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Midwestern Personnel Services, Inc. *and* Chauffeurs, Teamsters and Helpers Local Union No. 215, A/W International Brotherhood of Teamsters.[1] Cases 25–CA–25503–2, 25–CA–25823–3, and 25–CA–25978–5

February 28, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 22, 2004, Administrative Law Judge Ira Sandron issued the attached supplemental decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions, and to adopt the recommended Amended Order.[4]

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to the judge's refusal to permit its counsel to develop testimony from its expert witness beyond the facts and opinions encompassed within the expert's report, which was admitted into evidence. The Respondent argues that the judge deprived the Respondent of due process of law by limiting the expert's testimony. The Respondent's exception to the judge's rulings is without merit. The judge acted within his discretion to limit testimony based on its probative weight. The Respondent's counsel was given an opportunity to convince the judge that the expert could provide probative testimony in addition to the contents of his report. Counsel was unable to do so.

Member Schaumber finds that the judge's evidentiary rulings limiting the Respondent's ability to examine its expert witness were unnecessarily restrictive. Because the Respondent failed to demonstrate how it was prejudiced, however, he finds that the judge's rulings constituted harmless error.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The General Counsel has excepted to the judge's failure to include appropriate interest on the backpay sums identified in his order. The judge issued an Amended Order on August 5, 2004, which ordered the Respondent to pay interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We affirm the Amended Order.

Introduction

As set forth in the underlying Decision and Order in this case, the Respondent's truckdrivers commenced an unfair labor practice strike on January 17, 1998.[5] On March 27, 1998, the Union made an unconditional offer to return to work on behalf of the striking employees. The Respondent refused to reinstate them, thereby violating Section 8(a)(3) and (1) of the Act. The backpay period began on March 27, 1998, and ended on December 31, 1999, when the Respondent ceased doing business in the relevant geographic area.

The issues presented in this backpay proceeding are whether the Respondent made a valid offer of reinstatement to the discriminatees on April 12, 1999, and whether the Respondent sustained its burden of showing that any of the discriminatees failed to make a reasonable search for interim employment.

A. Respondent's April 12, 1999 Letter

On April 12, 1999, the Respondent sent a letter to each discriminatee that stated,

> You are hereby notified that work is available at Daviess County Ready Mix, in Owensboro, KY, at the rate of pay of $10.80 per hour. You are being offered this work and must respond to this letter of recall within three (3) days of receiving this letter by calling 1-800-897-9792. Failure to respond within three (3) days after receipt of this letter, will confirm that you are not interested in returning to work.

The Respondent contends that the letter constituted an offer of reinstatement sufficient to toll the backpay period.

A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll backpay. See *L. A. Water Treatment*, 263 NLRB 244, 246 (1982); and *Standard Aggregate Corp*., 213 NLRB 154 (1974). It is the employer's burden to establish that it made a valid offer of reinstatement to the discriminatees. *L. A. Water*, supra at 246. For a reinstatement offer to be valid, it must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee's former or a substantially equivalent position. *Standard Aggregate*, supra at 154.

Applying these principles, the Respondent's April 12 letter was not a valid offer of reinstatement sufficient to toll backpay because the positions offered were not substantially equivalent to those the discriminatees previously held. First, the positions offered paid $10.80 an hour, while the discriminatees' prestrike positions paid

[5] *Midwestern Personnel Services*, 331 NLRB 348 (2000), enfd. 322 F.3d 969 (7th Cir. 2003).

$12.10 to $13.20 an hour. Second, those discriminatees who called the Respondent in response to the letter were told that they would lose the seniority they had previously held.[6] Because the discriminatees would not have retained their rates of pay or seniority, the letter did not constitute a valid offer of reinstatement and did not toll the backpay period.[7] See *Weldun International, Inc.*, 340 NLRB 666, 677 (2003) (position not substantially equivalent if it does not offer equivalent compensation, or does not include restoration of the seniority acquired prior to an unlawful discharge); *Thalbo Corp*., 323 NLRB 630, 637–638 (1997) (reinstatement offer invalid because it was for a different shift, did not provide discriminatee substantially equivalent compensation, or restore her seniority), enfd. 171 F.3d 102 (2d Cir. 1999). Accordingly, an evaluation of the discriminatees' response to the letter is unnecessary.[8]

B. The Discriminatees' Alleged Failure to Mitigate Backpay

In his Supplemental Decision and Amended Order, the administrative law judge found specified amounts of backpay to be due the 24 discriminatees. Thereafter, the Respondent filed exceptions to the recommended amount of backpay as to 12 of the discriminatees: Wade Carter, Timothy Cronin, Jerry Fickas, Greg Harris, Henry Langdon, Randy Leinenbach, Robert Linendoll, Chris Pentecost, Scott Taylor, Randal Underhill, Gary Williams, and David Wyatt.[9] The Respondent contends that these discriminatees should not receive either part or all of the backpay awarded them by the judge.

In a backpay proceeding, the General Counsel must first show the amount of gross backpay due to each discriminatee. The Respondent then has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Millennium Maintenance & Electrical Contracting, Inc*., 344 NLRB No. 62, slip. op. at 2 (2004); *Chem Fab Corp*., 275 NLRB 21 (1985), enfd. mem. 774 F.2d 1169 (8th Cir. 1985). To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995) (citing *Mastro Plastics*, 136 NLRB 1342 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966)). It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. Id. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful. *Chem Fab Corp*., supra. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *United Aircraft Corp*., 204 NLRB 1068, 1068 (1973). The "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." *Wright Electric, Inc*., 334 NLRB 1031 (2001) (quoting *Electrical Workers Local 3 (Fischbach & Moore*), supra), enfd. 39 Fed. Appx. 476 (8th Cir. 2002).

In support of its contention that certain discriminatees failed to mitigate their backpay, the Respondent called an expert witness, Dr. Malcolm Cohen, to testify about the conditions of the job market at the time in question. The Respondent also submitted a report by Dr. Cohen that showed the number of trucking positions available annually in Indiana and Kentucky. The Respondent and our dissenting colleague assert that this evidence indicates that certain of the discriminatees failed to make a reasonable search for interim employment. In agreement with the judge, we find that Dr. Cohen's report and testimony were insufficient to meet the Respondent's burden of demonstrating that the discriminatees failed to seek interim employment with reasonable diligence.

Dr. Cohen reviewed the "help wanted" section of four local newspapers, picked one day from each quarter during the backpay period, and counted the number of advertisements he deemed applicable to the discriminatees. However, he did not include data as to the pool of applicants, nor analysis regarding the ability of the discriminatees to secure the trucking positions he identified. In addition, Dr. Cohen's findings focused on the number of trucking positions statewide, rather than in the geographic area in which the discriminatees lived. With regard to the "help wanted" ads, Dr. Cohen made no mention of whether the jobs would be comparable to the wages and hours of the discriminatees' former positions. The Board has previously found that the existence of "help wanted" advertisements does not serve to meet the

[6] The Respondent's owner, Samuel Ware, testified that each location kept a separate seniority list and thus discriminatees would fall to the bottom of the Owensboro seniority list behind the employees already working at that facility. Ware also testified that an employee's level of seniority could affect the number of hours that employee worked if there were layoffs or not enough work.

[7] In finding that the Respondent's offer did not constitute a valid offer of reinstatement, we do not rely on the fact that the positions were at a different facility than the facilities at which most of the discriminatees previously worked.

[8] See *Clean Soils, Inc.*, 317 NLRB 99, 110 (1995) (the Board does not evaluate a discriminatee's reply to a reinstatement offer until the respondent proves that the offer is a valid one); *Consolidated Freightways*, 290 NLRB 771, 772–773 (1988) (same), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 498 U.S. 817 (1990).

[9] There are no exceptions to the judge's findings as to the appropriate amount of backpay for the following discriminatees: Brian Aldridge, Chris Bolin, William Buzzingham, Anthony D. Clark, John Fritchley III, Donald Harris, Michael Herr, Preston Kellams, Christopher Means, Jeffrey Metcalf, Michael Pettit, and Eric Webster.

Respondent's burden of proving that the discriminatees failed to search for work with reasonable diligence. *Acme Bus Corp*., 326 NLRB 1447, 1448–1449 (1998); *Coronet Foods, Inc*., 322 NLRB 837, 842 (1997), enfd. in relevant part 158 F.3d 782 (4th Cir. 1998). For these reasons, we find that this evidence has little probative value.

Our dissenting colleague relies on general job market conditions to show that jobs were available for discriminatees. We believe that the burden on the wrongdoer (the Respondent) is more substantial than that. The Respondent has not shown identifiable jobs in the relevant area which were available to these discriminatees.

We now turn to individual discriminatees and find that the Respondent failed to establish that any of them failed to exercise reasonable diligence in their search for interim employment. We adopt the backpay awards to Timothy Cronin, Jerry Fickas, Greg Harris, Wade Carter, Robert Linendoll Jr., Scott Taylor, Randal Underhill, Gary Williams, and David Wyatt for the reasons stated in the judge's decision. For the reasons that follow, we also adopt the backpay awards to Henry Langdon, Randy Leinenbach, and Christopher Pentecost.

1. Henry Langdon

The judge found that Henry Langdon made reasonable efforts to secure interim employment. We adopt that finding. In searching for interim employment, Langdon primarily relied upon the Union's looking-for-work list. The Union's list was maintained at the union hall for members looking-for-work as drivers in the construction industry. Those looking for work were required to sign the list once every 30 days, though some signed more frequently. When employers called the Union with jobs for drivers, the Union would contact persons on the list in the order in which their names appeared. The list proved to be a successful tool for finding interim employment for several discriminatees, including Langdon.

Through the Union's list, Langdon secured six different jobs during 1998, one of which lasted 6 months. In addition, Langdon registered with the State unemployment agency and searched for work on his own. In July 1999, Langdon independently secured employment which he held for the remainder of the backpay period. We find that Langdon's efforts constituted reasonable diligence to obtain interim employment. See *Amshu Associates, Inc.*, 234 NLRB 791, 794 (1978) (discriminatee made reasonably diligent search to secure work including reading want ads and responding by telephone, consulting superintendents, friends, relatives, and local union, registering with state unemployment office, and making other inquiries).

The Respondent contends that Langdon should receive no backpay. The Respondent argues that he incurred a willful loss of earnings by relying almost exclusively on the Union's list. The Respondent also contends that the list was not a true hiring hall procedure and the Union did not make reasonable work opportunities available to the discriminatees. We reject the Respondent's contentions.

The Board has long held that, in seeking interim employment, a discriminatee need only follow his regular method for obtaining work. See *Tualatin Electric, Inc*., 331 NLRB 36 (2000) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment through the union's hiring hall), enfd. 253 F.3d 714 (D.C. Cir. 2001). Langdon, as a new union member, was entitled to go through the Union in seeking interim employment. The Respondent chose to discriminate against Langdon for his union activities and we will not entertain its arguments that Langdon's reliance on the Union for interim employment relieves it of its liability. See *Ferguson Electric Co*., 330 NLRB 514, 518 fn. 17 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

Whether the Union's list constituted a "true hiring hall" is irrelevant to the issue of whether Langdon, or other discriminatees, reasonably relied on the list in seeking interim employment. The record shows that several discriminatees, including Langdon, were successful in mitigating at least some of their backpay by using the list. The list exclusively encompassed driver positions in the construction industry, jobs which each of the discriminatees was qualified to perform and similar to the positions they held at the Respondent. Thus, the Respondent did not meet its burden of showing that the Union's list was an unreasonable method of searching for interim employment.

Our dissenting colleague says that, for 12 months of the 21-month backpay period, Langdon relied exclusively on the Union's looking-for-work list. However, there is no showing that such reliance was unreasonable. Indeed, as noted above, that list was successfully used to find work for several discriminatees, including Langdon. And, as noted, Langdon turned to other sources when it appeared to him that the union list was insufficient. In these circumstances, we do not believe that the Respondent has shown a failure to search for work.

2. Randy Leinenbach

The judge found that Randy Leinenbach also searched for work with reasonable diligence. We adopt that finding. Leinenbach applied for work with a number of employers, including personally asking the owners of several small trucking companies for a job. He specifically

recalled the names of eight employers with whom he made applications. He inquired at one of these employers five or six times during the backpay period, and inquired at another employer about once a month. He also registered with the State unemployment agency and searched for work through the agency, which is prima facie evidence of a reasonable search for employment. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), enfd. sub nom. *Package Service Co. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *United Aircraft Corp.*, 204 NLRB 1068, 1071 fn. 6 (1973). Leinenbach also engaged in self-employment and, during 1999, worked for his parents' company. Under these circumstances, we find that Leinenbach conducted his search for work with reasonable diligence.

In arguing that Leinenbach failed to diligently seek interim employment, the Respondent relies on *Southeastern Envelope Co.*, 246 NLRB 423 (1979). That case is inapposite. In *Southeastern Envelope Co.*, the discriminatee showed only that he went "from place to place" and asked various people she encountered what kind of work they did and whether they "are hiring in your job." Id. at 430. Leinenbach, by contrast, inquired with the *owners* of small trucking companies about a job as a *driver*. Thus, Leinenbach's search in this regard was focused on jobs that he was qualified to perform and he was inquiring with persons in a position to hire him if jobs were available.

The Respondent also asserts that Leinenbach rejected an offer of employment as a cement mixer truckdriver. However, the Respondent failed to provide evidence of whether or when Leinenbach was offered the cement mixer truckdriver position. In fact, it is not clear from the record that the company with whom Leinenbach talked even offered a job to him.

Our dissenting colleague contends that Leinenbach should receive no backpay, citing evidence that he had no earnings during the first two quarters of the backpay period, that he could not recall specific dates and details of his job search, and that his job search was sporadic. We disagree with our colleague's contentions.

First, the fact that Leinenbach was unsuccessful in his initial search for interim employment does not establish that he failed to conduct that search with reasonable diligence. See *Chem Fab Corp.*, supra, 275 NLRB at 21. Our dissenting colleague relies on "the market for truck drivers" during the backpay period. As shown above, such general economic conditions are insufficient to satisfy the Respondent's burden. Second, the fact that Leinenbach could not remember with more specificity the dates of his applications is attributable to the nearly 5-year delay between his search for work and the date of his testimony and does not provide sufficient evidence to support a finding that Leinenbach failed to mitigate. See *United States Can Co.*, 328 NLRB 334, 356 (1999) (discriminatee not barred from receiving backpay where he claimed to have made three job contacts per week but was unable to recall the name of a single employer he contacted, after 5-year lapse between job search and testimony), enfd. 254 F.3d 626 (7th Cir. 2001)*; Allegheny Graphics*, supra, 320 NLRB at 1145 (discriminatee's testimony was sufficient to show that he made a reasonable effort to mitigate his loss of income over the backpay period as a whole, despite his poor memory and failure to keep adequate records of his job search efforts).

Third, our colleague asserts that Leinenbach's efforts were "sporadic and casual." The cases relied upon by our dissenting colleague in support of this assertion are distinguishable and do not support a finding that Leinenbach failed to mitigate. In *Glenn's Trucking Co.*, 344 NLRB No. 41 (2005), the Board found that the discriminatee failed to seek *any* employment after the first few months of the backpay period. The discriminatee went for nearly a year with no evidence of any job search efforts. On these facts, the Board found that the respondent satisfied its burden of establishing that the discriminatee failed to exercise reasonable diligence in searching for interim employment. Likewise, in *Moran Printing, Inc.*, 330 NLRB 376 (1999), the Board found that employee Dixon failed to mitigate by engaging in only the most sporadic search for interim employment where he signed the union out-of-work book only twice after his discharge and gave conflicting testimony regarding his efforts to seek work, which the judge discredited.

Leinenbach's efforts, by contrast, were more frequent and encompassed the entire backpay period. There was no evidence that he stopped looking for work. He registered with the unemployment office, made regular and ongoing applications for work, engaged in self-employment, and worked for his parents' company. The record shows that, in 1999, Leinenbach earned some income during every quarter. We find for these reasons that the Respondent did not meet its burden of establishing that he failed to search for work with reasonable diligence. Our colleague's assertion that Leienebach's efforts were sporadic and casual is thus contradicted by the evidence cited above.

3. Christopher Pentecost

The judge found that Christopher Pentecost made reasonably diligent efforts to find interim employment. We adopt the judge's finding.

In 1998, Pentecost signed the Union's looking-for-work list and worked a few jobs through the Union lasting a day to 6 weeks in duration. Pentecost also inde-

pendently sought work at various employers and engaged in self-employment by doing clean-up at farms. He worked at one job which he learned about from a relative and registered with the State unemployment office.

During the first quarter of 1999, Pentecost remained on the Union's looking-for-work list and continued to receive sporadic employment through the Union. Pentecost remained on the Union's list for the rest of 1999, sought employment through other Teamsters locals as well as two other unions, and sought employment independently, but was unable to secure employment.

In sum, Pentecost worked at five different employers during the backpay period. Taking the backpay period as a whole, we find that the record established that Pentecost searched for interim employment with reasonable diligence.[10]

Our dissenting colleague argues that Pentecost's long periods of unemployment demonstrate that he failed to exercise reasonable diligence in seeking interim employment during the last three quarters of 1999. We disagree. The sufficiency of a discriminatee's efforts to search for interim employment is determined with respect to the backpay period as a whole, not on isolated portions. *Electrical Workers Local 3 (Fischbach and Moore, Inc.)*, supra, 315 NLRB at 1266 (discriminatee's search was sufficient when he worked for 3-1/2 months and inquired about work with four employers during the other 2-1/2 months of 6-month backpay period). Furthermore, there is no requirement that a discriminatee's efforts to seek interim employment be successful. *Weldun International, Inc.*, supra, 340 NLRB at 682. The record establishes that Pentecost made an "honest, good faith effort to find interim work." *Chem Fab*, supra, 275 NLRB at 21. He applied at several employers and sought work through several unions. For these reasons, we find that the Respondent failed to establish that Pentecost's employment search was not reasonably diligent and we adopt the judge's backpay award.

ORDER

The National Labor Relations Board adopts the recommended Amended Order of the administrative law judge and orders that the Respondent, Midwestern Personnel Services, Inc., Olive Branch, Mississippi and Louisville, Kentucky, its officers, agents, successors, and assigns, shall pay the sums set forth in the Amended Order.

Dated, Washington, D.C. February 28, 2006

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues in all respects other than their decision to affirm the judge's awards of full backpay to discriminatees Henry Langdon, Randy Leinenbach, and Chris Pentecost.

The Supreme Court has instructed us, consistent with the clear language of the Act, that the power of the Board to command affirmative action such as reinstatement and backpay "is remedial, not punitive." *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961). Backpay is not mechanically compelled by the Act, but is instead entrusted to the Board's discretion, consistent with the "healthy policy" underlying the Act of "promoting production and employment." See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196, 198 (1941). Thus, an employee who has been the victim of an unfair labor practice is not entitled to simply await reimbursement from his employer for lost wages, "for the statute was not intended to encourage idleness." *NLRB v. Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1017 (9th Cir 1979). To this end, Board law requires a discriminatee to exercise reasonable diligence in seeking interim employment. See *Glenn's Trucking Co.*, 344 NLRB No. 41, slip op. at 1 (2005).

Measured against this standard, I find that discriminatees Henry Langdon, Randy Leinenbach, and Chris Pentecost failed to exercise reasonable diligence in seeking employment for some or all of the backpay period which commenced on March 27, 1998, and ended on December 31, 1999. Each of these individuals was an experienced truckdriver employed by the Respondent at its facilities in Indiana and Kentucky prior to a strike in 1998. Their

[10] Chairman Battista finds that Pentecost made reasonably diligent efforts to obtain work during all quarters of the backpay period except for one segment of 1998. At that time, Pentecost was offered a position with Central City Produce, but he turned it down because, as he claimed, he anticipated the offer of a union job in the near future. However, he never specified what that position was and he did not say when it would have been available. In sum, Pentecost has not shown a basis for turning down a job that could have mitigated backpay. Accordingly, Chairman Battista would toll Pentecost's backpay from the date he turned down the Central City Produce position until he obtained further interim employment later in 1998.

Although, as discussed in his following dissent, Member Schaumber finds that Pentecost is not entitled to backpay for the last three quarters of *1999*, he nevertheless joins Member Walsh in finding, in agreement with the judge and contrary to the Chairman, that Pentecost remained entitled to backpay during all of the *entire 1998* segment of the backpay period.

remarkable lack of success in obtaining interim employment for many months at a time, despite a strong job market for truckdrivers, is, in my view, a predictable consequence of their sporadic and desultory efforts to obtain work. Accordingly, I decline to hold the Respondent liable for all their lost income.

The Respondent introduced evidence indicating that there were ample opportunities for the discriminatees to obtain work as truckdrivers during the backpay period. Economist Dr. Malcolm Cohen prepared a report showing that the unemployment rates in Indiana were below the national average, while in Kentucky, the unemployment rates were similar to or just slightly higher than the national average. The report also discloses that there were 4280 projected openings for truckdrivers within the States of Indiana and Kentucky in 1998 and in 1999. Nationwide, truckdrivers were among the 10 occupations with the largest job growth.

Dr. Cohen also found a large number of help wanted advertisements for truckdrivers in the local newspapers in the selected areas. Specifically, he found 754 advertisements for truckdrivers during the backpay period in four local newspapers.[1] Thus, it would appear from Dr. Cohen's testimony and report that the employment conditions were very favorable and that truckdriver positions were available during the backpay period.

My colleagues, like the judge, give Dr. Cohen's report little to no weight in their analysis of the discriminatees' efforts to seek interim employment. Job searches, however, are not conducted in a vacuum, and evidence of the economic conditions in which the searches occurred provides useful context. As the Sixth Circuit explained in *NLRB v. Seligman and Associates, Inc*., 808 F.2d 1155, 1165 (6th Cir. 1986): "The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market." Where, as here, the relevant job market for truckdrivers was robust, and there were many help wanted advertisements for truckdriver positions in the relevant area, yet certain discriminatees remained unemployed for many months at a time, the adequacy of their job search must be viewed in a different light than it would be if the job market for truckdrivers was weak and marked by high unemployment.

1. Henry Langdon

The judge found that Henry Langdon made reasonably diligent efforts to find interim employment during the backpay period and awarded him $44,555 for lost income. My colleagues adopt that finding. I disagree.

[1] The actual number of vacancies likely was much larger because Dr. Cohen only reviewed one issue per quarter for each newspaper.

In seeking to find interim employment, Henry Langdon relied for more than 12 months of the 21-month backpay period exclusively on the placement of his name on the Union's looking-for-work list.[2] While Langdon secured some work though the list during the early months of the backpay period, for the next 9 months—the 4th quarter of 1998 and the first two quarters of 1999—his reliance on the list failed to result in meaningful employment. Indeed, for the first two quarters of 1999, he earned a total of $522. Nevertheless, during this 9-month period, Langdon relied solely on the list for interim employment. He never looked at help wanted ads or engaged in any other method to find employment, and did not submit a single independent job application during this period. Only during the third quarter of 1999, when he was in danger of losing his house, did Langdon search the local paper. Within weeks, he found suitable employment, and stayed with that job for 1 year.

The record evidence establishes that Langdon failed to take even the most basic steps that a reasonable person would take to find a job, given his training, skills, and the conditions of the market. See *NLRB v. Seligman and Associates, Inc*., supra. Langdon was an experienced driver and was qualified to operate any type of truck, including those hauling hazardous materials. Given his experience, qualifications, and the strength of the relevant job market, I find that placing his name on a Union looking-for-work list without meaningful result for nine months does not constitute reasonable diligence. Even assuming that Langdon was entitled to rely on the Union's looking-for-work list for a reasonable period of time, he should have broadened the scope of his search when it became apparent that the list was no longer effective. Langdon's testimony supports this finding. When he was in danger of losing his home, Langdon finally decided to look in the newspaper. After doing so, he almost immediately found meaningful employment.

In support of their finding that Langdon's job search was reasonably diligent, my colleagues cite *Tualatin Electric, Inc*., 331 NLRB 36 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001), and *Ferguson Electric Co*., 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001), for the

[2] My colleagues rely on the fact that Langdon also registered with the State unemployment office as evidence that Langdon made reasonably diligent efforts to find interim employment. Such reliance is misplaced. Langdon's registration with the State unemployment office has no bearing on the reasonableness of his job search efforts. In Indiana, applicants for unemployment benefits must file weekly reports listing their job contacts in order to receive benefits, but this requirement is waived for applicants who have signed up for work through a union. Thus, signing the Union's looking for work list was sufficient for Langdon to receive benefits, and this is apparently all he did to search for work for more than a year into the backpay period.

principle that a discriminatee, in seeking interim employment, need only follow his regular method for obtaining work. My colleagues' reliance on those cases is misplaced. In *Ferguson Electric*, the parties stipulated that the employee's regular method for obtaining electrical work was to seek employment with nonunion contractors in conjunction with the union's organizing policy. Similarly, in *Tualatin Electric*, the employees were union salts whose normal pattern of seeking employment was to use the union's hiring hall. On those facts, in both cases, the Board found that the employees were entitled to follow their regular job search methods in seeking interim employment. In this case, however, there is no evidence regarding Langdon's "regular method for obtaining work," and thus no basis upon which to find that his regular method of seeking employment was simply signing the Union's looking-for-work list. Indeed, it is unclear that Langdon was a member of the Union before he worked for the Respondent.[3]

For these reasons, I would reduce Langdon's backpay award by an amount equal to 6 months' pay.

2. Randy Leinenbach

The judge awarded Randy Leinenbach $43,185, finding that Leinenbach applied for work through the unemployment office and independently made various other applications throughout the backpay period. The majority adopts the judge's finding and his award on a record which simply does not support it.

Leinenbach never sought assistance from the Union to find interim employment. He did not check the newspaper want ads for truckdriver openings or engage in other methods to find work. Not surprisingly, for the first two quarters of the backpay period, April through September 1998, Leinenbach had no interim earnings whatsoever.[4] He testified that his job search during this 6-month period consisted of submitting applications to five prospective employers, including his parents' company. Leinenbach was in jail during the last quarter of 1998 and unavailable for employment.

In 1999, Leinenbach performed some work for his parents, earning $1035 for each of the first two quarters of 1999, which amounts to less than $100 a week. He claimed he inquired about work with a few small trucking companies, but was unable to provide specific dates or details. In total, Leinenbach specifically recalled contacting fewer than eight employers during the 21 months of the backpay period—no more than one per quarter—but could not state when he applied. As stated, the market for truckdrivers during the backpay period was strong, and Leinenbach, by his own account, was one of the Respondent's most qualified drivers, with approximately 30 years of truckdriving experience. The evidence shows that Leinenbach did not seek interim employment with reasonable diligence, but, at most, engaged in a sporadic and casual search for work. See *Glenn's Trucking Co.*, supra, 344 NLRB No. 41, slip op. at 1 (2005) (discriminatee's search for interim employment was sporadic and not conducted with reasonable diligence when evidence showed he applied at four employers over a few months and then made no applications for the remaining year of the backpay period); *Moran Printing, Inc*., 330 NLRB 376, fn. 4 (1999) (discriminatee' conducted "sporadic" search for employment when, in the course of more than a year, he signed the union's out-of-work book twice and could only recall applying at two employers). As a result, he is not entitled to a backpay award.

3. Christopher Pentecost

During 9 months of 1999, the entire 2d, 3d, and 4th quarters, Christopher Pentecost was unemployed with no interim earnings. When asked about his job search during this 9-month period of time, Pentecost said, "I looked for jobs and filled out applications." However, he was able to recall only one of the employers with whom he applied. Pentecost provided vague testimony about signing a few union out-of-work lists, but was unable to give a timeframe. My colleagues correctly state that the Board looks to the record as a whole to determine if it establishes that a given employee has diligently sought employment during the backpay period. However, backpay can, and indeed must, be tolled when the record shows that the employee did not make a reasonable effort to secure work during a meaningful portion of the backpay period. See *Rainbow Coaches*, 280 NLRB 166, 193 (1986) (employee Kama failed to make reasonable effort to seek interim employment during portion of the backpay period by applying at one company during four quarters of unemployment).

Pentecost could only specifically recall submitting one application during his long period of unemployment in 1999. Under these circumstances, I find that Pentecost failed to engage in a reasonably diligent search for interim employment and would deny backpay for the last three quarters of 1999.

Dated, Washington, D.C. February 28, 2006

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[3] Because the cases are clearly distinguishable, it is not necessary for me to pass on whether they were correctly decided.

[4] Leinenbach was in jail during the last quarter of 1998 and thus unavailable for employment. The judge deducted this quarter from the backpay award and thus that quarter is not before the Board.

J. Steve Robles, Esq., for the General Counsel.
James U. Smith III, Esq. (Smith & Smith), of Louisville, Kentucky, for the Respondent.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a compliance specification and notice of hearing issued on June 30, 2003, against Midwestern Personnel Services, Inc. (MPS or the Respondent), stemming from the Board's Decision and Order in *Midwestern Personnel Services*, 331 NLRB 348 (2000), as affirmed by the Seventh Circuit Court of Appeals in *NLRB v. Midwestern Personnel Services*, 322 F.3d 969 (7th Cir. 2003). As set forth in the Board's decision, MPS truckdrivers commenced an unfair labor practice strike on January 17, 1998. On March 27, 1998, they made an unconditional offer to return to work, at which time the Respondent refused to reinstate them, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). It is undisputed that the backpay period began on March 27, 1998, and ended on December 31, 1999, the date when MPS ceased doing business in the geographic area where the discriminatees had worked.

Pursuant to notice, I conducted a trial in Evansville, Indiana, on November 17, 2003, and March 22–24, 2004, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

A number of discriminatees testified. Additionally, the General Counsel called Patricia Nachand, former compliance officer, concerning preparation of the compliance specification and its methodology; Joe Dimatteo, a retired union business agent, as to the out-of-work list that was maintained by Teamsters Local 215 (the Union); and Tom Horstman, a representative of the State of Indiana's unemployment office in Evansville, regarding how the State treated discriminatees who had signed that list. The Respondent called Malcolm Cohen, president of Employment Research Corporation, as an expert witness in economics, concerning the job market for drivers during the backpay period; and Sam Ware, former president of MPS, on how the business operated and his interaction with employees.

The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Legal Parameters

The Board and the Seventh Circuit Court of appeals have already determined that the Respondent discriminated against the subject employees by not reinstating them on March 27, 1998. Such an unfair labor practice finding is presumptive proof that they are owed some backpay. *Intermountain Rural Electric Assn.*, 317 NLRB 338 (1995); *NLRB v. Mastro Plastics*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). The objective in a compliance case such as this one is to restore the discriminatees to the status quo ante, as much as possible, to the circumstances that would have existed had the Respondent's unfair labor practices not occurred. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998); *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 20 (1990).

It is usually impossible to know with absolute certainty exactly what an individual discriminatee would have made had he or she continued working for a respondent during the backpay period. Recognizing this reality, the Board has held that in evaluating the legal sufficiency of a backpay specification, the General Counsel need only show that the methodology it used was reasonable and nonarbitrary. *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 544 (1943); *Performance Friction Corp.*, 335 NLRB 1117, 1118 (2001). Any uncertainty over how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent. *Alaska Pulp Corp.*, supra at 522; *United Aircraft Corp.*, 204 NLRB 1068 (1973). Thus, the burden of proof is upon a respondent to establish affirmative defenses that mitigate liability (*Atlantic Limousine*, 328 NLRB 257, 258 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986)), as is the burden of calling discriminatees. *Electric & Cabcor Service Corp.*, 335 NLRB 315–316 (2001); *Superior Warehouse Grocers*, 282 NLRB 802 (1987).

In sum, MPS bears the evidentiary burden of showing the money it owes to any of the discriminatees should be reduced vis-à-vis the backpay specification. MPS has asserted three primary bases for diminution of backpay, as follows.

Issues

1. Whether the Respondent's April 12, 1999 offer of employment to discriminatees[1] constituted a valid offer of reinstatement, requiring discriminatees to respond and cutting off the Respondent's backpay liability.
2. Whether certain discriminatees failed to make reasonable efforts to secure and retain interim employment.[2]
3. Whether as to Wade Carter and Robert Linendoll, the Respondent is entitled to certain offsets not incorporated in the backpay specification.[3]

Facts

Based on the entire record, including the Board's Decision and Order, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact.

A. Methodology Used by the General Counsel

In determining the backpay of discriminatees, Nachand made calculations on a quarterly calendar basis during the backpay period and deducted interim earnings from the projected earnings of what they would have made at MPS during the same timeframes. Interim earnings were based on discriminatees' income tax returns. Projected earnings were determined by

[1] GC Exh. 4.

[2] The interim earnings figures for Brian Aldridge, Chris Bolin, William Buzzingham, Anthony Clark, John Fritchley III, Donald Harris, Michael Herr, Preston Kellams, Christopher Means, Jeffrey Metcalf, Michael Pettit, and Eric Webster are no longer in dispute. See the Respondent's brief.

[3] The Respondent has contended that Randall Leinenbach's backpay should be reduced for the period of time he was incarcerated during the third and fourth quarters of 1998. In its posthearing brief, at 12, the General Counsel has modified the backpay specification as to Leinenbach to reflect this, in conformity with applicable precedent. See, e.g., *Performance Friction Corp.*, 335 NLRB 1117, 1121 (2001); *Gifford-Hill & Co.*, 188 NLRB 337, 338 (1971).

using the 1997 incomes of the discriminatees and, when their earning figures were unavailable, the average income of discriminatees whose figures were available.

The Respondent has stipulated to the validity of the General Counsel's overall methodology, and I find that it constituted a reasonable method of calculation.

B. Respondent's Operations Prior to the Strike

MPS provided labor, primarily truckdrivers, to companies engaged in the construction industry. River City Holding, Inc. was its largest customer. Most of the discriminatees worked out of locations in Boonville and Rockport, Indiana, but there were also work locations in Huntingberg, Indiana, and Owensboro, Kentucky. The wage rate paid to the drivers began at $10.80 per hour and went up several dollars, based primarily on seniority. Similarly, the number of hours drivers worked ranged from 40 to over 80 hours per week, with more senior drivers being given overtime preference.

C. Use of the Union's Out-of-Work List (the List)

After going out on strike, most of the discriminatees used the list maintained at the union hall. They had to sign the list at least once every 30 days, but some did so more frequently. When employers called with jobs for drivers, Dimatteo contacted persons on the list, starting with those at the top. Someone who turned down work went to the bottom of the list.

The State of Indiana accepts such a method as a reasonable work search. Thus, Horstman testified that the unemployment office considers an unemployed worker registered on a union's out-of-work list to have satisfied the requirement to actively search for employment. Therefore, such a person is not required to complete the active search section of the weekly voucher submitted to the unemployment office.

D. Respondent's April 12, 1999 Letter

The April 12, 1999 letter of employment to discriminatees, signed by Area Manager Jim Teegarden, stated the following:

> You are hereby notified that work is available at Daviess County Ready Mix, in Owensboro, KY, at the rate of pay of $10.80 per hour. You are being offered this work and must respond to this letter of recall within three (3) days of receiving this letter by calling 1-800-897-9792.
>
> Failure to respond within three (3) days after receipt of this letter, will confirm that you are not interested in returning to work.

Many of the discriminatees had conversations with Teegarden following the issuance of the letter. Since Teegarden did not testify, their similar versions of what he said were uncontroverted, and I credit them.

Teegarden specifically told Gerald Fickas, John Henry Fritchley, Michael Herr, Henry Langdon, Scott Taylor, Randal Underhill, and David Wyatt that they would not carry over the seniority they had enjoyed before the strike. Teegarden also told Fickas, Fritchley, Herr, Taylor, Underhill, and Wyatt that they would be making less money than they had previously.

Fickas, Herr, Langdon, Taylor, Underhill, and Wyatt also would have had a considerably longer drive to get to Owensboro than the locations where they had previously performed work for the Respondent.

Randall Leinenbach spoke with the general manager of River City Holding, which contracted out the work to MPS. He was told that he would begin at a lower pay rate and without seniority restoration.

Two discriminates—Timothy Cronin and Christopher Pentecost—responded to the letter and reported to the Owensboro facility. Cronin quit because, as a result of not having his seniority reinstated, he worked only half as many hours as he had before the strike. Pentecost also quit, after realizing that he would be paid less, retain no seniority, and have a longer commute.

For the reasons stated above, all of the named discriminatees either declined employment at the outset or quit shortly after accepting it.

In sum, the Respondent's employment offer, both on its face and as explained by Teegarden, effectively treated the discriminatees as new hires. Thus, the offer was without the seniority levels previously enjoyed, and it offered most of the discriminatees less (up to several dollars an hour) than they had made prior to the strike. Many discriminatees also would have a much longer commute.

E. Alleged Failure to Mitigate

The Respondent offered the testimony of economist Dr. Malcolm Cohen, who was stipulated to be an expert in his field, to show that the discriminatees as a group did not make reasonable efforts to search for and obtain interim employment. The Respondent also contends that specific individuals failed to do so.

1. The testimony of Dr. Cohen

Dr. Cohen was paid by the Respondent to prepare a report[4] and to testify. Using the report as a reference, he testified that the job market for truckdrivers during the backpay period was good, based on his analysis of national and statewide employment data. He summed up that there were 4280 such jobs a year in Indiana and Kentucky. His report also detailed his review of the "help wanted" section of three local newspapers. For each newspaper, Dr. Cohen picked one day from each quarter during the backpay period and counted the number of advertisements he deemed applicable to the discriminatees.

2. Specific allegations of failure to mitigate and claimed offsets

Following are the employment and employment efforts that specified discriminatees made during the backpay period, based on their unrebutted and credible testimony. With the exception of Cronin and Leinenbach, all of them were signed up on the out-of-work list during their periods of unemployment.

a. Carter

In 1998, Wade Carter went into his own business, under the name of Carter Construction Company, and he continued to be self-employed through 1999. In 1998, his business generated $35,167 in income, but after paying out wages and purchasing

[4] R. Exh. 7.

major business equipment, the business did not make any money that year. This was reflected in his income tax returns. There is nothing in the record to suggest that he would have gone into his business had he not been unlawfully laid off.

b. Cronin

On his own, Timothy Cronin obtained jobs at J. H. Rudolph (Rudolph), Spencer County Highway Department, and the Caddick Poultry Company. Cronin also temporarily returned to work at MPS but quit for the reasons previously stated. He also quit the job with Rudolph because it was too far from home and did not give him enough hours. After quitting Rudolph, he obtained a mechanic's position at Ford, through a temporary hiring agency.

c. Fickas

Through the list, Gerald Fickas obtained employment with Rudolph and with D. J. Transportation. He also applied for jobs listed in newspaper want ads.

d. Harris

Through the list, Gregory Harris secured employment at Field Technologies, Industrial Contractors, and Rudolph. He also sought work on his own, by submitting job applications, and he obtained employment with DMI Furniture, Blankenberger, and Dolly Madison Industries.

e. Langdon

Henry Langdon accepted six jobs through the union hall during 1998, including one at J. H. Rudolph. One of these assignments lasted 6 months. In addition, on his own, Langdon sought and secured employment with Boyd Brothers for the latter half of 1999.

f. Leinenbach

Randall Leinenbach applied for work through the unemployment office and independently made various other applications throughout the backpay period.

g. Linendoll

Through the list, Robert Linendoll worked for Sergeant Electric and AK Steel. He also successfully applied on his own for jobs at Jacobi Sod, Johnston Coca-Cola, BGM Equipment Company, and Huebner Trucking. Linendoll took a 3-week vacation during the last quarter of 1998. The record does not reflect that drivers for MPS received vacation pay, and I find it inappropriate to assume that such a benefit was provided.

h. Pentecost

In addition to signing the list, Christopher Pentecost signed up on at least five other Teamster Union out-of-work lists, in locations in states other than Indiana and Kentucky. He even expanded his search to non-Teamster Union out-of-work lists. Pentecost returned to work for MPS but quit for the reasons previously described. He was offered employment with Central City Produce but turned down the offer because he was advised that union work would soon be made available to him. He applied and secured employment at Mid America Oil Company, F. D. Jacobi Company, Gumbk Constructors, H. A. Klink, and TVA Power Plant through Atlantic Plant Maintenance.

i. Taylor

Through the list, Scott Taylor obtained employment at Sterling Boilers. He also applied for jobs through the unemployment office and on his own.

j. Underhill

Randall Underhill returned to work for a previous employer, Metzger Construction.

k. Williams

Gary Williams made job applications on his own. He obtained work with several employers, including Miles Farm, Evansville Marine, and A. K. Steel. Some paid less than what he made at MPS.

l. Wyatt

David Wyatt obtained a job at Rudolph through the list. He also made many job applications on his own.

Analysis and Conclusions

A. The April 12, 1999 Letter

In order to require a discriminatee to respond and to toll backpay liability, an employer's reinstatement offer has to meet certain criteria. It must be specific, unequivocal, and unconditional in offering a discriminatee his or her previous (or substantially equivalent) position, at the same rate of pay, with seniority and benefits intact. *Hoffman Plastic Compounds*, 326 NLRB 1060, 1061 (1998); *Tony Roma's Restaurant*, 325 NLRB 851, 852 (1998). The burden is on the employer to establish that its offer met these requirements. *Tony Roma's* at 852.

The Respondent's offer, both on the face of the letter and as explained to discriminatees by Teegarden, failed to meet any of the above requirements. Discriminatees were offered unspecified positions, with complete loss of previous seniority and, in most cases, at a considerably lower pay rate. Moreover, some of the discriminatees were faced with a much longer distance to travel to work. Just the fact that the offer took away discriminatees' seniority rights was enough to invalidate it. See *NLRB v. Laidlaw Corp.*, 507 F.2d 1381, 1382 (7th Cir. 1974).

Hence, I conclude that the offer of employment did not qualify as a valid offer of reinstatement and therefore neither required discriminatees to respond nor cut off the Respondent's backpay liability.[5]

B. Alleged Failure to Mitigate Backpay Liability

Discriminatees do have a duty to mitigate damages by making reasonably diligent efforts to seek interim employment.

[5] In light of these conclusions, I need not address the General Counsel's contention that the amount of time the Respondent gave discriminatees to respond was a further ground to invalidate the offer. I note that the letter did not give them a time limit in which to report to work or to make a decision but only to contact MPS. See *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988), which distinguishes the two situations.

Black Magic Resources, 317 NLRB 721 (1995); *American Bottling Co.*, 116 NLRB 1303 (1956). Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances (*Pope Concrete Products, 312 NLRB 1171 (1993); Cornwell Co., 171 NLRB 342, 343 (1968)),* and is measured over the backpay period as a whole, not isolated portions thereof. *Wright Electric*, 334 NLRB 1031 (2001); *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 266 (1995). This reasonable diligence standard does not require a discriminatee to exhaust all possible job leads. *Black Magic Resources*, supra; *Lundy Packing Co.*, 286 NLRB 141, 142 (1987).

Consistent with the remedial nature of compliance proceedings, the burden is not on claimants to show they made a reasonable search for work but on a respondent to show their failure to do so. *Black Magic Resources*, supra; *Southern Household Products Co.*, 203 NLRB 881 (1973). The employer does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Food & Commercial Workers Local 1357*, 301 NLRB 617 (1991). *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976).

1. Dr. Cohen's report and testimony

The first part of Dr. Cohen's report gave the number of trucking positions available annually in Kentucky and Indiana. It did not include any data as to pool of potential applicants or an analysis of whether the discriminatees would or would not have been able to secure such positions. Those considerations aside, a fundamental problem with relying on this aspect of his findings is that his data was on a Statewide basis. It contained no breakdown of the number of jobs available in various parts of each state and provided no specific information for the geographic area where the discriminatees worked. Certainly, the discriminatees were not obliged, as part of their duty to mitigate damages, to seek jobs in locations that would have forced them to relocate or to commute hundreds of miles.

The second aspect of Dr. Cohen's analysis was his analysis of local newspaper "help wanted" advertisements. By picking one day to project over an entire quarter, Dr. Cohen could have simply chosen the most favorable sample from each newspaper. Even if he made no deliberate effort to skew the results, the day selected might or might not have been representative. The report also failed to specify what qualified as a suitable job and would be counted. As with the first part of the report, no research was done into the pool of potential applicants or how many applicants actually put in for each of these jobs. Nor was any mention made of whether the discriminatees would have been likely to get the jobs or whether the jobs would have been comparable to the wages, hours, and commutes they had before. No analysis was done on how specific discriminatees would have fared in their applications; indeed, attempting to determine this appears to be an impossible task.

The Board has recognized the inherent difficulty of using want ads to evaluate whether discriminatees have made reasonable efforts to seek interim employment and, accordingly, has found such ads to be of little probative value. Thus, in *Airport Services Lines*, 231 NLRB 1272 (1977), the Board stated,"[T]he newspaper want ads did not establish that the jobs would have been available if [discriminatee] applied or that [discriminatees] would have been selected for any available positions." 231 NLRB at 1273; see also, *Florence Printing Co.*, 158 NLRB 775, 777 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), cert. den. 389 U.S. 840 (1967).

Taking all of the above factors into account, I conclude that Dr. Cohen's report and testimony were insufficient to meet the Respondent's burden of demonstrating that the discriminatees as a group failed to seek work with reasonable diligence.

2. The actions of individual discriminatees

The Respondent contends that Langdon's and most other discriminatees' reliance on the list for extended periods of time did not constitute a reasonably diligent work search.

The Respondent first claims that the Union did not operate a true hiring hall. However, it offered no evidence to support this bald assertion, and the State of Indiana recognizes the Union's out-of-work list as a bona fide means of seeking employment. Consistent with the State's policy, the Board has held that seeking employment through a union's normal referral system evidences a reasonably diligent search. *Big Three Industrial Gas*, 263 NLRB 1189, 1198 (1982); *Seafarers Atlantic District (Isthmian Line)*, 220 NLRB 698, 699 (1975). See also, *Moran Printing*, 330 NLRB 376 (1999) (such efforts must be more than sporadic). In any event, as discussed below, none of the discriminatees at issue relied exclusively on the list to seek interim employment.

The Respondent further contends that the decision of certain discriminatees to "work union" through reliance on the list breached their duty to mitigate. However, discriminatees are entitled to fulfill their job search responsibilities as union members, and an employer who discriminated against them is estopped from raising this as a ground for diminishing backpay liability. *Tulatin Electric*, 331 NLRB 36 (2000); *Ferguson Electric Co.*, 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

Turning to specific individuals, Fickas signed the list and obtained two jobs, one through the list. He also searched the classified ads and applied for various positions. Harris sought employment through the list, through which he secured three jobs. He also sought work on his own, leading to jobs at three other companies. In addition, he submitted applications to jobs that he did not obtain. Langdon signed the list and accepted six different jobs through the union hall during 1998 alone, one of which was an assignment that lasted 6 months. Leinenbach made numerous job applications through the State and on his own, and in 1999, worked each quarter for one employer. Taylor sought employment through the list and the State unemployment office. The Union helped him obtain one job, and he applied for several other positions, both through the State service and independently. Underhill was on the list and during the backpay period returned to work for a previous employer. Wyatt sought work through the list, through which he obtained a job, and he made many applications for employment on his own.

Based on the above, I conclude that Fickas, Harris, Langdon, Leinenbach, Taylor, Underhill, and Wyatt made reasonably

diligent efforts to obtain interim employment and that the Respondent has failed to meet its burden of showing that they failed to mitigate damages.

With respect to Carter, the Respondent first contends that his self-employment effectively removed him from the job market and amounted to a willful loss of earnings, thereby disqualifying him from backpay. Legal precedent is clearly to the contrary. See *Cassis Management Corp.*, 336 NLRB 961 (2001); *Performance Friction Corp.*, 335 NLRB No. 86 (2001); *Fugazy Continental Corp.*, 276 NLRB 1334, 1338 (1985), enfd. 817 F.2d 979 (2d Cir. 1987). The Respondent has therefore failed to satisfy its burden of proving Carter did not make a reasonably diligent search.

The Respondent raises an additional issue with regard to its backpay liability to Carter for 1998. That year, Carter purchased major equipment for his business. In calculating Carter's interim earnings in 1998, consistent with its methodology in general in formulating the backpay specification, the General Counsel relied on income tax returns. The Respondent has conceded the validity of this methodology.

The general rule is that a discriminatee's net earnings in his or her own business are treated as normal interim earnings.[6] *California Dental Care*, 281 NLRB 578 (1986); *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145,148 (2d Cir. 1968). The Respondent contends that the money Carter spent on major equipment in 1998 should be treated as net earnings and, hence, as interim earnings. However, the Respondent has not offered any Board or court precedent for this proposition. There is no evidence that but for the unlawful layoff, Carter would have gone into his business, as a result of which he incurred those equipment costs. Accordingly, and relying on the previously-cited presumptions in favor of discriminatees, I conclude that the Respondent has failed to carry its burden of proving that equipment costs for Carter's business venture should constitute interim earnings.

As to Linendoll, he worked at two jobs he secured through the list and at four other jobs he obtained on his own. I conclude that the Respondent has failed to establish that Linendoll did not make reasonable efforts to secure interim employment. There remains the matter of the 3-week vacation he took in the fourth quarter of 1998.

Nothing in the record suggests that Linendoll had or would have later received paid vacation benefits in the employ of MPS.[7] Therefore, that 3-week period must be considered time when he did not seek employment. The Respondent contends that the entire fourth quarter should be tolled because Linendoll did not work at all during that quarter. However, the vacation was only for 3 weeks, and the record does not support a finding that he removed himself from the job market for the full quarter. Rather, I conclude that it is more appropriate to reduce by three-thirteenths Linendoll's gross backpay figure for the fourth quarter of 1998. An equivalent deduction, with the appropriate resulting changes to accumulated interest, is reflected in the net backpay for Linendoll listed in the Order below.

As to Pentecost, the Respondent contends that his failure to accept employment with a nonunion company and his subsequent lengthy period of unemployment establishes he failed to mitigate. However, Pentecost testified that he did not accept the position because he anticipated (better paying) union work would soon be available. He made numerous job applications and subsequently worked for several companies. I conclude that the Respondent has not established that he incurred a willful loss of interim earnings by not accepting the nonunion position. Cf. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 1043, 1044 (2000). As to Pentecost's long period of unemployment, the law is settled that long periods of unemployment or underemployment do not necessarily equate to a showing of lack of reasonable diligence. *McKenzie Engineering*, 336 NLRB 336 (2001); *Mining Specialists*, 335 NLRB 1275 (2001). In all of the circumstances, I conclude that the Respondent has failed to establish that Langdon's employment search was not reasonably diligent.

Finally, Williams sought work through the list and secured jobs on his own. The Respondent contends that Williams' backpay should be reduced because some of these jobs paid less than what he had made at MPS. However, there is no duty upon discriminatees to seek better paying jobs than those they have actually obtained during the interim earnings period. *Tilden Arms Management Corp.*, 307 NLRB 13 (1992); *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978). I therefore conclude that the Respondent has failed to carry its burden of proving that Williams failed to make a reasonably diligent search.

CONCLUSION

For the reasons I have stated, I accept the General Counsel's final backpay specifications, as modified by its posthearing brief (at 11–12) in all respects, save the reduction I have set out to the amount owed to Linendoll.

On the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

IT IS HEREBY ORDERED that Respondent Midwest Personnel Services, Inc., its officers, agents, successors, and assigns, shall pay the individuals named below the indicated amounts of total gross backpay and other reimbursable sums for the period from March 27, 1998 to December 31, 1999:

Brian Aldridge	$16,422.00
Chris Bolin	$8,934.00
William Buzzingham	$44,887.00
Wade Carter	$37,448.00
Anthony D. Clark	$4,722.00
Timothy Cronin	$22,437.00

[6] There is nothing in the record indicating that he engaged in any self-employment prior to his layoff, in which event income from his business would not be deducted from his backpay. See *Birch Run Welding & Fabricating*, 286 NLRB 1316 (1987).

[7] Contrast, *Ironworkers Local 15*, 298 NLRB 445 (1990), where the discriminatee had accrued paid vacation leave.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Jerry Fickas	$40,646.00
John Fritchley III	$13,214.00
Donald Harris	$8,773.00
Greg Harris	$18,102.00
Michael Herr	$5,721.00
Preston Kellams	$13,954.00
Henry T. Langdon Jr.	$44,555.00
Randy Leinenbach	$43,185.00
Robert Linendoll Jr.	$24,287.93
Christopher C. Means	$36,593.00
Jeffrey Metcalf	$21,794.00
Chris Pentecost	$53,433.00
Michael Pettit	$43,759.00
Scott Taylor	$24,421.00
Randal Underhill	$30,339.00
Eric Webster	$26,648.00
Gary Williams	$31,980.00
David Wyatt	$33,339.00
TOTAL	$649,593.93

Dated, Washington D.C. July 19, 2004