

Oral Argument Not Yet Scheduled

No. 18-72416

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

LUCKY CAB COMPANY

Respondent

**ON APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of the Supplemental Decision and Order that issued against Lucky Cab Company (“the Company”) on April 4, 2018, and is reported at 366 NLRB No. 56. (ER 1-22.)¹ The Board’s Supplemental

¹ “ER” citations are to Excerpts of Record filed by the Company. “SER” citations are to the Board’s Supplemental Excerpts of Record. “Br.” cites are to the Company’s opening brief to the Court.

Order awards specific amounts of backpay that the Company owes five former employees whom the Board found in an earlier proceeding were unlawfully discharged.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 151, 160(a), which authorizes the Board to remedy unfair labor practices, and Section 10(c) of the Act, 29 U.S.C. § 160(c), which authorizes the Board to award backpay. The Court has jurisdiction over this enforcement proceeding under Section 10(e) of the Act, 29 U.S.C. § 160(e), and venue is proper because the unfair labor practices occurred in Las Vegas, Nevada. The Board’s application is timely because the Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the uncontested portion of its Supplemental Order awarding the amount of backpay the Company owes to discriminatee Malaku Tesema because of his unlawful discharge.

2. Whether the Board acted within its broad remedial discretion in determining the amounts of backpay the Company owes to discriminatees Almethay Geberselasa, Elias Demeke, Edale Hailu, and Mesfin Hambamo.

RELEVANT STATUTORY PROVISIONS

Relevant Sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

Previously, in the unfair-labor-practice proceeding, the Board found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discriminatorily discharging six employees for their union activities and ordered the Company to make them whole for any loss of wages and benefits they may have suffered because of the unlawful discharges. *Lucky Cab Co.*, 360 NLRB 271 (2014). On review, the D. C. Circuit enforced the Board's Order in full. *Lucky Cab Co. v. NLRB*, 621 F. App'x 9 (D.C. Cir. 2015). At the subsequent compliance hearing, the Company settled with one discriminate. The Board now seeks enforcement of its Supplemental Order which specifies the amounts of backpay the Company owes each of the remaining five discriminatees. Below are summaries of the procedural history, and the Board's Supplemental Order now under review.

I. PROCEDURAL HISTORY

The Company operates a taxi service in Las Vegas, Nevada. In early 2011, the Company unlawfully discharged six of its drivers—Assefa Kindeya, Malaku Tesema, Almethay Geberselasa, Elias Demeke, Endale Hailu, and Mesfin Hambamo—for their union activities. They were among a small group of employees who led the union organizing effort by talking to fellow employees about the benefits of unionization and soliciting authorization cards from them. As

relevant here, the Board's Order directed the Company to offer reinstatement to the unlawfully discharged employees, and to make them whole for any loss of earnings from the date of their unlawful discharge. *Lucky Cab Co.*, 360 NLRB 271 (2014), *enforced*, 621 F. App'x 9 (D.C. Cir. 2015).

Following the D.C. Circuit's enforcement of the Board's unfair-labor-practice order, a controversy arose concerning the amount of backpay that the Company owed the six discriminatees. As a result, the Board's Regional Director for Region 28 issued a compliance specification (later amended) that set forth the backpay due, the basis for those calculations, and a notice of hearing. The backpay period ran from the date each discriminatee was discharged to November 10, 2015, when the Company made valid offers of reinstatement to them. (ER 2 and n.2; SER 332-505, 599-609.) During the resulting compliance hearing before an administrative law judge, the parties resolved the backpay owed to discriminatee Assefa Kindeya. (ER 2; SER 196-98.) The Board's Regional Director asserted that the Company owed the five remaining discriminatees a total of \$194,912 in backpay. (ER 2.)

The administrative law judge, in a supplemental decision issued on September 18, 2017, found that the Company owed the five discriminatees \$182,175 in backpay. (ER 2-22.) The judge found that the discriminatees had engaged in reasonably diligent job searches during the backpay period. He also

tolled backpay for periods in which he found them unavailable for work. (ER 2-22.) In addition, he deducted from net interim earnings certain expenses incurred by the three discriminatees who had interim employment as independent contractors. In doing so, he found merit to some of the Company's arguments regarding the calculation of earnings and expenses for those discriminatees, and adjusted the respective amounts of backpay owed. (ER 6-22.)

II. THE BOARD'S FINDINGS OF FACT IN THE INSTANT BACKPAY PROCEEDING

All of the discriminatees had limited English skills and spoke Ethiopian as their primary language. (ER 2 n.5.) When the Company discharged the discriminatees in early 2011, Las Vegas had an unemployment rate of over 13 percent. That number was a historic high, and more than triple the unemployment rate from a few years earlier. In March 2013, the unemployment rate was still above 10 percent. (ER 2 and n.1, 5 and n.12.) Facts regarding the specific discriminatees are as follows:

1. Almethay Geberselasa: The Company unlawfully discharged Geberselasa on February 24, 2011. (ER 2; SER 51, 600.) The Board found that the Company owed Geberselasa backpay for those periods from February 2011 through June 2014 that she either had no interim earnings or earned less than when she had worked for the Company. The Board further found that no backpay was owed after June 2014 because her interim earnings exceeded her earnings at the

Company. (ER 3 and n.6; SER 599-601.) Contrary to the Company's suggestion (Br. 5, 20), the Board did not seek backpay for the period in 2012 when she was in Ethiopia, or in 2014 when she was on maternity leave. (ER 3 and n.6; SER 67, 75-76, 600-01.)

Geberselasa had worked at the Company for three years when it unlawfully discharged her. She worked a regular shift and received full medical and other benefits. (ER 2; SER 53-54, 58, 68, 82, 88-89, 151-52.) Previously she worked for two years at Frias Transportation, another taxi service in Las Vegas. She began working for the Company when Frias refused to maintain her employment after she took an emergency trip to Ethiopia. (ER 2; SER 82.) Prior to her taxi experience, Geberselasa had worked as a gas station and grocery store cashier, and a food runner. She had also attended a dealer school and turned down a job as a blackjack dealer at a casino to begin working for Frias. (ER 2-3; SER 53-55, 59, 79-81, 129-30, 273-74, 506-09.)

Following Geberselasa's unlawful discharge she applied for and received unemployment through the end of December 2011. (ER 3; SER 51.) During that time, she regularly searched and applied both online and in person for cashier jobs at various hotel-casinos and gas stations. She also applied for positions as a food runner, gourmet busser, and housekeeper. In addition, for several months, Gaberselsea returned to dealer school for a refresher course. She attended three

mornings a week and applied for dealer positions at most of the casinos in Las Vegas. (ER 3; SER 51-52, 54-56, 79, 133-45, 283-84, 286, 288, 506, 512.)

In January 2012, Geberselasa reapplied for unemployment compensation and received it for approximately four months before her unemployment benefits were exhausted. (ER 3; SER 56.) Between January and August, she applied for cashier jobs at various gas stations and markets. She also continued to apply for various positions at hotel-casinos, including dealer, cashier, housekeeper, porter, food runner, cocktail server, and limo driver. (ER 3; 56, 58-60, 69, 146-50, 155-56, 284-85, 509-09.) Thereafter, from early August to mid-October, Gaberselasa went to Ethiopia. (ER 3; SER 60-61, 76-77.) Upon returning, she resumed her search, both online and in person, and continued to apply for gaming and non-gaming jobs at hotel-casinos. She also took refresher courses at the dealer school for a few weeks, and attended job fairs at several of the major casinos. In addition, she unsuccessfully interviewed for a poolside dealer job at a casino. (ER 3; SER 60-62, 70-74, 77-79, 149, 276-77, 286, 512.)

In February 2013, a Ceasers Entertainment property hired Geberselasa as a housekeeper. The following week she was offered and accepted a better paying job as a beverage ambassador at another Caesars property. (ER 3; SER 63-66, 90, 132, 286-87, 510.) In February 2014, after returning from a three-month maternity leave, Geberselasa applied for a tipped position as a cocktail server job at a

different Caesars property. In July, she obtained the cocktail server job, a position that paid more than she had made at the Company. (ER 3; SER 64-67, 90-92, 131-32, 510, 600-01.) As noted, no backpay was sought for Geberselasa after July because her earnings exceeded those she received at the Company.

2. Elias Demeke: The Company unlawfully terminated Demeke on February 25, 2011. (ER 5; SER 244-45, 602.) The Board found that that the Company owed Demeke backpay from February 2011 through December 2013, when he either had no earnings or earned less than he had when working for the Company. The Board further found that no backpay was owed in 2014 because his earnings exceeded those at the Company, and that no backpay was due thereafter until the end of the backpay period because Demeke was unavailable for work. (ER 1 and n.1, 6, 11-12; SER 602-03.)

Demeke had worked at the Company for over six years prior to his unlawful discharge. He had previous experience as a gas station cashier. (ER 5; SER 245, 261.) Following Demeke's discharge he applied for cashier positions at numerous gas stations and markets. He also applied for cashier and stocker positions at Walmart, as well as porter, valet, and parking attendant positions at numerous hotel casinos. (ER 5; SER 261-65, 267.) Demeke also attended trucking school, and began applying to different trucking companies. (ER 5; SER 246-49, 253, 262, 265-68, 593-96.) Swift Transportation hired Demeke on July 14. (ER 5; SER 248-

49, 269.) Demeke left Swift in early December because he was not earning enough money. (ER 5; SER 250, 252-53, 260.) Demeke then purchased a truck and a trailer, and was hired by Habesha in early 2012 as an independent contractor. (ER 5; SER 251-53.) Demeke left Habesha in mid-November. The following month Demeke began operating his own trucking company, Nahom Transportation, LLC, and he continued to do so until May 2015. (ER 5-6; SER 252-54, 270-72, 597-98.) As noted, the Board found that Demeke is not entitled to any backpay after 2013 because he either earned more than when he worked for the Company or was unavailable for work.

3. Edale Hailu: The Company unlawfully terminated Hailu on March 8, 2011. (ER 12; SER 162, 603.) The Board found that the Company owed Hailu backpay from March 8 through December 2014, when he either had no earnings or earned less than at the Company. The Board did not seek backpay for a six-week period after he had quit interim employment and before he began working for another employer, or after 2014 when his interim earnings exceeded his earnings at the Company. (ER 1 and n.1; SER 603-04.)

Hailu had driven for the Company for over six years prior to his unlawful discharge where he had worked a regular shift. (ER 12; SER 175-76.) Previously, Hailu had driven for Yellow Cab in Las Vegas for a brief period, and for cab and

limousine companies in Florida for many years. He had also had prior experience as a truck driver. (ER 12; SER 169, 174-75.)

Following Hailu's termination, he worked as a cab driver at Whittlesea from April 4 to September 9. (ER 12; SER 163-64, 167-68, 175.) Hailu quit Whittlesea because he was an extra who was not assigned regular shifts and was usually given cabs with restricted medallions. As a result, he made 20 percent less than what he earned at the Company. (ER 12; SER 162-64, 167-68, 175-76, 187-88, 291, 567-82, 603.) That same month, Hailu took a refresher truck-driving course and he applied for a truck-driving position at Swift Transportation. Hailu worked for Swift from October 20 to January 16, 2012. (ER 12; SER 164-66, 168-69, 176-79, 186-88, 191-93.) In mid-February, Direct Haul hired Hailu as an independent contractor. Hailu drove for Direct Haul as an independent contractor until January 14, 2014. (ER 12; SER 165-66, 169-70, 172, 188, 191-93, 583-84, 604.) The following month, Hailu began operating his company, Emun Trucking, and continued to do so through the remainder of year. (ER 12 and n.54; SER 166, 171-74, 180-85, 190.) As noted, the Board found that Hailu is not entitled to any backpay after 2014 because his interim earnings exceeded his prior earnings at the Company.

4. Malaku Tesema: The Company unlawfully discharged Tesema on April 6, 2011. (ER 16; SER 5, 605.) The Board found that the Company owed

Tesema backpay for the periods in 2011, 2012, and 2014, when he was unemployed, or his weekly earnings averaged less than what he averaged at the Company. No backpay was sought for Tesema after June 2014 because his interim earnings exceeded his earnings at the Company. (ER 1, 17; SER 605-06.)

At the time of Tesema's unlawful discharge he had worked for the Company for approximately three years and was a full-time employee. (ER 16-17; SER 15, 292.) Tesema had previously worked for Frias and Yellow Checker Star as a cab driver, but was terminated by both companies. He also had prior experience working as a buffet runner at a hotel-casino. (ER 17; SER 5, 17-19, 44, 293-94.) After Tesema's discharge he received unemployment benefits through March 2012. (ER 17; SER 5-6, 11.) During this time, Tesema unsuccessfully applied for a bus driving job. He also inquired about returning to work at Yellow Checker Star, but was informed that he was "not rehireable." Tesema did not inquire about jobs with other cab companies. (ER 17; SER 6-7, 9, 19, 21-22, 44-45, 292-93.) Tesema also enrolled in a casino gaming (dealer) school and regularly applied for gaming and non-gaming jobs at various hotels. (ER 17; SER 9-11, 16, 23-36, 46-49, 298-99, 513-41.)

In April 2012, the Primadonna hotel-casino hired Tesema as a part-time blackjack dealer. (ER 17; SER 12, 36-37, 295-97.) He worked at Primadonna until June 2012, when he obtained a similar dealer position at a Ceasers

Entertainment property. Although the position at Ceasers was also part-time, for the rest of 2012 and 2013, he worked more hours and made more money than when he worked at Primadonna, and he often earned more than what he had earned at the Company. (ER 17; SER 12-13, 37-40, 43, 605-08.) When Tesema's earnings decreased in 2014, he applied for, and was hired in July for a full-time position at another Ceasers property. (ER 17; SER 14, 42, 605-06.) As noted, through the end of the backpay period, the Board did not seek backpay for Tesema because his interim earnings exceeded his earnings at the Company.

5. Mesfin Hambamo: The Company unlawfully terminated Hambamo on April 20, 2011. (ER 18; SER 95-96, 606.) The Board found that the Company owed Hambamo backpay from April 2011 through December 2014, when he was either unemployed or averaged less earnings per week than he did at the Company, with the exception of the time he stopped looking for work and attended driving school. The Board did not seek backpay for Hambamo in the fourth quarter of 2012 or after 2014 because Hambamo's earnings exceeded his earnings at the Company. (ER 18; SER 95, 608.)

Hambamo had worked at the Company for eight years when the Company unlawfully discharged him. (ER 17; SER 95, 199.) Hambamo had previously worked for three other local cab companies. He was terminated by Whittlesea and Western due to accidents, and quit Desert. Prior to driving a cab, Hambamo

worked as a dishwasher, housekeeper, porter, and cashier. (ER 17; SER 105, 198-99.)

After Hambamo's unlawful discharge he began looking for work every day, both in person and online. He applied unsuccessfully for jobs to Yellow Cab and Nellis Cab. He also unsuccessfully applied for jobs as a housekeeper and cashier. (ER 18; SER 96-99, 101, 201-03, 207.) In mid-August, ANLV Cab, a Frias company, hired Hambamo as an extra. He had to arrive at 2:00 a.m., each day, often waited hours for a cab and/or received a cab that broke down, and earned over 25 percent less money than when he had worked at the Company. Hambamo quit on September 20 and resumed his job search on a daily basis both online and in person. (ER 4, 18-19; SER 100-02, 104-07, 204-05, 291, 300, 302-03, 542-46, 563-66, 606-07.) Hambamo applied for housekeeping jobs at various hotel-casinos and also contacted various employment agencies to inquire about getting job training. (ER 18; SER 106-12, 205-09, 547-49.) Hambamo eventually received a Pell grant, and temporarily stopped his job search to attend trucking school from January 23 to February 29, 2012. (ER 18; SER 112-14, 209-10, 560-62.)

On March 20, 2012, Swift Transportation hired Hambamo as a truckdriver. He quit Swift on June 28 because of the low pay, the limited number of miles he could drive per week, and the poor working conditions. (ER 18; SER 108, 115-17, 211-18, 234-35, 547-53.) On July 13, ANF Freight hired Hambamo as an

independent contractor. (ER 18; SER 117-20, 218-21.) In August 2013, Hambamo brought his own truck and trailer and he resigned from ANF on September 28. (ER 18; SER 118, 223-24, 238.) Shortly thereafter, Nahom Transportation (Demeke's new trucking company) hired Hambamo as an independent contractor. Hambamo left Nahom on January 28, 2014, to start his own trucking company. (ER 18; SER 120-21, 224-25, 235-37, 239-41, 585-92.) Hambamo began operating his company, Elnathan Express LLC on March 20, 2014. He hauled freight for the rest of 2014. (ER 18; SER 120-23, 225-27, 229-30, 236.) As noted, the Board did not seek backpay for Hambamo in 2015 because his interim earnings exceeded his earnings at the Company.

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On April 4, 2018, after considering the Company's exceptions to the administrative law judge's supplemental decision and order, the Board (Chairman Kaplan and Members Pearce and McFerran) issued its Supplemental Decision and Order. (ER 1.) The Board affirmed the judge's findings and adopted his recommended order that specified the amounts of backpay due to the five discriminatees. (ER 1.) In total, the Board ordered the Company to pay \$182,175, plus accrued interest, to the discriminatees, and to reimburse them for any adverse

tax consequences of the backpay awards. (ER 1.) Specifically, the Board directed the Company to pay:

- Almethay Geberselasa \$37,312
- Elias Demeke \$65,131
- Edale Hailu \$21,736
- Malaku Tesema \$32,559
- Mesfin Hambamo \$25,437

(ER 1.)

STANDARD OF REVIEW

The Supreme Court has described the Board’s remedial power as “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). As the Supreme Court has further explained, “[i]n fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Accordingly, the Court should not disturb a backpay order unless it represents “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969); *accord Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988).

The Board's findings of fact in the backpay proceeding will be upheld if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Kawasaki Motors*, 850 F.2d at 527. In addition, a "court may not 'displace the Board's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" *United Nurses Assns. of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951)).

SUMMARY OF ARGUMENT

The D.C. Circuit enforced the Board's earlier unfair-labor-practice order in this case, which found that the Company unlawfully discharged, as relevant here, five employees for engaging in protected union activities. That finding is presumptive proof that some backpay is owed. Before the Court, the Board is entitled to summary enforcement of its backpay order with respect to discriminatee Tesema because the Company has not challenged that portion of the Board's Order in its opening brief. With respect to the four other discriminatees, the Board acted well within its broad remedial discretion in determining the amounts of backpay owed to them for the losses they suffered because of their unlawful discharges.

On the limited issues raised to the Court, the Company has failed to meet the heavy burden of proof on its asserted affirmative defenses. Thus, it has not demonstrated that discriminatee Geberselasa suffered a willful loss of earnings by

failing to make a reasonably diligent effort to secure interim employment. As the Board reasonably found, she applied to positions that were commensurate with her experience and she was not required to seek interim employment as a cab driver. In addition, the Board reasonably found that the Company failed to show that available cab driver positions in the Las Vegas area were substantially equivalent to the position that she had at the Company.

The Company also failed to meet its burden to show that the Board erred in determining the backpay owed to discriminatees Demeke, Hailu, and Hambamo. Contrary to the Company's contention, the Board acted well within its broad remedial discretion by deducting meal expenses that those discriminatees incurred while working as independent contractors. It is well settled that the Board, in determining net earnings, properly deducts operating expenses incurred for discriminatees who find work as independent contractors, and did so here.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS BACKPAY AWARD TO DISCRIMINATEE TESEMA

The Company's opening brief (Br. 22) does not challenge the Board's finding that it owes discriminatee Malaku Tesema \$32,559 in backpay. When a party fails to challenge a Board finding it waives any objection to that finding, and the Board is entitled to summary enforcement of the corresponding portions of its remedial order. *See NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir.

2011); *see also* Fed. R. App. P. 28(a)(8) (opening brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities . . . on which appellant relies”).

II. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN DETERMINING THE AMOUNTS OF BACKPAY THE COMPANY OWES DISCRIMINATEES GEBERSELASA, DEMEKE, HAILU, AND HAMBAMO BECAUSE OF THEIR UNLAWFUL DISCHARGE

A. The Board Has Broad Discretion To Devise Backpay Awards that Effectuate the Policies of the Act

Section 10(c) of the Act, 29 U.S.C. § 160(c), authorizes the Board to alleviate the affects of unfair labor practices by “order[ing] the violator ‘to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies’ of the Act.” *J.H. Rutter-Rex*, 396 U.S. at 262 (quoting Section 10(c)). Under the Act, an award of reinstatement with backpay is the conventional remedy in cases of unlawful discharge. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941). And “[t]he finding of an unfair labor practice is presumptive proof that some backpay is owed.” *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972).

A backpay award is a make-whole remedy designed to restore, as nearly as possible, the economic status quo the employee would have obtained but for the employer’s wrongful act. *See Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 188 (1973). A backpay award also serves to deter future unfair labor

practices by preventing wrongdoers from gaining any advantage from their unlawful conduct. *See J.H Rutter-Rex*, 396 U.S. at 265.

To restore the economic status quo, the unlawfully discharged employee is normally entitled to backpay during the period that runs from the date of the unlawful discharge to the date the employer offers the discharged employee valid, unconditional reinstatement. *See NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 603 (4th Cir. 1977). During that period, the employee is ordinarily entitled to the difference between his gross backpay—the amount that he would have earned but for the wrongful conduct—and his actual interim earnings. *See NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 712 n.2 (6th Cir. 1993).

The burdens of proof in a Board backpay proceeding are matters of settled law. The General Counsel’s burden is to establish only that the gross backpay amounts contained in a compliance specification are reasonable. *See Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 527 n.1 (9th Cir. 1988).² The

² The Board’s General Counsel is required to show only the “gross amount of backpay due.” *Kawasaki Motors Mfg. Corp.*, 850 F.2d at 527. The General Counsel, however, normally goes further, 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. *See 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 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.

burden then shifts to the employer to establish affirmative defenses mitigating liability. *See id.* “This is a difficult burden because doubts must be resolved against the employer who committed the unfair labor practice.” *Id.*

B. The Board Reasonably Rejected the Company’s Affirmative Defense that Geberselasa Is Not Owed Any Backpay For Failure to Mitigate Her Losses

Before the Court, the Company does not dispute the basic formula and principles that the Board applied to find the amount of backpay owed discriminatee Geberselasa. Instead, the Company (Br. 14-21) disputes the Board’s rejection of its affirmative defense that Geberselasa incurred a willfull loss of earnings because she unreasonably failed to apply for driver jobs at other cab companies following her unlawful discharge, which the Company asserts would reduce her backpay to zero. As shown below, the Board reasonably found that the Company did not carry its burden of establishing its affirmative defense, and the Company’s contrary claims are meritless.

1. A victim of discrimination is entitled to backpay, so long as she makes an honest, good-faith effort to mitigate her losses during the backpay period

An employer may reduce its backpay liability by an affirmative showing that a discriminatee “willfully incurred” a loss of earnings during the backpay period by a “clearly unjustifiable refusal to take desirable new employment.” *Phelps Dodge Corp.*, 313 U.S. at 198-200; *accord Canova v. NLRB*, 708 F.2d 1498, 1506

(9th Cir. 1983). However, “[a] wrongfully discharged employee is required to make only a reasonable effort to obtain interim employment and is not held to the highest standard of diligence.” *Kawasaki Motors*, 850 F.2d at 527; *accord Canova*, 708 F.2d at 1506. 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.*, 313 U.S. at 200.

Accordingly, for an employer to prove a willful loss of earnings, it cannot simply point to the discriminatee’s failure to find interim employment. *Kawasaki Motors*, 850 F.2d at 527. Rather, the employer must prove that the discriminatee failed to show an “inclination to work and to be self-supporting.” *Id.* In Board backpay proceedings, therefore, the principle of mitigation of damages does not require success; it only requires “an honest good faith effort.” *Id.* (quoting *Canova*, 708 F.2d at 1506). In addition, the Board “look[s] to the backpay period as a whole and not at isolated portions of that period.” *Kawasaki Motors*, 850 F.2d at 527; *accord NLRB v. St. George Warehouse, Inc.*, 645 F.3d 666, 673 (3d Cir. 2011).

2. Geberselasa made an honest, good-faith effort to mitigate her losses during the backpay period and did not incur a willful loss of earnings

Applying the foregoing principles, the record amply supports the Board’s

finding (ER 5) that Geberselasa made a reasonably diligent effort to find and maintain employment during the backpay period. Following Geberselasa's unlawful discharge she regularly searched and applied for cashier jobs at various hotel-casinos and gas stations. She also applied for positions as a food runner, gourmet busser, porter, cocktail server, housekeeper, and limo driver. In addition, Geberselasa returned to dealer school and applied for dealer positions at most of the casinos in Las Vegas. Significantly, until exhausted, Geberselasa received unemployment benefits. Receiving unemployment benefits is, as the Board noted, "prima facie evidence that she made a reasonable search for work during that time." (ER 5 n.13.) *See NLRB v. KSM Indus., Inc*, 682 F.3d 537, 548 (7th Cir. 2012); *Taylor Mach. Prods.*, 338 NLRB 831, 832 (2003), *enforced*, 98 F. App'x. 424 (6th Cir. 2004). Moreover, after Geberselasa obtained interim employment as a housekeeper at Ceasers, she searched for higher paying positions. Those efforts led to other positions at Ceasers and to her eventually earning, as the Company acknowledged before the Board (ER 5), more than what she had earned at the Company.

Notwithstanding Geberselasa's efforts following her unlawful discharge to obtain interim employment and to then obtain higher paying interim employment, the Company asserts (Br. 9-10, 17-21) that Geberselasa incurred a willful loss of earnings by failing to search for work as a cab driver and that her failure to do so

precludes her from receiving any backpay.³ Under the applicable standards, the Board reasonably found that the Company failed to meet its heavy burden to substantiate its claim that Geberselasa suffered a willful loss of earnings by not applying for other cab driving jobs.

Simply put, the Company's mitigation defense is fatally undermined by the Board's collective rejection of that defense as it pertains to all five discriminatees, and which, except for Geberselasa, is not specifically disputed here. Thus, before the Board (ER 1 n.1, 2) the Company asserted that the five discriminatees forfeited backpay for all, or most, of the backpay period because they failed to make reasonable efforts to mitigate their losses by failing to apply for or leaving interim jobs with other cab companies.

Before the Court, the Company asserts only that "the Board erred by finding that a driver who refused to apply for a single job in the cab industry conducted a reasonable search for interim employment." (Br. 2.) The Company (Br. 9-10, 19-21) then references Geberselasa in the argument section of its brief. The brief does not dispute that the Board reasonably rejected the Company's mitigation defense

³ The Board found (ER 4) that the Company met its burden of showing that Frias and Whittlesea were hiring drivers during the backpay period. The Company, however, does not dispute the Board's additional finding that it "presented no evidence that any of the numerous Las Vegas taxi services other than Frias and Whittlesea were hiring during the relevant period." (ER 3 n.6.)

that Demeke and Tesema suffered a willful loss of earnings because they unreasonably failed to seek employment with other cab companies. (ER 1 n.1, 2, 3, 6, 17.) Rather, as shown above, the Company's brief concedes that the Board properly determined the backpay owed Tesema. Nor does the Company's brief offer any argument to challenge the Board's rejection of its mitigation defense that Hailu and Hambamo suffered a willful loss of earnings because they unreasonably quit interim jobs at other cab companies. (ER 1 n.1, 2, 3, 12, 13, 19.) The reasoning that led the Board to reject the Company's defense for those four discriminatees applies with equal force to Geberselasa.⁴

As the Board explained, "the mere fact that Geberselasa did not apply for cab driver jobs at Frias and Whittlesea or other companies is not determinative." (ER 4.) Rather, as the Board noted here (ER 4), and as set forth above, it considers all of the circumstances to determine whether a discriminatee made a good-faith honest effort to mitigate the loss of earnings following an unlawful discharge. Consistent with that principle, the Board, as stated here, does not require that "unlawfully terminated employees search for interim employment in the same

⁴ To the extent the Company's brief can be read as continuing to assert that Demeke suffered a willful loss of earnings by failing to apply for another cab driving position, and that Hailu and Hambamo suffered a willful loss of earnings by leaving interim jobs with other cab companies, the same reasoning applied by the Board to reject that affirmative defense with respect to Geberselasa also applies to those discriminatees.

industry.” (ER 4.) *See De Jana Indus.*, 305 NLRB 845, 846 n.6 (1991) (“Backpay rights are not dependent on efforts to seek precisely the same type of employment from which the discriminatee was discharged.”); *Fugazy Continental Corp.*, 276 NLRB 1334, 1341 (1985) (“a discriminatee’s failure to seek the same type of employment from which he was discharged does not make him ineligible for backpay”), *enforced*, 17 F.2d 979 (2d Cir. 1987); *Southeastern Envelope*, 246 NLRB 423, 431 (1979) (“The Board has held that failure to seek precisely the same type of interim employment as that from which an employee is discriminatorily discharged is not a determinative factor in assessing eligibility for backpay.”).

In adopting the administrative law judge’s finding that the discriminatees, including Geberselasa, were not required to search for work as cab drivers, the Board “emphasize[d] that the judge correctly found that [all of] the discriminatees [including Geberselasa] sought and obtained interim employment that made appropriate use of their past work experience and skills and paid comparable wages to their positions with the [Company].” (ER 1 n.1.) Thus, Geberselasa had prior experience as a cashier and food runner, and after completing training, had once turned down a job as blackjack dealer. Commensurate with that experience Geberselasa applied for numerous cashier and hotel jobs including dealer positions at most of the casinos in Las Vegas. Moreover, despite the high unemployment

rate, Geberselasa, as the Board found, “was eventually successful and [she obtained jobs] that provided her with earned income for well over half the backpay period.” (ER 5.) Indeed, as noted above, it is undisputed that she eventually obtained a position in which she earned more than when she had worked at the Company.

In these circumstances, the Board reasonably found that the Company failed to carry its burden “to establish that Geberselasa’s job search was unreasonably restricted or inadequate.” (ER 5.) *See Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), *enforced sub nom.*, *Package Serv. Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997) (looking at the backpay period as a whole, discriminatee made a good-faith effort to mitigate his damages even though he failed to find employment during the first year of a two-year backpay period); *Colder Furniture*, 307 NLRB 1442, 1444 (1992) (discriminatee engaged in a good-faith search for interim employment by applying for jobs that were “comparable with [the discriminatee’s] past work history,” and “consistent with the broad area of skills” the discriminatee possessed), *enforced sub nom.*, *NLRB v. Henry Colder Co.*, 9 F.3d 113 (7th Cir. 1993).

Moreover, even putting aside the Board’s reasonable finding that Geberselasa was not required to seek interim employment as a cabdriver, the Board further reasonably found (ER 4-5), contrary to the Company’s contention

(Br. 17-19), that any available cab driver positions were not substantially equivalent to her job at the Company. Thus, it is well established that “traditional mitigation rules do not require claimants to accept offers to position that are not substantially equivalent to their former positions.” *Alamo Cement Co.*, 298 NLRB 638, 638 n.2 (1990). Likewise, a discriminatee “is not required to seek or retain a job more onerous than the job from which he or she was discharged.” *Kawasaki Motors*, 850 F.2d at 528. “The words ‘substantially equivalent’ cover many things, including rate of pay, hours, working conditions, location of the work, kind of work, and seniority rights.” *NLRB v. Oregon Steel Mills, Inc.*, 47 F.3d 1536, 1539 (9th Cir. 1995) (ellipses and quotation marks omitted). If an interim job is not substantially equivalent to the one that was lost, a discriminatee’s subjective reasons for declining or quitting it are irrelevant. *See Lundy Packing Co.*, 286 NLRB 141, 145 (1987), *enforced*, 856 F.2d 627 (4th Cir. 1988).

Applying the above principles here, the Board reasonably concluded that “the overwhelming weight of the evidence indicates that the available cab driver positions at Frias and Whittlesea during the relevant period were not substantially equivalent to Geberselasa’s position at [the Company].” (ER 4.) Thus, Geberselasa worked a regular shift at the Company when it unlawfully discharged her. In contrast, Frias and Whittlesea hired new drivers as extras. Extras, as the Board found, and the Company does not dispute, “were not assigned a regular

shift[,]” “would wait for up to an hour or more for a cab to become available,” and “were paid nothing or the minimum wage while [waiting].” (ER 4 and n.10; SER 68, 82-86, 88-89, 100-02, 124-25, 152-53, 175-76, 204-05, 275, 301, 304-05, 308, 316-23.) In addition, Frias and Whittlesea often assigned new hires to cabs that had restricted medallions (license plates), which prohibited them from picking up passengers in the busiest areas of Las Vegas, such as the Strip and the airport.⁵ (ER 4; SER 187, 310-13, 324-30.) As a result, new hires usually made substantially less money per week than those with regular shifts. (ER 4, 19; SER 68, 87-88, 104, 187-88, 275, 603-04, 606-07.) Indeed, it is undisputed that during Hailu’s interim employment as an extra at another cab company he earned 20 percent less than at the Company, and that during Hambamo’s interim employment as an extra at another cab company he earned 25 percent less than at the Company. In these circumstances, the Company is in no position to assert (Br. 18) that the Board “merely assumed” that new drivers would earn substantially less money at other cab companies than what they had earned at the Company.

⁵ In the underlying unfair-labor-practice proceeding the Board’s decision reflects that Geberselasa’s unlawful discharge occurred based on alleged events that had taken place on a day that she was driving a restricted cab. 360 NLRB at 284-85. The record in the current proceeding does not address the type of cab driven on the day she was discharged or establish that she drove a restricted cab throughout her employment at the Company. In any event, assignment to an irregular shift without benefits provides ample support for the Board to find that jobs at Frias and Whittlesea were not substantially equivalent to her job at the Company.

Equally important, Geberselasa had full benefits when the Company unlawfully discharged her. In contrast, as the Board found, new hires at Frias and Whittlesea “did not receive medical benefits until after they had completed 6–9 months (and a sufficient number of complete shifts per month at Frias), or paid vacation leave until after a full year.” (ER 4; SER 68, 123-24, 126, 158-59, 275, 300, 306-07, 315, 318). In these circumstances, the Company is in no position (Br. 4, 18) to characterize the wait for benefits as a mere “few months.”

Given the differences in working conditions and benefits, the Board was fully warranted to find (ER 4) that any available job during jobs at Frias and Whittlesea were not substantially equivalent to Geberselasa’s position at the Company at the time of her unlawful discharge. *See Kawasaki Motors*, 850 F.2d at 528 (interim job that required different working hours was not substantially equivalent to discriminatee’s prior job); *Arlington Hotel*, 287 NLRB 851 (1987) (available job as a hotel cook that paid 25 percent less than the discriminatee’s prior job as a hotel cook was not substantially equivalent), *enforced, in relevant part*, 876 F.2d 678 (8th Cir. 1989).

C. THE BOARD REASONABLY DETERMINED THE AMOUNT OF BACKPAY DUE DEMEKE, HAILU, AND HAMBAMO BECAUSE OF THEIR UNLAWFUL DISCHARGE

It is settled that “‘self-employment is an adequate and proper way for the injured employee to attempt to mitigate his loss of wages.’” *F.E. Hazard, Ltd. v.*

NLRB, 917 F.2d 736, 737 (2d Cir. 1990) (quoting *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968)). Thus, self-employment is treated the same as any other employment for the purposes of evaluating whether a discriminatee has satisfied his duty to mitigate his lost wages. *Sioux Falls Stock Yards*, 236 NLRB 543, 564 (1978); *Brown & Root, Inc.*, 132 NLRB 486, 500 (1961), *enforced*, 311 F.2d 447 (8th Cir. 1963).

As noted, before the Court, the Company does not dispute the Board's finding (ER 1 n.1, 6, 13, 17, 19) that it did not meet its burden to establish as an affirmative defense that discriminatees Demeke, Hailu, and Hambamo failed to mitigate their losses in their search for employment after the Company unlawfully discharged them, a period that includes self-employment as independent contractors. Instead, the Company (Br. 1-2, 8-9,11-13) argues only that the backpay calculations for those discriminatees should be reduced because the Board's interim earnings for them improperly deducted meal expenses during time periods when they worked as independent contractors. The Board reasonably found that the Company failed to meet its burden on that defense.

- 1. The Board has broad discretion to devise specific backpay formulas, including for those who are self-employed**

As set forth above, the Board's backpay orders are entitled to considerable deference. That deference extends to the formulas used by the Board to determine

net backpay. *NLRB v. Dodson's Market, Inc.*, 553 F.2d 617, 619 (9th Cir. 1977). In determining backpay formulas, the Board may use “close approximations,” and “may adopt such formulas reasonably designed to produce such approximations.” *NLRB v. Int'l Ass'n of Bridge, Structural and Reinforced Iron Workers*, 378, 532 F.2d 1241, 1242 (9th Cir. 1976). Moreover, the Supreme Court has stated that “in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.” *Phelps Dodge*, 313 U.S. at 198.

“It is well established that only net earnings from self-employment are considered to be interim earnings deductible from gross backpay.” *Regional Import & Export Trucking Co.*, 318 NLRB 816, 818 (1995), *accord* *Ryder Sys.*, 302 NLRB 608, 617 (1991), *enforced*, 938 F.2d 705 (6th Cir. 1993). To calculate net earnings for those self-employed, the Board deducts operating expenses from gross earnings. *California Gas Transport, Inc.*, 355 NLRB 465, 468, 470 (2010) (and cases cited). *See also NLRB Casehandling Manual (Part Three) Compliance Proceedings*, Sec. 10552.3 (Sept. 2015). The use of net earnings for the purposes of mitigation when discriminatees are self-employed reflects the fact that the self-employed bear their own costs. *See California Gas Transport*, 355 NLRB at 466, 468.

The Company has the burden to establish how much its backpay liability should be reduced by a discriminatee's interim earnings. *See J.J. Cassone Bakery*, 356 NLRB 951, 955–956 (2011); *Rainbow Coaches*, 280 NLRB 166, 169 (1986), *enforced*, 835 F.2d 1436 (9th Cir. 1987) (table). Where interim earnings are derived from self-employment, the Company's burden includes establishing that any claimed business expenses should not be deducted in calculating the total net amount earned. *See Cliffstar Transport. Co.*, 311 NLRB at 169–70 (1993); *Photographers Local 659, IATSE*, 216 NLRB 633, 638 (1975). Further, because the Company created the dispute by its unlawful actions, doubts or uncertainties in the evidence regarding backpay calculations and formulas are resolved against it. *California Gas Transport*, 355 NLRB at 465 n.1.

2. The Board reasonably deducted meal expenses from interim earnings

The Board applied its standard formula for determining the amount of backpay owed Demeke, Hailu, and Hambamo because of their unlawful discharges. First, the Board calculated the amount of gross pay the discriminatees would have received from the Company had they not been unlawfully discharged. From those respective backpay figures, the Board then deducted interim earnings reported by the discriminatees to derive the net backpay figure, plus interest, that the Company is responsible for paying them. During the time that the discriminatees worked as independent contractors, the Board deducted business

expenses set forth on their income tax returns, such as truck and trailer depreciation, tools, rent, telephone, and meal expenses, consistent with the Internal Revenue Code. (ER 8-11, 14-16, 19-20.)⁶

With respect to meal expenses, the Company concedes (Br. 7) that the Board properly recognized that “[t]he IRS permits independent contractor truck drivers to deduct from their income the cost of their meals on a per diem basis.” (ER 9, 24-25.) The Company also concedes that the Board properly found (ER 9) that the deduction may be “a reasonable approximation” based on the applicable per diem. (Br. 7.) Applying those undisputed principles, the Board determined total meal expenses for Demeke (ER 9,10), Hailu (ER 14-16) and Hambamo (ER 19-20), for each year of the backpay period based on their IRS tax returns. Those returns determined meal expenses by multiplying the number of days that they drove

⁶ Regarding Demeke, in 2012 the Board deducted from his interim earnings \$14,160 in meals, \$3,600 in truck depreciation, \$1,100 in trailer depreciation, and \$1,950 in tool costs. (ER 8-9.) In 2013, the Board deducted from interim earnings \$13,208 in meal costs, and \$1,467 in trailer depreciation. (ER 10-11.) With respect to Hailu, in 2012 the Board deducted from interim earnings \$14,400 in meal expenses, \$1,000 in phone expenses, and \$800 in truck depreciation. (ER 14.) In 2013, the Board deducted \$17,325 in repair and maintenance expenses, \$8,932 in meal expenses, \$6,080 in truck depreciation, \$4,083 in trailer depreciation, \$840 in phone expense, and \$540 in tool expenses. (ER 15-16.) In 2014, the Board deducted from interim expense \$9,440 in meals expenses, \$3,648 in truck depreciation, \$2,880 in phone expense, \$2,701 in trailer depreciation, and \$225 in tool costs. With respect to Hambamo, in 2013 the Board deducted \$52,997 in car and truck expenses, \$13,783 in meal expenses, \$2,000 in trailer depreciation, and \$337 in phone expenses. (ER 19-20.)

trucks as independent contractors times the applicable per-diem for meals under IRS regulations. The Board then deducted that expense from gross earnings because there was no evidence that they were compensated for meals. (ER 9, 10, 14-16, 19-20.)

In deducting such expenses, the Board acted consistently with precedent, set forth above, that the Board deducts operating expenses for discriminatees who work as independent contractors during the backpay period. *See, e.g., Ryder Sys., Inc.*, 302 NLRB 608, 610 (1991) (“as a general rule, depreciation is an allowable deduction”); *C.R. Adams Trucking, Inc.*, 272 NLRB 1271, 1277 (1984) (“tools and equipment . . . may be depreciated”); *see generally Velocity Express, Inc.*, 342 NLRB 888, 889 (2004), *enforced*, 434 F.3d 1198, 1203 (10th Cir. 2006) (calculating net interim earnings by subtracting from gross receipts discriminatees’ interim expenses resulting from their self-employment). Accordingly, the Board appropriately accounted for Demeke’s, Hailu’s, and Hambamo’s meal expenses in calculating their interim earnings.

The Board’s conclusion is not undermined, as the Company claims (Br. 9, 12), by the fact that Demeke, Hailu, and Hambamo were not reimbursed for meal expenses when they worked for the Company. As noted, the discriminatees did not work as independent contractors for the Company. Moreover, contrary to the Company’s contention (Br. 12-13), the evidence does not reflect that the

discriminatees incurred meal expense during their interim self-employment “exactly as they would have been incurred” at the Company. The discriminatees worked for the Company on a shift basis in a local area and there is no evidence that they even ate meals during their shifts. In contrast, as independent contractors, they worked very different schedules and potentially traveled to a wide variety of locations. For instance, when Hailu worked as an independent contractor for Direct Haul he could drive to 48 states. (SER 189.) In this context, the discriminatees’ meal expenses as independent contractors are no different than other operating expenses that the Board deducted from their interim earnings and that the Company has not disputed here.⁷

Contrary to the Company’s contention (Br. 11-12), the Board’s decision in *Cimpi Transportation Co.*, 266 NLRB 1054 (1983), does not require a different result. In that case a Cimpi, a trucking company, unlawfully discharged an employee who worked as an over-the-road truck driver. Cimpi did not compensate the employee for meals or hotel expenses when he was away from home. After the discharge, the employee found interim employment as a truck driver for an employer that was located in a different geographic area but was otherwise

⁷ Although Swift did not reimburse for meals, it hired drivers as employees and paid them a flat rate to cover all expenses. There is no evidence that any of the discriminatees when working as independent contractors received any amount that was expected to cover meal expenses, apart from the available tax deduction.

substantially the same. The Board held that the employee was entitled to transportation and other expenses incurred when traveling to the interim employer, but was not entitled to reimbursement for money spent on meals and hotels when he was actually on the road working as truck driver because Cimpi had not reimbursed him for such expenses. 266 NLRB at 1055-56. Here, unlike the discriminatee in Cimpi, the discriminatees worked as independent contractors. And their work as independent contractors was not substantially the same as their jobs at the Company.

Finally, the Court has no jurisdiction to consider the Company's alternative claim (Br. 13-14) that the Board erred in its specific calculations of Demeke's 2013 meal expenses. The administrative law judge found that the Company did not "contend that the [2013] calculation was incorrect" (ER 11 n.47), and the Company filed no exceptions to that finding before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) ("the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board"); *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008) (Section 10(e) of the Act, 29 U.S.C. § 160(e), "constitutes a jurisdictional bar to this court considering claims not raised before the [Board]") (citing *Woelke & Romero*). Moreover, as shown above at p. 18, any argument not raised in an

opening brief is waived, and the Company's opening brief offers no argument that it had disputed the 2013 calculation before the judge.⁸

Accordingly, the Company has presented the Court with no viable basis to disturb the Board's well-reasoned and amply supported findings. Therefore, the Court should enforce the Board's Order awarding these wrongly discharged employees their long overdue backpay remedy.

⁸ The Company's "Summary of the Argument" (Br. 9) asserts that Demeke's 2012 meal expenses were incorrectly calculated. The argument section of the Company's brief, however, contains no argument to support that claim. In any event, the Board (D&O 7, 9) reasonably rejected that contention.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

Respectfully submitted,

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February 2019

ADDENDUM

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 10(c) of the Act (29 U.S.C. § 160(c)) provides in relevant part:

[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 backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant part: [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

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
v.)	Nos. 18-72416
)	
LUCKY CAB COMPANY)	
)	
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 8745 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 15th day of February 2019

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 15th day of February 2019