

# No. 12-3485-ag

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ATLANTIC VEAL & LAMB, INC.

Respondent

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ON APPLICATION FOR ENFORCEMENT  
OF SUPPLEMENTAL AND SECOND SUPPLEMENTAL ORDERS OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court upon the application of the National Labor Relations Board (“the Board”) to enforce both a supplemental and a second supplemental order issued against Atlantic Veal & Lamb, Inc. (“the Company”). The Board had subject matter jurisdiction over the underlying unfair labor practice and the instant backpay proceeding under Section 10(a) of the National Labor

Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the underlying unfair labor practices occurred in Brooklyn, New York, within this judicial circuit. The Board’s Supplemental Decision and Order issued on May 28, 2010, and is reported at 355 NLRB No. 38. (SPA 1-6.)<sup>1</sup> The Board’s Second Supplemental Decision and Order issued on June 27, 2012, and is reported at 358 NLRB No. 74. (SPA 7-12.) The Board’s Orders are final with respect to all parties. The Board’s application for enforcement, filed on August 24, 2012, is timely, as the Act places no time limit on such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its Supplemental Order that the Company owes employee Jeorge Ogando backpay for the period from June 7, 2004, until it makes him a valid offer of reinstatement.

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<sup>1</sup> “A” references and “SPA” references are to the Joint Appendix and Special Appendix filed by the Company. “SA” references are to the Supplemental Appendix filed by the Board. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether the Board acted within its broad remedial discretion in determining the amount of backpay that the Company owes to employee Ogando for the period prior to June 7, 2004, as ordered in the Second Supplemental Order.

### **STATEMENT OF THE CASE**

In an Order issued in 2004, the Board found, in relevant part, that the Company violated the Act by unlawfully discharging employee Ogando in August 2001 for his actual or suspected union activity, and it ordered the Company to reinstate him with backpay. On review, the D.C. Circuit enforced the Board's Order. Thereafter, the Company failed to comply with that court-enforced Order, and the Board's Regional Director initiated a compliance proceeding.

After a hearing, an administrative law judge issued a recommended decision establishing the backpay owed to Ogando for the period after June 2004. On review, the Board in its Supplemental Decision and Order adopted the judge's backpay figure (\$18,514) for that period, but severed and remanded the portion of the case for the period from August 2001 to June 2004, after determining that the judge had failed to make adequate findings of fact for that period. After remand, the Board in its Second Supplemental Decision and Order found that Ogando was owed backpay (\$74,461.37) for that earlier period.

The Board now seeks enforcement of both backpay Orders. Below are summaries of the prior proceedings and the Board's Orders currently under review.

## I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

The Company processes, sells, and distributes meat at its facility in Brooklyn, New York. 342 NLRB 418, 423 (2004). In August 2001, the Knitgoods Workers' Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO ("the Union") began organizing the Company's 100 production employees. *Id.* Ogando, who began his employment with the Company in 1988, signed a union card on August 23. On August 28, the Company discharged Ogando, within hours of interrogating him about whether he had attended a recent union meeting. *Id.* at 424-26.

On June 30, 2004, the Board issued its Decision and Order in *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004). 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 employee Ogando, and by suspending another employee in retaliation for their actual or suspected union activity. *Id.* at 418, 424-26. The Board also found that the Company violated Section 8(a)(1) by interrogating Ogando and another employee about their union activities, and by threatening employees with discharge and plant closure if they signed union cards. *Id.* at 418, 427. As relevant here, the Board's Order directed the Company to offer reinstatement to Ogando, and to make him whole for any resulting loss of earnings from the date of his discharge.

*Id.* at 421. On review, that Order was enforced by the D.C. Circuit. *See* 156 F. App'x 330 (2005) (per curiam).

## II. THE COMPLIANCE PROCEEDING

After enforcement, a controversy arose concerning the amount of backpay that the Company owed Ogando. As a result, the Board's Regional Director issued a compliance specification (later amended twice) and a notice of hearing, alleging that the Company owed Ogando net backpay of \$109,992.92 for the period from his August 28, 2001 discharge through September 2006. (SPA 1; 11-17, 153-55, SA 34.)<sup>2</sup> The Company filed an answer contending that the amounts indicated were incorrect. (A. 18-26.)

After a hearing, the administrative law judge issued a supplemental decision on January 31, 2007. (SPA 3-6.) The judge ordered the Company to pay Ogando \$18,514 in net backpay, plus interest, for the period from June 2004, when Ogando began working at a Whole Foods grocery store, through September 2006. (SPA 5-

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<sup>2</sup> Gross backpay is "the amount [an] employee[] would have received but for the employer's illegal conduct." *Fugazy Continental Corp.*, 276 NLRB 1334, 1336 (1985), *enforced*, 817 F.2d 979 (2d Cir. 1987). Net backpay is the difference between gross backpay and a discriminatee's actual earnings from the time of the adverse employment action until the employer makes a valid offer of reinstatement, subject to other defenses. *See Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968).

6.) The judge also found that the Company's backpay obligation did not end after Ogando had accepted the Company's offer to return to work in March 2006, because the Company had not provided him with the proper wage rate or benefits upon reinstatement. (SPA 1, 4 & n.2, 7 & n.4; A. 12 & n.1.) For the period prior to June 2004, however, the judge found that the Company did not owe Ogando backpay because he was not able to make findings about Ogando's work history or search for work prior to that date. (SPA 5.)

### **III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER AND ORDER REMANDING**

On May 28, 2010, the Board (Chairman Liebman and Members Schaumber and Pearce) issued its Supplemental Decision and Order and Order Remanding. (SPA 1-3.) The Board adopted the judge's recommended backpay order for the period beginning in June 2004 and continuing until the Company made Ogando a valid offer of reinstatement. (SPA 1.) The Board found that as of November 2006, the Company owed Ogando backpay of \$18,514, plus interest. (SPA 3.)

However, the Board found that the "judge erred in failing to make findings of fact concerning Ogando's work history" from the date of his August 2001 discharge until June 2004. (SPA 1.) The Board severed and remanded that portion of the case to the judge to "reconsider the record evidence, make credibility determinations, and provide an analysis explaining the basis for his findings." (SPA 1.) Specifically, the Board "direct[ed] the judge to make an explicit finding

as to Ogando's income in 2002 and 2003 and whether or not the [Company] met its burden to establish that Ogando willfully concealed income from the Board."

(SPA 2.)

#### **IV. PROCEEDINGS ON REMAND**

On July 16, 2010, the administrative law judge issued his second supplemental decision to address the period from Ogando's August 2001 discharge to June 2004. (SPA 11-12.) The judge found that Ogando's backpay period began in November 2001, when he began looking for work, and ordered the Company to pay Ogando net backpay of \$3,440 for the period from November 1 through December 31, 2001. (SPA 7, 11, 12.) The judge also found that Ogando was not entitled to backpay for the period from January 2002 to June 2004 because his quarterly interim earnings either exceeded the Board's quarterly gross backpay calculations, or because Ogando willfully concealed interim earnings from the Board during that time period. (SPA 7, 11-12.)

#### **V. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER**

On June 27, 2012, the Board (Chairman Pearce and Member Griffin; Member Hayes, dissenting in part) issued its Second Supplemental Decision and Order. The Board ordered the Company to pay net backpay, plus interest, of \$74,461.37 for the period following his August 2001 discharge to June 7, 2004. (SPA 7-9.) That order was based on the Board's finding that Ogando's backpay

period began on November 15, 2001, and that it owed Ogando \$4,001.04 in backpay for the last 6 weeks of 2001. Reversing the judge, the Board also found that the Company owed Ogando backpay from January 2002 to June 2004 because the Company had not carried its burden to show that Ogando had concealed interim earnings to the Board. (SPA 7-9.) On July 25, 2012, the Company filed a motion for reconsideration, which the Board denied. (SA 36-41.)

### **SUMMARY OF ARGUMENT**

The Board is entitled to summary enforcement of its Supplemental Order because the Company failed to challenge that Order in its opening brief. Although the Company contests the Board's Second Supplemental Order, it does so primarily by reasserting two affirmative defenses for which the Board reasonably found that it had failed to carry its burden of proof.

Thus the Board determined that the Company failed to prove its affirmative defense that it did not owe Ogando any backpay for the last 6 weeks of 2001 because Ogando failed to mitigate his damages by not conducting a reasonable job search. Contrary to the Company's contentions, neither Ogando's difficulty in testifying to certain specifics regarding his job search, nor his failure to maintain records of his search for work, foreclose the Board from ordering backpay for that period. Moreover, it is hardly surprising that Ogando had limited recollection

about certain specifics of his job search that he had conducted more than 5 years before testifying at the compliance hearing.

The Board also reasonably rejected the Company's affirmative defense that Ogando was not owed backpay from 2002 to June 2004 because he allegedly concealed earnings from the Board. Although there was a discrepancy between the interim earnings computed by the Board for 2002 and 2003 and earnings Ogando provided to a bank on a mortgage application that the Company submitted into evidence, it was insufficient to prove concealment. As the Board reasonably found, the discrepancy simply created an unresolved doubt as to whether Ogando concealed earnings from the Board, particularly because other record evidence directly conflicted with information on the mortgage documents. Based on the well-settled principle that doubts are to be resolved against the wrongdoer, the Board was fully warranted in concluding that the Company did not carry its burden on that defense.

The Company's remaining argument that the Board improperly precluded the Company from exploring Ogando's expenses in more detail is not before the Court. Because the Company never filed an exception on that ground before the Board, the Court is jurisdictionally barred from reviewing the claim. Nor, as the Company claims, did the Board abuse its discretion in denying the Company's 2012 motion to reconsider the 2004 unfair labor practice finding that Ogando was

unlawfully discharged. Once the unfair labor practice Order had been enforced by the D.C. Circuit, the Board had no jurisdiction to reconsider it.

### **ARGUMENT**

Despite the lengthy history of this case, the issues before the Court are quite narrow. The Company's opening brief fails to contest the amount it owes under the Board's Supplemental Order. The Company's brief disputes only its backpay liability under the Board's Second Supplemental Order, and it does so primarily by reasserting two affirmative defenses that the Board reasonably considered and rejected. The Court should enforce the Board's Orders in full.

#### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS SUPPLEMENTAL ORDER**

In its opening brief, the Company does not challenge the Board's Supplemental Order (SPA 3) that required the Company to pay Ogando \$18,514, plus interest, for the period from June 7, 2004, when Ogando began interim employment at a Whole Foods grocery store, through November 2006. Nor does the Company's opening brief challenge the Board's requirement (SPA 2-3) that the Company's backpay obligation continues after Ogando's March 2006 reinstatement until such time that the Company pays Ogando the proper wage rate, offers him an opportunity to participate in the Company's health insurance plan, and provides him the proper amount of vacation pay.

By failing to challenge the Supplemental Order in its opening brief, the Company has waived its right to challenge it before this Court. *See NLRB v. Star Color Plate Serv., Div. of Einhorn Enter., Inc.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (employer's failure to present claim in its opening brief "provides an independent ground under Fed. R. App. P. 28(a)(2) for court's refusal to hear . . . [the] claim"); *see also Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (requiring petitioners to raise all arguments in opening brief to prevent "sandbagging" of respondents). The Board is therefore entitled to summary enforcement of its Supplemental Order. *See Torrington Extend-A Care Employee Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994).

**II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF BACKPAY THAT THE COMPANY OWES TO EMPLOYEE OGANDO FOR THE PERIOD PRIOR TO JUNE 7, 2004, AS DIRECTED IN THE SECOND SUPPLEMENTAL ORDER**

Before the Court, the Company does not dispute the basic formula and principles that the Board applied in finding that the Company owed Ogando backpay of \$74,461.37 for the period after his August 2001 discharge to June 7, 2004, when Ogando began interim employment at a Whole Foods grocery store. Instead, the Company primarily disputes the Board's rejection of its claims that Ogando failed to mitigate his damages in 2001 and willfully concealed additional earnings in 2002 and 2003 that would have reduced his backpay award. As shown

below, the Board reasonably found that the Company did not carry its burden of establishing either affirmative defense, and the Company's contrary contentions are meritless.

**A. The Board Has Broad Discretion To Devise Backpay Awards that Effectuate the Policies of the Act, Subject Only To Limited Judicial Review**

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor practices. *See Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *accord NLRB v. Fugazy Continental Corp.*, 817 F.2d 979, 982 (2d Cir. 1987). That section provides that, “upon finding that an unfair labor practice has been committed,” the Board may “order the violator ‘to take such affirmative action including reinstatement of employees with . . . backpay, as will effectuate the policies’ of the Act.” *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262-63 (1969). Accordingly, “[t]he legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute.” *Id.* at 263. A finding of discriminatory discharge “‘is presumptive proof that some backpay is owed.’” *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 431 (2d Cir. 2001) (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965)).

The object of the backpay remedy under the Act is twofold. Backpay serves primarily to “restor[e] . . . the situation, as nearly as possible, to that which would

have obtained but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); accord *Ferguson Elec. Co.*, 242 F.3d at 431. Backpay also deters the commission of unfair labor practices by preventing the wrongdoer from gaining advantage from his unlawful conduct. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 265; *Mastro Plastics*, 354 F.2d at 175.

To restore the economic status quo, the “wrongfully discharged employee is entitled to the difference between what he would have earned but for the wrongful discharge and his actual interim earnings from the time of discharge until he is offered reinstatement.” *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968). Once that figure is established, “the burden shifts to the employer to establish facts which would negative the existence of liability . . . or which would mitigate that liability.”<sup>3</sup> *Ferguson Elec.*, 242 F.3d at 431 (internal citation and

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

quotation marks omitted). With Supreme Court and judicial approval, the Board resolves any doubts over alleged affirmative defenses against the wrongdoer who committed the unfair labor practice. *J.H. Rutter Rex Mfg.*, 396 U.S. at 263-65; *Ferguson Elec.*, 242 F.3d at 431.

The Board's authority to formulate backpay remedies is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). For that reason, when the Board orders backpay to make a discriminatee whole, the order "'should stand unless . . . [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *NLRB v. Fugazy Cont'l Corp.*, 817 F.2d 979, 982 (2d Cir. 1987) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

The Board's factual determinations relating to the remedy, as in other contexts, should be upheld if supported by substantial evidence. *See Ferguson Elec.*, 242 F.3d at 431; Section 10(e) of the Act (29 U.S.C. § 160(e)). Under that standard, reversal based on a factual question is warranted only "if, after looking at the record as a whole," this Court finds that "no rational trier of fact could reach the conclusion drawn by the Board." *NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 763 (2d Cir. 1996) (citation and internal quotation marks omitted).

**B. The Board Reasonably Determined the Amount of Backpay Due**

As an initial matter, the Board reasonably found (D&O 8) that Ogando's backpay period began on November 15, 2001, because Ogando testified that after his August 2001 discharge he started his search for employment in mid-November. (SPA 4, 8; A. 60, 62.) As the Board explained (SPA 8), it did not commence the backpay period upon his August 2001 discharge "because Ogando did not begin searching for work within 2 weeks of his unlawful termination." Thus, the Board concluded, "the commencement of the backpay period is tolled until the time that his search for work actually began." (SPA 8, citing *Grosvenor Resort*, 350 NLRB 1197, 1198-99 (2007), *enforced mem.*, 52 F. App'x 485 (11th Cir. 2008)). The Board reasonably concluded therefore (SPA 8) that, "for 2001, Ogando is entitled to backpay for only 6 weeks."

After determining that Ogando's backpay period began on November 15, 2001, the Board then calculated Ogando's total gross backpay from that time to June 7, 2004. The Board determined Ogando's gross backpay quarterly based on Ogando's hourly pay rate at the time of his discharge, and pay rates of comparable employees over the backpay period, to determine that Ogando would have received

a raise in 2003 and worked overtime.<sup>4</sup> (SPA 3-4; A. 183-95, Second Amended Compliance Specification.) Thereafter, the Board ordered the Company to pay Ogando net backpay of \$75,461.37, by deducting Ogando's interim earnings from performing light construction in 2002 and 2003 from his gross backpay. (SPA 4; A. 30-31, 66-67, Second Amended Compliance Specification.)

**C. The Board Reasonably Found that the Company Failed To Prove Its Affirmative Defense that Ogando Had Not Conducted a Reasonable Job Search in Fall 2001**

The Board reasonably found that the Company did not carry its burden of establishing its affirmative defense that Ogando forfeited backpay in 2001 by failing to mitigate his damages. With respect to mitigation, a discriminatee is not entitled to backpay if he fails to diligently search for alternative work. *See Mastro Plastics*, 354 F.2d at 174 n.3. Because proving a failure to mitigate is an affirmative defense, "the ultimate burden of proving a willful loss is on the

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<sup>4</sup> The Board stated that the Company owed Ogando "an additional" \$4,001.04 for the last 6 weeks of 2001. (SPA 8.) As the Company correctly points out (Br. 11-12), that figure is the total amount that the Company owes Ogando for that period, not an amount in addition to that found by the judge. Indeed, Member Hayes joined the Board majority's "finding that Ogando is owed \$4,001.04 for the last 6 weeks of 2001." (SPA 9.) Any ambiguity in the Board's phrasing was unintentional.

employer.” *Heinrich Motors*, 403 F.2d at 148. For “it is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period.” *Mastro Plastics*, 354 F.2d at 178. An employer does not meet its burden where the wrongfully discharged employee has made “honest good faith efforts,” and used “reasonable diligence” to find comparable work. *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (citation and internal quotation marks omitted). Moreover, in evaluating the employee’s job search 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).

Here, the Board reasonably found (SPA 8) that “the evidence does not support the [Company’s] argument that Ogando failed to mitigate his damages in 2001.” That finding was reasonable given Ogando’s testimony that he began his search in mid-November 2001 (SPA 7, 11; A. 60), and from then through March 2002, he sought work at a minimum of 30 companies, including warehouses, factories, and a night club. (A. 55-60, 62.) In these circumstances, the Company failed to show that Ogando did not make “honest good faith efforts,” or use

“reasonable diligence,” to find comparable work during the last 6 weeks of 2001. *Thalbo Corp.*, 171 F.3d at 112.

The Company offers no basis for this Court to overturn the Board’s finding that the Company did not establish that Ogando failed to mitigate his damages in the last 6 weeks of 2001. Indeed, settled principles undermine the Company’s arguments. Thus, the mere fact that the judge discredited some of Ogando’s testimony did not require the judge, as the Company suggests (Br. 13-14), to discredit Ogando’s testimony that he began his job search in mid-November. Under settled precedent, a judge has the ability to credit some, but not all, of a witness’s testimony. *See NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) (Hand, J.) (observing that “nothing is more common in all kinds of judicial decisions than to believe some and not all” of a witness’s testimony), *vacated and remanded on other grounds*, 340 U.S. 474 (1951); *accord Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001).

Similarly, Ogando’s inability to provide contemporaneously created records regarding his job search during the last 6 weeks of 2001, nor his difficulty in identifying specific companies where he had searched for work, did not require the Board to deny him backpay for that quarter. As the Board has explained, Board law “does not require a discriminatee to document his search for work.” *Midwest Motel Mgmt. Corp.*, 278 NLRB 421, 422 (1986). Indeed, a discriminatee is not

disqualified from receiving backpay solely because of poor recordkeeping. *G&T Terminal Packing Co.*, 356 NLRB No. 41, 2010 WL 4926981, at \*16 (2010), *enforced mem.*, 459 F. App'x 19 (2d Cir. 2012). Moreover, “it is neither unusual nor suspicious if a discriminatee cannot accurately recall details of a work search undertaken several years before.” *Id.* That is particularly true here, where Ogando was asked at the compliance hearing to recollect information about a job search that had begun more than 5 years earlier.

Nor, as the Company suggests (Br. 14), did Ogando’s inability to obtain interim employment during the last 6 weeks of 2001 demonstrate a lack of diligence that precludes the Board from awarding backpay for that period. As the Board has explained, “there is no requirement that [a discriminatee’s] effort must *meet with success.*” *Mastro Plastics*, 136 NLRB at 1349 (emphasis in the original). Therefore, Ogando’s unsuccessful effort to find work during the last 6 weeks of 2001 is not a basis to deny him backpay for that time period.

**D. The Board Reasonably Found that the Company Failed To Prove Its Affirmative Defense that Ogando Concealed Interim Earnings From the Board**

The Board reasonably found (SPA 8-9) that the Company did not carry its burden of establishing that Ogando forfeited his backpay from January 2002 to June 2004 for allegedly willfully concealing earnings from the Board. (SPA 9). Under Board law, a discriminatee who willfully conceals interim earnings from the

Board will lose backpay for those “quarters in which [he] engaged in the employment so concealed.” *American Navigation Co.*, 268 NLRB 426, 427 (1983). Here, although the Board recognized that the Company submitted documentary evidence at the hearing that showed higher interim earnings for 2002 and 2003 than the Board had computed, the Board reasonably concluded that it was inconclusive whether Ogando misled *the Board*—“and doubt alone will not suffice to satisfy [the Company’s] burden.” (SPA 9.)

Thus, the Company introduced a W-2 for 2002 and two pay statements for 2003 from Royal Quality Construction that were submitted to a bank in 2003, by or on behalf of Ogando, to obtain a mortgage. Those documents showed higher interim earnings for 2002 and 2003 than the earnings the Board had computed based on Ogando’s self-employment during that period. (SPA 5, 9, 11-12; A. 66-68, 98-102, 313-15.) The Board reasonably found (SPA 9), however, that the mere existence of a discrepancy between the documents relied on by the Board and those provided to the mortgage company is an insufficient basis for the Company to carry its burden of showing that Ogando concealed earnings from the Board. Rather, as the Board explained (SPA 9), the evidence “creates no more than an unresolved doubt as to whether Ogando concealed earnings from the [Board].” *See Cibao Meat Prods.*, 348 NLRB 47, 48 (2006). In so concluding (SPA 9), the Board properly adhered to basic principles governing its remedial authority:

resolving doubts against the wrongdoer and deterring future unlawful action through backpay awards. *See* p. 14.

There is no merit to the Company's contention (Br. 16-23) that the Board reversed the administrative law judge's credibility findings to reject the Company's defense. The judge found that Ogando had higher interim earnings from 2002 through 2004 and discredited his denials based solely on the documentary evidence that was submitted with the mortgage application. (SPA 11-12; A. 159, SA 3-4.) Similarly, the judge (SPA 7, 12) relied on the same documentary evidence to discredit Angel Diaz, the owner of Royal Construction, who testified (A. 204-06) that Ogando did not work for him during the backpay period. And the judge appeared to have found that Ogando had worked for Diaz from 2002 until he was hired by Whole Foods in June 2004, although as the Board noted (SPA 7), the judge did not state those credibility findings "with any clarity."

On review, the Board, considering the record evidence as a whole and applying the standard for determining a concealment of earnings, disagreed with the judge's conclusion. Instead, the Board reasonably found (SPA 8) that reviewing credibility determinations on this issue was unnecessary because, "even accepting those determinations," the documentary evidence submitted by the Company was insufficient to show that Ogando had additional earnings that he had failed to report *to the Board*, which is the proper standard at issue. To wit, the

Board observed that the judge “did not make any affirmative findings of fact regarding Ogando’s interim earnings for 2002, 2003, and the first half of 2004,” probably because “other findings and evidence cast doubt on the issue of Ogando’s earnings during this period.” (SPA 8.) Indeed, as the Board explained (SPA 8-9 n.6; A. 156-57, 161-62, SA 5-7), Ogando provided “uncontested testimony at the compliance hearing that the documents submitted in support of the mortgage were fraudulent.” And the judge even acknowledged (SPA 8 n.6, 12 n.3) that Diaz and Ogando may have forged documents to the bank to obtain a larger mortgage than Ogando would have otherwise qualified for.

Additionally, as the Board stated (SPA 9), the judge did not address Ogando’s tax returns (A. 261-86, 290-311), documents which are submitted to the IRS, and “directly conflict with the [admittedly fraudulent] mortgage documents and report lower interim earnings.” Because “the judge relied on the mortgage documents to discredit Ogando and Diaz,” but “failed to reconcile those documents with Ogando’s tax returns,” the Board was “left to interpret conflicting documentary evidence.” (SPA 9 n.7.) Thus, even recognizing that Ogando was an imperfect witness, the Board was fully warranted in finding that the conflicting documents rendered the amount and source of such interim earnings ambiguous at best. (SPA 9 n.7.) “Where, as here, the Board disagrees with the [judge], the standard of review with respect to the substantiality of the evidence does not

change, because in the end it is the Board that is entrusted by Congress with the responsibility for making findings under the statute.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 772 (D.C. Cir. 2012) (citations and internal quotation marks omitted); *accord Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 175 (2d Cir. 1998) (when “the Board and the ALJ draw different legal conclusions from the same record evidence, the [judge]’s conclusions are entitled to no special weight”).<sup>5</sup>

Moreover, the Company’s claim (Br. 17-18) that the judge’s determination not to credit Ogando “necessarily extend[ed] to discrediting the accuracy of the tax returns prepared by him,” is misplaced given that the judge never mentioned the tax returns in his decision. Moreover, the judge’s statement (SPA 12) that he did “not credit, on this record” Ogando’s assertion that he had minimal interim earnings in 2002 and 2003 was not a reference to the tax returns. Rather, the judge was referring only to the W-2 and pay stubs from Royal Construction, because his

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<sup>5</sup> To no avail, the Company relies (Br. 22-23) on *Parts Depot, Inc.*, 348 NLRB 152 (2006), *enforced mem.*, 260 F. App’x 607 (4th Cir. 2008), which the Board reasonably distinguished. In *Parts Depot*, the Board made an affirmative finding that the employee willfully concealed from the Board her interim earnings of \$8,775 from a job that she not only failed to report to the General Counsel, but continued to deny at hearing, and was discredited based on documentary evidence that verified those earnings. *Id.* at 153-54, 157.

reference to “this record” came immediately after he had discussed that evidence. (SPA 12.)

Contrary to the Company’s contention (Br. 22), the Board’s finding is fully consistent with its earlier decision in *Ciabo Meat Products*, 348 NLRB 47 (2006). There, the Board held that, even assuming *arguendo* that a discriminatee deliberately misled third parties, that action would not “operate to reduce the [employer’s] obligation to remedy its unfair labor practice.” *Id.* at 48. There, the employer argued that tax returns provided in support of a mortgage application showed a higher income for the discriminatee than the tax returns for the same period that the discriminatee had provided to the Board. *Id.* Although the Board in *Ciabo Meat* acknowledged “the obvious discrepancies between the above items of evidence,” it declined to find “that the mere existence of such discrepancies suggests willful concealment.” *Id.* Instead, the Board found that “the [employer] who bears the burden of proof” did not establish that the “discrepancies reflect willful concealment of *earnings from the Board.*” *Id.* (emphasis in the original). Here, as in *Ciabo Meat*, the Board reasonably found that the discrepancies in the documents provided to the Board, and those provided to a third party, were insufficient for the Company to establish that Ogando willfully concealed earnings from the Board.

**D. The Company’s Remaining Contentions Are Without Merit**

Having failed to show that the Board erred by finding that the Company did not carry its burden of establishing its affirmative defenses, the Company fares no better by claiming (Br. 24-26) that the Board improperly precluded the Company from exploring Ogando's expenses in more detail. That claim is not before the Court because the Company never filed an exception to the Board claiming that the judge improperly excluded such evidence. Section 10(e) of the Act (29 U.S. C. §160(e)) provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord National Maritime Union of America v. NLRB*, 867 F.2d 767, 775 (2d Cir. 1989). Here, the Company has offered no circumstances, let alone an extraordinary one, that would permit it to argue for the first time to this Court that the Board excluded evidence relating to Ogando's expenses.<sup>6</sup>

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<sup>6</sup> The Company filed a cross-exception to the judge's supplemental decision claiming that the judge erred by denying the Company from further pursuing documents obtained by subpoena during the compliance proceeding that could have established that Ogando had additional interim earnings after June 2004. That exception, however, was based on an argument that the judge erred by failing to reopen the record to require additional documents from Diaz, the owner of Royal Construction, and his accountant. (SA 11, 18-20.) The Company has waived that argument before this Court because it is not contained in its opening

In any event, the judge did not preclude the Company from examining Ogando about his expenses. Rather, he specifically gave counsel permission (SA 2) to ask Ogando about “what he spent his money on,” his bank accounts, and his major purchases, so that counsel could make an overall calculation of his expenses. The judge simply directed counsel “to do it much faster” than he was doing it (SA 2), and noted that he did not “need to know every dime” that Ogando spent (SA 1.) Moreover, the Company’s brief does not mention any question that its counsel was not permitted to ask Ogando regarding his expenses that might have prejudiced its case.

Finally, the Company offers the frivolous argument (Br. 26-27) that the Board abused its discretion by denying the Company’s motion for reconsideration of the 2004 unfair labor practice decision finding that Ogando was unlawfully discharged, filed years after the D.C. Circuit enforced that Order. As the Board stated in denying the Company’s motion, it lacks jurisdiction to grant the Company’s motion because the D.C. Circuit’s “judgment and decree are final, subject only to Supreme Court review.” (SA. 40-42.) *See W.L. Miller Co. v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (the Board has no jurisdiction to modify

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brief. *See NLRB v. Star Color Plate Serv., Div. of Einhorn Enter., Inc.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988), and cases cited at pp. 10-11.

a court-enforced Board order); *Grinnell Fire Protection Sys. Co.*, 337 NLRB 141, 142 (2001) (same). Accordingly, the Board's earlier finding "that the [Company] unlawfully discharged Ogando is the law of the case." (SA. 40.)

In any event, the Company has offered no support for its claim that the judge's partial crediting of Ogando in the compliance hearing is a basis for the Board to revisit its underlying unfair labor practice finding. Indeed, even where an employee lies under oath to the Board in an underlying unfair labor practice proceeding, which was not found here, the Board is not precluded from ordering reinstatement and backpay to remedy an unlawful discharge. *See ABF Freight Sys. v. NLRB*, 510 U.S. 317, 325 (1994).

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing the Board's Orders in full.

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April 2013

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ATLANTIC VEAL & LAMB, INC.

Respondent

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\* No. 12-3485-ag

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\* Board Case No.

\* 29-CA-24484

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,267 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

**COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS**

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, DC  
this 23rd day of April, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record 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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