Acme Bus Corp., Brookset Bus Corp., Baumann & Sons Buses, Inc., Alert Coach Lines, Inc., a Single Employer *and* Local 868 International Brotherhood of Teamsters, AFL–CIO *and* Garth Anthony Campbell *and* Theresa Cafaro. Cases 29–CA–17613, 29–CA–17622, 29–CA–17648, 29–CA–17653, 29–CA–17658, 29–CA–17802, 29–CA–17858, 29–CA–17888, 29–CA–17788, and 29–CA–17839

September 30, 1998

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 7, 1997, Administrative Law Judge Steven Davis issued the attached supplemental decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Our dissenting colleague faults discriminatee Joseph Anderson for failing to work two jobs simultaneously and would therefore find that he failed adequately to mitigate the financial losses he suffered as a result of his unlawful termination by the Respondent. We disagree with our colleague and find that the judge correctly determined that Anderson's interim employment record was reasonable and sufficient to mitigate his loss of pay and fully warrant the award of backpay.

Following his retirement in 1986 from the New York City Transit Authority, Anderson worked full time as a busdriver for the Respondent for approximately 7 years. Not long after his unlawful discharge in September 1993, Anderson found work driving occasional chartered runs with Educational Bus Company. Finding the hours there insufficient, Anderson left that job and, a month later, secured a position with Charity Bus Company. For about a year, he regularly drove charters for Charity between 1 and 3 days per week. Thereafter, and through the date of the hearing, he drove charters for Allen Bus Company, where he was able to work more steadily, up to as many as 3 or 4 days a week during their busy season.

While the dissent focuses on the fact that Anderson failed to obtain "the equivalent of full-time employment," mirroring that which he enjoyed with the Respondent, we believe that Anderson's efforts demonstrate due diligence at securing interim employment. Throughout the backpay period, Anderson sought and obtained successively more financially remunerative positions. While each of his jobs was part time, neither was on a fixed schedule and each involved multiple days of work per week. Although Anderson conceded that it was not "impossible" to work for two or more companies at the same time, he could not predict or control when he would be assigned to a particular charter and, therefore, he could not reasonably be expected to attempt to juggle both the Charity and Allen jobs at the same time. Further, the Respondent introduced no evidence to establish that Anderson could have in fact worked both jobs simultaneously. Under these circumstances, contrary to our dissenting colleague, we conclude that Anderson's post-discharge employment history demonstrates that he fulfilled his obligation to make reasonable efforts to mitigate the loss of pay resulting from his unlawful termination.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Acme Bus Corp., Brookset Bus Corp., Baumann & Sons Buses, Inc., and Alert Coach Lines, Inc., a single employer, Ronkonkoma, New York, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and state laws:

Joseph Anderson	$36,171.47
Tommy Edmond	21,664.00
TOTAL	$57,835.47

MEMBER HURTGEN dissenting in part.

Contrary to my colleagues, I find that discriminatee Joseph Anderson did not make a reasonable effort to mitigate his losses arising from his discharge.

A discriminatee must make reasonable efforts to secure interim employment in order to be entitled to backpay. See, e.g., *Electrical Workers IBEW Local 3* (*Fischbach & Moore)*, 315 NLRB 1266 (1995). In my view, that effort should include reasonable efforts to secure the equivalent of full-time employment if in fact the discriminatee had worked full time before the unlawful discharge.

In the instant case, Anderson had worked full time for Respondent. After his discharge, Anderson secured successive part-time interim employment from Educational Bus Company, Charity Bus Company, and Allen AME Bus Company. As the judge noted, Anderson conceded that he could have worked for Charity and Allen at the same time, inasmuch as they were each part-time jobs. He testified that he did not do so because he did not want to work for more than one bus company at a time. He did not suggest, and there is no evidence to indicate, that the driving schedule under the one employer would conflict with that of the other. Under these circumstances, Anderson's failure to take advantage of the opportunity was a failure to mitigate backpay.

I do not suggest that an employee must always work for two interim employers in order to demonstrate a reasonable effort to mitigate backpay. To the contrary, in many circumstances, it will not be reasonable or feasible for a discriminatee to work at two jobs.[1] But, here, Anderson conceded that he could have done so. If he had done so, his interim earnings would have been greater, and the loss of pay would have been mitigated. In my view, Anderson's mere preference to work for one company at a time is insufficient to justify this refusal to mitigate losses.

My colleagues assert that Anderson "could not reasonably be expected to juggle both the Charity and Allen jobs at the same time." However, given the nature of charter-bus driving, I do not see the problem in driving a charter trip for one company and subsequently driving another charter trip for another company. Anderson's sole response was simply that he did not wish to do this. I do not think that this satisfies the duty to mitigate damages.[2]

April Wexler, Esq., for the General Counsel.
Alan Pearl, Esq. (Portnoy, Messinger, Pearl & Associates, Inc.), of Syosset, New York, for the Respondent.

SUPPLEMENTAL DECISION

STEVEN DAVIS, Administrative Law Judge. On December 22, 1995, the Board issued its Decision and Order in these cases, published at 320 NLRB 458, directing Acme Bus Corp., Brookset Bus Corp., Baumann & Sons Buses, Inc., Alert Coach Lines, Inc., a Single Employer (Respondent) to reinstate and make whole employees Joseph Anderson and Tommy Edmond. Respondent waived its right under Section 10(e) and 10(f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying that Order.

A controversy having arisen over the amount of backpay due to Anderson and Edmond under the Board's Order, the Regional Director for Region 29, on November 15, 1996, issued an amended compliance specification and notice of hearing. Respondent's answer denied certain aspects of the specification, and a hearing was held before me in Brooklyn, New York, on January 29 and February 28, 1997. The General Counsel and Respondent filed initial briefs, and Respondent filed a reply brief.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

FINDINGS OF FACT

Gross Backpay

The specification stated that gross backpay for Anderson included computations based upon a 40-hour workweek. Respondent's answer denied that, and asserted that Anderson worked an average of 37.176 hours.

During the hearing, the General Counsel amended the specification to state that Anderson worked 39.07 hours per week rather than 40 hours as set forth in the initial specification. Respondent had no objection to the amendment, the matter was not litigated further, and it was not raised in Respondent's brief.

> In a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due - the amount the employees would have received but for the employer's illegal conduct. In discharging its burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a different result. [*Basin Frozen Foods,* 320 NLRB 1072, 1074 (1996).]

I accordingly find that the General Counsel has appropriately set forth the proper average number of hours for the computation of Anderson's gross backpay. As set forth in the specification, the General Counsel calculated gross backpay based upon Anderson's hourly rate of pay multiplied by the average number of hours he worked per week prior to his discharge. Such method of computation is the standard manner for calculating gross backpay. *La Favorita, Inc.,* 313 NLRB 902 (1994).

Interim Earnings

Once the General Counsel has shown the gross backpay due in the specification, the employer bears the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from any backpay award. *La Favorita*, supra; *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). Any uncertainties or ambiguities should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp*., 204 NLRB 1068, 1069 (1973).

An employer does not meet its burden of showing that a discriminatee neglected to make reasonable efforts to find interim work by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. The standard to which an employee's efforts are held is one of reasonable diligence, not the highest diligence, and he need not exhaust all possible job leads. In determining whether a claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period. *Black Magic Resources*, 317 NLRB 721 (1995).

At the hearing, the employees were asked whether they applied to certain school bus companies. They denied doing so. There was no showing that jobs were available at such companies. The burden was upon Respondent to show that in the context of their entire job searches, it was unreasonable for Anderson and Edmond not to apply at those facilities. Respondent has failed to show that any specific jobs would have been available to them at any of those companies. *Allegeheny Graphics,* 320 NLRB 1141, 1145 (1996); *Black Magic*, supra. Even the existence of "help wanted" advertisements does not serve to meet Respondent's burden of proving that the employees failed to

[1] Indeed, in this case, I am satisfied that it was not reasonable and feasible for discriminatee Edmund to work for two bus companies at the same time.

[2] Obviously, if a driving trip for one company precluded a driving opportunity with the other, only the earnings from the former would be subtracted from gross backpay. But this is not the issue. The issue is posed by Anderson's refusal for personal reasons, to work seriatim for two companies.

make reasonable efforts to find work. *Coronet Foods, Inc*., 322 NLRB 837, 842 (1997).

Joseph Anderson

Following his discharge by Respondent, Anderson searched for employment as a busdriver by checking newspaper advertisements, and applying at various bus companies. He also applied for unemployment insurance benefits and utilized that service's computer search facilities.

Anderson began work for Educational Bus Company shortly after his discharge by Respondent. He worked there only 2 weeks because he did not have regular work. He was called only when charter work, the driving of coach buses to gambling casinos or on sightseeing trips to other cities, was available.

Anderson then obtained a job at Charity Bus Company through its owner, who is his neighbor. He began working 1 or 2 days per week, but such work increased to about 3 days per week. At Charity, Anderson did coach work, operating charter buses to Atlantic City. He was employed at Charity for about 1 year.

Anderson's relative recommended him for a job with Allen AME Bus Company, where he also did charters. He works one to 3 days per week, and sometimes 4 days per week. He is still employed there. At Charity and at Allen he was paid by the trip, and received tips from the passengers or from the organization that booked the charter. Such tips averaged a total of $20 to $35 per trip.

Anderson conceded that he could have worked for Charity and Allen at the same time, but did not do so because he did not want to work for more than one bus company at one time.

Anderson stated that when he worked for Respondent, he never worked for more than one employer. He had 7.5 years more seniority than other drivers, which seniority entitled him to a better job and more work. He noted that had he not been unlawfully discharged, he would still be employed there, and would not have had to work at two jobs in order to be employed for the same amount of hours as he had worked at Respondent.

Anderson admitted that he did not report to the Board the amount of tips he received since he did not believe that they were important. Respondent argues that Anderson should be disqualified from receiving any backpay for all quarters in which he received tips but did not report them. In *American Navigation Co.,* 268 NLRB 426, 428 (1983), the Board held that where a backpay claimant has "intentionally concealed employment from, and willfully deceived the Board" in concealing earnings, backpay would be denied for those quarters in which the concealed employment occurred. The Board noted, however, that it would not apply this sanction where the claimant, "through inadvertence, fails to report earnings."

Here, I find that Anderson did not engage in willful or intentional conduct in failing to disclose his tip income to the Board. Rather, such omission was due to inadvertence. Thus, he cooperated fully with Respondent's requests for information. He produced his tax returns, W-2 forms, a 1099 form, insurance documents, and readily admitted his tip income at the hearing. I accordingly find that Anderson's failure to report his tip income was not willful and that his tip income should be included as interim earnings. *Paper Moon Milano*, 318 NLRB 962, 965 (1995).

Following the close of the hearing, the General Counsel submitted with her brief an amended appendix concerning Anderson's interim earnings. Anderson did not have any record of the tips he received. However, he testified that he received tips in the amount of from $20 to $35 for each trip he made for Charity and Allen. He made two to three trips per week for each company. The General Counsel computed the tips he received at an average of $30 per trip, and 2.5 trips per week during his employment in the years 1994 through 1996.

Accordingly, the General Counsel's amended backpay computation includes an additional $75 per week in tips for all weeks in 1994 and 1995, a total of $975 in 1994, and $975 in 1995.

Anderson filed a self- employment tax form as part of his tax return for the year ending 1994. Compliance Supervisor Richard Epifanio credibly testified concerning Anderson's tax returns and related documents. According to his uncontradicted testimony, Anderson received additional earnings from self-employment of $2387 in 1994, which includes $2187 listed as "business income," and $200 listed as "wages, salaries." General Counsel's amended backpay computation sets forth the amount of $2387 as additional interim earnings.

Tommy Edmond

Edmond testified that following his discharge by Respondent, he applied at several bus companies, including Laidlaw and United Bus, a school bus company. He began work for United 1 week after his discharge. He has worked at United continuously thereafter.

Edmond asked for work at United which had a starting time after 8:30 a.m., and wanted to be a "spare" driver, since he worked a midnight to 8 a.m. shift as a nurse's assistant at a veterans' hospital. It should be noted that he worked the same amount of hours at the hospital when he was employed by Respondent.

Edmond works about 4 to 12 hours per week at United, which is much less than the 30 hours per week he worked at Respondent, where he was a "spare" driver. He is also considered a "spare" driver at United. He has no fixed schedule or regular amount of hours.

Edmond conceded that he could have applied for work as a coach driver for a different company, taking passengers on trips to resorts or sightseeing tours.

Edmond did not seek any other work after he began work for United. He admitted that he could have been on call for a company other than United, and worked for two or three different bus companies, but did not do so, because (a) he would be subject to conflicting assignments and (b) he did not believe that he needed to work for more than one company.

There were some unexplained increases in Edmond's earnings notwithstanding his lower paying job and his wife's retirement. However, the burden was upon Respondent to establish that Edmond had greater interim earnings than reported. Respondent has not met its burden.

Respondent further argues that Edmond was obligated to accept a higher paying job to minimize its backpay liability as much as possible. The law requires only reasonable diligence in obtaining employment, and the test is whether his efforts are "consistent with the inclination to work and to be self-supporting." *Airport Park Hotel*, 306 NLRB 857, 861 (1992). In this regard, Edmond has certainly exercised diligence in obtaining employment. He searched for work immediately upon his discharge, and began work only 1 week after his termination by Respondent.

Edmond should not be required to have obtained "fill in work" in addition to the job he held at United, as argued by Respondent. His work history establishes that he always held

only two jobs at one time—at Respondent's facility and the veterans hospital, and then after his discharge, at United and the veterans hospital. Thus, it would not be consistent with his work history for Edmond to have obtained a third job. The fact that the job at United provided fewer hours and pay than at Respondent does not establish a willful loss of earnings. The fact remains that, but for Edmond's unlawful discharge, he would have remained employed by Respondent.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I hereby issue the following recommended[1]

ORDER

The Respondent, Acme Bus Corp., Brookset Bus Corp., Baumann & Sons Buses, Inc., Alert Coach Lines, Inc., a Single Employer, its officers, agents, successors, and assigns, shall pay to Joseph Anderson $36,171.47, and to Tommy Edmond the sum of $21,664, the total net backpay due them, as set forth in the attached Appendix A and Appendix B, with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and less taxes required by law to be withheld.

[1]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.

APPENDIX A

BACKPAY CALCULATION

Joseph Anderson

Year	*Qtr.*	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1993	3	$851.73	$110.45	$741.28
1993	4	5,536.22	0	5,536.22
1994	1	5,536.22	1,571.75	3,964.47
1994	2	5,536.22	1,571.75	3,964.47
1994	3	5,567.49	1,571.75	3,995.74
1994	4	5,637.84	1,571.75	4,066.09
1995	1	5,637.84	2,854.00	2,783.84
1995	2	5,637.84	2,854.00	2,783.84
1995	3	5,684.72	2,854.00	2,830.72
1995	4	5,790.20	2,854.00	2,936.20
1996	1	4,008.60	1,440.00	2,568.60
Totals		**$55,424.92**	**$19,253.45**	**$36,171.47**

APPENDIX B

BACKPAY CALCULATION

Tommy Edmund

Year	*Qtr.*	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1993	3	$654.00	0	$654.00
1993	4	4,251.00	1,822.00	2429.00
1994	1	4,251.00	2,196.00	2,055.00
1994	2	4,251.00	2,196.00	2,055.00
1994	3	4,275.00	2,196.00	2,079.00
1994	4	4,329.00	2,196.00	2,133.00
1995	1	4,329.00	2,305.00	2,024.00
1995	2	4,329.00	2,305.00	2,024.00
1995	3	4,365.00	2,305.00	2,060.00
1995	4	4,446.00	2,305.00	2,141.00
1996	1	3,078.00	1,068.00	2,010.00
Totals		**$42,558.00**	**$20,894.00**	**$21,664.00**