

Nos. 17-1130 & 17-1166

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

M.D. MILLER TRUCKING & TOPSOIL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

M.D. MILLER TRUCKING & TOPSOIL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1130 & 17-1166
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	13-CA-104166
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

M.D. Miller Trucking & Topsoil, Inc. was the Respondent before the Board in the underlying unfair-labor-practice and compliance proceedings (Board Case No. 13-CA-104166) and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters, was the charging party before the Board.

B. Rulings Under Review

The present court proceeding involves review of: (1) the Board’s Decision and Order against M.D. Miller Trucking & Topsoil, Inc., issued on December 16, 2014, and reported at 361 NLRB No. 141; and (2) the Board’s Second

Supplemental Decision and Order against M.D. Miller Trucking & Topsoil, Inc.,
issued on April 12, 2017, and reported at 365 NLRB No. 57.

C. Related Cases

The Board decisions under review here have not previously been before this
Court, or any other court.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 4th day of December 2017

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GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. § 151 et seq.)
ASA	Additional Supplemental Appendix
Board	The National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent M.D. Miller Trucking & Topsoil, Inc.
Company	M.D. Miller Trucking & Topsoil, Inc.
Contractors' Association	The Contractors Association of Will and Grundy Counties
FMCSA	Federal Motor Carrier Safety Administration
JA	Joint Appendix
Union	General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of M.D. Miller Trucking and Topsoil, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, two Board orders against the Company. In a December 16, 2014 Decision and Order, reported at 361 NLRB No. 141, the Board found that the Company violated the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*) (“the Act”) by: bypassing its employees’ union

representative and dealing directly with the employees regarding possible reductions in their wages and benefits; threatening employee Edward McCallum with loss of overtime when he complained about possible benefits cuts; further threatening McCallum, following his discharge for alleged insubordination, that it would be futile to file a grievance over the discharge; and thereafter, despite McCallum's successful grievance and award of reinstatement, refusing to accept his medical documentation and conditioning his return to work on his completion of multiple new medical certifications. (JA 2 & n.1.)¹ In a Second Supplemental Decision and Order dated April 12, 2017, and reported at 365 NLRB No. 57, the Board specified the various amounts owed to McCallum and the union pension benefit fund as part of the remedy for the unfair labor practices found. (JA 19.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), and its above Orders are final with respect to all parties. This Court has jurisdiction and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit and allows the Board to cross-apply for enforcement.

¹ Record references in this final brief are to the Joint Appendix ("JA") filed by the Company, and to the Additional Supplemental Appendix ("ASA") filed by the Board with this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

The Company filed its petition for review on May 15, 2017. The Board filed its cross-application for enforcement on June 29, 2017. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its 2014 unfair-labor-practice Order.

2. Whether the Board acted within its broad remedial discretion in specifying the amounts due as a make-whole remedy for the Company's unlawful discrimination against employee McCallum.

STATEMENT OF THE CASE

This case originated with an unfair-labor-practice charge filed by General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters ("the Union"). Acting on that charge, the Board's General Counsel issued a complaint, and the Board thereafter issued a Decision and Order finding that the Company had violated the Act in several respects. As particularly relevant here, the Board found that the Company had unlawfully discriminated against employee Edward McCallum by refusing to accept his medical certification and requiring him to present multiple medical certifications before it would reinstate him as required by a grievance award—all because McCallum had expressed

opposition to the Company's announcement of possible cuts to employees' wages and benefits. The Board ordered the Company to offer McCallum reinstatement to his former job or to a substantially equivalent position, as already required by the grievance award, and to make him whole for any monetary losses suffered as a result of the discrimination against him.

The Company did not comply. Instead, it once again conditioned McCallum's reinstatement on his medical certification, and when McCallum tendered a valid medical certification, the Company once again refused to accept it—effectively repeating the conduct that the Board had previously found unlawful.

Consistent with regular practice in cases of non-compliance, the General Counsel issued a compliance specification, alleging the specific amounts due under the Board's Order. Thereafter, the Company filed an answer to the compliance specification, and the General Counsel moved for summary judgment on the pleadings. The Board granted the General Counsel's motion in large part, but directed a hearing on possible deductions from McCallum's backpay, and on McCallum's expenses. Following the hearing, the Board issued a Second Supplemental Decision and Order fixing the specific amounts due in backpay and expenses, and recapitulating the amounts owed under the prior summary-judgment order.

The Board now seeks enforcement of its unfair-labor-practice Order and its Second Supplemental Order specifying the amounts due. Below are summaries of the prior proceedings and Board Orders currently under review.

I. THE BOARD'S FINDINGS OF FACT IN THE UNFAIR-LABOR-PRACTICE PROCEEDING

A. The Company's Operations and Its Union-Represented Truck Drivers

The Company hauls construction material and debris for D Construction, a road construction company with a site in Rockdale, Illinois.² (JA 6-7; JA 71, 72, 73, 118.) The Company's 11 truck drivers, who perform its hauling work, report to a facility that the Company maintains at the Rockdale site. (JA 6; JA 72, 73, 111-12.) The drivers typically work during three seasons only—spring, summer, and fall—and are temporarily laid off in the winter months when the weather conditions are not favorable for construction work. (JA 6; JA 71, 83, 118.)

Each driver must hold a commercial driver's license to operate the Company's trucks. (JA 7; JA 81-82, 104.) In addition, consistent with Department of Transportation regulations, the Company requires each driver to periodically submit a medical card signed by a doctor, certifying that the driver has been examined and is physically fit to drive a commercial vehicle. (JA 7; JA 80-82, 84.)

² At the time of the events herein, the Company had no other customers. (JA 6; JA 112.)

The drivers are under the direct supervision of Dispatcher and Supervisor Chad Miller (“Miller”). (JA 6; JA 72, 117.) Miller’s mother, Marlene Miller (“Ms. Miller”), owns the Company and oversees its business, while a third member of the Miller family, Cathy Miller (Miller’s wife), serves as an office manager. (JA 6; JA 72, 112, 117, 132.)

For years, the Company has recognized the Union as the exclusive collective-bargaining representative of its truck drivers and has agreed to be bound by successive collective-bargaining agreements executed between the Union and the Contractors Association of Will and Grundy Counties. (JA 6; JA 72, 105, 112.) One such agreement was in effect in 2013, when the events at issue unfolded. (JA 6; JA 131, ASA 1-31.) The agreement allowed signatory employers to discharge employees only for “just cause” and provided a mechanism for grievances to be resolved by a joint panel of union and association representatives, in the event that the Union and employer involved were not able to resolve the grievance directly. (JA 6-7; JA 94, ASA 8-9, 19.)

B. Company Owner Miller Bypasses the Union and Asks Employees To Consider Wage and Benefit Concessions; When Driver McCallum Objects, the Millers Threaten and Discharge Him; Owner Miller Then Challenges McCallum To File a Grievance Over His Discharge and Says It Will “Get Nowhere”

In the spring of 2013, the Company recalled its drivers, including Edward McCallum, to work as usual. (JA 7; JA 120.) McCallum, at the

time, had 11 years of experience driving trucks for the Company and had driven for 3 of those years with a diagnosis of multiple sclerosis (“MS”) that was known to the Millers. (JA 7; JA 71, 75-77, 115, 119, 121-22.) As in previous years, McCallum submitted an updated medical card to reflect that his doctor had cleared him to drive, notwithstanding his MS. (JA 7; JA 82-83, ASA 35.)

On April 11, 2013, just a few weeks after McCallum resumed work, Ms. Miller convened a meeting of the drivers at the Rockdale facility. (JA 7; JA 73, 96-97, 123, 131.) She told them that the Company had encountered financial difficulties and needed the employees’ help to reduce costs. (JA 7; JA 73, 123.) She particularly suggested that employees could take a pay cut, but also hinted at other alternatives that she could not discuss. (JA 7; JA 74, 100, 129.) McCallum assumed that one of the “other alternatives” involved changes to the employees’ health insurance. (JA 7; JA 100.)

When Ms. Miller concluded her remarks, McCallum offered the first response. (JA 7; JA 74.) He stated that he would not take a pay cut or opt out of his insurance. (JA 7; JA 74, 98-99.) Supervisor Miller immediately became angry with McCallum, calling him “a f—king jackoff” and “stupid,” and telling him that he “would never see overtime again.” (JA 7-8; JA 74.)

In response, McCallum told Miller not to speak to him that way. (JA 8; JA 74.) Ms. Miller then told McCallum that he was fired for insubordination. (JA 8; JA 74.)

McCallum protested that all he had done was ask Miller not to speak to him that way. (JA 8; JA 74.) He added that he would go to the Union and file a grievance for harassment. (JA 8; JA 74.) Ms. Miller responded, “Go file a grievance. You’ll get nowhere.” (JA 8; JA 74.) McCallum replied that he would see for himself, at which point Ms. Miller reiterated that he would “get nowhere.” (JA 8; JA 74.) Ms. Miller escorted McCallum to his truck to retrieve his personal items, and he left the facility. (JA 8; JA 74.)

C. The Union Pursues a Grievance on Behalf of McCallum; Supervisor Miller Continues the Refrain That the Grievance Will Go Nowhere, Explaining That the Company Will Not Bring McCallum Back to Work

Later the same day, McCallum went to the union hall and initiated a grievance over his discharge. (JA 8; JA 77, 78, 106, ASA 33.) Consistent with the parties’ collective-bargaining agreement, Union Business Agent Greg Elsbree began processing the grievance by calling Supervisor Miller to see if the grievance could be resolved through direct discussions with the Company. (JA 8; JA 77, 107, ASA 8.) Elsbree asked if he could set up a time to discuss the grievance with Ms. Miller, as well as Miller and McCallum. (JA 8; JA 107-08.) As before, however, Miller simply became

angry and resorted to profanity. (JA 8; JA 107-08.) He told Elsbree that there was “nothing to talk about” because “no matter what[] [was] said,” the grievance was “going nowhere,” and they were “not bringing Ed [McCallum] back to work.” (JA 8; JA 108.) Elsbree then informed Miller that the Union would proceed to the next step in the contractual grievance process—a written filing with the Contractors’ Association. (JA 8; JA 108, ASA 8-9.) Miller repeated that it would “go nowhere anyway.” (JA 8; JA 108.)

D. The Union Takes McCallum’s Grievance to the Contractually Established Panel, Which Finds in His Favor and Orders His Immediate Reinstatement; the Company Refuses To Reinstatement Him Until He Provides New Medical Paperwork and Withholds Reinstatement Even After He Does So

On April 15, 2013, the Union filed a grievance over McCallum’s discharge with the Contractors’ Association, which referred the matter to the contractually designated joint panel for resolution.³ (JA 8; JA 106, 108, ASA 8-9.) The joint panel held a hearing on April 22, 2013, in which both McCallum and Ms. Miller participated. (JA 8; JA 78-79, 108-09, 113, 124.) After the hearing, the joint panel deliberated and rendered its decision the same day. (JA 8; JA 101, 114.) The panel found merit in McCallum’s grievance and informed Ms. Miller, in person,

³ The Union also filed two other grievances on behalf of McCallum, which are not material here. (JA 8; ASA 32, 34.)

that McCallum should be reinstated with backpay. (JA 8; JA 114.) In apparent acceptance of the panel's decision, Ms. Miller spoke to McCallum before leaving the hearing venue and returned his two-way radio, which he would need for work. (JA 8; JA 101, 115, 125.)

Immediately after leaving McCallum, however, Ms. Miller "ran home" and asked Office Manager Cathy Miller to pull McCallum's personnel file so that she could examine it. (JA 8; JA 115, 125, 130.) After doing so, she called McCallum and left a voicemail for him, stating that he needed to furnish a copy of the "long form" examination report from his last physical—a document that the Company had never required before. (JA 8; JA 80-85, 92-93, 95-96, 110.) That evening, when Supervisor Miller called to give McCallum his start time, he similarly emphasized that he could not return to work until he submitted the long form. (JA 8; JA 85, 115.)

The following morning (April 23, 2013), McCallum hand-delivered his long form to Miller at the Rockdale site. (JA 8; JA 85-86, 115, ASA 36-38.) In the health history portion of the form, McCallum neglected to note his MS, but the remainder of the form, completed by his doctor, clearly noted and discussed his MS. (JA 8; JA 127, 128, ASA 36-38.) As in the past, the doctor qualified McCallum to drive for a period of six months before he would have to return for another evaluation of his ability to drive. (JA 7, 8; ASA 36-38.)

Notwithstanding the doctor's qualification, Ms. Miller called the Federal Motor Carrier Safety Administration ("FMCSA") to ask what she could do if she had a problem with an employee's long form. (JA 9; JA 115-16, 126.) The person she spoke to said that she could try getting a second opinion from an FMCSA-approved doctor. (JA 9; JA 116, 126.) Following this suggestion, Ms. Miller went to the FMCSA website and chose one of the two FMCSA-approved doctors in her area to examine McCallum anew. (JA 9; JA 116, 126.) She arranged and paid for McCallum to be examined by her chosen physician (Dr. Moiduddin). (JA 9; JA 115-16, 126.)

On April 24, 2013, Supervisor Miller sent McCallum a text message at around 1:30 p.m. notifying him that he had to appear at Dr. Moiduddin's office within two hours, at 3:30 p.m., "to be given the okay to work." (JA 9; JA 86, 125, ASA 47.) McCallum followed this instruction and underwent a physical examination with Dr. Moiduddin. (JA 9; JA 86-87.) At the conclusion of the examination, however, Dr. Moiduddin did not issue McCallum a medical card and long form examination report. (JA 9; JA 87.) Instead, he issued a letter stating that he required the input of McCallum's neurologist. (JA 9; JA 87, ASA 39.) Despite thereafter receiving several communications from McCallum's neurologist that indicated that his MS was stable and should not prevent him from driving a

commercial vehicle, Dr. Moiduddin refused to clear McCallum to drive. (JA 9; JA 87-90, 116, ASA 40-42.)

In light of Dr. Moiduddin's refusal, and knowing from recent text-message exchanges with Miller that the Company wanted him to be cleared by an FMCSA-approved doctor, McCallum visited the FMCSA website for a list of approved doctors. (JA 9; JA 90, 103, ASA 47-49.) He found only one other FMCSA-approved doctor in the area (Dr. Skomurski) and made an appointment to see him. (JA 9; ULP Tr. 90, 102-03.)

Dr. Skomurski examined McCallum and determined that he was fit to drive a commercial vehicle. (JA 9; JA 91.) He accordingly provided McCallum with a medical card so certifying, and also gave him the completed long form that the Millers said they needed in order to reinstate him. (JA 9; JA 85, 91, ASA 43-46.)

On May 9, 2013, McCallum sent text messages to both Supervisor Miller and Ms. Miller stating that he had secured the necessary documentation from an FMCSA-approved doctor. (JA 9; JA 91, 103, ASA 49-50.) Neither Miller nor his mother responded in any way to this message or otherwise took any further action to reinstate McCallum pursuant to the grievance panel's decision. (JA 9; JA 91, 103, 116.)

II. THE BOARD'S UNFAIR-LABOR-PRACTICE DECISION AND ORDER

On the foregoing facts, the Board (then-Chairman Pearce and Members Johnson and Schiffer) issued its Decision and Order on December 16, 2014, finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by bypassing the Union and dealing directly with employees concerning their wages and benefits. (JA 2 n.1.) Relying on the credited testimony of McCallum, the Board further found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening McCallum with loss of overtime when he objected to any cuts in wages or benefits, and threatening that any grievance he filed over his discharge for alleged insubordination would be futile.⁴ (JA 2 & n.1.) Finally, the Board found that, after McCallum prevailed in his grievance and was awarded reinstatement, the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to accept McCallum's then-current medical certification and requiring him to complete multiple medical certifications as a condition of returning to work. (JA 2.)

⁴ Member Johnson dissented from the finding that the Company violated Section 8(a)(1) of the Act by telling McCallum that any grievance he filed over his discharge would “get nowhere.” (JA 2 n.4.) In Member Johnson's view, such statements from Company Owner Miller merely conveyed her “subjective opinion about the merits of [McCallum's] potential grievance,” which she had a right to express under Section 8(c) of the Act (29 U.S.C. § 158(c)). (JA 2 n.4.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (JA 3, 11-12.) Affirmatively, the Order requires the Company to: offer McCallum reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position; make McCallum whole for any loss of earnings and other benefits suffered as a result of the discrimination against him; remove from its files any reference to the unlawful termination of McCallum, and notify him in writing that this has been done and that this action will not be used against him in any way; and post a remedial notice.⁵ (JA 3, 11-12.)

III. THE INITIAL COMPLIANCE PROCEEDING

On January 20, 2015, about one month after the Board issued its Decision and Order, the Company offered to reinstate McCallum to his former job if he provided documents showing that he was still cleared by a doctor to drive a commercial vehicle. (JA 15; JA 34.) Within ten days, McCallum accepted the offer and provided the requested certification signed by his doctor. (JA 15; JA 35.) Once again, however, the Company rejected McCallum's documentation—this time citing the fact that the appropriate box was not checked to indicate that he was

⁵ In explaining its chosen remedies, the Board noted that the Company would also have to compensate McCallum for any adverse tax consequences following from his receipt of a lump-sum backpay award. (JA 2 n.2, 11.)

qualified for “interstate” (rather than just “intrastate”) driving.⁶ (JA 15; JA 36, 38.) McCallum quickly addressed the error and submitted a corrected certification, but the Company refused delivery of McCallum’s certified letter containing the corrected document. (JA 15-16; JA 39-41.)

On May 29, 2015, given the Company’s noncompliance with the Order, the Board’s Regional Director for Region 13 issued a compliance specification and notice of hearing. (JA 14; JA 42-56.) The compliance specification alleged that the backpay period for McCallum began on April 22, 2013, the date of the unlawful discrimination against him, and continued to run as the Company had failed and refused to reinstate McCallum despite his presentation of the necessary medical certification. (JA 14; JA 42.) The compliance specification further set forth in detail the Regional Director’s methodology for calculating the various amounts owed as of the date of the specification. (JA 14, 16; JA 42-48.) Pursuant to the Regional Director’s calculations, the compliance specification alleged that, for the period from April 22, 2013, to May 29, 2015, McCallum had no interim earnings and therefore the Company owed him \$145,714.00 in net backpay, \$8,588.00 for medical expenses, and \$38.00 for his search-for-work expenses, plus interest. (JA 44-50.) The compliance specification further alleged that the

⁶ McCallum’s prior certifications filed with the Company had consistently indicated that he was qualified for interstate driving. (JA 15 n.5.)

Company owed McCallum \$7,984.00 as compensation for the adverse tax consequences of receiving a multiyear lump-sum backpay award, and owed the Union's pension fund \$15,876.00 in missed contributions on behalf of McCallum, plus interest. (JA 48, 50.)

One month after the compliance specification issued, the Company filed its answer, largely denying the Regional Director's allegations. (JA 14-16; JA 269-78.) In particular, the Company challenged its allegedly continuing obligation to reinstate McCallum, claiming that he could not be reinstated because he lacked the required medical certification and may have been without such certification at points during the backpay period. (JA 14-15; JA 269.) The Company further asserted that the Regional Director's calculations conflicted with pay documents attached to the Company's answer, and that the Company lacked sufficient information to respond to most of the Regional Director's calculations. (JA 14, 16; JA 270-76.)

Viewing the Company's answer as insufficient in many respects and improper in others, the General Counsel filed a motion with the Board, seeking summary judgment on all allegations in the compliance specification. (JA 14; JA 27-32.) The Board thereafter transferred the proceeding to itself and issued a notice to show cause why the General Counsel's motion should not be granted.

(JA 14.) The Company responded by filing an opposition to the motion, and the General Counsel filed a reply. (JA 14.)

IV. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On November 25, 2015, the Board (then-Chairman Pearce and Members Miscimarra and McFerran) issued a Supplemental Decision and Order granting the General Counsel's motion in part, and denying it in part. (JA 14-17.) In regard to the Company's outstanding obligation to reinstate McCallum, and the consequently ongoing backpay period, the Board granted summary judgment to the General Counsel. (JA 15.) The Board found that the relevant portions of the Company's answer failed to establish any issue of fact warranting a hearing, and instead represented a renewed attempt to discriminatorily "scrutinize McCallum's medical certifications more rigorously than in the past" in order to evade its obligations to McCallum. (JA 15.) Relying on settled law, the Board barred the Company's effort to effectively re-litigate, in the context of the compliance proceeding, medical-certification issues that had already been decided against it in the underlying unfair-labor-practice proceeding. (JA 15.) Along the same lines, the Board found that no "genuine issue of fact exist[ed] as to whether McCallum possessed valid medical certification at all times during the backpay period." (JA 15.) The Board explained that the Company again relied on nothing more than its

own pretextual views about what constitutes a valid medical certification to generate a factual issue where none in fact existed. (JA 15-16.)

The Board also granted summary judgment to the General Counsel in regard to the methodology for calculating the amounts due, and in regard to the resulting sums owed in gross backpay, adverse tax assessments, and pension fund contributions. (JA 16.) The Board explained that the Company's answer on these issues failed to meet the specificity requirements of the Board's Rules and Regulations by failing "to specifically deny or set for the basis of its disagreement with the amounts of gross backpay, pension fund contributions, and excess tax assessment included in the compliance specification," and by failing to "offer any alternative formula or figures for computing these amounts." (JA 16.) *See* 29 C.F.R. § 102.56(b) and (c).

Nevertheless, the Board found that the Company's general denials were sufficient to warrant a hearing on matters beyond the Company's knowledge—specifically, McCallum's interim earnings and expenses. (JA 16.) The Board accordingly denied summary judgment on those paragraphs of the compliance specification alleging interim earnings and expenses, and remanded the proceeding to the Regional Director for a hearing limited to those two issues. (JA 16-17.)

V. THE CONTINUED COMPLIANCE PROCEEDING ON REMAND

The Regional Director subsequently scheduled a hearing before an administrative law judge on the two limited issues identified in the Board's Supplemental Decision and Order. (JA 20; JA 279.) Before the scheduled hearing date, the Company amended its answer to the compliance specification to assert, as an affirmative defense, that McCallum "failed to mitigate his damages by diligently seeking alternative truck driving employment" during the backpay period. (JA 286-94.)

At the hearing, the judge allowed the Company to present evidence relevant to its mitigation defense, which bore on the issue of interim earnings that was properly before him. (JA 22-24; JA 189-213.) The judge, however, rejected the Company's effort to venture into the separate matter of McCallum's medical certifications during the backpay period, as to which the Board had already found that no "genuine issue of fact exist[ed]." (JA 15; JA 155.)

Following a two-day hearing, the judge issued a decision and recommended order finding that the Company owed McCallum backpay (\$145,714.00) and reimbursement for his search-for-work expenses (\$38.00), as alleged in the compliance specification. (JA 24 & n.27.) The judge further found that the evidence presented at the hearing supported reimbursement of health insurance expenses (\$6,224.98). (JA 24.) Finally, consistent with the Board's partial grant

of summary judgment, the judge reiterated that the Company owed the amounts alleged in the compliance specification to make McCallum whole for adverse tax assessments (\$7,984.00), and to make his pension fund whole for missed contributions (\$15,876.00). (JA 24.)

In recommending that the Company be ordered to pay the above amounts, plus interest, the judge rejected the Company's affirmative defense that McCallum failed to diligently search for interim employment during the backpay period and thereby forfeited all compensation related to the discrimination he suffered. (JA 23-24.) The judge instead found that McCallum complied with his duty to mitigate, crediting his testimony that he diligently sought work through multiple channels, including the internet, on a bi-weekly basis throughout the period covered by the compliance specification (April 22, 2013 through May 29, 2015). (JA 23.)

VI. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER

On April 12, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued a Second Supplemental Decision and Order affirming the judge's credibility determinations and other findings. (JA 19.) In agreement with the judge, the Board ordered the Company to pay the following amounts, plus accrued interest on all amounts except the adverse-tax reimbursement:

Net backpay (to McCallum)	\$145,714.00
Health insurance expenses (to McCallum)	\$6,224.98
Search-for-work expenses (to McCallum)	\$38.00
Reimbursement for adverse tax assessments (to McCallum)	\$7,984.00
Missed pension fund payments (to the Union Pension Fund)	\$15,876.00

SUMMARY OF ARGUMENT

This case involves the Company's commission of several unfair labor practices, which are undisputed at this point, and its effort to evade all liability for the most egregious of the unfair labor practices: its repeated, discriminatory insistence on new medical documentation from longtime employee Edward McCallum, after he spoke out against a company proposal to reduce employee compensation. For the reasons explained below, the Court should reject the Company's efforts to evade liability for its undisputed unfair labor practices, and should enforce both of the Board Orders under review.

1. The Company does not contest the Board's unfair-labor-practice findings. Nor does the Company challenge any aspect of the corresponding 2014 Board Order, which specifically required the Company, *inter alia*, to offer McCallum full reinstatement to his former position and to make him whole for any losses suffered as a result of the discrimination against him. Given the absence of any challenge, under settled precedent in this Court, the Board is entitled to summary enforcement of its unfair-labor-practice Order.

2. After the Board issued its Order, the Company avoided its reinstatement obligation to McCallum by once again scrutinizing his medical documentation and refusing to accept it even after he satisfied the Company's newly-discovered concerns. Plainly, the Company continues to use the issue of medical documentation as a subterfuge for its discriminatory determination not to reinstate McCallum. But the Company does not stop there. In the present proceeding, it attempts to avoid its *monetary* obligations to McCallum as well—thus completing the circle of evasion that began soon after the Board ordered the Company to remedy its unfair labor practices in 2014.

Contrary to the Company's present claims, McCallum is entitled to backpay and related make-whole remedies for the discrimination he suffered. Indeed, as this Court has recognized, an employer's unlawful discrimination is presumptive proof that some backpay is owed. Moreover, the Board here reasonably found that McCallum made an honest, good-faith effort to find alternative employment while awaiting an offer of reinstatement to his former job—thereby fulfilling his duty to mitigate his losses, and preserving his right to backpay. In its brief, the Company pours forth a slew of complaints about the frequency and quality of McCallum's efforts, ignoring the credited testimony and, equally, disregarding relevant law as to how a discriminatee's efforts are measured in proceedings before the Board. The Company fails, however, to undermine the Board's reasonably based Second

Supplemental Order. Relying on credited testimony and settled law, the Board reasonably found that the Company failed to substantiate its bold claim that it owes McCallum nothing for the two-plus years in which he was out of work because of the Company's discrimination and dogged refusal to simply comply with multiple reinstatement directives.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS 2014 UNFAIR-LABOR-PRACTICE ORDER

In its opening brief, the Company does not challenge the Board's 2014 unfair-labor-practice findings and corresponding remedial order, which triggered the Company's present compliance obligations. Thus, the Company does not deny that it violated the Act by: bypassing the Union and dealing directly with the employees regarding possible reductions in their wages and benefits;⁷ threatening employee McCallum with loss of overtime when he complained about the suggested benefits cuts;⁸ further threatening McCallum, following his discharge for alleged insubordination, that it would be futile to file a grievance over the

⁷ See *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990) (explaining that "an employer that negotiates directly with an individual employee, without first bargaining with the union, violates [Section] 8(a)(5)" of the Act).

⁸ See *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342, 342-44 (9th Cir. 1967) (employer violated Section 8(a)(1) of the Act by threatening loss of overtime in the course of unlawful direct-dealing with employees).

discharge;⁹ and, notwithstanding a later grievance award in McCallum's favor, refusing to accept his medical certification and requiring him to complete multiple medical certifications before he could return to work.¹⁰

Under this Court's precedent, where a party fails to challenge a Board unfair-labor-practice finding in its opening brief, it is deemed to have waived any objection to that finding, and the Board is entitled to summary enforcement of the corresponding portions of its remedial order. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011); *accord Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1304 (D.C. Cir. 2011); *Europa Auto Imports, Inc. v. NLRB*, 576 F. App'x 1, 2 (D.C. Cir. 2014). *See also* Federal R. App. P. 28(a)(8)(A) (opening brief must contain "appellant's contentions and the reasons for them, with citations to the authorities . . . on which appellant relies"). Here, because the Company's opening brief fails to challenge any of the unfair-labor-practice findings in the Board's 2014 Decision and Order, the Board is entitled to summary enforcement of that Order in its entirety.

⁹ *See Prudential Ins. Co. of Am.*, 317 NLRB 357, 357 (1995) (statements implying futility of filing a grievance "had [the] reasonably foreseeable effect [of] discourag[ing]" the listening employee "from invoking the grievance procedure and thereby violated Section 8(a)(1) of the Act").

¹⁰ *Manor Care of Easton, PA., LLC v. NLRB*, 661 F.3d 1139, 1140-41 (D.C. Cir. 2011) (employer "discriminat[ed] in regard to hire or tenure of employment," within the meaning of Section 8(a)(3) of the Act, by punishing employee for protected conduct).

Nevertheless, the uncontested violations do not disappear simply because they are not preserved for appellate review; rather, they remain in the case, “lending their aroma to the context in which the remaining issues are considered.” *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); accord *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000). See also *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 968 (8th Cir. 2005) (uncontested violation considered as “important background information” in analyzing remaining issues); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993) (findings that are summarily enforced “remain relevant” in resolving remaining issues).

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNTS OWED AS A REMEDY FOR THE COMPANY’S UNLAWFUL DISCRIMINATION AGAINST McCALLUM

As this Court has recognized, “[t]he National Labor Relations Act confers broad remedial authority on the [Board].” *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1315 (D.C. Cir. 1972). Section 10(c) of the Act 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) (quoting 29 U.S.C. § 160(c)).

Where the Board acts on this liberal grant of authority, it “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); *accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 934 (D.C. Cir. 2005). Accordingly, this Court has stated, in agreement with the Supreme Court, that a Board remedial 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.”” *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 30 (D.C. Cir. 2017) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964), and *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

As discussed below, the Company has not provided any reason to disturb the Board’s backpay order in this case. Indeed, the Company does not challenge the methodology used to calculate what the Company owes, nor does it otherwise specifically challenge the amounts identified as due. Instead, the Company rests on the bold claim that it owes absolutely nothing to McCallum, because he failed to mitigate his losses during the backpay period, as required by law. The Board reasonably rejected this claim, based on settled legal principles applicable to employee mitigation efforts in Board proceedings, as well as the credited evidence

showing that McCallum made an honest, good-faith effort to find interim employment.

A. A Victim of Discrimination is Entitled to Backpay, So Long As He Makes an Honest, Good-Faith Effort To Mitigate His Losses During the Backpay Period

Where, as here, there is a finding that the employer discriminated against an employee within the meaning of the Act, resulting in his loss of employment, that finding in itself is “presumptive proof that some backpay is owed by the violating employer.” *Madison Courier*, 472 F.2d at 1316; *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 262-63 (“The legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute.”) As this Court has explained, the objective of a Board backpay order is twofold: first, it “reimburses the innocent employee for the actual losses which he has suffered as a direct result of the employer’s improper conduct”; second, it “furthers the public interest advanced by the deterrence of such illegal acts.” *Madison Courier*, 472 F.2d at 1316.

In general terms, backpay is “the difference between what [the discriminatee] would have earned but for the [discrimination] 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); *accord Oil, Chem. & Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 547 F.2d 598, 602 (D.C.

Cir. 1976). The Board's General Counsel bears the burden of establishing what the discriminatee would have earned but for the discrimination ("the gross backpay"). *NLRB v. Ferguson Elec. Co.*, 242 F.2d 426, 431 (2d Cir. 2001). Once the gross backpay is established, the burden shifts to the employer "to establish facts which would negative the existence of liability" or diminish that liability.¹¹ *Madison Courier*, 472 F.2d at 1318.

An employer may meet its burden by proving that the discriminatee "failed to seek interim employment and thus incurred a willful loss of earnings." *St. George Warehouse*, 351 NLRB 961, 963 (2007), *subsequent proceeding at* 355 NLRB 474, *enforced*, 645 F.3d 666 (3d Cir. 2011); *accord NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 n.3 (2d Cir. 1965). This burden, however, is not easily met. *See Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3d Cir. 2001).

¹¹ Although the General Counsel is required to show only the "gross amount of backpay due," *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988), he normally goes further, pursuant to Section 102.55 of the Board's Rules and Regulations (29 C.F.R. § 102.55), 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. *Madison Courier*, 472 F.2d at 1318 n.32. 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 anticipatorily negating matters of defense or mitigation. *See id.* at 1318.

As the Supreme Court has made clear, the purpose of the willful-loss doctrine in Board backpay proceedings is “not so much the minimization of damages as the healthy policy of promoting production and employment.” *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 200 (1941); *accord Oil, Chem. & Atomic Workers*, 547 F.2d at 602. Accordingly, in order to prove a willful loss of earnings, an employer cannot simply point to the discriminatee’s failure to find interim employment and minimize backpay. *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (employer cannot establish willful loss merely by way of the employee’s lack of documentation or success in his search for comparable employment). Rather, the employer must prove that the discriminatee failed to show a “sincere inclination to work and to be self-supporting,” consistent with the “healthy policy of promoting production and employment.” *Kawasaki Motors Mfg. Corp. v NLRB*, 850 F.2d 524, 527 (9th Cir. 1988). In Board backpay proceedings, therefore, “[t]he principle of mitigation of damages does not require success; it only requires an honest good faith effort.” *Madison Courier*, 472 F.2d at 1318-19 (quoting *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955)) (internal quotation marks omitted).

With longstanding court approval, the Board resolves doubts about the sufficiency of the discriminatee’s job-search efforts against the wrongdoing employer, who also bears the ultimate burden of proving willful loss of earnings.

See, e.g., NLRB v. Mining Specialists, Inc., 326 F.3d 602, 605 (4th Cir. 2003); *Kawasaki Motors*, 850 F.2d at 527 (citing cases). As the Supreme Court has explained, “[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Accordingly, “the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act.” *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 (3d Cir. 1968); *accord Madison Courier*, 472 F.2d at 1321.

The Board’s expert judgments about remedial matters such as mitigation and willful loss are entitled to great deference on review. *See Consol. Freightways v. NLRB*, 892 F.2d 1052, 1055 (D.C. Cir. 1989). Thus, the judgments that the Board made here will only be overturned if their underlying factual findings are not supported by substantial evidence, or can be said to serve ends other than those which the Act embraces. *See* 29 U.S.C. § 160(e); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Where, as here, the Board’s findings are based on credibility assessments, the Court’s review is even more deferential: the Court “accept[s] all credibility determinations made by the [administrative law judge] and adopted by the Board unless those determinations are ‘patently

insupportable.” *King Soopers*, 859 F.3d at 30, 32-33 (quoting *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015)).

B. The Board Reasonably Rejected the Company’s Affirmative Defense That McCallum Failed To Mitigate

Contrary to the Company’s claims (Br. 3, 20-28), substantial evidence supports the Board’s finding that the Company failed to meet “its ultimate burden to prove ‘that [McCallum] did not mitigate his damages by using reasonable diligence in seeking alternate employment.’” (JA 24, quoting *St. George Warehouse*, 351 NLRB at 964.)¹² The credited testimony of McCallum establishes that he searched for work every two weeks over the course of the nearly 25-month backpay period (from late-April 2013 through May 2015), by looking “[t]hrough internet sites like Craigslist, monster.com, [and] local newspapers,” and then following up on opportunities for which he believed he was qualified. (JA 20; JA

¹² In *St. George Warehouse*, the Board modified the burdens of production that apply “[w]hen a respondent raises a job search defense to its backpay liability.” 351 NLRB at 964. The respondent bears the initial burden of producing “evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period.” *Id.* If the respondent satisfies that burden, the General Counsel takes up the burden of “producing evidence concerning the discriminatee’s job search.” *Id.* Despite the shifting burdens of production, the Board reaffirmed in *St. George* that the ultimate burden of persuasion “as to the contention that a discriminatee has failed to make a reasonable search for work” remains on the respondent, who raised the job-search defense in the first place. *Id.* at 961, 964. Here, both parties carried their relevant burdens of production, leaving the Company to persuade the Board that McCallum failed to make a reasonable search for work.

160-61, 179-80.) McCallum’s credited testimony shows that he also “walked in to businesses”—either “on [his] own” initiative or in response to “advertisements that [he] had driven past”—to inquire about, and sometimes apply for, available positions. (JA 20; JA 160-61, 179-80.) Using this combination of different approaches, McCallum communicated with numerous potential employers over the course of the backpay period, and in his credited testimony, he was able to detail over 20 of those communications. (JA 217.)

As the Board noted, McCallum did not “extensive[ly]” document his efforts. (JA 21.) For example, he did not print web results or application screens as he conducted his searches online. (JA 21 & n.12; JA 218-19.) However, when he remembered to do so, he kept documents memorializing his search for work. Thus, the record contains copies of applications that McCallum completed in person at two different employers in 2013 (Peak Fitness and Promotional Physical Therapy), and a letter confirming McCallum’s application to a third employer (160 Driving Academy). (JA 302-06.) *See Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), *enforced*, 354 F.2d 170 (2d Cir. 1965) (in evaluating the discriminatee’s efforts, the Board does not undertake a “mechanical examination of the number or kind of applications” made during the backpay period). The record also contains Board-provided search-for-work forms, on which McCallum noted some of the names of the prospective employers with whom he had communicated

about work, and the approximate dates of those communications. (JA 146, 412-14.) The forms reflect that McCallum communicated with 16 different prospective employers over the course of the backpay period, including Promotion Physical Therapy and 160 Driving Academy. In his credited testimony, McCallum expanded upon the content of the forms and also detailed several additional contacts that he admittedly “didn’t write . . . down.” (JA 160-86, 214, 216-17, 226-27.)

Apart from McCallum’s credited testimony and documentation regarding his job search, the record also contains undisputed testimony and documentary evidence showing that McCallum received unemployment benefits from the State of Illinois for much of the backpay period. (JA 23; JA 297-301.) As the Board noted, moreover, “[i]n Illinois, an individual can receive unemployment benefits only if he ‘was actively seeking work for the period in question.’” (JA 23, quoting *Moss v. Dep’t of Employment Sec.*, 830 N.E.2d 663, 668 (2005) (citing 820 ILCS 405/500 (West 2002))). Accordingly, the Board reasonably viewed McCallum’s receipt of unemployment benefits as yet another factor supporting his credited testimony that he sustained a diligent search for interim employment during the backpay period. Indeed, as the Board pointed out, under Board precedent, receipt of unemployment benefits constitutes “‘prima facie evidence of a reasonable search for interim employment.’” (JA 23, quoting *NLRB v. KSM Indus., Inc.*, 682

F.3d 537, 548 (7th Cir. 2012), and *Taylor Mach. Prods.*, 338 NLRB 831, 832 (2003), *enforced*, 98 F. App'x. 424 (6th Cir. 2004)).

McCallum's account of his diligent job search finds further support in the testimony of Union Business Agent Elsbree, who confirmed that McCallum regularly communicated not only his desire to return to work for the Company, but his interest in possible union referrals to other jobs. (JA 265-66.) Elsbree admitted that he could have, but did not, refer McCallum to other jobs, because he thought McCallum's reinstatement to his former job at the Company was imminent, given his victory before a grievance panel and subsequent Board proceedings. (JA 265.) By May 2015, however, as McCallum clearly remained in search of a job, Elsbree determined to refer him to a driving position with a union contractor. (JA 267.)

In light of all the "competent evidence showing the reasonableness of McCallum's job search," the Board reasonably rejected the Company's affirmative defense that McCallum incurred a willful loss of earnings and forfeited all backpay by failing to diligently search for alternate employment during the backpay period.¹³ (JA 24.) In its brief (Br. 20-32), the Company mounts a series of attacks

¹³ Because this case involves more than just the "bare testimony" of McCallum, the Company errs in likening it to *DeLorean Cadillac, Inc. v. NLRB*, 614 F.2d 554, 555 (6th Cir. 1980). (Br. 22.) In that case, the Sixth Circuit reversed the Board's finding that a discriminatee made reasonable efforts to find interim employment where (1) the only evidence of his interim job search was his own testimony, (2) there were "no corroborating witnesses or tangible evidence,"

on the Board's treatment of the evidence, ignoring the administrative law judge's credibility determinations and advancing its own view of the evidence relevant to McCallum's job search. However, as discussed below, the Company fails to establish any basis for reversal of the Board's reasonable backpay award.

C. The Company Fails To Show Any Error in the Board's Findings

The Company argues that McCallum is not entitled to any backpay because the Board's finding that he engaged in a reasonable job search is "against the manifest weight of the evidence." (Br. 3.) In so arguing, the Company minimizes the considerable and credited evidence on which the Board relied, and undervalues all that McCallum did to relieve the unemployment caused by the Company's unlawful demand that he produce new and different medical documentation—purportedly to qualify himself for a job he had successfully held for 11 years—and its dogged refusal to reinstate him even after he complied. At bottom, the Company's arguments here reflect a failure to appreciate two basic principles: first, that in a Board proceeding such as this, the duty to mitigate "only requires an honest good faith effort" to find work; and, second, that the Company cannot meet its burden of showing a failure to mitigate, or a "willful loss" of earnings, by

and (3) he "never filed an application or left a business card" with any employer. *Id.* at 555.

merely casting doubt on what McCallum did, or pointing to a few things that he failed to do. *Madison Courier*, 472 F.2d at 243.

1. The totality of the evidence on which the Board relied was more than sufficient to establish McCallum's good-faith effort to find interim employment

The Company initially attempts to meet its burden of proving the unreasonableness of McCallum's job search by suggesting that he did not, in fact, search for work as he testified that he did. In this regard, the Company relies heavily on McCallum's failure to document his job search at every step, and his inability to recollect the names of every employer he contacted, as well as the exact dates of his communications with them. (Br. 20-21.) However, it is well settled that "[a]n employee's poor recordkeeping or faulty memory regarding a job search that was conducted years ago will not disqualify that employee from backpay." *Essex Valley Visiting Nurses Ass'n*, 352 NLRB 427, 429 (2008), *affirmed and adopted*, 356 NLRB 146 (2010), *enforced mem.*, 455 F. App'x 5 (D.C. Cir. 2012); *accord Rainbow Coaches v. Hawaii Teamsters & Allied Workers*, 280 NLRB 166, 179 (1986), *enforced*, 835 F.2d 1436 (9th Cir. 1987) ("Claimants are not disqualified from receiving backpay solely because of poor recordkeeping or uncertain memories."); *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996) (finding employee's testimony sufficient to establish his reasonable search for interim employment, even though his "memory of his efforts . . . was quite poor

and he admittedly failed to keep concurrent records of his job search”), *enforced sub nom. Package Serv. Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997). Thus, as a matter of law, the Company cannot meet its burden of proving that McCallum incurred a willful loss of earnings by pointing to his imperfect memory, or to his lack of documentation to reconstruct his entire 25-month job search.

Contrary to the Company’s suggestions, moreover, McCallum was not required to “corroborate” his testimonial account of his job search with complete records memorializing that search. (Br. 15-16.) While discriminatees in Board proceedings are encouraged to keep paper records of their search for employment during the backpay period (*see* NLRB Casehandling Manual, Sec. 10558.2), they do not forfeit the backpay to which they are presumptively entitled by not keeping such records. *See NLRB v. Atlantic Veal & Lamb, Inc.*, 548 F. App’x 657, 659-60 (2d Cir. 2013) (willful loss not shown by mere lack of documentation), and cases cited at p. 37. Rather, they simply bear the burden (along with the General Counsel) of proving their job search without the benefit of such records. Here, McCallum and the General Counsel met this burden by providing McCallum’s credible account of his job search, and by providing supporting documentation, including documents showing that McCallum received unemployment benefits in each year of the backpay period (2013-2015).

Implicitly recognizing the strength of the General Counsel's evidence, on which the Board ultimately relied, the Company takes pains to highlight its purported flaws. Thus, the Company notes that: McCallum testified that he applied for a driver position at Promotion Physical Therapy in May 2013, rather than in August of that year as his search-for-work form indicates; he was mistaken in his testimony that he applied for a position at USF Holland twice, as records from that company show he only applied once; and he was initially imprecise in testifying that he made an entry on his search-for-work form "every time" he called a prospective employer or applied for a job.¹⁴ (Br. 16, 21, 26.) But the Company gains no ground by such trifling observations. The few, minor imprecisions to which the Company refers do not render "patently insupportable" (*King Soopers, Inc. v. NLRB*, 859 F.3d 23, 32 (D.C. Cir. 2017)) McCallum's credited testimony that he diligently sought work throughout the backpay period by looking "[t]hrough internet sites like Craigslist, monster.com, [and] local newspapers," "walk[ing] in to businesses on his own," and pursuing opportunities for which he felt he was qualified. (JA 20-22; JA 160-61, 179-80.) The Company, accordingly, has failed to meet this Court's "high bar" for reversal of the administrative law

¹⁴ Although McCallum initially testified that he made a written note every time he "made a call" (JA 187) about a job, he later clarified, on further examination about his record-keeping practices (JA 214, 216-17, 226-27), that he "didn't write everything down." (JA 24.)

judge's credibility determination and rejection of McCallum's credited testimony regarding his honest, good-faith effort to find interim employment.¹⁵ *King Soopers*, 859 F.3d at 33.

Likewise, although the Company quibbles (Br. 26) with some of the search-for-work documents produced by the General Counsel—noting that some lack dates or specific employer names—any doubts created by such missing information must be resolved against the Company, as the wrongdoer, and in favor of McCallum, as the innocent discriminatee. *See NLRB v. Pessoa Constr. Co.*, 632 F. App'x 760, 763 (4th Cir. 2015) (“[A]ny doubts arising with regard to alleged affirmative defenses are to be resolved against the employer who committed the unfair labor practice.” (internal quotation marks and citation omitted)); *Lundy Packing Co.*, 286 NLRB 144, 146 (1987) (employer has burden of proving a “clearly unjustifiable refusal to take desirable new employment,” and “[u]ncertainty in such evidence is resolved against the respondent as the wrongdoer”), *enforced*, 856 F.2d 627 (4th Cir. 1988). Accordingly, to the extent

¹⁵ In view of the administrative law judge's credibility determination, this case is readily distinguishable from *Vaccaro v. Custom Sounds, Inc.*, 2010 WL 1223907 (M.D. Fla. Mar. 4, 2010), an out-of-circuit, district court case that the Company claims is instructive. (Br. 23.) In *Vaccaro*, the fact-finding judge found, “[h]aving observed [p]laintiff's demeanor and having listened carefully to his testimony,” that his account of his mitigation efforts was “less than credible.” *Id.*, at *4. Here, by contrast, the fact-finding judge found, based in part on his observation of McCallum's demeanor, that McCallum credibly testified to his mitigation efforts. (JA 20, 23-24.)

that there are gaps in McCallum's documentation of his job search, those gaps do not inure to the Company's benefit.

Nor does the Company succeed in undermining the remaining evidence on which the Board relied—documentary evidence of McCallum's unemployment benefits—by erroneously arguing that the State of Illinois distributes unemployment benefits without regard to whether the benefits claimant is actually looking for work. (Br. 17, 25-26.) In fact, Illinois, like other states, requires that an individual “actively seek[] work” on a bi-weekly basis as a condition of receiving unemployment benefits. *Moss v. Dep't of Employment Sec.*, 830 N.E.2d 663, 668 (2005) (citing 820 ILCS 405/500 (West 2002)).¹⁶ The State of Illinois enforces this requirement, in part, through an automated telephone system (“Tele-Serve”) that individual benefits claimants must call into every two weeks.¹⁷ In order to receive benefits for the prior two-week period, the claimant must certify that he actively looked for work in that period. The state also reserves the right to seek evidence of the job search from the employee, and punishes instances of

¹⁶ *See also*

<http://www.ides.illinois.gov/IDES%20Forms%20and%20Publications/Worksearch.pdf> (last visited Oct. 26, 2017).

¹⁷ Illinois Department of Employment Security (IDES), *Tele-Serve Telephone Express Line 3*, 6-7 (2013), <http://www.ides.illinois.gov/IDES%20Forms%20and%20Publications/CLI113L.pdf>.

fraud.¹⁸ Accordingly, the Company's assertion that there is no serious job-search requirement for unemployment benefits in Illinois is simply incorrect and unduly denigrates that state's system of administering unemployment benefits.

Unlike the Company, the Board, as a matter of policy, does not pass judgment on the means by which a state determines eligibility for unemployment benefits. Rather, the Board maintains a neutral rule that "the receipt of unemployment compensation under the applicable eligibility rules for such benefits constitutes prima facie evidence of a reasonable search for interim employment." *Pessoa Constr. Co.*, 361 NLRB No. 138, 2014 WL 7149470, at *1 n.43 (2014), *enforced*, 632 F. App'x 760 (4th Cir. 2015); *accord NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 548 (7th Cir. 2012); *NLRB v. St. George Warehouse, Inc.*, 645 F.3d 666, 672 (3d Cir. 2011); *Taylor Mach. Prods., Inc.*, 338 NLRB 831, 832 (2003), *enforced*, 98 F. App'x 424 (6th Cir. 2004); *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996), *enforced sub nom. Package Serv. Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997). Although the Company argues that the application of this neutral rule was improper "under the circumstances of this case," the Company fails to show that the requirements for obtaining unemployment benefits in Illinois are so

¹⁸ *See*

<http://www.ides.illinois.gov/IDES%20Forms%20and%20Publications/ADJ034F.pdf> (last visited Oct. 26, 2017); http://www.ides.illinois.gov/Pages/UI_Fraud_by_Individuals.aspx (last visited Oct. 26, 2017).

radically different from the requirements in other states as to warrant a special approach to unemployment benefits distributed by the State of Illinois. Indeed, it appears that Illinois is in accord with other states in making regular re-employment efforts a basic requirement for receipt of temporary unemployment benefits. It was, therefore, entirely appropriate and reasonable for the Board to rely on McCallum's receipt of unemployment benefits as further evidence that McCallum diligently sought work throughout the backpay period.¹⁹

¹⁹ Notwithstanding the Company's position that it owes McCallum absolutely nothing, it also confusingly suggests (Br. 16, 26-28) that it would have been satisfied had the Board parsed McCallum's efforts more closely and credited him with a reasonable job search only during those weeks in which he received unemployment benefits or made documented job contacts. The Board, however, committed no error in failing to take such a novel approach. As the Company itself acknowledges, "[t]he 'sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period.'" (Br. 19, quoting *Wright Elec., Inc.*, 334 NLRB 1031 (2001), *enforced*, 39 F. App'x 476 (8th Cir. 2002)). *NLRB v. Midwestern Personnel Servs., Inc.*, 508 F.3d 418, 425 (7th Cir. 2007). Accordingly, "[a]n employer does not satisfy its burden [of] showing that no mitigation took place . . . by showing an absence of a job application by the claimant during a particular quarter or quarters of the backpay period." *Essex Valley Visiting Nurses Ass'n*, 352 NLRB 427, 429 (2008), *affirmed and adopted*, 356 NLRB 146 (2010), *enforced mem.*, 455 F. App'x 5 (D.C. Cir. 2012). *Cf. KSM Indus., Inc.*, 353 NLRB 1124, 1125 (2009) (once employer has established willful loss, the Board may preclude backpay for those calendar quarters in which the discriminatee failed to mitigate), *affirmed and adopted*, 355 NLRB 1344 (2010), *enforced*, 682 F.3d 537 (7th Cir. 2012).

2. The Company cannot meet its burden of proving McCallum's failure to mitigate by emphasizing a few steps that he did not take in his search

Having failed to undermine the evidence supporting McCallum's reasonable job search, the Company attempts to meet its burden by examining what McCallum did not do. Thus, the Company misguidedly emphasizes at the outset that "McCallum did not work for *anyone* during the backpay period." (Br. 2, emphasis in original.) But, as this Court has held, in Board proceedings, "[t]he principle of mitigation of damages does not require success; it only requires an honest good faith effort." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972) (internal quotation marks and citation omitted).

The Company similarly faults McCallum for failing to avail himself of specific resources in his search for work: Illinois Job Link, which is maintained by the same state agency that administered McCallum's unemployment benefits, and the Union's out-of-work referral list. (Br. 3-8, 21, 27.) Again, however, the Company misunderstands the nature of McCallum's duty to mitigate. "It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income . . . need not comport with the highest standard of diligence, i.e., he or she need not exhaust all possible job leads." *Lundy Packing Co.*, 286 NLRB 144, 146 (1987), *enforced*, 856 F.2d 627 (4th Cir. 1988). All that is required is reasonable diligence, and as shown above, McCallum met that

standard here. *Madison Courier*, 472 F.2d at 1318. Accordingly, the Company does not satisfy its burden of proving McCallum's failure to mitigate by pointing to the fact that he "failed to follow certain practices in his job search," or failed to exhaust all possible avenues of securing a job.²⁰ *Essex Valley Visiting Nurses Ass'n*, 352 NLRB 427, 429 (2008), *affirmed and adopted*, 356 NLRB 146 (2010), *enforced mem.*, 455 F. App'x 5 (D.C. Cir. 2012); *Lundy Packing*, 286 NLRB at 146; *see also NLRB v. Atlantic Veal & Lamb, Inc.*, 548 F. App'x 657, 660 (2d Cir. 2013) (employee did not forfeit backpay by "fail[ing] to utilize New York State's job search assistance program, despite collecting unemployment insurance").

Nor has the Company shown that reasonable diligence required McCallum to apply for jobs with two specific employers (D Construction and Prairie Materials) who were hiring during the backpay period.²¹ "The existence of job opportunities by no means compels an inference that the discriminatee[] would

²⁰ In any event, the record shows that McCallum did attempt to get on the Union's out-of-work referral list by speaking to Union Business Agent Elsbree. (JA 161, 230-32.) And although McCallum plainly did not go through the formalities necessary to secure a place on the list (*see* Br. 21), the record shows that he believed—and rightly so—that he was eligible for referral based solely on his communications with Elsbree. (JA 178, 230-32, 252, 258, 260.) Indeed, Elsbree admitted that, on occasion, he refers members to jobs even though they are not on a referral list, and that he in fact took this approach in referring McCallum to a job at Price Gregory in 2015. (JA 261, 263-64.)

²¹ Although the Company presented evidence that a third employer, USF Holland, had vacancies for drivers during the backpay period, it is undisputed that McCallum applied for a position with that employer.

have been hired if [he] had applied.” *Taylor Mach. Prods., Inc.*, 338 NLRB 831, 832 (2003), *enforced*, 98 F. App’x 424 (6th Cir. 2004). Thus, the mere fact that there were “hundreds of trucking positions available [at D Construction and Prairie Materials] during the backpay period” proves nothing about McCallum’s diligence in seeking work or lack thereof. (Br. 24.) *See St. George Warehouse*, 351 NLRB at 961, 964 (to establish willful loss, employer must not only produce evidence of substantially equivalent jobs in the relevant geographic area, but must persuade that the discriminatee “unreasonably failed to apply for th[o]se jobs”).

As the Board noted, there were 1,700 to 1,800 applicants for the 218 driver positions filled by Prairie Materials in 2013. (JA 22 n.21.) McCallum accordingly would have stood about a 12 percent chance of securing a driver position if he had applied for one of the vacancies that year. The Company does not confront this unpromising statistic in advancing its theory that it was incumbent upon McCallum to apply for a job at Prairie Materials. Nor does the Company attempt to explain, more generally, how McCallum’s failure to apply to the two employers in question was unreasonable or inconsistent with an “honest good faith effort” to find work during the backpay period. *Madison Courier*, 472 F.2d at 1318. The Company, accordingly, has fallen well short of proving that the Board unreasonably rejected its defense of willful loss based on the asserted bounty of jobs available in McCallum’s area.

D. The Company's Remaining Claims Are Not Properly Before the Court

In its brief, the Company complains that the administrative law judge who presided over the compliance hearing should have permitted the Company to litigate whether McCallum had the necessary medical certification to drive a commercial vehicle during the backpay period. (Br. 30, 31-32.) However, in barring litigation of this issue, the judge simply implemented the Board's earlier finding, on summary judgment, that there was "no merit in the [Company's] argument that a genuine issue of fact exists as to whether McCallum possessed valid medical certification at all times during the backpay period." (JA 20.) And although the Company now questions the wisdom of that finding, it failed to timely challenge it before the Board, by filing a motion for reconsideration of the Board's Supplemental Decision and Order granting partial summary judgment on the compliance pleadings. *See* 29 C.F.R. § 102.48.

Having failed to timely raise its challenge to the scope of summary judgment, and to the matters remanded for hearing, the Company cannot secure consideration of those challenges at this late stage, in this Court. Indeed, Section 10(e) of the Act specifically 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." 29 U.S.C. § 160(e); *see also See Woelke & Romero Framing*, 456 U.S. 645, 666

(1982) (holding that Section 10(e) “bar[red]” argument that could have been raised to the Board in a “petition for reconsideration or rehearing”); *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (holding that where party could not reasonably have raised an issue on exceptions, it must raise the issue in a motion for reconsideration in order to preserve it for review); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012) (Section 10(e) renders the Court without jurisdiction to consider arguments not raised either in exceptions to the Board or in a motion for reconsideration).

Here, the Company has not acknowledged, much less provided “extraordinary circumstances” to excuse, its failure to timely challenge the Board’s summary-judgment decision barring inquiry into McCallum’s medical certification during the backpay period. Under Section 10(e) of the Act, therefore, the Court lacks jurisdiction to consider the Company’s present claims regarding McCallum’s medical certification.

In any event, for purposes of evaluating McCallum’s mitigation efforts, it is irrelevant whether McCallum had a valid medical certification at all times during the backpay period. Indeed, as the Fourth Circuit noted in rejecting an employer’s arguments similar to the Company’s arguments here, FMCSA regulations “d[o] not require [an employee] to voluntarily undergo a DOT physical at his own expense or hold a current DOT [medical] card in order to *search* for suitable interim

employment as a [commercial motor vehicle] driver to mitigate his losses.” *NLRB v. Pessoa Constr. Co.*, 632 F. App’x 760, 766 (2015) (emphasis in original). The Company, thus, is simply mistaken that McCallum’s possession of a valid medical card was “relevant” to the issues properly before the administrative law judge at the hearing. Moreover, when the Company called upon McCallum to produce a valid medical card to return to work in 2015, he did so in short order, proving that any concern over his ability to secure a medical card during the relevant time period is entirely specious.

The Court similarly lacks jurisdiction to consider the Company’s passing claim (Br. 22) that it was deprived of the opportunity to meaningfully cross-examine McCallum about his job search because the General Counsel and McCallum failed to produce records of his job search until the hearing. *Cf. David R. Webb Co.*, 311 NLRB 1135 (1993) (noting that prehearing discovery ordinarily is not permitted in Board proceedings, including proceedings at compliance). The Company did not file exceptions to the judge’s decision, to challenge this alleged unfairness. And the Company does not now suggest that its failure should be excused because of extraordinary circumstances. Accordingly, to the extent that the Company passingly claims (Br. 20, 22) that it was denied due process at the hearing, any such claim is beyond the bounds of what the Court may properly consider, under Section 10(e) of the Act. *See W & M Props. of Conn., Inc. v.*

NLRB, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (describing section 10(e) as a “jurisdictional bar” in the face of which the Court is “powerless . . . to consider arguments not made to the Board”); *see also Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.” (internal quotation marks and citation omitted)).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order and Second Supplemental Order in full.

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December 2017

H:/M.D. Miller-final brief-jgmr

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

M.D. MILLER TRUCKING & TOPSOIL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1130 & 17-1166
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	13-CA-104166
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 11,555 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 4th day of December 2017

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

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v.)	
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NATIONAL LABOR RELATIONS BOARD)	13-CA-104166
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, I electronically filed the foregoing document 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 the 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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Dated at Washington, D.C.
this 4th day of December 2017

ADDENDUM

STATUTES, REGULATIONS, AND MANUALS

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151 *et seq.***

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

* * *

(3) 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: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other

members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

* * *

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

* * *

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

* * *

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible

for the discrimination suffered by him: And provided further, that in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a

whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**Relevant provisions of the Illinois Compiled Statutes,
Unemployment Insurance Act, 820 ILCS 405/500**

Sec. 500 [Eligibility for benefits] An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director finds that:

A. He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Director may prescribe, except that the Director may, by regulation, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs, and as to such other types of cases or situations with respect to which he finds that compliance with such requirements would be oppressive or inconsistent with the purposes of this Act, provided that no such regulation shall conflict with Section 400 of this Act.

B. He has made a claim for benefits with respect to such week in accordance with such regulations as the Director may prescribe.

C. He is able to work, and is available for work; provided that during the period in question he was actively seeking work and he has certified such. Whenever requested to do so by the Director, the individual shall, in the manner the Director prescribes by regulation, inform the Department of the places at which he has sought work during the period in question. Nothing in this subsection shall limit the Director's approval of alternate methods of demonstrating an active search for work based on regular reporting to a trade union office.

1. If an otherwise eligible individual is unable to work or is unavailable for work on any normal workday of the week, he shall be eligible to receive benefits with respect to such week reduced by one-fifth of his weekly benefit amount for each day of such inability to work or unavailability for work. For the purposes of this paragraph, an individual who reports on a day subsequent to his designated report day shall be deemed unavailable for work on his report day if his failure to report on that day is without good cause, and on each intervening day, if any, on which his failure to report is without good cause. As used in the preceding sentence, "report day" means the day which has been designated for the individual to report to file his claim for benefits with respect to any week. This paragraph shall not be

construed so as to effect any change in the status of part-time workers as defined in Section 407.

2. An individual shall be considered to be unavailable for work on days listed as whole holidays in “An Act to revise the law in relation to promissory notes, bonds, due bills and other instruments in writing,” approved March 18, 1874, as amended;¹ on days which are holidays in his religion or faith, and on days which are holidays according to the custom of his trade or occupation, if his failure to work on such day is a result of the holiday. In determining the claimant's eligibility for benefits and the amount to be paid him, with respect to the week in which such holiday occurs, he shall have attributed to him as additional earnings for that week an amount equal to one-fifth of his weekly benefit amount for each normal work day on which he does not work because of a holiday of the type above enumerated.

3. An individual shall be deemed unavailable for work if, after his separation from his most recent employing unit, he has removed himself to and remains in a locality where opportunities for work are substantially less favorable than those in the locality he has left.

4. An individual shall be deemed unavailable for work with respect to any week which occurs in a period when his principal occupation is that of a student in attendance at, or on vacation from, a public or private school.

5. Notwithstanding any other provisions of this Act, an individual shall not be deemed unavailable for work or to have failed actively to seek work, nor shall he be ineligible for benefits by reason of the application of the provisions of Section 603, with respect to any week, because he is enrolled in and is in regular attendance at a training course approved for him by the Director:

(a) but only if, with respect to that week, the individual presents, upon request, to the claims adjudicator referred to in Section 702 a statement executed by a responsible person connected with the training course, certifying that the individual

¹ 815 ILCS 105/0.01 *et seq.*

was in full-time attendance at such course during the week. The Director may approve such course for an individual only if he finds that (1) reasonable work opportunities for which the individual is fitted by training and experience do not exist in his locality; (2) the training course relates to an occupation or skill for which there are, or are expected to be in the immediate future, reasonable work opportunities in his locality; (3) the training course is offered by a competent and reliable agency, educational institution, or employing unit; (4) the individual has the required qualifications and aptitudes to complete the course successfully; and (5) the individual is not receiving and is not eligible (other than because he has claimed benefits under this Act) for subsistence payments or similar assistance under any public or private retraining program: Provided, that the Director shall not disapprove such course solely by reason of clause (5) if the subsistence payment or similar assistance is subject to reduction by an amount equal to any benefits payable to the individual under this Act in the absence of the clause. In the event that an individual's weekly unemployment compensation benefit is less than his certified training allowance, that person shall be eligible to receive his entire unemployment compensation benefits, plus such supplemental training allowances that would make an applicant's total weekly benefit identical to the original certified training allowance.

(b) The Director shall have the authority to grant approval pursuant to subparagraph (a) above prior to an individual's formal admission into a training course. Requests for approval shall not be made more than 30 days prior to the actual starting date of such course. Requests shall be made at the appropriate unemployment office.

(c) The Director shall for purposes of paragraph C have the authority to issue a blanket approval of training programs implemented pursuant to the federal Workforce Innovation and Opportunity Act² if both the training program and the criteria for an individual's participation in such training meet the requirements of this paragraph C.

² 29 U.S.C.A. § 2801 *et seq.*

(d) Notwithstanding the requirements of subparagraph (a), the Director shall have the authority to issue blanket approval of training programs implemented under the terms of a collective bargaining agreement.

6. Notwithstanding any other provisions of this Act, an individual shall not be deemed unavailable for work or to have failed actively to seek work, nor shall he be ineligible for benefits, by reason of the application of the provisions of Section 603 with respect to any week because he is in training approved under Section 236 (a)(1) of the federal Trade Act of 1974,³ nor shall an individual be ineligible for benefits under the provisions of Section 601 by reason of leaving work voluntarily to enter such training if the work left is not of a substantially equal or higher skill level than the individual's past adversely affected employment as defined under the federal Trade Act of 1974⁴ and the wages for such work are less than 80% of his average weekly wage as determined under the federal Trade Act of 1974.

D. If his benefit year begins prior to July 6, 1975 or subsequent to January 2, 1982, he has been unemployed for a waiting period of 1 week during such benefit year. If his benefit year begins on or after July 6, 1975, but prior to January 3, 1982, and his unemployment continues for more than three weeks during such benefit year, he shall be eligible for benefits with respect to each week of such unemployment, including the first week thereof. An individual shall be deemed to be unemployed within the meaning of this subsection while receiving public assistance as remuneration for services performed on work projects financed from funds made available to governmental agencies for such purpose. No week shall be counted as a week of unemployment for the purposes of this subsection:

1. Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits, provided that, for benefit years beginning prior to January 3, 1982, this requirement shall not interrupt the payment of benefits for consecutive weeks of unemployment; and provided further that the week immediately preceding a benefit year, if part of one uninterrupted period of unemployment which continues into such benefit year, shall be

³ 19 U.S.C.A. § 2296.

⁴ 19 U.S.C.A. § 2101 *et seq.*

deemed (for the purpose of this subsection only and with respect to benefit years beginning prior to January 3, 1982, only) to be within such benefit year, as well as within the preceding benefit year, if the unemployed individual would, except for the provisions of the first paragraph and paragraph 1 of this subsection and of Section 605, be eligible for and entitled to benefits for such week.

2. If benefits have been paid with respect thereto.

3. Unless the individual was eligible for benefits with respect thereto except for the requirements of this subsection and of Section 605.

E. With respect to any benefit year beginning prior to January 3, 1982, he has been paid during his base period wages for insured work not less than the amount specified in Section 500E of this Act as amended and in effect on October 5, 1980. With respect to any benefit year beginning on or after January 3, 1982, he has been paid during his base period wages for insured work equal to not less than \$1,600, provided that he has been paid wages for insured work equal to at least \$440 during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest.

F. During that week he has participated in reemployment services to which he has been referred, including but not limited to job search assistance services, pursuant to a profiling system established by the Director by rule in conformity with Section 303(j)(1) of the federal Social Security Act, unless the Director determines that:

1. the individual has completed such services; or

2. there is justifiable cause for the claimant's failure to participate in such services.

This subsection F is added by this amendatory Act of 1995 to clarify authority already provided under subsections A and C in connection with the unemployment insurance claimant profiling system required under subsections (a)(10) and (j)(1) of Section 303 of the federal Social Security

Act⁵ as a condition of federal funding for the administration of the Unemployment Insurance Act.⁶

**Relevant provisions of the Rules and Regulations of
the National Labor Relations Board
29 C.F.R. § 102**

Sec. 102.48 [No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record]

(a) *No exceptions filed.* If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

(b) *Exceptions filed.*

(1) Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in §102.46, the Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board Member or other Board agent or agency, or otherwise dispose of the case.

(2) Where exception is taken to a factual finding of the Administrative Law Judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(c) *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify

⁵ 42 U.S.C.A. § 503.

⁶ 820 ILCS 405/100 *et seq.*

the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

Sec. 102.55 [Contents of compliance specification]

(a) *Contents of specification with respect to allegations concerning the amount of backpay due.* With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

* * *

Sec. 102.56 [Answer to compliance specification]

(a) *Filing and service of answer to compliance specification.* Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) *Form and contents of answer.* The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the

specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) *Failure to answer or to plead specifically and in detail to backpay allegations of specification.* If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) *Extension of time for filing answer to specification.* Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.

(e) *Amendment to answer.* Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

**Relevant provisions of the National Labor Relations Board's
Case Handling Manual (Part 3)
Compliance Proceedings**

Sec. 10558.2 Investigating Mitigation

The Compliance Officer is responsible for investigating mitigation issues. The discriminatee's account of his or her efforts to obtain employment and of any loss of interim employment will be the primary source of information upon which a determination will be based. Whenever there is a mitigation issue, the discriminatee should give a complete account of his or her efforts to seek employment. Particular attention is appropriate for prolonged periods of unemployment.

Where a discriminatee has qualified for unemployment compensation, compliance with the state requirements is a well-grounded proxy for the reasonable search for work as required by mitigation law. A separate detailed inquiry into the discriminatee's job search efforts is duplicative and unnecessary. The Region should accept and use receipt of unemployment benefits as evidence of a reasonable search for work. *See* GC 11-07.

Where discriminatees have not received or are no longer receiving unemployment compensation, Regions should continue to use the Board's requirements as the standard for what constitutes a reasonable search for work.

The Region should not allow respondent counsel to interview discriminatees concerning mitigation issues without clearance from the Division of Operations Management. Section 10592.7.

As set forth in Section 10508.8, the Compliance Officer is responsible for communicating with discriminatees as soon as the Region has determined that a violation has occurred that may result in a backpay remedy. Disputes concerning mitigation may be avoided if the discriminatee is clearly advised at that time of his or her obligation to mitigate; the discriminatee should be further advised to keep careful notes or records of his or her efforts to seek interim employment. Form NLRB-4288 contains such advice.