—the sole asserted basis for the immigration suspicions that Domsey raises to this Court (Br. 20). In contrast, Domsey did assert in its answer that it believed Luis Ramos Frederick to be undocumented, established that the Board lacked a social security earnings report for Frederick (A 877-78), and elicited testimony that Frederick was using a different social security number at the time of the hearing than the one he used while working at Domsey and during the backpay period (A 879-84). Having done all that, however, Domsey did not attempt to ask Frederick any immigration-related questions.[19]

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[18] There were 9 other discriminatees out of the group of 22 of whom Domsey similarly did not attempt any questions about their social security numbers, beyond getting several of them to confirm their correct number. *See* Ana Alvarez-Contreras (A 579); Ronald Jean Baptiste (A 421); Rose Marie Castor (A 643; Marie Laconte (A 859); Alta Meuze (A 417); deceased discriminate Marie Narcisse on whose behalf Marie Racine Menard testified (A 978-80); Simion Ramon Castillo (A 808-39); Margaret St. Felix (A 917-18); and Lourdes Williams (A 957-59).

[19] There were 6 other discriminatees out of the group of 22 of whom Domsey similarly asked pointed questions about their social security numbers, yet did not

Domsey may have failed to pursue further questions of some discriminatees out of concern for exposing its own past legal violations. Thus, it ceased making social security number inquiries of discriminatee Bridgette Charles after admitting to the judge that it was required by law to maintain a record of Charles's social security number for tax purposes. A 366-68. By contrast, with respect to discriminatee Feliciano Reyes, Domsey for no apparent reason proclaimed, in response to an objection to a social security number question, "I don't care about his status to tell you the truth."[20] A 765-68. Whatever its motive, Domsey's failure to even attempt to make a record concerning these 22 discriminatees necessarily precludes Domsey from requesting this Court's review now, even if Domsey's request were not independently barred by Section 10(e). Accordingly, once the 22 discriminatees to whom Domsey did not attempt immigration-related

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take the next step and ask the judge's pre-approved immigration-related questions. *See* Marie Camille (A 845-53); incapacitated discriminatee Marie Anne Cideufort, on whose behalf Jean Marcel Raymond testified (A 905-09); Mureille La Fleur (A 887-99); Oscar Nunez (A 592-604); deceased discriminatee Eduardo Roman Feliciano, on whose behalf Edwin Freytes testified (A 865-69); and Richard Simon (A 1042-43).

[20] There were 3 other discriminatees out of the group of 22 to whom Domsey made no further immigration-related inquiries after the administrative law judge sustained objections based on lack of foundation for even its social-security-number questions. *See* Louis P. Jean (A 942-51); Ludovic Pierre Louis (A 789-91); and Rene Rochez (A 965-71).

questions are subtracted from Domsey's cites, then the total number of discriminatees that Domsey hopes to put at issue is further reduced to 16.

D. Even for the Final Group of 16 Discriminatees to Whom Domsey Actually Posed or Attempted To Pose Immigration-Related Questions, Domsey Relies On Inadequate Evidence To Disturb Their Backpay Awards

After taking into account the subtractions set out above, there are only 16 remaining discriminatees cited in Domsey's opening brief whose backpay awards could have been preserved for review if Domsey had satisfied Section 10(e) of the Act by attacking their immigration status in its exceptions to the Board. But even as to these 16,[21] the sparse evidence and arguments that Domsey now belatedly advances are not sufficient to overturn their awards.

1. This Court reviews the Board's formulation of backpay remedies, and the judge's evidentiary rulings, only for abuse of discretion

The Board's discretion in formulating remedies, including the backpay calculations at issue here, is "a broad one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.s. 203, 208, 216 (1964). *Accord*

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[21] The 16 discriminatees who Domsey has potentially placed at issue are: Jean Max Adolphe (Br. 16, 19); Francois Alexander (Br. 15); Gerda Benoit (Br. 20); Jean Joseph Eliacin f/k/a Jean Bonny (Br. 18, 24); Jose Deleon (Br. 24); Gertha Denaud (Br. 16, 24); Marie Estivaine (Br. 16, 24); Murat Georges (Br. 16); Ruffino Guity (Br. 20); Maximo Lacayo (Br. 19, 25); Rachel Louissant (Br. 24); Marie Marithe-Jacques (Br. 18); Rufino Norales (Br. 17, 22); Marcos Pitillo (Br. 17, 23); Romulo Ovado Ramirez (Br. 17, 23); and Antoinette Romain (Br. 16-17).

NLRB v. Katz's Delicatessen of Houston St., 80 F.3d 755, 769 (2d Cir. 1996). For that reason, this Court will not overturn a remedial order "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." *Katz's Delicatessen*, 80 F.3d at 769 (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). Any doubts about the alleged affirmative defenses to the Board's backpay orders are to be resolved against the employer who committed the unfair labor practice. *See NLRB v. J.H. Rutter Rex Mfg. Co.*, 396 U.S. 258, 263-65 (1969); *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976). Moreover, where, as here, the petitioning party essentially takes issue with evidentiary rulings by an administrative law judge, the courts review those rulings only to see if they were abuses of discretion. *See, e.g., Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153 (D.C. Cir. 2000). As we now show, the judge's rulings as to the 16 discriminatees at issue fell within his discretion, and even if Domsey had preserved its right to appeal the awards of those 16, Domsey has pointed to no basis to disturb them.

2. When asked, Domsey's immigration-related questions elicited testimony that would not have assisted its affirmative defense

For 6 of the 16 discriminatees, Domsey asked immigration-related questions, but the answers elicited ranged from unhelpful, to outright damaging to an immigration-status affirmative defense. Thus, Jose Deleon denied that he had any

concerns about his immigration status at the inception of the backpay period (A 359-60); Rachel Louissaint denied being offered any employment that she could not accept during the backpay period (A 665-66); and Gerda Benoit denied both using more than one social security number (A 536-39) and that her immigration status caused her any difficulty in finding employment (A 540). The only evidence that Domsey now presents to cast doubt on these respective backpay awards is its social security expert's acknowledgment (Br. 24) that Deleon's social security number was indeed validly issued in New York either before or during the backpay period, and her claim that Louissaint used a valid social security number that was allegedly issued to someone else. As to Benoit, Domsey relies solely on the fact that the Union's strike-related records contained an incorrect social security number for her (Br. 20). Such weak evidence would hardly be adequate to justify disturbing the Board's award of backpay to any of these three discriminatees.

The evidence that was outright damaging to Domsey came from the discriminatees whose testimony strongly suggested that they possessed work-authorization documents, and Domsey's present arguments do little more than quibble with the documents that were revealed through their testimony. As to Murat Georges, Domsey harbored a speculative belief that he may have lacked authorization to do anything other than agricultural work based only on Georges's

testimony that he once worked on a farm. A 431-32. However, Georges flatly denied that his residency status limited the type of work he could perform (*id.*), and Domsey provides not a shred of evidence to suggest why Georges's status was suspect (Br. 16). Antoinette Romain similarly testified that her immigration status did not impact her ability to find work (A 548), and Domsey's sole evidence to impeach her assertion (Br. 16-17) is that Romain explained at the beginning of her testimony that she typically used the name Antoinette despite the fact that her green card set forth her first name as Antonia (A 545), an argument that the judge found singularly unpersuasive (A 546-47).

Domsey claims Marie Estivaine's green card may have expired during the backpay period (Br. 16), but the judge reasonably ruled that Domsey was not entitled to embark on a further "fishing expedition" concerning Estivaine's immigration status,[22] considering that she received unemployment benefits during the backpay period after presenting her green card and that Domsey reemployed her during the backpay period without regard to the alleged infirmity with her authorization documents. A 495, 496-503. Indeed, Domsey's own social-security expert tends to undermine its claim by admitting that Estivaine's social security

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[22] Rather than challenging this ruling by the judge in its exceptions, Domsey focused on Estivaine's delay in searching for work. *See* Exception Nos. 417-20 (A 1747-48). Consequently, the Board agreed with Domesy's delay argument and tolled Estivaine's backpay for three months. SPA 195.

number was valid and, at most, may have issued before or during the backpay period. (Br. 24) In short, Domsey has still failed to lodge a substantial immigration issue that would, if preserved, justify a further inquiry into the immigration status of any of these discriminatees.

3. When Domsey failed to meet its threshold burden, the judge reasonably sustained objections to its attempted immigration questions

Regarding seven of the remaining discriminatees, the judge reasonably determined that Domsey's evidence, to the extent that any existed, was insufficient to justify even limited questions related to the discriminatees' immigration status. Perhaps the most obvious examples are Francois Alexander (Br. 15) and Marie Marithe Jacques (Br. 18), discriminatees for whom Domsey lacked any individualized immigration suspicions pre-hearing, as evidenced by Domsey's failure to assert immigration status in its answer for either. At hearing, Domsey did little to add weight to its attempted immigration inquiry, arguing only that the Union's records contained an incorrect social security number for Alexander and that Jacques was hired before IRCA's enactment. The judge acted within his discretion in rejecting both reasons considering that Alexander provided a correct social security number to the Board which was verified by the social security administration (A 404-05), and Jacques's substantial interim earnings left her with a net of only $320 in backpay (A 757) (SPA 336).

Domsey fares little better in contesting its preclusion from questioning Jean Max Adolphe and Gertha Deanaud. For each it now asserts that its immigration suspicions are based upon the Board's failure to procure an earnings report from the social security administration.[23] Br. 16. The judge reasonably rejected such contrived reasoning as lacking in analytical weight; in the case of Denaud even offering to overlook Domsey's failure to raise immigration status in its answer if Domsey could produce a substantive reason for its sudden suspicion at hearing.[24] Domsey could not provide a satisfactory answer to the judge's question when posed, and now relies upon its immigration expert's testimony near the close of the hearing that, although Denaud's social security number was valid, it was also used by someone else. A 1097. It was hardly an abuse of discretion for the judge to conclude that such evidence was too little, too late, in reference to Denaud and the additional 140-plus discriminatees whose testimony had concluded before the

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[23] Domsey makes the additional assertion that it suspected Denaud of being undocumented based on her failure to apply for unemployment benefits. Br. 16. If Domsey in fact believed that the receipt of unemployment benefits was an accurate indicator of immigration status, then it should not be attempting now to object to the backpay due many of the testifying discriminatees, including Adolphe who confirmed that he applied for and received unemployment benefits during the backpay period. A 457-58.

[24] The judge pointedly accused Domsey of embarking on a fishing expedition and sustained the objection to Domsey's attempted immigration-related question to Denaud, saying "If you had told me that you had some basis for asking the question, I would allow it. You have no basis, so I'm not going to allow it." A 509-12.

immigration expert took the stand.[25] As to Adolphe, Domsey fails to mention that its expert tended to support the judge's earlier ruling by confirming simply that Adolphe's social security number was valid. A 1066.

Even for discriminatees for whom the social security expert's evidence was potentially more germane, by, for example, alleging that multiple people were utilizing the social security numbers held by Romulo Ovado Ramirez (Br. 17, 23), and Ruffino Norales (Br. 22), it hardly follows that it was an abuse of discretion for the judge to sustain objections to immigration-related questioning when the allegedly suspicious information had not been introduced at the time of the discriminatees' testimony. Indeed, when the judge asked Domsey for the basis for its individualized suspicion of Norales, the reply was only that his interim earnings paystub showed his middle name—Guerrero—as his surname.[26] A 580, 583-86. By contrast, although Domsey raised its belief that another person used Maximo Lacayo's (Br. 19, 25) admittedly valid social security number during his testimony, Domsey raised it as nothing more than a bald allegation, and an afterthought at

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[25] Domsey made no attempt to recall any of the testifying discriminatees for further cross-examination after its expert's evidence was introduced.

[26] Domsey did not except to the judge's failure to allow immigration-related questions to Norales. Instead, it excepted to the judge's failure to deduct Norales's strike benefits as interim earnings. *See* Exception Nos. 615-16 (A 1796-97). The Board found merit in Domsey's argument and remanded Norales's backpay to be recalculated. SPA 198.

that, again leaving the judge well within his discretion in rejecting a further immigration-related inquiry.[27] A 982-84, 985-87.

4. Domsey cannot show an abuse of the Board's discretion regarding the backpay awards for discriminatees whose testimony was arguably helpful to Domsey's unpreserved affirmative defense

On balance, if Domsey had raised the immigration status issue in their exceptions, only three discriminatees' testimony could have presented truly close calls for the Board. Ruffino Guity (Br. 20), Marcos Pitillo (Br. 17, 23), and Jean Joseph Eliacin f/k/a Jean Bonny (Br. 18, 24) all admitted at hearing to some potentially suspicious use of work-authorization documents. Guity worked for several years before the backpay period under his counsin's name and social security number; Pitillo began using a new social security number after the backpay period, and Eliacin used three different social security numbers and a different name. Nevertheless, by considering the context surrounding those admissions, the Board would not have abused its discretion in failing to remand the three discriminatees' backpay claims for an immigration-status determination.

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[27] Again, Domsey chose not to except to the judge's preclusion of its immigration-related questioning of Lacayo. Instead, it challenged the judge's finding that Lacayo made a reasonably diligent search for work. *See* Exception No. 553 (A 1782). And again, the Board sided with Domsey and tolled Lacayo's backpay for five months. SPA 197-98.

With respect to two of these three, Guity (A 779) and Pitillo (A 616-17, 633-34), the judge allowed immigration-related inquiries. Both denied that their immigration status negatively impacted their search for work during the backpay period, and they denied that they were ever asked for immigration documents that they could not provide. Thus, while Guity may have been undocumented until he ceased working under his counsin's name in 1986 (A 777-78), no evidence suggested that he had failed to attain legal status by the beginning of the backpay period in 1990.[28] Likewise, the fact that Pitillo obtained a new work permit and accompanying social security number in 1998 (A 628) did not prove that he lacked work authorization in 1990-91.

As to Eliacin, the judge sustained objections to Domsey's questions about his use of three social security numbers (A 715-17, 718-19) after he asserted his Fifth Amendment privilege against self-incrimination in response to Domsey's questions about how he changed his name (A 698-705). SPA 253 n.76. Domsey challenged the judge's ruling in its exceptions (Exception Nos. 308-09 (A 1719-20)) but did not argue, until now (Br. 18, 24), that Eliacin was likely undocumented. Indeed, Domsey argued to the Board (Exception No. 319 (A 1721-

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[28] Like several of the discriminatees noted above, Domsey's exceptions concerning Guity did not mention immigration status, but instead focused upon his search for work. *See* Exception Nos. 477-83 (A 1763-64). The Board responded to Domsey's exceptions, reversed the judge's reasonably diligent search findings, and tolled Guity's backpay for nearly five months. SPA 196-97.

22)) that the judge erred in finding the social-security-number evidence as inadequate to prove Eliacin's concealment of earnings, not that the evidence suggested a legal impediment to Eliacin's receipt of any amount of backpay.

Considering the judge's explanation that there was "no dispute," that prior to the backpay period Eliacin was assigned a social security number by the INS as part of his legalization application, the Board could hardly be required to find that the evidence demanded that additional immigration-related questions be posed to Eliacin. SPA 255. This conclusion is especially reasonable considering that Domsey never attempted to ask Eliacin either of the judge's immigration-related questions after introducing the evidence concerning his multiple social security numbers. Furthermore, as the judge noted, "even [Domsey's] expert witness . . . confirmed that Eliacin's numbers were issued about the times he was using them." SPA 255. Thus, even if Domsey's exceptions had raised Eliacin's immigration status as an issue, the Board would not have abused its discretion in viewing the evidence as a whole as insufficient to warrant remanding Eliacin's backpay claim for an immigration-status determination.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the petition for review and enforce the Board's Supplemental Orders in full.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Petitioner/Cross-Respondent	)	Nos. 08-4845-ag
	)	08-5165-ag
	)	
v.	)	Board Case No.
	)	29-CA-14548
DOMSEY TRADING CORP.	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMNENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 9,779 words of proportionally-

spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 20th day of May, 2009

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	)	
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	)	Board Case No.
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	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by overnight delivery upon the following counsel at the address[es] listed below:

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