Nos. 10-3411 & 10-3546

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

ST. GEORGE WAREHOUSE, INC.

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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(29 U.S.C. § 151 et seq.)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE 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 St. George Warehouse, Inc. ("the Company"), to review, a Second Supplemental Decision and Order issued against the Company that requires the payment of backpay to two discriminatees. The Board had subject matter jurisdiction under Section 10(a) of

the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Second Supplemental Decision and Order issued on August 10, 2010, and is reported at 355 NLRB No. 81. (A. 1-9.)[1] That Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act because the unfair labor practice occurred in New Jersey.

The Board filed its application for enforcement on August 12, 2010, and the Company filed its cross-petition for review on August 25, 2010. Both were timely filed because the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined, based upon credited evidence, the amount of backpay due discriminatees Leonard Sides and Jesus (Jesse) Tharp.

STATEMENT OF THE CASE

In an earlier unfair labor practice proceeding, the Board found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employees Leonard Sides and Jesus (Jesse) Tharp for antiunion reasons. This Court enforced the Board's Order in an unpublished opinion.

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[1] "A." references are to the 3-volume joint appendix, the first volume of which is appended to the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Thereafter, the Board's Regional Director issued a compliance specification. A hearing was held during which the Company maintained, but a Board administrative law judge found failed to prove, that the discriminatees had made inadequate job searches. In a Supplemental Decision, the Board remanded for the taking of further evidence, finding that the Company's evidence regarding the availability of comparable work was sufficient to shift the burden of production, but not persuasion, to the General Counsel to proffer evidence concerning the discriminatees' job-search efforts. After a reopened hearing, a second administrative law judge found that the Company failed to prove that either discriminatee had made an inadequate job search.

The Company filed exceptions. A two-member Board affirmed the administrative law judge's rulings and findings and adopted his conclusions and recommended order. (A. 2.) *See St. George Warehouse, Inc.* 353 NLRB No. 50 (2008). The Company then petitioned for review of the Board's 2009 Order in this Court, and the Board cross-applied for enforcement, Case Nos. 08-4875, 09-1269. The case was briefed and taken on submission on October 30, 2010, by a panel consisting of Circuit Judges Sloviter, Fluentes, and Hardiman. Among the issues briefed was whether the two-member Board had the statutory authority to decide cases, including the present one.

On November 1, the Clerk notified the parties that the panel had placed the case in abeyance pending the Supreme Court's resolution of whether the two-member Board had the statutory authority to decide cases. On July 7, 2010, based upon the Supreme Court's ensuing determination that a two-member Board lacked such authority, *New Process Steel L.P. v. NLRB*,130 S. Ct. 2635 (2010), the panel issued an unpublished decision vacating the two-member Board's order, dismissing "as moot" the pending petition and cross application, and remanding for further proceedings.

On August 12, 2010, a properly-constituted three-member panel of the Board issued a Second Supplemental Decision and Order. The Board affirmed the administrative law judge's rulings, findings, and conclusions, and adopted his recommended order, to the extent and for the reasons stated by the two-member panel in its 2009 Second Supplemental Decision and Order, which the Board incorporated by reference in the 2010 decision. (A. 1.) The pertinent facts follow.

STATEMENT OF FACTS

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

In early February 1999, the Company responded to a nascent organizing effort at its warehouse by committing a broad range of unfair labor practices, including the abrupt and unwarranted discharge of the two in-plant leaders of the organizing effort, forklift operator Sides and warehouseman Tharp. Sides had

worked for the Company for a year and a half and Tharp had been employed for 6 years. On June 23, 2000, the Board affirmed a decision of its administrative law judge finding that the Company unlawfully discharged Sides and Tharp and ordered the Company to offer reinstatement to both employees and to make them whole for their losses. (A. 2; 14-21.) The Company refused to comply with the Board's Order until this Court enforced it via unpublished decision on April 23, 2001. (A. 2-3; 26-35.)

II. THE COMPLIANCE PROCEEDING

Following the Court's order, the Board's Regional Director issued a compliance specification computing gross backpay from the date of the discriminatees' discharges in March 1999 until September 1, 2000, when the Company extended reinstatement offers. The Regional Director deducted from the gross backpay computations whatever interim earnings the discriminatees had reported. Sides had been able to find work through two temporary manpower agencies, where he was assigned to a variety of businesses, during a 4-month period, but otherwise had no interim earnings. Tharp found no work for 5 months following his discharge, at which point he moved to Florida. Shortly after arriving, he secured a job that he held for the remaining 10 and 1/2 months of the backpay period. In addition to the discriminatees' interim earnings, the Regional Director deducted from backpay voluntary payments that the Company made to each

discriminatee after the Court enforced the Board's underlying unfair labor practice order. (A. 3; 50-58.)

At the subsequent hearing on the compliance specification, the Company did not dispute the backpay computations but argued instead, as an affirmative defense, that jobs for the discriminatees were plentiful and the employees would have found work had they made reasonable efforts. Specifically, the Company produced an expert witness, Donna Flannery, a certified disability management specialist. Flannery, who admittedly never spoke to either discriminatee, prepared a report asserting that, in her professional judgment, "a significant number of job postings were advertised . . . during this period" and "that neither of these job seekers made a diligent effort to seek and obtain new employment." Her report assumed that a 25-mile radius surrounding the Company's warehouse constituted an appropriate search area for each discriminatee, although it analyzed advertisements, without geographic limitation, from the Newark Star Ledger, which lists jobs spanning a 13-county area in Northern New Jersey and New York State. The report only reviewed every other Sunday's worth of ads during the 1.5 year backpay period.

Still, Flannery admitted in her testimony that reviewing even those Sundays "was very cumbersome and tedious," and that it would have taken "forever" to "count every ad." Nevertheless, based upon the results of her effort, she concluded that the discriminatees could have easily found work had they simply consulted the

listings in each Sunday edition of the Star Ledger issued during the backpay period. (A. 3, 9; 72-73, 75, 79, 397, 402-04.)

Neither the Company nor the General Counsel sought to adduce testimony from the discriminatees about the extent or nature of their job searches. (A. 1-2; 80.) The Company asserted, however, that Flannery's report and testimony were sufficient to shift the burden to the General Counsel to prove that the discriminatees did not willfully lose earnings by failing to conduct reasonable job searches. (A. 3; 80.)

The administrative law judge found that the Company's evidence, standing alone, was inadequate to establish that either employee had actually incurred a willful loss of earnings. In so doing, the judge rejected the Company's claim that the expert's report and underlying newspaper listing should shift the burden of proving no willful loss of earnings to the General Counsel. Rather, since it was open to the Company to produce testimony from the discriminatees and the burden was on the Company to prove its affirmative defense, the judge found the opinion testimony and newspaper listings inadequate to establish that either employee actually did not make an proper job search. The judge therefore recommended that the Company pay the discriminatees the amounts set forth in the backpay specification, plus interest. (A. 3, 48-49.) The Company filed timely exceptions.

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

In its Supplemental Decision and Order, the Board (Chairman Battista and Members Schaumber and Kirsanow; Members Walsh and Liebman dissenting) rejected the Company's position that its expert's evidence was sufficient either to prove willful loss, or shift the burden of proving willful loss to the General Counsel. Instead, the Board reaffirmed the settled principle common in all areas of employment-law litigation that "the ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate" lies with the respondent, here, the Company. (A. 39-42.) The Board, however, noted that the General Counsel has greater access to the discriminatees than respondent employers, and that either the General Counsel or the discriminatee will know what the discriminatee did to find work. On that basis primarily, the Board deemed it appropriate to modify extant Board law to a limited extent, so that, where, as here, "a respondent raises a job search defense . . . and produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period," the General Counsel bears a limited burden to produce evidence from the discriminatees and others regarding their job search efforts. (A. 39.)

The Board emphasized that, by "plac[ing] on the General Counsel the burden of producing evidence concerning the discriminatee's job search," it was doing no more than codifying the usual practice followed by the General Counsel in cases of

this sort.[2] (A. 39-42.) Because extant Board law had imposed no burden of production on the General Counsel, the Board remanded the case for the taking of further evidence. (A. 42.)

IV. THE SECOND COMPLIANCE HEARING

A second hearing was held on February 26 and March 14, 2008. At that hearing, the General Counsel presented evidence demonstrating that both Sides and Tharp were dependent on public transportation, a fact not considered by the Company's expert when she opined that jobs were available for which they might have applied. The General Counsel also presented evidence pertinent to Sides' job-search efforts from Sides himself and from the head of the unemployment office that had assisted Sides with his search. The General Counsel's evidence with respect to Tharp's job-search efforts—Tharp had passed away by the time of the hearing—was presented through his mother. In turn, the Company presented evidence from the Region's compliance officer concerning her instructions to each employee to keep on-going records of his job-search efforts, but did not recall its expert to offer testimony responding to the discriminatees' actual circumstances.

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[2] Specifically, the Board's Casehandling Manual instructs the General Counsel to "advise" discriminatees of their need to mitigate and asks them to keep the Region apprised of their efforts. It also directs the General Counsel to present such evidence in a backpay case when on notice that a job-search defense will be raised. (A. 41-42.)

A. Leonard Sides

Sides testified that he did not own a car and that his job search was constrained by his reliance on public transportation that placed him within walking distance of his job. He further testified that, following his discharge, he went to the state unemployment office, where he was interviewed extensively, taught how to look for work, and informed that he was entitled to a veterans' preference for job referrals from that office. Thereafter, Sides visited the office (a 45-minute commute each way) on a near weekly basis for the ensuing 9 months. In all, he received referrals to only eight potential employers. Sides testified that he kept each referral appointment, none of which produced an offer. In September 1999, to help advance his job search, Sides took and passed an exam certifying his competence as a forklift operator. (A. 3-4; 153-62, 209-11.)

Sides testified that, in addition to relying on unemployment-office referrals, he read the classifieds every Sunday in the Newark Star Ledger and would follow up on advertised jobs that he could identify as being within a reasonable walking distance or accessible through public transportation and a reasonable walk. He also spoke to friends and associates and got leads through them. In all, he identified and applied in person for jobs at an additional 25 potential employers, none of which produced a job offer. (A. 3-4; 172-79, 202-03, 210-13, 376-88.)

On October 25, 1999, based on a friend's referral, Sides secured employment with Labor Ready, a manpower provider, which referred him for work on a part-time basis to a stocking job until November 25, 1999. At the end of November or early December, Sides went to work for a second temporary employment provider, J & J Staffing Resources, Inc., which found him part-time work for several months. During the period he worked for those temporary employers, with the possible exception of a few weeks to a month after he first began working for Labor Ready, Sides testified that he looked for permanent work by regularly contacting the state unemployment office and continuing to check the Star Ledger for suitable openings. He found and applied for several openings each month through the end of the backpay period, but none produced an offer of employment. Sides also testified that he thought that working through the temporary agency might provide his best chance of securing a permanent job from one of the employers to which it had referred him. (A. 4; 164-69, 218-19, 224-25.)

Salvatore LoSauro, the supervisor of records in the New Jersey Department of Labor's Employment Services Office, remembered Sides "as a very active job seeker," (A. 128), and verified that his records showed Sides' considerable contacts with his office, which had produced a total eight referrals. (A. 4; 109-10, 112, 120-33, 345-50.) LoSauro testified that he had no independent recollection of the jobs to which Sides had been referred, or whether Sides kept the appointments his office

arranged. He also explained that "most of the time" employers did not follow through and mail back paperwork his office requested of them, and that, when they did, the return cards they sent were destroyed "after a while." LoSauro gave several reasons why utilizing his office to find employment was a preferred method—it has a relationship with many employers because its referral services are free, and those employers will accept applications from LoSauro's office for 2 weeks before the employer advertises the opening elsewhere. Moreover, LoSauro explained that Sides veterans' preference gave him priority over other out-of-work employees who used the state's unemployment referral system to find jobs. (A. 4; 134, 140.)

B. Jesus (Jesse) Tharp

Discriminatee Tharp, who died prior to the second hearing, had worked for the Company for some 6 years prior to his discharge, and, like Sides, his job search was constrained by his reliance on public transportation as he did not own a car. According to his mother, Gail Moskus, Tharp was quite upset with having been discharged and was anxious to secure employment elsewhere. As she testified: "[H]e liked to work. . . . Jesse was used to working. He always had a paycheck coming in." (A. 6, 8; 86.)[3] Moskus also testified that she spoke to her son every

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[3] The administrative law judge noted that Moskus' name was improperly reported in the hearing transcript as "Mastes," which is how the Company refers to her in its brief. (A. 5 n.5.)

other week during his unemployment and that he reported to her that he was job-searching daily, unsuccessfully. She could not recall the details, but said that her son had mentioned names of places where he had looked. (A. 6, 8; 83-86, 94.)

Moskus testified that Tharp became very concerned about his inability to secure a job after 4 months of looking, at which point she suggested that he move down to Florida where jobs were available and where he could live with her and have help from relatives in finding a job. After a month more of fruitless searching, Tharp informed Moskus that he had decided to move. Tharp received unemployment benefits from shortly after his discharge in March through mid-August. (A. 6, 8; 85-88, 342-44.)

In early September, Tharp moved to Florida and promptly began a job search. (A. 6, 8; 87-89, 101-03.) In Florida, he made job contacts and pursued them through personal interviews. Moskus testified that she drove her son to those interviews, and that, eventually, on October 18, 1999, Tharp decided to take a job with Naples Lumber because it paid "the closest to what he made in New Jersey." (A. 6, 8; 87-89, 105-06.) Finally, Moskus testified that Tharp began at Naples Lumber the following day and worked there without interruption for nearly a year until September 3, 2000, after the backpay period ended. (A. 6, 8; 106.)

C. The Administrative Law Judge's Decision on Remand

The judge found the testimony presented by the General Counsel's witnesses, as recounted above, not only credible, but also compelling proof that each discriminatee entertained a sincere desire to find interim work throughout the backpay period. The judge further found that the report offered by the Company's expert (which did not consider Sides and Tharp's personal circumstances), and any gap in employment by either discriminatee, or recordkeeping by Tharp, was wholly inadequate to prove otherwise. He therefore concluded that the Company had failed to prove that either discriminatee incurred a willful loss of earnings. The judge recommended that the Company be required to pay Sides and Tharp's estate the amounts specified. (A. 7-9; 47.)

The Company filed timely exceptions challenging the judge's credibility determinations and arguing that the proof offered by the General Counsel, and the absence of comprehensive records concerning job searches, failed to meet what it claimed was the General Counsel's burden of proof to establish that the job searches conducted by Sides and Tharp met accepted Board standards.

V. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER

On August 20, 2010, the Board (Chairman Liebman and Members Schaumber and Becker) issued a Second Supplemental Decision and Order affirming the judge's credibility determinations and other findings and adopting his

recommended order that the Company pay Sides $26,447.90, and Tharp's estate $14,649.79, plus interest, for the reasons stated in the two-member Board's 2008 decision, which it incorporated by reference. (A. 1-2, 9.)[4]

SUMMARY OF ARGUMENT

The Board's findings with respect to remedial matters—here, whether the discriminatees' made reasonable efforts to secure employment—partake of nuanced decision-making that depends on the Board's special expertise. Those decisions, therefore, are entitled to great weight. The Company bore the burden of proving willful loss of earnings when the backpay case was before the Board, and bears the burden before this Court of demonstrating grounds for second-guessing the Board's expert judgment. The Company's brief is inadequate to that task.

It consists, in the main, of challenging the Board's well-reasoned credibility determinations, or misstating the extent to which the Board altered extant procedures for litigating backpay issues. While the Company asserts otherwise, the Board here expressly held that the burden of persuasion on the issue of willful loss of earnings never shifts; it remains on the wrongdoer respondent, against whom all

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[4] The Company contends (Br. 8 n.12, 13 n.4) that, in arriving at the above figures, the Board made an inexplicable mathematical error. However, the Company failed to note that error during the proceedings before the Board, and therefore no such argument may be considered under Section 10(e) of the Act, 29 U.S.C. § 160(e), by this Court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

ambiguities in proof are to be resolved. The Board only shifted the burden of production to the General Counsel when, in support of a claim that an employee failed to conduct an adequate search for work, the employer produces evidence that comparable positions were available. In that circumstance, the Board held that the General Counsel had "the burden of producing evidence concerning the employee's job search." (A. 39.)

Here, the Board found that the evidence established that each employee made good faith and reasonable efforts to secure work during periods following their discharges, and that the opinion and job-availability evidence offered by the Company to prove otherwise was manifestly unequal to the task. The Company's repeated assertion that job openings were plentiful and the employees could have found work had they only looked does not comport with the record evidence. The testimony of the Company's expert, Flannery, fails to confront the uselessness of searching voluminous classified advertisements spanning 13 different counties—as Flannery proposed—to employees dependent on public transportation to commute to work. In the face of evidence showing the limitations Sides and Tharp encountered in their job search, the Company did not even recall Flannery to the stand to defend her report. The Board reasonably concluded that the Company failed to meet its burden of proof—which the Board held always remains on the wrongdoer—to demonstrate that Sides and Tharp engaged in a willful loss.

ARGUMENT

THE BOARD REASONABLY DETERMINED, BASED UPON THE CREDITED EVIDENCE AND PROBABILITY OF EVENTS, THAT THE COMPANY DID NOT PROVE THAT SIDES AND THARP FAILED TO MAKE AN ADEQUATE JOB SEARCH

A. General Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to alleviate the effects of unfair labor practices by "order[ing] the violator 'to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act . . . .'" *NLRB v. J.H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 262-63 (1969). The object of a Board remedy is twofold. First, it is a make-whole remedy designed to restore "'the economic status quo that [the employee] would have obtained but for the [employer's] wrongful [act].'" *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Second, a backpay award serves to deter the commission of future unfair labor practices by preventing wrongdoers from gaining advantage from their unlawful conduct. *See J.H. Rutter-Rex*, 396 U.S. at 265. "'The finding of an unfair labor practice is presumptive proof that some backpay is owed.'" *NLRB v. Madison Courier, Inc*., 472 F.2d 1307, 1318 (D.C. Cir. 1972) (quoting *NLRB v. Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968)).

In a backpay proceeding, the burden on the General Counsel is limited to proving the gross amount of backpay due. Once that is done, "the burden shifts to the employer to demonstrate that no backpay is due or that the amount due had been improperly determined." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 719 (3d Cir. 2001) (citing cases). "The burden is a heavy one," *id*. at 721, and any doubts about alleged affirmative defenses are to be resolved against the party who committed the unfair labor practices, *Madison Courier*, 472 F.2d at 1318. In making an employee whole, deductions are made from gross backpay "for actual [interim] earnings of the worker, [and] also for losses which he willfully incurred." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, 199-200 (1941). *Accord Oil, Chemical & Atomic Wkrs. Int'l v. NLRB*, 547 F.2d 598, 602 (D.C. Cir. 1976). A willful loss occurs when the employee "'fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.'" *Oil, Chemical & Atomic Wkrs.*, 547 F.2d 602-03 (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 (2d Cir. 1965)).

The duty of employees to avoid such willful losses flows not so much from any obligation to mitigate (though that term is often used), but rather from what the Supreme Court termed the "healthy policy of promoting production and employment." *Phelps Dodge*, 313 U.S. at 200. Indeed, while backpay awards

"somewhat resemble compensation for private injury . . . [they are] designed to vindicate public, not private rights." *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 543-44 (1940). It therefore is "wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order." *Id.* *Accord NLRB v. Velocity Exp., Inc.*, 434 F.3d 1198, 1202-04 (D.C. Cir. 2006) (upholding the Board's refusal to deduct expenses drivers would have incurred operating their own trucks absent unlawful discharge).

Further, as this Court has recognized, the Board has long held that a wrongfully discharged employee "'is not held to the highest standard of diligence in his or her effort to secure comparable employment; reasonable efforts are sufficient.'" *Atlantic Limousine*, 243 F.3d at 719. *Accord Madison Courier*, 472 F.2d at 1318 (quoting *NLRB v. Arduni Mfg. Co*., 394 F.2d 420, 422-23 (1st Cir. 1968)). "'The principle of mitigation . . . does not require success, it only requires an honest good faith effort.'" *Atlantic Limousine*, 243 F.3d at 721 (attribution omitted). And, in evaluating whether such an effort has been made, the Board does not undertake a "mechanical examination of the number or kind of applications," but rather examines "the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment." *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), *enforced*, 354 F.2d 170 (2d Cir. 1965). *Accord Madison Courier*, 472 F.2d at 1318.

In sum, when an employee's job-search efforts are challenged by an employer, the touchstone is whether those efforts were shown not to reflect a sincere "'inclination to work and to be self-supporting.'" *Kawasaki Motors Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988) (quoting *Mastro Plastics Corp.*, 136 NLRB at 1359). And, it is settled that an employee need not "seek or retain a job more onerous than the job from which he or she was discharged," *Kawasaki Motors*, 850 F.2d at 527, which, here, means a job "located an unreasonable distance from [the discriminatee's] home," *Oil, Chemical & Atomic Wkrs.*, 547 F.2d at 603, posing an "unacceptable disruption to [the employee's] private life," *Shell Oil Co.*, 218 NLRB 87, 89 (1975). *Accord Madison Courier*, 472 F.2d at 1321; *Raismas v. Michigan Department of Mental Health*, 714 F.2d 614, 625-26 (6th Cir. 1983) (citing cases).

The Board's expert judgments about issues of willful loss and other affirmative defenses are entitled to great deference on review. *See Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 543-44 (1940). Thus, the judgments made here will only be overturned if their underlying factual findings are not supported by substantial evidence, or can be said to serve ends other than those which the Act embraces. *See Atlantic Limousine*, 243 F.3d at 715; *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987). Where, as here, the Board's findings are based on credibility assessments, the Court's review is even more deferential: "'[C]redibility

determinations should not be reversed unless inherently incredible or patently unreasonable.'" *Atlantic Limousine*, 243 F.3d at 718-19 (attributions omitted).

B. The Company Failed To Demonstrate That Sides and Tharp Incurred a Willful Loss of Earnings

As noted, here, the Board modified extant procedures for litigating mitigation issues when an employer raising a job-search defense produces evidence that comparable jobs were available to the backpay claimants. In such circumstances, the Board held that it was appropriate to require the General Counsel to produce the discriminatees themselves or some other competent evidence concerning their search efforts. Throughout its brief, the Company repeatedly asserts that the Board went further and imposed a burden of persuasion on the General Counsel. But the Board could not have been clearer that the burden of persuasion never shifts, remaining at all times on the wrongdoer respondent to prove a willful loss of earnings. As the Board stated (A. 39): "[W]e make no change in the ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; the burden remains on the respondent to prove that the discriminatee did not mitigate his damages . . . . ." This burden, after further evidence had been taken, the Board reasonably concluded the Company failed to meet here.

To the contrary, as detailed below, the Board reasonably concluded that the credited testimony offered by the General Counsel's witnesses, together with the probability of events, convincingly demonstrated that both Sides and Tharp made

reasonable job searches, consistent with a sincere and good faith desire to secure employment. That was all the law required of them.

The central premise of the Company's argument, however, is that its expert's testimony, and the newspaper listings she produced, proved that job openings were plentiful for both discriminatees throughout the backpay period. However, while the Board accepted the expert's report at face value in its first decision on compliance, it did so in the absence of countervailing evidence. Once it became apparent that the expert's premises were wildly inaccurate because neither employee lived anywhere near the Company's warehouse and both were dependent on public transportation to commute to work, her report became meaningless, as there was no evidence that newspaper listings provided a ready means for either discriminatee to find work.

In these circumstances, the Company's failure to recall Flannery to testify regarding the discriminatees' individual circumstances underscores the obvious—that the record was devoid of evidence faulting either employee for failing to make adequate use of listings from the Star Ledger in his search, and of proof that accessible jobs were identifiable in sufficient numbers to make a case of willful loss on either employee's part. *See, e.g.*, *Grosvenor Orlando Associates*, 350 NLRB 1197, 1200 n.16 (2007) (report prepared in a case involving multi-discriminatees

fired from a resort in an area filled with other resorts had no bearing on the job search efforts of a discriminatee dependent on public transportation).

What remains then is whether the Company has offered any other basis for questioning the General Counsel's backpay specification by establishing that either discriminatee incurred a willful loss of earnings during any any period for which backpay was awarded. As shown below, the Board reasonably concluded based upon credited testimony and logical inferences that the Company did not, and that, instead, both Sides and Tharp made reasonable job searches, consistent with a sincere and good faith desire to secure work.

1. Discriminatee Sides

Sides testified, and the unemployment office's records confirmed, that Sides diligently visited the unemployment office on a weekly basis—and sometimes more—throughout the 9 months after his termination. According to the office's manager, LoSauro, that level of activity marked Sides as a particularly diligent job-seeker. Nevertheless, even though LoSauro testified that many employers sought referrals from his office for at least 2 weeks before looking elsewhere, his office was able to refer Sides to available jobs in only 8 instances.

Sides testified that he followed up on those referrals in each instance, but failed to secure any offers, and the administrative law judge, affirmed by the Board, credited him. The Company seeks (Br. 15-17) to defeat this credibility

determination based upon evidence the judge considered and found to be of no meaningful weight—employer responses to company counsel's letters sent several years after Sides had applied for work. As the Board noted, however, "[n]one of the responses . . . show that Sides did not make such applications," but rather only that companies had moved, files had not been retained, or "information was not available." (A. 7.) The Company has presented no tenable argument as to why the Board's credibility determinations should be disturbed on review.[5]

Sides also credibly testified that he regularly checked the Sunday Newark Star Ledger classifieds in search of leads, and followed up when he found advertised jobs that he could identify as being reasonably accessible via public

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[5] The Company claims (Br. 16) that, at least once, it had proof positive that Sides lied about applying for a job. That instance involved Sides' application to Van Brunt Warehouse; the unemployment office's files contained a returned Job Employer Reference form from Van Brunt, but the form was unsigned. As the Company notes (Br. 16), Van Brunt's manager replied to counsel's letter of inquiry by writing that: "I always sign and return cards back to job bank, when given by applicant. I also show no application for employment for Leonard Sides on file." The same manager, however, continued: "*[B]ut reminder, that was back on September 9, 1999*." (A. 421 (emphasis added).)

On its face, there are several explanations as to why the form was unsigned—for example, that the manager may have failed to follow his normal procedure or Sides forgot to bring the form with him and simply returned the form himself. Regardless, the judge credited Sides' staunch assertion that he was certain that he had applied when confronted with Van Brunt's letter on cross-examination. (A. 283-84.) And, the manager himself noted that the files could have been stale. Thus, contrary to the Company, the letter provides no basis for disturbing the judge's finding on this point.

transportation. In all, he visited 25 additional employers who had advertised for work, hardly the unimpressive number the Company would make of it, given that the unemployment office, with its free pre-screening and job referrals, could only provide Sides with 8 referrals in 9 months of weekly visits. The judge was impressed with Sides as a witness, and also with his demonstrated desire to maintain employment. (A. 6-7.) Not only had Sides worked for the Company for a year and a half without interruption before his unlawful discharge (and held many jobs before that), but also, during the backpay period, he willingly took a step down and accepted employment at very low wages through two temporary employment agencies over a period of 4 months.[6]

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[6] The Company notes (Br. 21, 47 n.13) that Sides testified that he probably did not engage in an active job search during the first month he worked for Labor Ready, the first of the two temporary-service employers through which he secured work for a 4-month period. (A. 255-58.) To the extent that he might not have actively looked for other employment during that period, it was not unreasonable for Sides to think that landing a full-time job through a temp referral might have been his best chance to secure work. Even at that, Sides was clear that he resumed looking for a full-time job through other channels probably within two weeks, but no later than a month, of having started with Labor Ready, and continued such efforts throughout his work with Labor Ready and the second temp employer through which he secured part-time work. (A. 255-58.) In these circumstances, the Board reasonably declined to second guess Sides for whatever exclusive reliance he placed upon securing a full-time job through his work with Labor Ready, given that he actually worked during the period. *See Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629-30 (4th Cir. 1989) ("[T]olling back pay for workers who accept part-time or seasonal employment and discontinue otherwise reasonable job searches has the effect of condemning those workers for accepting part-time jobs, despite the fact that the earnings from such jobs serve to mitigate the employer's back pay liability.").

The Company also contends (Br. 46-50) that the number of job-contacts Sides made was manifestly inadequate to constitute a reasonable search in light of what it claims were the wealth of available jobs in the form of listings in the Sunday Star Ledger. However, Sides testified (A. 153-55, 161-62) that he did the best he could to find listings that were within reasonable reach through public transportation and walking, and the collection of newspapers produced by the Company does not speak to the contrary.

Indeed, the Board was plainly warranted in concluding that the Company's newspaper listings and opinion testimony counted for nothing. The Company's expert, Flannery, conceded that identifying jobs within a 25-mile radius of the Company's warehouse from the advertisements (which she misidentified as a logical center from which Sides' "reasonable" job search could be measured) was a "very cumbersome and tedious" task, even for someone with her resources and skills (A. 72), and that it would have taken her "forever" to locate all of them, (A. 75). In forming her opinion based upon a selective sampling of the advertisements on three Sundays, Flannery did not even bother to find out where Sides lived, much less contact him or the General Counsel to find out how he commuted to work. Further, even in the face of Sides' testimony explaining his job search, the Company failed to recall Flannery to the stand to explain how her report might fare in light of Sides' personal circumstances. Thus, as discussed earlier, the Company

presupposes that the Board should have faulted Sides for failing to find a means for determining which job listings in the Star Ledger—the listings covered some 13 counties—were accessible to him through public transport, a task which the Company's own expert never even attempted to undertake. This, the Board reasonably declined to do, especially given the expert's own self-confessed difficulties in conducting the far more manageable task of identifying listings that fell within a specified geographic area.

The Company insists (Br. 41, 48-49) that, during 11 months of the backpay period, Sides either made inadequate efforts to find work by relying exclusively on unemployment referrals or "made no effort whatsoever" to find work at all, but the record will not support it. To the contrary, the Board credited Sides' documented account that shows that he either applied for jobs or was working during every month of the backpay period but two, and one of the two was due to his having been promised a job by an employer who reneged. (A. 4-5; 111-38, 372-89, 225-26.) Thus, while there were periods when Sides was unable to find job opportunities to pursue, the Board reasonably concluded (A. 8) that those periods were the understandable product of the difficulties that Sides faced in finding viable opportunities due to his dependence on public transportation and did not detract from the wealth of evidence showing that Sides actions throughout reflected a sincere desire to find work. (*Id*.)

The Company discusses a series of backpay cases in which courts have disagreed with Board backpay determinations, but none of those cases is apposite here. Thus, *Arlington Hotel Co. v. NLRB*, 876 F.2d 678, 680-81 (8th Cir. 1989), upon which the Company principally relies (Br. 45-46), did not involve a discriminatee whose job opportunities were constrained by a reliance on public transportation, or whose unsuccessful efforts to find employment through newspaper advertisements mirrored the state unemployment office's inability to generate more than an average of 1 contact per month. Nor did the discriminatee in *Arlington* display a willingness to take lower paying work when his efforts to find work at his usual level failed, or seek to improve his marketability, as Sides did here in seeking and obtaining a certification of his skills as a forklift operator. Thus, nothing that the court said in *Arlington Hotel* about the discriminatee's dearth of job contacts has any bearing on Sides actions here, which the Board reasonably found were duly diligent in the circumstances presented.

The one paragraph decision in *NLRB v. Pugh & Barr Inc.*, 207 F.2d 409, 409-10 (4th Cir. 1953), also has no application here. There, in declining to enforce the Board's backpay award, the Fourth Circuit emphasized that the discriminatee had been out of work for more than a year and apparently had relied exclusively upon the unemployment office as his only basis for a job search, notwithstanding his skills as an accomplished cook, whose services presumably were in demand.

Nothing in that decision speaks to the reasonableness of Sides' job-search efforts here, which were not limited to an unreasonable reliance on a single source for referrals for available work, and were subject to real-world constraints not faced by the cook in *Pugh & Barr*.

At bottom, the Company's claim (Br. 49, 51) that the burden of *persuasion* shifted to the General Counsel to prove which of the numerous listings in the Star Ledger each week were inaccessible to one or both of the discriminatee turns the Board's Supplemental Decision, not to mention decades of settled mitigation law, on its head. (A. 38-40.) The burden of persuasion on the issue of available work remained with the Company from beginning to end, and the Company failed to present any evidence to establish that there were any openings that Sides could be faulted for failing to identify or pursue. Rather, the Board reasonably concluded, based upon the credited evidence, that Sides comported himself throughout consistent with a sincere desire to secure interim employment—that any failure to find work, or jobs to apply for, were not shown to have been the product of any dereliction on his part. Accordingly, the Board reasonably rejected the Company's attacks on the backpay awarded Sides as completely lacking in proof.[7]

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[7] *See Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (employee's job search reasonable, even though his need to care for his mother limited his search to sending letters to prospective employers and networking); *Kentucky River Medical Center*, 352 NLRB 194, 199-203 (2008) (nurses who made

2. Discriminatee Tharp

As noted, the Board credited Tharp's mother, Gail Moskus, who testified that she spoke to her son regularly following his discharge and that he reported to her that he was out every day looking for work, but could find none. Tharp, like Sides, was dependent on public transportation. Moskus explained that her son had always been self-supporting and had a strong work ethic, and that after 5 months of fruitless looking, he agreed to relocate and live with her in Naples, Florida, where jobs (and help finding them) were available. And, within a few weeks of moving to Florida, he was working full-time.

Moskus was unable to provide details concerning her son's job search while he was in New Jersey, but the Board (A. 8) nevertheless credited her testimony. Her description of her son as being industrious and anxious to work comported with his long and uninterrupted 6-year work history with the Company, which began when he was in his early twenties. It was also consistent with his quick actions in

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limited contacts in health field while registering with state unemployment office not shown to have made inadequate searches); *Grosvenor Orlando Associates*, 350 NLRB 1197, 1200 n.16 (2007) (report prepared in a case involving multi-discriminatees fired from a resort in an area filled with other resorts had no bearing on the reasonableness of the job search efforts of a discriminatee dependent on public transportation and her inability, in contrast to other discriminatees, to find interim work); *Avery Heights*, 349 NLRB 829, 835 (2007) (respondent's contention that 39 job contacts were an inadequate search for employment not established where it failed to "show that the nursing homes not contacted by Caldwell were within reach of her home consistent with her driving ability").

securing a job in Florida and retaining it throughout the backpay period, even though he had no overhead expenses since he lived with his mother. That he was unable to find work in New Jersey comported with Sides' experience, and with Sides' difficulty of conducting a job search via public transportation. Furthermore, as the Board emphasized, Moskus' testimony was fortified by the fact that her son received unemployment benefits while in New Jersey, which under settled law, "'is prima facie evidence of a reasonable job search,'" because an unemployment claimant's benefits would be denied if he did not engage in a search for work. (A. 8) (quoting *Avery Heights*, 349 NLRB 829, 834 (2007)). *Accord NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 424 (7th Cir. 2007) (citing cases).

The Company insists (Br. 37-39) that Moskus' hearsay testimony was not "competent" evidence to prove Tharp's employment efforts, as the Board's Supplemental Decision contemplated. However, the Board in its Supplemental Decision did not require the General Counsel to prove anything; rather, it shifted to the General Counsel only a burden of production, which it specifically stated could be met "by someone familiar with the discriminatee's job search." (A. 39.) As the Second Circuit held in an identical context:

> Even if the testimony here received would be inadmissible hearsay in a civil action, we are not prepared to require the Board to exclude it from a backpay hearing. As the discriminatee could not be produced, the Board could accept other evidence which tended to establish the facts. Here, the evidence was testimony as to the deceased's discussions of his search for alternative work. We do not consider it 'practical' as that word is used in Section 10(b)[8] to exclude this relevant testimony. Moreover, since the burden of proving lack of a diligent search was on [the employer], we fail to see how the admission of this testimony was prejudicial. As we stated above, the Board can only be expected to make available for the employer's cross-examination such evidence as it may reasonably obtain.

NLRB v. Mastro Plastics Corp., 354 F.2d 170, 179 (2d Cir. 1965). *See also Conley Trucking v. NLRB*, 520 F.3d 629, 640 (6th Cir. 2008) (use of hearsay appropriate where "the relaxation of the Federal Rules of Evidence by the administrative law judge was reasonable under the circumstances and limited in its application to the practicalities of this situation").

Here, as noted, the Board found that Moskus' testimony was corroborated by Sides' experience, and that the Company's evidence to the contrary—newspaper listings and the opinion of the Company's expert—was, as also noted above, untethered to the discriminatees' individual circumstances. The Board reasonably concluded that the Company failed to prove that Tharp incurred a willful loss of earnings during the backpay period. Indeed, not only is the Company's bald

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[8] Section 10(b) of the Act (29 U.S.C. § 160(b)), in pertinent part states that "[a]ny [Board] proceeding, shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States * * *."

assertion—that it was reasonable to presume that Tharp simply decided not to look for work—belied by the fact that Tharp had worked for the Company for 6 years without interruption, but also ignores that he was without income from any source for a month and a half following his discharge, when he first began receiving unemployment checks. In this context, the most likely explanation for Tharp's failure to find work while in New Jersey was not that he failed to look for it, but rather that his job prospects were constrained by his dependence on public transportation and compromised by the fact, not susceptible to a ready explanation, that he had been just been fired by the only employer for whom he had ever worked.

The Company contends (Br. 36-38) that Tharp's failure to maintain records of his job search as requested by the Board's Casehandling Manual, Section 10558.2, combined with Moskus' inability to provide details, should relieve it of the obligation to prove a loss of earnings. This claim is specious. It is well settled that the Casehandling Manual creates no binding law. *Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998). And, even if it were binding, the cited provision of the manual only directs that discriminatees be "advised" to keep records, not that they forfeit all rights to backpay if they do not.

In any event, with court approval, the Board has consistently held that backpay claimants will not be "disqualified from receiving backpay because of poor

record keeping or uncertain memories," neither of which will relieve an employer of its burden of persuasion on the issue of willful loss. *Rainbow Coaches*, 280 NLRB 166, 179 (1986), *enforced mem.*, 835 F.2d 1436 (9th Cir. 1987). *Accord Ernst & Young*, 304 NLRB 178, 179 (1991) (noting that "it is not unusual or suspicious that backpay claimants [fail to keep records and] cannot remember the names of employers with whom they applied") (citing cases).[9] Indeed, to rule otherwise would be to ignore that backpay is a remedy designed to vindicate public rights, not simply private ones governed by "conventional common law or chancery principles," *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 543-44 (1940), and would fail to consider the well-settled rule that all ambiguities in proof are to be resolved against the wrongdoer—here, the Company.

Equally fatuous is the Company's misleading assertion (Br. 38-40) that Tharp completed a Board form showing that he failed to search for work diligently until his move to Florida. As the Board's Regional Compliance Officer explained, "we sen[d] a letter out when the complaint issues, which [was] probably before [June 24]. . . . It looks like [Tharp] filed it out in June. . . ." (A. 317.) Tharp's form, which covers Tharp's job search efforts for a 1-week period beginning June 24,

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[9] *See Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996), *enforced sub nom.*, *Package Service Co., Inc. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *Arduini Mfg. Corp.*, 162 NLRB 972, 975 (1967), *enforced in relevant part*, 394 F.2d 420, 422 (1st Cir. 1968).

showed that Tharp contacted 7 potential employers for work in that week alone. Thus, far from indicating that Tharp only looked for work in June, it appears more likely that Tharp simply misunderstood what he was supposed to do and reported only those jobs he had looked for during the week he dated the form, which was June 24. (A. 342.) Indeed, except for a period when he was temporarily denied benefits on the faulty ground that he had been discharged for cause, Tharp's unemployment records show that he received unemployment benefits through mid-August. (A. 330-35.) As noted earlier, the receipt of unemployment benefits "'is prima facie evidence of a reasonable job search'" under Board law. (A. 8) (attribution omitted).

The Company's final argument (Br. 40)—that Tharp should have been penalized for relocating and taking a job that paid a few dollars less per hour than he earned at the Company—is no argument at all. Indeed, to rule otherwise would be to punish a sound judgment made in good-faith to secure new employment, and turn the public policy underlying the duty to mitigate—that is, the "healthy policy of promoting production and employment," *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 200—on its head. This, the Board reasonably declined to do.

CONCLUSION

The Board respectfully requests that the Court enter a judgment granting the Board's application, denying the Company's cross-petition, and enforcing the Board's Order in full.

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National Labor Relations Board

December 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	
	*	Nos. 10-3411 &
v.	*	10-3546
	*	
ST. GEORGE WAREHOUSE, INC.	*	Board Case No.
	*	22-CA-23223
	*	
Respondent/Cross-Petitioner	*	

COMBINED CERTIFICATES OF COMPLIANCE WITH TYPE-VOLUME REQUIREMENT AND CONTENT AND VIRUS SCAN REQUIREMENT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 8,617 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Office Word 2003. Board counsel certifies that the contents of the pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and was scanned for viruses using Symantec Antivirus Corporate Edition, program 10.0.2.2000 version June 18, 2009 rev.4, and according to that program, was free of viruses.

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Dated at Washington, DC
this 6th day of December 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	
	*	Nos. 10-3411 &
v.	*	10-3546
	*	
ST. GEORGE WAREHOUSE, INC.	*	Board Case No.
	*	22-CA-23223
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by electronic filing and by overnight mail the required number of copies of the Board's brief in the above-captioned case, and has served that brief by electronic filing and by sending two copies by first-class mail upon the following counsel at the address listed below:

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Dated at Washington, DC
this 6th day of December, 2010