

Nos. 10-1397, 10-1424

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**ESSEX VALLEY VISITING NURSES ASSOCIATION,
NEW COMMUNITY CORPORATION, and
NEW COMMUNITY HEALTH CARE, INC.**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**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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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ESSEX VALLEY VISITING NURSES)	
ASSOCIATION, NEW COMMUNITY)	
CORPORATION, AND NEW COMMUNITY)	
HEALTH CARE, INC.)	
)	
Petitioner)	Nos. 10-1397, 10-1424
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	22-CA-24770
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. **Parties, Intervenors, and Amici:** Essex Valley Visiting Nurses Association, New Community Corporation, and New Community Health Care, Inc. (“the Company”) are the petitioners/cross-respondents before this Court. The National Labor Relations Board (“the Board”) is the respondent/cross-petitioner before this Court.

B. **Ruling Under Review:** The case involves the Company’s petition to review and the Board’s cross-application for enforcement of a Decision and Order the Board issued on November 16, 2010, reported at 356 NLRB No. 18, which incorporated by reference 352 NLRB 427 (2008).

C. *Related Cases:* The ruling under review was previously before this Court as Case Nos. 08-1334, 08-1364. The Court remanded those cases to the NLRB in accordance with the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2365 (2010).

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Dated at Washington, DC
this 28th day of November, 2011

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ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the petition of Essex Valley Visiting Nurses Association (“EVVNA”), New Community Corporation (“NCC”), and New Community Health Care, Inc. (“NCHC”) (collectively “the Company”), to review a Board Order issued against the Company.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Supplemental Decision and Order, issued on November 16, 2010, and reported at 356 NLRB No. 18 (A. 56),¹ is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Supplemental Decision and Order adopts and incorporates by reference the Board’s previous decision and order (A. 39-55), which was issued on April 30, 2008, and reported at 352 NLRB 427.

A two-member quorum of the Board issued the April 30, 2008 decision. The Company petitioned the Court for review of that Order, and the Board cross-applied for enforcement. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board’s powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members. The Court granted the Board’s motion for remand on the basis of *New Process*. The Board then issued its November 16, 2010 Supplemental Decision and Order that adopted and incorporated by reference the April 30, 2008 decision.

¹ “A.” refers to the parties’ Joint Appendix and “SA” refers to the Board’s Supplemental Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

On November 22, 2010, the Company petitioned for review of the Board's Order. On December 30, 2010, the Board filed a cross-application for enforcement of its Order. Both were timely filed, as the Act imposes no time limit for such filings. The Court has jurisdiction over the petition and the cross-application pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board acted within its broad remedial discretion in determining the amounts of backpay the Company owed four nurses for the loss of earnings they suffered as a result of their unlawful transfer.
2. Whether the administrative law judge abused her discretion in imposing limited sanctions on the Company for failing to substantially comply with Board-issued subpoenas.
3. Whether substantial evidence supports the Board's determination that EVVNA, NCC, and NCHC are a single employer for purposes of their backpay liability.

STATEMENT OF THE CASE

The Board previously found that the Company violated Section 8(a)(5)² and (1)³ of the Act (29 U.S.C. § 158(a)(5) and (1)) by transferring four nurses from the administrative in-house positions of utilization management (“UM”) nurse to field nurse positions without bargaining with the Health Professionals and Allied Employees, Local 5122 (“the Union”). *See Essex Valley Visiting Nurses Ass’n*, 343 NLRB 817 (2004), *enforced*, No. 05-3351 (3d Cir. Nov. 18, 2005). Following a compliance hearing, an administrative law judge determined backpay amounts for the four nurses. The Company filed exceptions with the Board to the judge’s decision. In its Supplemental Decision and Order, which it now seeks to enforce, the Board ordered the Company to pay specific amounts of backpay to the four nurses. The procedural history of the case and a brief summary of the Board’s conclusions and Order are set forth below; facts relevant to the backpay awards and other issues are outlined in the Argument.

² Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative[] of [its] employees.”

³ An employer that violates Section 8(a)(5) of the Act also commits a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of rights guaranteed in Section 7 of the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act (29 U.S.C. § 157) grants employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection”

I. PROCEDURAL HISTORY

A. The Unfair Labor Practice Proceeding

In August 2001, the Company transferred four UM nurses—Stella Savino, Shirley Lambert, Patricia Jones and Anne Schepers—to field nurse positions in a claimed effort to address financial pressures. (A. 21; SA 2.) On September 13, 2001, the Company then discharged the four transferred nurses, asserting that they were “not qualified to perform the duties and responsibilities of a field nurse.” (A. 36; 521-24; SA 4.) The Union filed an unfair labor practice charge, alleging that the Company had transferred the nurses without bargaining with the Union in violation of Section 8(a)(5) and (1) of the Act and had terminated their employment in violation of Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)).⁴ An administrative law judge held a hearing and found that the Company had violated the Act as alleged. (A. 36.)

On November 30, 2004, the Board (Chairman Battista and Members Schaumber and Walsh) issued a decision affirming the administrative law judge’s finding that the Company violated Section 8(a)(5) and (1) of the Act. Specifically, the Board found that the Company unilaterally transferred the nurses while negotiations for a collective-bargaining agreement were ongoing, and without

⁴ Section 8(a)(3) of the Act makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”

“having reached an overall impasse with the Union, [having] established exigent circumstances, [or having] reached an impasse over the issue of the decision to transfer the employees.” (A. 36.) The Board found, however, in disagreement with the judge, that the Company did not violate the Act by terminating the nurses’ employment because the unilateral transfers had “no causal nexus to the discharges.” (A. 10, 13.)

With regard to remedy, the Board determined that the standard remedy for a failure-to-bargain violation—that is, an order to bargain about the matter, to rescind the unlawful conduct pending bargaining, and to make the employees whole for any loss of earnings or benefits that resulted from the unlawful conduct—was inappropriate because, by the time the Board issued its decision, the parties had already bargained over the issue of transfers. (A. 14.) A year and half before the Board’s decision issued, the parties had executed a new collective-bargaining agreement on March 14, 2002, which contained a management-rights clause that privileged the Company to make such unilateral transfers. (A. 14.) Accordingly, the UM nurses “would in any event have been lawfully transferred to the field nurse positions as of March 14, 2002.” (A. 14.) The Board therefore found that, at that time, the transferred nurses lost their right to return to their former positions. (A. 14.) Given this finding, the Board held that the nurses were entitled to backpay from the date of their transfer (August 13, 2001) until March

14, 2002. (A. 14.) Subsequently, the Third Circuit granted default judgment enforcing the Board's Order in full. *See NLRB v. Essex Valley Visiting Nurses Ass'n*, No. 05-3351 (3d Cir. Nov. 18, 2005).

B. The Compliance Proceeding

On June 30, 2006, the Board's Regional Director issued a compliance specification and notice of hearing, and issued an amended compliance specification on September 12, 2006. (A. 329-34, 354-59.) On October 11 and 20, 2006, an administrative law judge held a compliance hearing, at which the parties stipulated that the method used to compute backpay was appropriate. (A. 40; SA 36.) Following the hearing, the judge issued a supplemental decision in which she made findings of fact and credibility determinations on the issues of whether the four nurses made reasonable efforts to secure interim employment and whether EVVNA, NCC, and NCHC were a single employer for purposes of backpay liability. (A. 39-55.) The judge issued a recommended order directing the Company to pay the four nurses the amounts indicated in the amended compliance specification and finding that EVVNA, NCC, and NCHC constituted a single employer for the purposes of backpay liability. (A. 51, 55.)

C. The Board's Prior Supplemental Decision and Order; the Subsequent Appeal

On April 30, 2008, the Board's two sitting members (Chairman Schaumber and Member Liebman) issued a Supplemental Decision and Order requiring the

Company to pay specific amounts of backpay to the four transferred nurses. (A. 56.) Thereafter, the Company filed a petition to review with this Court, and the Board filed a cross-application for enforcement. *See Essex Valley Visiting Nurses Ass'n v. NLRB*, Nos. 08-1334, 08-1364 (D.C. Cir. filed Oct. 22, 2008). On July 24, 2009, the Court ordered the consolidated cases held in abeyance. On September 20, 2010, following the Supreme Court's decision in *New Process*, the Court issued an order granting the Company's petition for review, denying the Board's cross-application for enforcement, and remanding the case for further proceedings before the Board.

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 16, 2010, a three-member panel of the Board (Chairman Liebman and Members Becker and Hayes) issued a Supplemental Decision and Order affirming the administrative law judge's findings and adopting her proposed order to the extent and for the reasons stated in its prior April 30, 2008 Supplemental Decision and Order, which the Board incorporated by reference. (A. 56.) The Board ordered the Company to pay the following amounts of backpay plus interest to the four nurses:

Patricia Jones	\$ 26,306.44
Shirley Lambert	\$ 26,974.68
Stella Savino	\$ 21,178.24
Anne Schepers	\$ 13,650.30
TOTAL:	\$ 88,109.66

(A. 39, 56.)

SUMMARY OF ARGUMENT

The Board’s findings with respect to remedial matters—here, whether the nurses made reasonable efforts to secure employment—are particularly dependent on an exercise of the Board’s special expertise. These decisions are thus entitled to great weight by a reviewing court. During the compliance proceedings before the Board, the Company bore the burden of proving that the nurses willfully incurred a loss of earnings, and it failed to carry that burden. The Company now bears the burden of demonstrating grounds to this Court for second-guessing the Board’s expert judgment. The Company has failed in this regard.

The Company’s defenses and arguments amount to little more than meager challenges to the Board’s detailed and well-reasoned credibility determinations, as well as errant claims that field nurse positions were “substantially equivalent” jobs to the UM nurse position. Here, the Board reasonably found that the credited evidence established that each nurse made good faith and reasonable efforts to

secure appropriate work during periods following their terminations, and the Company's attempts to show a robust job market for nurses was unavailing. The Company's repeated assertion that job openings for field nurses were plentiful was wholly irrelevant, as the Board properly determined that such positions were not, in fact, substantially equivalent to the administrative UM nurse positions held by the four nurses.

The Board properly upheld the administrative law judge's decision to impose limited sanctions on the Company for its unexplained failure to substantially comply with Board-issued subpoenas, notwithstanding multiple extensions of time to permit compliance. The Company's custodian of records readily acknowledged that the Company did not undertake a comprehensive search for many of the subpoenaed documents and testified that certain responsive documents certainly existed but were simply, and inexplicably, not produced. Having admitted to the foregoing and having been afforded the opportunity to explain its failure to comply, the Company cannot reasonably challenge before this Court the Board's decision to uphold the judge's exercise of discretion to impose limited sanctions.

Lastly, the Company's attempts to avoid single employer liability among the three entities—EVVNA, NCC, and NCHC—are unpersuasive. The credited evidence in the record, coupled with the appropriately drawn adverse inferences,

overwhelmingly supports the Board's finding that the three entities are a single employer, and thus derivatively liable for the backpay owed to the four nurses.

ARGUMENT

The Board reasonably rejected the various defenses the Company now raises before the Court in an effort to reduce its backpay liability. Specifically, the Board rejected the Company's defense claiming that the transferred nurses had willfully incurred a loss of earnings by not conducting reasonable job searches. The Board also rejected the Company's belated defense that the nurses were not entitled to any backpay, its frivolous challenge to the administrative law judge's decision to impose certain sanctions for the Company's noncompliance with Board-issued subpoenas, and its attempts to avoid derivative liability for entities that are clearly operating as a single employer. The Company's defenses are untenable, and it has failed to provide any basis for the Court to disturb the nurses' backpay awards, which the Board issued pursuant to its broad remedial powers.

I. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNTS OF BACKPAY THE COMPANY OWES THE FOUR NURSES FOR THE LOSS OF EARNINGS THEY SUFFERED AS A RESULT OF THEIR UNLAWFUL TRANSFER

A. A Backpay Award Is a Make-Whole Remedy Designed To Restore the Economic Status Quo that an Employee Would Have Obtained but for the Employer's Unfair Labor Practice

Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that the Board, upon finding that an employer has committed an unfair labor practice, “shall order the violator to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of the Act.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969) (internal quotations omitted). The object of a Board backpay remedy is two-fold. 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. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). Second, a backpay award deters the commission of future unfair labor practices by preventing wrongdoers from benefiting 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)). To restore the economic status quo, the employee is ordinarily entitled to the

difference between her gross backpay—the amount that she would have earned but for the wrongful act—and her actual interim earnings. *See Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 547 F.2d 598, 602 (D.C. Cir. 1976). The backpay period generally runs from the date of the unlawful action to the date that the employer “cures” its wrongdoing. *See NLRB v. Cauthorne*, 691 F.2d 1023, 1025-26 (D.C. Cir. 1982).

In a backpay proceeding, the burden is on the General Counsel to prove the gross amount of backpay due to each claimant. Once the General Counsel has established this amount, “the burden is upon the employer to establish facts [that] would negative the existence of liability to a given employee or [that] would mitigate that liability.” *Madison Courier*, 472 F.2d at 1318 (quoting *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963) (internal quotations omitted)). A court resolves any doubt about an alleged affirmative defense against the party who committed the unfair labor practice. *See Madison Courier*, 472 F.2d at 1321.

Notwithstanding that minimal burden, the General Counsel will include in the backpay specification any deductions for amounts he has learned that an employee has earned in interim employment and will make no assessments for periods during which an employee removed herself from the workforce and was not actively seeking employment. In so calculating, the General Counsel does not,

however, assume “the burden of establishing the truth of all of the information supplied or of negating matters of defense or mitigation.” *Brown & Root*, 311 F.2d at 454; *accord Madison Courier*, 472 F.2d at 1317.

B. Standard of Review

The Board’s remedial power is “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). The Supreme Court has explained that, “[i]n fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). When the Board exercises its “informed discretion” and awards backpay, the order “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord St. Francis Fed’n of Nurses & Health Prof’ls v. NLRB*, 729 F.2d 844, 849 (D.C. Cir. 1984) (citing cases).

The findings of fact underlying the Board’s decision are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). The Court must uphold the Board’s legal conclusions if they have a reasonable basis in the law, and a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court might have

made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Further, the Board’s judgments about willful loss and other affirmative defenses are entitled to great deference on review. *See Virginia Elec. & Power*, 319 U.S. at 543-44. 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 that the Act embraces. *See Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 715 (3d Cir. 2001). Where, as here, the Board’s findings are based on credibility assessments, the Court’s review is even more deferential: “[W]e will not disturb the Board’s adoption of an ALJ’s credibility determinations unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.” *Palace Sports & Entm’t, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (internal quotations and citations omitted).

C. The Board Reasonably Rejected the Company’s Affirmative Defense that the Nurses Incurred Willful Losses of Earnings

The Company contests neither the formula used in the compliance specification to calculate gross backpay nor the calculations themselves. Rather, the Company primarily challenges the Board’s determination that the nurses did not willfully incur a loss of earnings on a number of bases. As we now show, all of the Company’s arguments are meritless, falling far short of providing any basis to reduce the Board’s backpay award.

1. The standard for determining whether an employee has incurred a willful loss of earnings

An employee's entitlement to backpay for purposes of a make-whole remedy is offset by "actual [interim] earnings of the worker, [and] also for losses which he willfully incurred." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, (1941); accord *Oil, Chem. & Atomic Workers*, 547 F.2d at 602. 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, Chem. & Atomic Workers*, 547 F.2d 602-03 (internal quotation and citation omitted).

An employee's duty to avoid a willful loss flows not so much from any duty 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," and 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." *Virginia Elec. & Power*, 319 U.S. at 543-44; accord *NLRB v. Velocity Express, Inc.*, 434 F.3d 1198, 1202-04 (D.C. Cir. 2006). With uniform court approval, the Board has long held that individuals wrongfully denied their employment need only make an "honest good faith effort,"

Oil, Chem. & Atomic Workers, 547 F.2d at 603, and must make “reasonable exertions in . . . regard [to finding employment], not the highest standard of diligence.” *Madison Courier*, 472 F.2d at 1318 (internal citation and quotations omitted).

2. The Company failed to prove that there were any substantially equivalent positions available to the nurses into which they would have been hired during the backpay period

The Company baldly asserts (Br. 29-30) that there were an “inordinately high number of jobs” that the nurses should have applied for in the local geographical area, and that therefore they “unreasonably failed to find interim employment during the backpay period.” (Br. 29.) The Company’s conclusory assertion, however, is not supported by any specific evidence of substantially equivalent positions available to the nurses into which they would have been hired during the backpay period. Its contention must therefore fail.

In assessing the Company’s defense, the Board properly determined that the Company’s reliance on the “purported existence of a favorable job market [was] misplaced,” and insufficient to support its claim. (A. 50.) Indeed, the Company’s evidence was limited to direct-care nursing positions rather than UM nurse positions, the “mere introduction” of classified advertisements, and as the Board explained, only “scant and conclusory” testimony that lacked the necessary specificity to meet the Company’s burden of proof. (A. 50.) On the basis of that

generalized evidence, the Board properly determined that the Company failed to show, as it must, that substantially equivalent positions were available to the nurses into which they would have been hired during the backpay period.

Moreover, the Board applied well-settled principles in attaching no weight to the Company's nonspecific evidence and vague testimony about the general availability of nursing jobs. *See United States Can Co.*, 328 NLRB 334, 343 (1999) (rejecting as inconsequential expert testimony about job market conditions and "numerous help wanted ads" in the face of credited testimony of the employees themselves), *enforced in relevant part*, 254 F.3d 626 (7th Cir. 2001). Any probative value regarding the general speculation of the job market with respect to nonspecific nursing positions would have evaporated when measured against the detailed and "very credible" (A. 49 n.28) testimony of the four nurses regarding their individual job searches.

Further, the fact that the Company had taken the position in the underlying unfair labor practice proceeding that the four nurses were unqualified to perform direct patient care (A. 50 n.29; 521-24; SA 4) casts doubt on the testimony of its administrator in the current compliance hearing that direct patient-care positions would be equivalent positions. This discrepancy indicates that the Company's contention here is at best disingenuous, and at worst contrived. Accordingly, the

Company has offered this Court no basis to disturb the Board's rejection of the Company's defense.

3. The Company failed to show that the nurses willfully incurred a loss of earnings by not seeking field nurse positions involving direct patient care

In a related vein, the Company argues (Br. 31, 33, 35, 37) that each of the four nurses incurred a willful loss of earnings because they limited their job search to equivalent UM nurse positions and did not apply for field nurse positions that would require them to provide patient-care services. The Board reasonably rejected this claim.

As the Board found in the underlying case, "the UMs employed by [the Company] were registered nurses (RNs) who dealt with insurance companies, health maintenance organizations, Medicaid and Medicare and were responsible for ensuring that [the Company] was paid for the services it performed." (A. 10; 435-50, 465-72, 549-620, 621-98; SA 13-16.) That is to say, their positions were largely administrative and their duties did not encompass patient care. (A. 41, 49; 367, 372, 414, 418, 435-50, 465-72, 549-620, 621-98; SA 13-16.) Therefore, the Board reasonably concluded that the UM nurse position "is one which has significantly different tasks, skills, and responsibilities than traditional patient care or field nurse positions" (A. 50), and thus field nurse positions were not

substantially equivalent positions for which the nurses were required to apply in conducting their job searches.

Indeed, at the time of the unlawful transfer (and, thus, the beginning of the backpay period), Nurse Savino had not performed direct patient care for 20 years, Nurses Lambert and Jones had not done so in 9 years, and Nurse Schepers had not in 6 years. (A. 50; 372, 379, 382, 393, 413-14.) The Board also credited the testimony of the four nurses that they did not feel qualified to perform direct patient-care responsibilities. (A. 50; 374, 383-86, 400-02, 419.) Under these circumstances, it was entirely appropriate for the nurses to search for UM nursing positions and similar administrative-type nursing work, and not seek positions as field nurses.

Again, and perhaps most telling, the Company itself took the position in the underlying unfair labor practice proceeding that the UM nurses were not qualified to perform direct care of patients and terminated their employment on that basis. (A. 50 n.29; 403-05, 408-09, 519-24.) The Company's defense therefore distills to the following proposition: to avoid incurring a willful loss of earnings, the Company would require the nurses to seek positions for which the Company had deemed them so unqualified as to terminate their employment. In short, the Board reasonably rejected the Company's insufficiently supported defense.

4. The Company failed to prove that Nurses Savino, Lambert, Jones, and Schepers engaged in inadequate searches for interim employment

As outlined above, an employee does not incur a willful loss of earnings if she makes a “reasonably diligent effort to obtain substantially equivalent employment.” *Moran Printing*, 330 NLRB 376, 376 (1999), and cases cited at pp. 16-17. In evaluating an employee’s efforts, the Board does not undertake a “mechanical examination of the number or kind of applications,” but, rather, examines “the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment.” *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), *enforced*, 354 F.2d 170 (2d Cir. 1965); *accord Madison Courier*, 472 F.2d at 1318. Moreover, the Board does not evaluate each individual employment decision in isolation, and, instead, determines whether an employee’s efforts are consistent with “an inclination to work and to be self-supporting.” *Mastro Plastics Corp.*, 136 NLRB at 1359.

Consistent with these principles, while an employee will be deemed to have incurred a willful loss of earnings for voluntarily refusing or quitting an interim job without good justification, the Board will not lightly second-guess an employee’s judgment that circumstances were such that a decision to refuse or quit a job was reasonable. *Firestone Synthetic Fibers*, 207 NLRB 810, 815 (1973) (employee’s employment decision “should not lightly be treated as a willful loss of earnings . . .

even if he exercises what to the comfortably employed or affluent may seem a bad and hasty judgment”). Moreover, the Board has long held that an employee need not seek employment that “is not consonant with his particular skills, background, and experience.” *Oil, Chem. & Atomic Workers*, 547 F.2d at 603.

In the underlying proceeding, the administrative law judge specifically found that the nurses’ testimony with regard to their job searches was credible.

In general, I found the [nurses] to be very credible witnesses. They were responsive throughout their testimony, and answered questions in a direct and thoughtful manner. They acknowledged any failure to record details of their job searches, or their inability to recall such details. Moreover, the nurses were examined about matters of some personal significance and potential embarrassment to them and maintained a dignified composure throughout.

(A. 49 n.28.) As we now show, having considered the “very credible” testimony and applying well-settled principles, the Board reasonably found (A. 56) that the Company failed to meet its burden of proving that Nurses Savino, Lambert, Jones and Schepers incurred a willful loss of earnings by conducting inadequate job searches.

a. Nurse Savino

The Board reasonably found that the credited evidence demonstrates that Nurse Savino engaged in a reasonable job search. Specifically, the Board credited her testimony that she researched help-wanted advertisements in newspapers, nursing journals, and internet searches. (A. 42; 72, 76.) She identified seven

prospective employers from whom she sought work between September 2001 and April 2002, and credibly testified that she applied for other jobs that were not listed in her job report, including several between December 2001 and March 2002, during the backpay period. (A. 42, 50; 73-74, 76, 131-32.)

Further, Nurse Savino collected unemployment insurance between September 2001 and March 2002. (A. 42; 76.) The Board has long held, with court approval, that “[t]he fact that [a claimant] received such benefits . . . lends support to [her] testimony that [she] complied with the [s]tate [u]nemployment job search requirements,” because, “[h]ad [she] not done so, it is unlikely [she] would have received those benefits.” *United States Can*, 328 NLRB at 346; *see also NLRB v. Thalbo Corp.*, 171 F.3d 102, 113 (2d Cir. 1999) (reasonable job search evidence included unemployment documents); *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 801 (4th Cir. 1998) (same); *Midwestern Personnel Servs.*, 346 NLRB 624, 627 (2006) (evidence that an employee has registered for benefits and searched for work through an appropriate state agency is prima facie evidence of a reasonable job search).

The Company primarily predicates (Br. 30-31) its challenge to Nurse Savino’s job search on her failure to list prospective employers between December 2001 and March 2002, and on the absence of documents evidencing her job search. Neither of these arguments has merit. The Board credited Nurse Savino’s

explanation that she had difficulty remembering particular positions because “many of the positions I applied to were post office box numbers, I did not even know where my resume was going.” (A. 42; 74.) Moreover, the Board “has repeatedly held that it is not unusual or suspicious that [claimants] cannot remember the names of employers with whom they [sought work].” *Ernst & Young*, 304 NLRB 178, 179 (1991) (collecting cases).⁵ As the Board has explained, “the fact that [a claimant] could not recall the names of all the establishments she contacted . . . does not invalidate the conclusion that [she] made reasonable exertions to find employment.” *Cassis Mgmt. Corp.*, 336 NLRB 961, 965 (2001). With respect to the lack of documents, Nurse Savino credibly explained that, once she obtained employment, she disposed of her job search papers. (A. 42; 72.) In any event, Nurse Savino was not obligated to keep such records because “[t]he Board does not require a [claimant] to document [her] search for work.” *Midwest Motel Mgmt.*, 278 NLRB 421, 422 (1986).

The Company’s focus on a snapshot of Nurse Savino’s job search is also inconsistent with established Board precedent. “[A]n employer does not satisfy its burden of showing that no mitigation took place . . . by showing an absence of a

⁵ See also *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996) (same), *enforced sub nom., Package Serv. Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *Rainbow Coaches*, 280 NLRB 166, 179 (1986), *enforced*, 835 F.2d 1436 (9th Cir. 1987); *Arduini Mfg. Corp.*, 162 NLRB 972, 975 (1967), *enforced in relevant part*, 394 F.2d 420, 422 (1st Cir. 1968).

job application by the claimant during a particular quarter or quarters of a backpay period.” *Aneco, Inc.*, 333 NLRB 691, 701(2001). Accordingly, the Company has shown no reason to overturn the Board’s order of backpay for Nurse Savino on the basis of willful loss of earnings.

b. Nurse Lambert

The Board reasonably found, on the basis of the credited evidence, that Nurse Lambert similarly undertook a reasonable job search. Specifically, the Board found that she attended open houses sponsored by prospective employers, universities, and hospitals and attended seminars offered by the unemployment office. (A. 42; 79-80.) Nurse Lambert also credibly testified about specific contacts she had with potential employers and about the submission of her resume to various employers. (A. 42; 79, 82, 260-64.)

The Company’s attack (Br. 32-35) on the adequacy of Nurse Lambert’s job search is unavailing. First, the Company urges (Br. 32-33) the Court to find that Nurse Lambert’s failure to obtain an interview during the backpay period compels the conclusion that she willfully incurred a loss of earnings. The Board reasonably rejected the Company’s claim as a “‘bootstrap attempt’ to equate a lack of success with lack of trying.” *Parts Depot, Inc.*, 348 NLRB 152, 155 n.6 (2006).

Second, the Company argues that Nurse Lambert “made a conscious decision to take [computer] classes and forego employment opportunities further

warranting the tolling of any backpay during this period.” (Br. 33-34.) The Company’s argument is meritless. The Board has long recognized, with court approval, that an employee who enrolls in a course or training during a backpay period but who remains in the job market may still be entitled to backpay. *See J. L. Holtzendorff Detective Agency*, 206 NLRB 483, 484-85 (1973), *enforced by unpublished judgment*, No. 73-3536 (9th Cir. Feb. 19, 1974).

Moreover, the Board reasonably concluded that the training course, which the state unemployment agency arranged and paid for as part of Nurse Lambert’s ongoing job search (A. 42, 86), could be viewed “an attempt to mitigate backpay by fostering the development of those skills which had become increasingly necessary to the performance of the sort of work the nurses had previously performed for [the Company].” (A. 51.) Indeed, Nurse Lambert testified that her employment search made her realize that computer skills were becoming more necessary for work in her field. (A. 43; 79, 86.) Lastly, she specifically and credibly testified that she continued to seek employment while undergoing training, that she had arranged with her counselors and instructors to miss class and reschedule assignments if she received a call for a job interview, and that she would have accepted work had it been offered. (A. 42, 51; 82-83.) Under these circumstances, the Company’s claim that the Board should have tolled her backpay period is untenable.

The Company next posits (Br. 34) that Nurse Lambert submitted inconsistent forms—listing two different sets of prospective employers on two different forms submitted at different times. (A. 260-62, 263-64.) The Board fully credited Nurse Lambert’s explanation for the alleged inconsistency. With regard to the second set (A. 263-64), she testified that the list was “in addition to what I did, they’re not different, it’s just that when the form came I filled that out at that time, . . . when you have a lot of places you’re sending it to, I’m sitting with the papers in front of me, I just list them as I go along.” (A. 42 n.9; 84.) The Company has provided this Court with no basis to reverse the Board’s crediting of Nurse Lambert’s testimony.

c. Nurse Jones

The Board reasonably found that Nurse Jones also engaged in a reasonable job search. Specifically, the Board found that she credibly testified that she sought positions similar to the ones she held with the Company, as opposed to staff nurse positions, sent out resumes “practically every day,” interviewed for at least three positions, and attended three job fairs during the backpay period. (A. 43; 116, 117, 122, 318.) The Board also credited her testimony that she cast a wide net in her job search, applying for such positions as home care planning coordinator, nursing agency intake department employee, quality assurance/medical records department employee, home/care discharge planner, quality assurance manager, and UM nurse

with hospitals, insurance companies, and a rehabilitation center. (A. 43; 114-18, 318-19.) Nurse Jones also submitted her resume to an employment agency and a pharmaceutical company. (A. 43; 118.) Further, she collected unemployment benefits from October 2001 until April 2002. (A. 43; 121.) In light of her credited testimony and the fact that she obtained unemployment benefits, the Board's conclusion that Nurse Jones did not willfully incur a loss of earnings is amply supported by substantial evidence.

The Company first claims (Br. 35) that Nurse Jones' job search was inadequate because she "limited her job search starting in November 2001, by only interviewing for jobs she felt she was qualified for." (Br. 35.) In other words, the Company takes issue with the fact that Nurse Jones did not seek a field nurse position. As shown at pp. 19-20, that contention is meritless.

The Company next trots out (Br. 35-36) the same argument as it did with Nurse Lambert—that a computer training course in which Nurse Jones enrolled tolled her backpay period, and must fail for the same reasons. *See* pp. 25-26. Like Nurse Lambert, Nurse Jones testified that she took the course to improve her chances of securing employment because she learned that computer proficiency was an increasingly common job requirement for positions in her field. (A. 43; 122-23.) She testified that she actively continued to seek employment and "stayed extra" after class to submit online resumes to prospective employers. (A. 43; 122.)

Nurse Jones also credibly testified that she would have accepted employment if an employer offered her a job during her course. (A. 43; 122.) It is abundantly clear on these facts that she did not remove herself from the job market, and the Company has, therefore, offered no plausible reason to toll her backpay period.

d. Nurse Schepers

The Board reasonably found that Nurse Schepers also engaged in a reasonable search for substantially equivalent employment. Specifically, the Board found that, like the other nurses, she collected unemployment insurance for 6 months (A. 44; 68), and for the same reasons shown at p. 23, receipt of those benefits is evidence supporting a reasonable job search. Further, during the backpay period, she submitted her resume to and interviewed with several prospective employers. (A. 44; 60-61, 63-64, 68, 128-30.) Nurse Schepers also testified that she sought employment by “networking” through other nurses, that she looked for positions in The Nursing Spectrum, and that she sought work “everyday.” (A. 44; 60, 67, 68.) On the basis of this credited evidence, the Board’s conclusion that Nurse Schepers did not willfully incur a loss of earnings is entirely reasonable.

The Company claims (Br. 37) that Nurse Schepers willfully incurred a loss of earnings by “not apply[ing] to any jobs after December 20, 2001.” (Br. 37.) The Company’s argument is plainly mistaken. In December 2001, Nurse Schepers

obtained and accepted a per diem employment offer from Atlantic Health Systems. (A. 44; 63.) The offer was contingent, however, on a background check and training. (A. 44; 62-63). Nurse Schepers began the required training course on January 13, 2002, and officially began work on February 4, 2002. (A. 50; 63.) She therefore only stopped her job search because she had obtained employment and needed to complete the pre-hire requirements. The Company's argument that she thus willfully incurred a loss of earnings is baseless.

5. The Company's remaining contentions are meritless

The Company argues (Br. 20-24) that the nurses are not entitled to backpay because "[t]he only actual violation the Board found was a technical violation concerning the [Company's] failure to bargain with the Union about the transfer" (Br. 21), and that the date of discharge tolled the backpay period (Br. 24). These contentions, however, are little more than an inappropriate attempt to relitigate issues already decided in the underlying unfair labor practice case. For example, in finding that the Company committed an unfair labor practice, the Board explicitly held that "the nurses are entitled to backpay, at the UM rate from the date of their transfer (August 12) until March 14, 2002." (A. 14.) The Board further found that "[t]he lawful discharge of September 13, 2001, did *not* toll backpay as that discharge was from the field nurse position." (A. 14 n.15) (emphasis added).

Accordingly, under the well-settled principle that a party may not relitigate issues during a compliance proceeding that were, or should have been, addressed in the underlying unfair labor practice proceeding (*see Sceptor Ingot Castings, Inc.*, 341 NLRB 997, 998 (2004), *enforced*, 448 F.3d 388 (D.C. Cir. 2006)), those issues cannot now be challenged. Moreover, the Company never sought clarification, reconsideration, or review of the Board's explicit remedial findings (A. 40), and subsequently the Board's Order was enforced in full. *NLRB v. Essex Valley Visiting Nurses Ass'n*, No. 05-3351 (3d Cir. Nov. 18, 2005). The Company may not belatedly challenge that court-enforced Board order.

The Company also mistakenly contends (Br. 38-41) that the Board erred by not retroactively applying in this case the modification the Board made to the burden of production in backpay proceedings that it announced in *St. George Warehouse*, 351 NLRB 961 (2007). Here, as the Board noted (A. 39 n.3), the administrative law judge's decision "preceded the Board's decision in *St. George Warehouse* . . . in which the Board modified the burdens of proof with regard to employee mitigation efforts during the backpay period." Specifically, in *St. George Warehouse*, the Board held that "when a respondent raises a job search defense and satisfies its burden of coming forward with evidence that there were substantially equivalent jobs in the relevant geographic area available to the [claimant] during the backpay period, then the burden shifts to the General Counsel

to produce competent evidence of the reasonableness of the [claimant]’s job search.” 351 NLRB at 967.

Here, as shown, the Company failed to meet its initial burden of establishing the existence of substantially equivalent jobs (*see* pp. 17-19), and the General Counsel produced the nurses to testify and provided ample evidence of their reasonable job searches (*see* pp. 22-30). Thus, there was no need to remand the case for a second evidentiary hearing given that the parties had developed a complete record and fully litigated the issues. Indeed, the Company fails to articulate any particular reason for reopening the record, nor has it claimed any resulting prejudice; rather, it merely reasserts, contrary to the Board’s findings of fact, that it proved “there was no shortage of [field] nursing positions and that burden should have shifted back to the General Counsel to prove that the [n]urses took reasonable steps” to seek those field nurse positions. (Br. 42.) Accordingly, the Board simply clarified that it was not relying “on the judge’s recitation of the law applicable to employee mitigation efforts insofar as that recitation is inconsistent with the law as set forth in *St. George Warehouse*.” (A. 39 n.3.)

II. THE ADMINISTRATIVE LAW JUDGE DID NOT ABUSE HER DISCRETION IN IMPOSING LIMITED SANCTIONS ON THE COMPANY FOR FAILING TO SUBSTANTIALLY COMPLY WITH BOARD-ISSUED SUBPOENAS

A. Applicable Principles and Standard of Review

The Board found (A. 39; 52-53) that the administrative law judge acted within her discretion at the compliance hearing in imposing limited sanctions on the Company for failing to substantially comply with subpoenas issued by the General Counsel. Although the Company attempts to challenge (Br. 53-59) the judge's rulings, it fails to show that the judge in any way abused her discretion.

Section 11(1) of the Act (29 U.S.C. § 161(1)) grants the Board and its agents broad investigatory authority, including the power to subpoena any "evidence that relates to any matter under investigation or in question." *Accord Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (recognizing this power). This broad subpoena power, which is "indispensable to the carrying out of [the Board's] functions," *Pedersen v. NLRB*, 234 F.2d 417, 420 (2d Cir. 1956), enables the Board "to get information from those who best can give it and who are most interested in not doing so," *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). When a party refuses to comply with a Board-issued subpoena, the administrative law judge has discretion to impose a wide variety of sanctions that are tailored to the circumstances of the case.

Appropriate sanctions may include permitting the party seeking production to use secondary evidence and precluding the noncomplying party from rebutting that evidence or presenting evidence directly covered by the subpoenas. *See, e.g., Bannon Mills, Inc.*, 146 NLRB 611, 633-34 (1964). In particular, the preclusion sanction “prevents the party frustrating discovery from introducing evidence in support of his position on the factual issue respecting which discovery was sought.” *Atlantic Richfield Co. v. U.S. Dep’t of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1985); *see Perdue Farms*, 144 F.3d at 834 (judges may use the “preclusion rule” to ensure compliance with Board-issued subpoenas). Importantly, the judge may also draw adverse inferences against the noncomplying party on the issue affected by the unproduced evidence. *See UAW v. NLRB*, 459 F.2d 1329, 1338, 1343 (D.C. Cir. 1972); *Nat’l Football League*, 309 NLRB 78, 99 (1992); *accord Atlantic Richfield*, 769 F.2d at 794. The Court’s review an administrative law judge’s decision to impose sanctions on a party refusing to comply with a Board-issued subpoena under the abuse of discretion standard. *See Perdue Farms*, 144 F.3d at 834; *UAW*, 459 F.2d at 1339.

B. The Judge Did Not Abuse Her Discretion In Drawing Limited Adverse Inferences and Refusing to Consider Certain Secondary Evidence Introduced by the Company as a Result of the Company’s Failure to Comply with the Board-Issued Subpoenas

Here, the administrative law judge reasonably imposed limited sanctions on the Company for its failure to substantially comply with subpoenas issued by the

General Counsel. On August 30, 2006, the General Counsel subpoenaed nearly identical documents from EVVNA, NCC, and NCHC relating to the issue of single employer liability. (A. 45, 52; 653-58.) On September 8, acting on the Company's motion to revoke the subpoenas, an administrative law judge directed the Company to comply, but limited the time frame to documents between January 1, 2002, and December 31, 2005. (A. 46 & n.18, 52.) The Company then sought and obtained two postponements of the compliance hearing on the basis of its representations that it needed additional time to comply with the subpoenas. (A. 46; 754-55.) The hearing was thus postponed from September 12 to October 11, a date selected by the Company as one that would provide it sufficient time to fully comply with the subpoenas. (A. 46; 754-55.) After agreeing to the second postponement, the General Counsel indicated that he would not agree to any further postponements. (A. 755.)

On October 11, at the commencement of the hearing, the Company had produced certain documents, but there were many outstanding requests, and its custodian of records, Jacky Clay, was absent from the hearing. (A. 46 & n.19, 52; 265-308, 670, 671-72, 673, 707-49, 753, 759-60.) After testimony from three of the four nurses, the judge adjourned the hearing until October 20. (A. 46.) In the interim, the parties exchanged written communications regarding the outstanding subpoenas. (A. 46, 52; A. 758-64.) Company counsel requested clarifications,

committed to undertake a “comprehensive search” for responsive documents, and then notified the General Counsel that Clay would be unable to testify at the second hearing date set for October 20. (A. 46, 52-53; 758.) The General Counsel repeated the request for documents listed in the subpoenas, clarified other requests, and objected to any request for a continuance to accommodate Clay’s absence. (A. 46, 52; 759-60, 763-64.)

On October 20, the second date of the hearing, the Company produced some additional documents and presented William Baez, NCC Human Resources (HR) Director for Health Care. (A. 46 & n.23; 659-69.) Baez was Clay’s subordinate and testified in her stead. (A. 46, 52.) According to Baez, Clay instructed him only 1 or 2 weeks before his appearance at the hearing to search for records in his office relating to EVVNA. (A. 46; 91.) Baez never reviewed the subpoenas prior to the hearing and acknowledged that he did not search for documents relating to at least 8 of the 11 paragraphs. (A. 47 & n.24; 92-94, 97.) Baez also testified that certain unproduced documents existed and would have been maintained by Clay. (A. 47 & n.25, 53; 92.)

On the basis of that testimony and the Company’s overall conduct, the General Counsel requested that the administrative law judge impose sanctions, emphasizing that the Company had failed to produce key documents relating to the preparation, filing and payment of taxes, licenses, insurance policies, personnel

actions, attorneys and agents, and documents reflecting managerial personnel and organizational hierarchy, all relevant to the single-employer issue. (A. 47; 107-09.) The judge then generously permitted the Company to introduce its own secondary evidence and heard oral argument on the request for sanctions, thereby offering the Company “a full opportunity to explain [its] failure to substantially comply.” (A. 39 n.3, 47; 109-10.) In granting the General Counsel’s request, the judge determined that it was appropriate under the circumstances “to draw certain appropriate adverse inferences based upon and related to the evidence [that] has been adduced both in the underlying and current proceedings, as well the inherent probabilities that certain documents would exist and be maintained by the [Company].” (A. 53.) The judge also found it appropriate “to reject certain secondary evidence proffered by [the Company].” (A. 53.) On review, the Board agreed with the judge’s rulings and fully adopted the judge’s conclusions. (A. 39 n.3.)

On this record, the judge acted well within her discretion to impose these limited sanctions. Indeed, the Company does not dispute Baez’s failure to search for at least 8 of the 11 requested areas of documents and records. Nor does it dispute Baez’s acknowledgement that certain subpoenaed documents exist, but were simply not produced. The Company also has failed to offer an explanation for Clay’s absence from the hearing on October 11, a date the Company itself had

requested. The Company would be hard pressed to dispute these matters so clearly demonstrated on the record.

The Company summarily asserts (Br. 55) that it substantially complied with the subpoenas because it produced some documents. That assertion is belied by the overwhelming lack of readily available documents in the record that are covered by the subpoenas (such as collective-bargaining agreements, tax forms, and organizational charts). The Company's position is further undermined by Baez's undisputed testimony that, on behalf of the Company, he conducted no search for 8 out of 11 document areas covered by the subpoenas and his explicit acknowledgement that many documents existed and were in the Company's possession, but not produced. The Company cannot now credibly argue that it "substantially complied," or that faced with those deficiencies in production, the judge abused her discretion in imposing limited sanctions.

Further, the Company posits (Br. 55-57) that it acted in good faith by producing Baez rather than Clay and that the denial of a postponement to produce Clay was "extremely prejudicial." Neither claim is persuasive. As detailed above, the Company had already received two postponements. The hearing commenced on a date chosen by the Company as one that would provide sufficient time for it to search for and produce all relevant documents covered by the subpoena. Despite this accommodation, the Company continued to flout the Board-issued subpoena

and refused to turn over documents in its possession, many of which were readily-available documents. Plainly, none of the Company's contentions demonstrate that the judge abused her discretion in ruling on these matters.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EVVNA, NCC, AND NCHC CONSTITUTE A SINGLE EMPLOYER FOR PURPOSES OF BACKPAY LIABILITY

The Board's finding (A. 39, 55) that EVVNA, NCC, and NCHC constitute a single employer for purposes of backpay liability is fully consistent with settled principles of law, the credited evidence admitted at the compliance hearing, and certain adverse inferences resulting from the Company's non-compliance with Board-issued subpoenas. In its challenge to that determination, the Company has failed (Br. 45-53) to demonstrate that any of the Board's findings of facts are not supported by substantial evidence, and its contentions are otherwise meritless.

A. Nominally Separate Business Entities that Are Highly Integrated with Respect to Ownership and Operation May Be Treated as a Single Employer

Long-standing Supreme Court precedent allows the Board to treat nominally separate business entities as a single employer for the purposes of the Act where the entities are highly integrated with respect to ownership and operation. *See Radio & Television Broad. Technicians Local Union 1264, IBEW v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). The Board generally considers four factors in assessing whether two or more entities constitute a single employer:

common ownership, common management, interrelation of operations, and centralized control of labor relations. *See South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 802 & n.3 (1976) (citing *Radio & Television Broad. Technicians*, 380 U.S. at 256); accord *United Tel. Workers v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978).

No single factor controls, and not all factors must be present for the Board to find single-employer status. *See Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 518 F.2d 1040, 1045 (D.C. Cir. 1975) (single-employer relationship can exist even in the absence of a common labor relations policy), *affirmed in relevant part sub nom., South Prairie Constr. Co.*, 425 U.S. at 806. “Whether two entities will be considered a single employer depends on the circumstances of the case taken as a whole.” *Distillery, Wine & Allied Workers Int'l Union v. Nat'l Distillers & Chem. Corp.*, 894 F.2d 850, 852 (6th Cir. 1990). The Board’s conclusion that nominally separate corporations constitute a single employer is a factual one and should “not to be disturbed provided substantial evidence in the record supports the Board’s findings.” *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24-25 (1st Cir. 1983); accord *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003).

B. The Board Reasonably Found that EVVNA, NCC and NCHC Constitute a Single Employer Under Its Four-Factor Test

In assessing single employer status, the Board properly applied its traditional four-factor test to the credited evidence that is largely uncontested. Indeed, having shown above (pp. 33-39) that the administrative law judge properly acted within her discretion in drawing certain adverse inferences against the Company, and by rejecting consideration of certain evidence proffered by the Company, the record is comprised of essentially undisputed evidence and fully supports the Board's finding that EVVNA, NCC, and NCHC were, at all relevant times, "a single employer and a single-integrated enterprise." (A. 55.) The links between and among the three entities bear the classic earmarks of a single-employer relationship.

1. Common ownership

First, the Company concedes (Br. 50) that EVVNA and NCC have common ownership. With respect to EVVNA and NCHC, the administrative law judge determined that, while there was "no evidence in the record regarding the ownership interests of NCHC," the General Counsel had subpoenaed documents relating to that issue and the Company failed to produce them. (A. 53 n.33.) Accordingly, the judge "infer[red] that such documents would have not been favorable to the [Company's] position herein." (A. 53 n.33; 655-56.) Further, the judge noted that EVVNA, after its acquisition by NCC, "was placed under the

control of NCHC, apparently in the absence of any formal arm's-length transaction. This evidence suggests an element of common ownership among all three named entities.” (A. 20, 53 n.33; SA 21-24.)

2. Common management

Second, the record fully supports the Board's finding that the three entities share common management. EVVNA was placed under the control over NCHC, and after its acquisition, its board of directors was reconstituted to include officers and managers of other NCC affiliates. (A. 53; 93, 670; SA 24.) The NCC website lists NCHC as one of the “most central parts of the NCC network” and identifies EVVNA as a constituent component of NCHC. (A. 53; 699.)

At the time of the unfair labor practice proceeding, there was significant overlap in the directors and managerial personnel of the three entities. Monsignor Linder was the founder and CEO of NCC and a member of NCHC's board of directors. (A. 20, 53; SA 20, 30-31.) Shakir Hoosain was the CEO and executive administrator of NCHC, the CEO and executive administrator of another NCC affiliate, and director of EVVNA after its acquisition by NCC. (A. 20, 53; SA 8, 26-27.) Vincent Golden was the financial director for NCHC and all of its health care affiliates. (A. 20, 53; SA 1, 17-18, 19.) Further, starting in July 2001, Golden and Hoosain assumed managerial control of EVVNA and folded those new responsibilities into their existing positions. (A. 20, 53; SA 19, 30, 32.) NCHC's

board of directors made the decision to appoint Hoosain into the managerial position. (A. 20, 53; SA 30.) At least 5 of the 12 members of EVVNA's board of directors also "held high-level positions with NCC." (A. 53; 100-01, 670.) EVVNA's executive director reports directly to the NCC CEO, and EVVNA's controller reports to the NCC CFO. (A. 53; 100-01.)

Further, the administrative law judge drew an adverse inference from the Company's failure to produce documents related to common management, supervision, and personnel of the three entities. (A. 53.) The judge noted that counsel for the General Counsel explicitly stated in his October 12 letter that he was seeking "documents reflecting managers, personnel, and organizational structure of each of the [entities]." (A. 53; 655, 759-60.) The Company only produced an organizational chart for EVVNA and a listing of EVVNA's board of trustees as of January 2004. (A. 53; 670, 753.) Baez testified that he did not search for documents responsive to this request but that such documents exist, that Clay would likely maintain them, and that they exist in electronic form as well. (A. 47 n.25, 53; 100.) The Company never explained why "such documents were not, or could not, be produced." (A. 53.) Accordingly, the judge determined that it was "appropriate to infer that such documents would confirm that there was common management among EVVNA, NCC, and NCHC during the relevant period." (A. 53.)

3. Functional interrelation of operations

Third, the record evidence strongly supports the Board's finding that the operations of the three entities were integrally linked. The record establishes that NCC assumed full responsibility for EVVNA, a financially strapped entity with a similar mission to NCHC. (A. 20, 54; SA 24-25.) At the time of acquisition, NCC began paying the salaries of EVVNA employees, covering EVVNA's losses, and providing management and support services to EVVNA. (A. 20-21, 54; 428-33.) According to NCHC's financial director, EVVNA was under no repayment schedule for loans or services provided, and it was solely within NCC's discretion to seek repayment. (A. 20-21, 54; 432.) Baez testified that he had never seen any request from NCC to EVVNA to pay for services provided. (A. 54; 99.) Further, there is strong evidence that financial transactions between NCC and EVVNA were not conducted at arm's length (A. 20-21, 54; 428-33; SA 24-25), and that "if not for the continuing material and financial support NCC provides to EVVNA, it would not continue to exist." (A. 54.) *See, e.g., Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279 (7th Cir. 1989) ("[the] facts . . . clearly reveal not only a financial interdependency between [the two entities], but also a propensity on the part of [the owners] to operate the two [entities] in such a manner that the exigencies of one would be met by the other. This method of operating shows less than an 'arm's length relationship.'").

NCC constructed EVVNA's facility. (A. 54.) There was, however, no documentary evidence of any rental arrangement between the two entities despite the subpoenas contemplating such documents. (A. 54; 656.) Indeed, Baez testified that he did not search for any lease or rental documents. (A. 54; 93.) Under these circumstances, the judge concluded that "if such a lease arrangement existed, or that a transfer of funds in the form of rent was made, documentation of such arrangements or transfers would have been maintained and, moreover, could have easily been produced by the [Company]." (A. 54.) Accordingly, the judge drew an adverse inference that there "was no formal lease agreement, and, further, that EVVNA has not paid rent for its office space." (A. 54.)

The same vendor provides health insurance for all three entities. (A. 54; 94.) With regard to insurance premiums, the Company failed to produce documents reflecting the entity responsible for making such payments despite the subpoenas contemplating those records. (A. 54; 656.) Indeed, Baez testified that he did not even look for documents responsive to that request. (A. 54; 97.) The judge therefore concluded that, in the absence of documents showing otherwise and the undisputed record evidence regarding EVVNA's poor financial condition, NCC funded EVVNA's insurance obligations. (A. 54.) Moreover, NCC and EVVNA employees have access to companywide benefits such as a credit union and retirement plan. (A. 54; 94, 107.)

With respect to NCHC, the record establishes that NCC had the authority to put EVVNA's assets under NCHC's control and that NCC funded certain NCHC liabilities, including substantial losses. (A. 54; 428-33.) This type of arrangement does not demonstrate an arm's-length relationship between NCC and NCHC, and coupled with the substantial overlap in managerial and administrative personnel compelled a finding that NCC and NCHC constituted a "single-integrated enterprise." (A. 55.)

4. Centralized control over labor relations

Fourth, EVVNA, NCC and NCHC centralize control over their labor relations. Both EVVNA's executive director and Hoosain, the executive administrative of NCHC, signed the 2002 collective-bargaining agreement between EVVNA and the Union. (A. 55; 547.) After NCC acquired EVVNA and placed it under NCHC's control, Mary Hanna, EVVNA's then-CEO, began to report to Linder and the NCC board of directors on such labor matters as nurse recruitment and compensation. (A. 20, 55; 652, 707-12.) Also at this time, NCHC began employee recruitment efforts on EVVNA's behalf. (A. 55; 94, 97-98, 684-92; SA 6-7, 9-12.) Hoosain and Golden participated in EVVNA's collective-bargaining negotiations. (A. 21, 55.)

Hoosain was also responsible for developing the UM transfer plan—the basis of the underlying case—which involved the transfer of 13 employees to other

NCC affiliates. (A. 21, 55; SA 2-3.) Hoosain consulted with NCHC officers on the training and transfer of the four nurses in this case. (A. 21-22, 55; 649; SA 5, 28-29, 33, 34, 35) In 2003, the NCHC executive administrator's report discussed items such as nurse recruitment and the reopening of the union contract for EVVNA nurses. (A. 55; 715-16.) There was also evidence that an NCC manager issued disciplinary warnings and termination notices to EVVNA employees. (A. 55; 95-96, 678-80.)

Further, the responsibilities of the NCC HR department strongly support a finding of centralized control of labor relations. For example, the NCC HR department is significantly involved with EVVNA nurse recruitment and hiring, including "aggressive recruitment methods," "instituting salary and benefit increases for RNs and LPNs," and "replac[ing] the RNs who resigned or were terminated and hir[ing] additional RNs to meet the needs of the Agency." (A. 55.) It also drafted and reviewed the EVVNA personnel manual. (A. 55; 103.) The NCC HR department performs all human resource functions for EVVNA—which has no separate department to handle such matters—including maintenance of personnel files, handling of workers' compensation claims, unemployment insurance claims, and grievances for EVVNA employees, dues withholding for EVVNA employees, and participation in collective-bargaining negotiations. (A. 55; 90-91, 96, 98, 100, 102, 681-83, 693-752.)

Lastly, and again, the administrative law judge noted that the Company failed to offer any explanation for its noncompliance with the Board-issued subpoena, and concluded that “had [the Company] conducted [an appropriate] search, and produced relevant documents pursuant to subpoena, such documents would have shown that that there has been common control of labor relations during all relevant periods.” (A. 55.) On the basis of the overwhelming evidence, the Board properly concluded that EVVNA, NCC, and NCHC constitute a single employer.

C. The Company’s Arguments Are Meritless

The Company first contends (Br. 43-45) that the Board denied NCC and NCHC due process. Well-settled Board law establishes the failure of the Company’s claim in this regard. As the Board has unequivocally held, “derivative liability for backpay may be imposed upon a party to a supplemental compliance proceeding even though it was not a party to the underlying unfair labor practice proceeding, if it was sufficiently closely related to the party that was found in the underlying proceeding to have committed the unfair labor practices.” *Aiken Underground Util. Servs.*, 336 NLRB 1033, 1033 (2001); *accord Associated Gen. Contractors v. NLRB*, 929 F.2d 910, 913 (2d Cir. 1991); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1321 (7th Cir. 1986). *But see N. Montana Health Care Ctr.*, 178 F.3d 1089, 1098 (9th Cir. 1999). As one court has explained, as long as the

entities constituted a “single employer” at the time the unfair labor practice case was litigated, they “are deemed to have identical interests, [and] the representation of the interests of one of them at the unfair labor practice hearing amounts to representation of both for the purposes of due process.” *Viking Indus. Sec., Inc. v. NLRB*, 225 F.3d 131, 135 (2d Cir. 2000) (citing *Southeastern Envelope Co.*, 246 NLRB 423, 424 (1979)). As shown above, NCC and NCHC were sufficiently closely related to EVVNA to constitute a single employer during the time the unfair labor practices was being litigated and therefore derivative liability is appropriate. The Company cannot show that it suffered any prejudice.

The Company next argues (Br. 47-49) that the administrative law judge improperly relied on events occurring prior to the unfair labor practice. The Company’s argument is untenable. The Company cites (Br. 48-49) specific events that may have occurred before the underlying unfair labor practice proceedings, but its argument ignores the fact that the judge relied on the ongoing effects of those events. That is to say, the judge properly relied on facts and events that were occurring in 2002 and beyond, but whose triggers may have predated the unfair labor practice proceeding.

For example, the Company challenges (Br. 48) the judge’s reliance on NCC’s control of EVVNA at the time of acquisition (i.e., July 2000). The judge, however, did not limit her analysis to the acquisition itself; rather, she recounted

and relied on detailed factors as a result of that acquisition. Further, the Company erroneously asserts that the administrative law judge relied on certain pre-2002 events. For instance, the Company cites (Br. 48) the 2001 decision to replace EVVNA's then-CEO Hanna. The judge did not rely on the decision to replace her; rather, the judge, after noting that Hoosain and Golden succeeded Hanna, relied on the fact that those NCHC officers assumed responsibilities once performed by EVVNA's CEO and continued to perform those duties as evidence of a single employer. In sum, the Company has provided no basis for the Court to disturb the Board's reasonable determination, which is supported by substantial evidence, that the three entities constitute a single employer for purposes of backpay liability.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ESSEX VALLEY VISITING NURSES)	
ASSOCIATION, NEW COMMUNITY)	
CORPORATION, AND NEW COMMUNITY)	
HEALTH CARE, INC.)	
)	
Petitioner)	Nos. 10-1397, 10-1424
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	22-CA-24770
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,100 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 28th day of November 2011

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)	

CERTIFICATE OF SERVICE

I certify that on November 28, 2011, I electronically filed the Board's brief in this case with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the Board's brief on the following counsel through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 28th day of November, 2011