Aneco, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 606, AFL–CIO. Case 12–CA–15738

March 29, 2001

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On April 28, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision and certification. The Respondent and General Counsel each filed exceptions, supporting briefs, and answering briefs.

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, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel has excepted to the judge's finding that the backpay period in this case should run from July 12, 1993, the date of the discriminatory refusal to hire Winson Cox, to August 19, 1993.[1] The judge assumed, based on the fact that Cox was a paid union organizer and only worked for the Respondent for 5 weeks in 1998 after accepting the Respondent's remedial offer of a job, that he also would not have worked for more than 5 weeks in 1993 had he not been unlawfully refused a job at that time. The General Counsel argues that this finding is entirely speculative and that the Respondent has failed to prove that the backpay period in the compliance specification—a period terminating on April 1, 1998, when Cox began working for the Respondent—is unreasonable.[2] For the reasons set forth below, we find merit in the General Counsel's exceptions.

In compliance matters, a wrongdoing employer bears the burden of proving that a discriminatee would not have remained at the same job which he was unlawfully denied. *Dean General Contractors*, 287 NLRB 573 (1987). This principle is the same for paid union organizers as for other employee discriminatees. *Ferguson Electric Co.*, 330 NLRB 514, 516 (2000), enfd. 242 F.3d 426 (2d Cir. 2001). In this case, the Respondent urges the Board to adopt the judge's finding that Cox would not have remained more than 5 weeks with Aneco in 1993 if he had been hired.

As indicated above, in so finding, the judge relied in part on the fact that Cox was a paid union organizer. The judge found that, if it appeared that Cox was not making progress in his service to the Union by organizing the employer's work force, "at some point the Union would decide that Cox should not spend further time cultivating that infertile field." The judge found that, if that decision were made, Cox would follow the instructions of the Union's organizing manual and leave his job by declaring a strike rather than simply quitting.

The judge further relied on the events in 1998. On April 1 of that year, Cox accepted the Respondent's remedial job offer and began working for the Respondent. However, approximately 5 weeks later, he declared an unfair labor practice strike and ceased work. The judge found that in doing so, Cox was following the Union's above-described organizing strategy as set forth in the Union's manual. However, under all the circumstances, including the absence of any evidence that the Respondent had engaged in any unfair labor practices to prompt the declared strike, the judge found that Cox had really resigned rather than engaged in an unfair labor practice strike.

Based on the foregoing findings, the judge acknowledged that a determination of how long Cox would have worked if the Respondent had hired him in July 1993 was "somewhat speculative." However, the judge reasoned that there was "no better indication" of this than Cox's actual length of service in 1998. In this regard, the judge stated that "there is no evidence that organizing the Respondent's employees would either have been easier or more difficult in 1993 than it proved to be five years later," and that he could not "conclude that Cox would have found organizing Respondent's employees any more doable in 1993 than in 1998." Based on Cox's actions in 1998, the judge therefore concluded that Cox would not have remained employed with the Respondent in 1993 for more than 5 weeks.

We have no quarrel with the notion that, as a paid union organizer, Cox *could* have left his job with the Respondent prior to April 1, 1998 if the Union's organizational objectives at Aneco were achieved or abandoned, or if his services were more urgently needed elsewhere. However, both Cox and Harry Brown, the Union's business manager, testified that there were no limits on the length of time Cox could, if hired, remain with a targeted employer in pursuit of organizational objectives. Brown testified that he would have left Cox with Aneco for as much as 5 years "if it was productive" in terms of increasing the Union's membership.

It is the Respondent's evidentiary burden to bridge the gulf from *could* to *would* when disputing the propriety of

[1] The previous Board decisions and orders issued in this case are summarized in the judge's attached decision and reported at 325 NLRB 400 (1998), and 330 NLRB 969 (2000).

[2] The General Counsel admits there is no backpay liability for 9 of the 20 calendar quarters encompassed in the gross backpay period between July 12, 1993, and April 1, 1998, due to an inadequate job search by the discriminatee.

a backpay period, and it has failed to do so here. The Respondent argues generally that its structure and a local building boom remained the same throughout this period, so that it is illogical to conclude that Cox and the Union would have spent any extended period of time in attempting to organize a single nonunion employer. However, the Respondent, whose burden it is, has failed to present any specific evidence showing that Cox or the Union would not have done so, nor has it shown that there was anything about the Union's organizational objectives, the Respondent's work force, or the local area economy that would invariably have led to Cox's departure from work after only 5 weeks.

As indicated above, the judge himself found no evidence that organizing the Respondent's employees in 1993 was easier or more difficult than in 1998. However, he erroneously relied on the absence of such evidence to conclude that Cox would have worked the same length of time in either year. We find that, in so doing, the judge contravened the well-established principle that "[t]he Board resolves compliance-related uncertainties or ambiguities against the wrongdoer." *Ferguson Electric Co.*, supra.

Contrary to the judge, we find that the Respondent has failed to carry its burden of showing that Cox would only have worked 5 weeks in 1993, or that he would have ceased working at any subsequent point prior to April 1, 1998, the day Cox accepted his remedial job offer and began working for the Respondent. We shall therefore order that the Respondent reimburse Cox for lost earnings for the full backpay period, as set forth in the specification and below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Aneco, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall pay to Winson Cox the sum of $47,349.29, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State tax laws.

Evelyn M. Korschgen, Esq., for the General Counsel.

William E. Sizemore, Esq. and *John W. Bencivenga, Esq. (Thompson, Sizemore & Gonzalez),* for the Respondent.

Kathryn Piscitelli, Esq. and *Tobe Lev, Esq. (Egan, Lev & Siwica),* for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE**,** Administrative Law Judge. I heard this case on March 20, 21, and 23, 2000, in Orlando, Florida. After the parties rested, I heard oral argument, and on March 23, 2000, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.1

Respondent's Posthearing Motion

This case concerns the amount of backpay which Respondent must pay to Winson Cox, whom Respondent refused to hire because Cox was also a Union organizer, or "salt." Respondent has moved that the bench decision be clarified. Quoting my conclusion that the discriminatee "did not satisfy his duty to mitigate in any of the quarters set forth in the Compliance Specification," Respondent proposes that I make the following additional findings of fact: "First, that Mr. Cox failed to visit enough electrical contractors in search of employment during the backpay period to constitute a 'reasonably diligent' job search. Second, that Mr. Cox failed to reasonably use available job service placement agencies to make a reasonably diligent job search." Further, Respondent asserts that, because Cox did not make a reasonably diligent job search, its backpay liability should be zero.

After considering Respondent's motion and reviewing the case law, I must conclude that I did not apply the correct standard in determining whether Cox was reasonably diligent in searching for work during the backpay period alleged in the Compliance Specification. The Board discussed this standard in its recent decision, *Ferguson Electric Co*., 330 NLRB 514 (2000). The discriminatee must seek interim employment substantially equivalent to the position of which he was unlawfully deprived and that employment must be suitable to a person of like background and experience. However, a discriminatee need only follow his regular method for obtaining work.

The record in this case clearly establishes that, if Cox had been seeking work as an electrician but not trying to organize the employees of nonunionized companies, he would have used the Union's hiring hall. However, during the backpay period alleged in the compliance specification, Cox was trying to organize employees, and therefore limited his job search to nonunionized companies, which ruled out use of the hiring hall.

In *Ferguson Electric Co.*, the parties stipulated that the discriminatee's regular method of obtaining work "was to seek employment with nonunion contractors in conjunction with the Union's organizing policy." In the present case, the parties have not entered into such a stipulation, and I must determine what constituted Cox's regular method of obtaining work.

The record establishes that during the backpay period alleged in the specification, Cox would apply for work with non-unionized electrical contractors which fell within certain size limits which made an organizing effort appear worthwhile. He would obtain the names of some of these contractors from the Florida State Employment Service. I find that this practice

[3] We affirm the judge's finding that Cox mitigated his loss through a reasonable job search in those quarters of the backpay period for which the General Counsel seeks backpay. We do not, however, rely on the judge's interpretation of *Ferguson Electric* to the extent that he suggested that it will always be reasonable for a paid union organizer engaged in "salting" activities to conduct an interim job search within limitations imposed by the organizer's union. On the contrary, the Board stated in *Ferguson* that a respondent could prove a willful loss of earnings if "the Union's policies unreasonably limited [the discriminatee's] job search." As in *Ferguson*, the Respondent here did not argue that any specific restrictions imposed by the Union on Cox's interim job search were unreasonable. Instead, the Respondent chose to argue that the mere *existence* of any union restrictions was *per se* unreasonable. The Board rejected this argument in *Ferguson*, and we reject it here as well.

We also affirm the judge's ruling that the testimony of the Board compliance officer should not be stricken from the record. We find that the Respondent has failed to show that her refusal to answer certain questions posed by the Respondent's counsel prejudiced the Respondent's ability to litigate interim earnings issues in this case.

[1] The bench decision appears in uncorrected form at pp. 1003 through 1013 of the transcript, a copy of which is attached hereto. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

constituted Cox's regular method of seeking work, and that he followed it during the backpay period alleged in the compliance specification.

The Board held in *Ferguson Electric Co*., that in "seeking interim employment, a discriminatee need only follow his regular method for obtaining work." In most instances, a discriminatee's "regular method for obtaining work" will have no other objective than obtaining employment. Presumably, such a method will have resulted in past success because otherwise, the jobseeker would not have continued to use this method and it would not have become "regular." In such circumstances, it is reasonable to equate using the "regular method for obtaining work" with exercising reasonable diligence in searching for work.

The situation becomes more complicated when the discriminatee's "regular method for obtaining work" accommodates not only the objective of obtaining work but also another purpose. In the present case, for example, Cox's "regular method of obtaining work" was designed not only to achieve the goal of finding a job, but also served the objective of organizing nonunionized employers, the latter goal imposing constraints on the former.

It may be argued that in such an unusual situation, it is not appropriate to conclude that following the discriminatee's "regular method of obtaining work" equals exercising "reasonable diligence in the search for work." However, I do not believe that the Board's decision in *Ferguson Electric Co*. authorizes me to make such an exception to the general rule.

Like the present case, *Ferguson Electric Co*. concerned the amount of backpay owed to a union organizer who had been denied employment unlawfully. The Board stated without qualification, "In seeking interim employment, a discriminatee need only follow his regular method for obtaining work." Quite explicitly, the Board also stated, "We have rejected the suggestion that a different mitigation test should apply in 'salting' cases."

In light of the Board's holding in *Ferguson Electric Co*., if the record establishes that Cox followed his regular method of finding work, I must conclude that he exercised reasonable diligence in searching for work. The record does establish that Cox followed his regular method of finding work during the backpay period alleged in the compliance specification. Therefore, I conclude that he exercised reasonable diligence in his search for work. Contrary to the conclusion in my bench decision, I must find that Cox, having followed his regular method of finding work, did make sufficient efforts to mitigate backpay liability.

My conclusion that Cox did exercise reasonable diligence in the search for work does not alter my finding that Cox would have worked for the Respondent only 5 weeks and would then have resigned. Therefore, as stated in the bench decision, I find that Cox's backpay period extends from July 12, to August 19, 1993.

Before addressing the issue of how much income Cox would have earned during this backpay period, one other matter must be discussed. During the hearing, the Region's compliance officer refused to answer certain questions. Respondent's motion quotes Section 102.44(c) of the Board's Rules and Regulations regarding action which the judge may take when a witness refuses to answer a question. However, the motion does not urge that a specific sanction be imposed. Instead, it states that Respondent "requests clarification on whether [the compliance officer's] decision to ignore the Judge's rulings resulted in the striking of her testimony on related matters."

At hearing, I did not strike any of the compliance officer's testimony and do not do so now. The purpose of a compliance proceeding is to determine how a discriminatee may be made whole for the unlawful acts which already have been proven. It would be unfair to impose a sanction which could affect the discriminatee's remedy because a totally different witness, acting independently, had refused to answer a question. I decline to do so.

Computation of Backpay

As stated in the attached bench decision, I find that, but for the unlawful discrimination against him, Winson Cox would have worked for Respondent for 5 weeks, and that accordingly, the backpay period extends from July 12, 1993 to August 19, 1993. In the bench decision, I estimated that during this period, Cox would have earned a total of $1975, but cautioned that this was a preliminary estimate, which was subject to further calculation.

To arrive at this preliminary estimate, I relied upon the wages earned by Harold Kincaid, one of the comparator journeyman electricians described in the compliance specification. However, the preliminary estimate did not take into account the wages of other comparator journeyman electricians identified in the compliance specification.

In its March 20, 2000 ruling granting partial summary judgment, the Board approved the compliance specification's formula for computing backpay. Therefore, the issues before me concern only the duration of the backpay period, and not the appropriateness of the compliance specification's formula. I must apply the formula approved by the Board as exactly as possible to compute the backpay which Winson Cox would have earned during the backpay period. Using the wages of only one of the comparator journeyman electricians does not follow the Board approved formula as faithfully as possible.

As customary in compliance specifications, the formula used here computes backpay by calendar quarter. However, I have found that the backpay period lasts only 5 weeks, that is, 5/13ths of a calendar quarter. To achieve the highest fidelity to the Board approved formula, I will calculate the net backpay by taking 5/13ths of the net backpay alleged in the compliance specification for the third calendar quarter of 1993.

The compliance specification, at appendix C, alleges net gross backpay of $3799.00 for the third calendar quarter of 1993. Having found that Cox would have worked five weeks during this calendar quarter, consisting of 13 weeks, I conclude that his net gross backpay is 5/13ths of $3799, or $1,461.15.

[Recommended Order omitted from publication.]

APPENDIX A

This is a supplemental decision in Aneco, Inc., and International Brotherhood of Electrical Workers, Local Union No. 606, AFL–CIO, Case 12–CA–15738. It is a Bench Decision issued pursuant to Section 102.35(a)(10) of the rules and regulations of the National Labor Relations Board.

On February 27, 1998, the Board issued a decision and order in this matter, finding that the Respondent, Aneco, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act by refusing to hire Winson Cox on July 12, 1993, because Cox was a business agent of the Union, International Brotherhood of Electrical Workers, Local Union Number 606, AFL–CIO.

On June 15, 1998, Respondent and the General Counsel of the Board entered into a stipulation in which Respondent waived its right to contest either the propriety of the Board's order or the findings of fact and conclusions of law underlying that order. The parties also agreed that the Regional Director for Region 12 of the Board could issue an order setting a date for hearing to determine the amount of backpay due in this case.

On May 28, 1999, the Regional Director issued a Compliance Specification and notice of hearing. On June 15, 1999, the Respondent submitted his answer to the Compliance Specification, and on June 26, 1999, filed its amended answer to the Compliance Specification.

On October 22, 1999, the General Counsel filed with the Board a motion to strike Respondent's amended answer in part, and for a partial summary judgment.

The Board issued a Supplemental Decision and Order on March 20, 2000, which granted portions of the General Counsel's motion. The Board struck portions of the Respondent's answer to the Compliance Specification, and deemed admitted the corresponding portions of the Compliance Specification.

Also on March 20, 2000, the compliance hearing in this matter began in Orlando, Florida. The parties presented evidence in this matter on March 20, 21 and 22, 2000, and on March 23, 2000, presented oral argument. I am issuing this Bench Decision on March 23, 2000.

The Board's Supplemental Decision and Order of March 20, 2000, has significantly narrowed the issues to be resolved in this proceeding. I will begin by summarizing what the Board already has determined. The Board has deemed admitted the allegation in Paragraph 1 of the Compliance Specification that the gross backpay due Winson J. Cox is the amount of earnings he would have received, but for the discrimination against him.

The Board has deemed admitted the allegation in Paragraph 2 of the Compliance Specification that the backpay period for Cox commences on July 12, 1993, when Respondent discriminatorily denied his employment as a journeyman electrician. However, the Board denied the General Counsel's motion to strike the remaining allegation in Paragraph 2 of the Specification, which states that the backpay period ends on April 1, 1998, when Cox received an offer of employment from the Respondent. Therefore, the Board has left open for resolution in this hearing when the backpay period ends.

The Board has deemed admitted all allegations in Paragraph 4 of the Specification. This paragraph establishes the appropriate measure of the gross backpay for Cox by identifying

employees of Respondent who performed work similar to that which Cox would have performed if Respondent had hired him on July 12, 1993. The Specification calls these employees, whose hours reflect what Cox would have worked, "comparator journeymen electricians."

The Board has deemed admitted all allegations in Paragraph 5 of the Specification. This paragraph, which incorporates Specification Appendices A–1 through A–10 and part of Appendix C, alleges what hours the comparator journeymen electricians worked during the backpay period.

Further, the Board has deemed admitted all allegations in Paragraph 6. This paragraph, which incorporates Appendix B and part of Appendix C, alleges the average wage rates earned by comparator journeymen electricians in each calendar quarter of the backpay period.

The Board also has deemed admitted the allegations in Paragraph 7 of the Specification, which alleges that Cox's gross backpay by calendar quarter as set forth in Appendix C.

Additionally, the Board has struck those portions of Respondent's answer, which contested a general obligation to pay backpay. The Board rejected Respondent's defense that when Cox applied for work with the Respondent, he was acting as a tester. However, the Board's order did not strike Respondent's tester defense as it related to the issue of interim earnings.

In addition to the issue of Cox's interim earnings, the Board's order also left open for resolution in this hearing the issue of when Cox's backpay period ended. When Cox applied for work at the Respondent's business on July 12, 1993, he was already working full time for the Union as an assistant business manager and organizer. He has retained that position at all material times.

Union rules prohibit members from working for a non–unionized Employer with one exception. With the Union's permission, a member or Union official may accept employment with a nonunionized contractor as part of an effort to organize the employees of that company. When the Union official or member obtains employment with the non–unionized company, with the intent to organize the employees, it is called "salting," and the official or member so employed is called a "salt."

When Cox applied for work with the Respondent, it was part of the Union's attempt to salt Respondent's work force with prounion employees. It is undisputed that, as an employment applicant, Cox was entitled to the protection of the National Labor Relations Act, even though he was also working full–time for the Union. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

In the typical compliance proceeding involving a construction industry employer, the issue litigated concerns how long a discriminatee would have worked for the employer if it had hired him, rather than unlawfully refused to hire him. Typically, a construction contractor will argue that if the discriminatee had been hired and put to work on a particular project, the discriminatee's employment would have ended when the project was completed.

In such a case, the Board places the burden on the employer to show that when the first project had been completed, the discriminatee would not have been transferred to work on another project. For example, in *Laben Electric Co.*, 323 NLRB 1 (1997), the Board found that the Respondent unlawfully had laid off employees named McDermott and Chavez. The Board stated that it was "including a conditional order of reinstatement that entitles the Respondent to avoid the reinstatement obligation and terminate the backpay obligation at the completion date of the project in question, if the Respondent shows at the compliance stage that under its established policies and practices employees hired into positions like those held by McDermott and Chavez would not have been transferred or reassigned to another job after the project at issue ended."

If a Respondent may show that its own policies would have resulted in the termination of a discriminatee's employment, it is logical that a Respondent also should be allowed to demonstrate that the employee's own interests would have led him to quit as of a particular time. In the present case, for reasons I will discuss, I conclude that if Respondent had hired Cox on July 12, 1993, Cox would have ended his employment with Respondent 5 weeks later.

In his testimony, Cox made clear that his first allegiance was to the Union he served as assistant business representative and organizer. If any conflict arose between his obligations to the Union and his efforts to seek or hold other employment, he would choose to serve the needs of the Union.

For example, Cox testified that if he were not trying to organize nonunionized companies, he would not have applied for work at such companies, but instead, if he had wished to work as an electrician, Cox would have used the Union's hiring hall. Thus, Cox's allegiance to the Union objective of organizing took precedence over Cox's own preferences in looking for work.

From the testimony of both Cox and his superior in the Union, Business Manager Harry Brown, it is clear that Cox limited his search for employment to nonunionized companies, which appeared to be, in Brown's phrase, "doable." This requirement, that Cox would not apply for work for a contractor unless it appeared possible for Cox to organize that company's employees, imposed significant limitations on where Cox could apply for work. It totally ruled out going through the Union's hiring hall, because companies which obtained employees from the Union's hiring hall already had a relationship with the Union.

It also ruled out applying to large nonunionized companies, if the likelihood of organizing the employees appeared small. On the other end of the scale, there were many small contractors with employee complements so small they would not be worth Cox's time as an organizer. Business Manager Brown estimated that there were about 100 such electrical contractors in the Orlando area. His testimony also suggests that Cox's job with the Union would be in jeopardy if Cox went to work at one of these small nonunionized shops.

In other words, Cox's duties as a Union organizer severely limited the number of nonunionized employers at which he could apply for work. Similarly, Cox's duties as an organizer limited the time he could spend working for any particular employer.

If Cox got a job with a particular nonunionized Employer and his work there continued to attract new members to the Union, Business Manager Brown would have no objection to Cox continuing working there. Conversely, if Cox were employed by a company but did not make progress organizing the employees, at some point the Union would decide that Cox should not spend further time cultivating that infertile field.

On cross examination by the General Counsel, Brown testified that he never instructed Cox not to apply for work with a particular nonunionized employer, and never told Cox to limit his search to exclude any nonunionized employer. However, on direct examination, Brown had stated that he would probably not put up with Cox having another job which would not further the interests of the Union. Brown also acknowledged that some employers were too large to be a good target for organizing, and many were too small.

Both Business Manager Brown and Assistant Business Manager Cox had attended training sessions conducted by the International Union on techniques for organizing employers in the construction industry. This training contemplated that at times, it would be advantageous for salts already employed by a non–unionized company, to leave their employment with that company.

One training manual, called "Union Organization in the Construction Industry," told Union officials how to leave when the time came. It emphasized that the organizers employed by a non–unionized company should not "drag up," an expression which Cox testified meant to quit or resign. Under the heading "Never Drag Up—Always Strike," the organizing manual stated, in part, as follows:

Craftsmen who voluntarily drag up have no guaranteed re–employment rights. An economic striker has the legal right to be placed on a preferential hiring list upon making an unconditional offer to return to work. A ULP striker has the right to immediate reinstatement, upon making an unconditional offer to return. Therefore, the experienced construction organizer encourages his salts or other supporters, who are leaving the job or Employer anyway, to never drag up—always strike.

From this manual and the record as a whole, I conclude that the Union's organizing strategy contemplated that the Union salts would cease working for a Company when it appeared that further organizing efforts would be unfruitful, and that they would make their exit in the form of a strike.

Cox did exactly that. On April 1, 1998, the Respondent offered Cox employment, which Cox accepted. Cox could not recall his last day of employment, but estimated that it was 4 to 5 weeks later. Then he left during what he described as an "unfair labor practice strike."

Local 606 did not call this strike. Rather, a local from the Tampa area called it, but the record does not reflect that the Respondent had engaged in any unfair labor practices to prompt it. According to Cox, the Tampa local had filed an unfair labor practice charge, but Cox believed that it later withdrew this charge.

Cox testified that he did not make an offer to return to work for the Respondent or request reinstatement. In these circumstances, and particularly considering the instruction in the Union's training manual, never drag up, always strike, I conclude that Cox, really was "dragging up," that is, resigning, even though he ostensibly was going on strike.

Deciding how long Cox would have worked if Respondent had hired him in July 1993 is somewhat speculative, but no more so than other aspects of a compliance proceeding. Backpay issues typically involve deciding what would have happened if unlawful discrimination had not occurred. There never can be absolute certainty in deciding what would have happened, but did not.

However, the evidence in this case is highly persuasive that Cox would have spent no more time working for Respondent than necessary to organize its employees or conclude that such organizing would not be practical. In 1998, Cox decided to leave Respondent's employment after about 5 weeks. I find that there is no better indication of how long Cox would have continued his employment with Respondent in 1993 than how long Cox actually did continue his employment with the Respondent in 1998.

Certainly, conditions were different to some extent in 1993, than were conditions in 1998, but there is no evidence that organizing the Respondent's employees would either have been easier or more difficult in 1993 than it proved to be 5 years later. Indeed, at the time Respondent offered Cox employment in 1998, it had been chastened by the Board's finding that it had committed unfair labor practices, and it had waived its right to appeal that finding to the Court of Appeals. I cannot conclude that Cox would have found organizing Respondent's employees any more doable in 1993 than in 1998.

In sum, based upon Cox's actions in 1998, I conclude that he would not have worked for Respondent more than 5 weeks in 1993. Therefore, I find that his backpay period extends from July 12, 1993 to August 19, 1993.

In view of this conclusion, it is not necessary to discuss whether Cox made sufficient efforts to find employment and, therefore, to mitigate during the backpay period alleged in the Compliance Specification. However, I will reach this issue in case the Board disagrees with my conclusion that the backpay period ends on August 19, 1993.

Already I have discussed how Cox's duties to the Union limited the scope of his search for employment. It placed off limits all jobs with companies, which got their craftsmen through the Union's hiring hall. Additionally, it excluded applying for work with nonunionized contractors at which the prospects of organizing the employees appeared small. Further, it excluded the small companies, which had too few employees to be of interest to the Union.

The evidence also indicates that the role of Union organizer limited the manner in which Cox applied for work at the remaining companies. He took along at least one other person, and sometimes more, to the job interview. Cox did not do so because having someone else along improved his chances of being hired, but did so that he would have witnesses. Such a practice would help Cox support an unfair labor practice charge, but it did not make him appear more desirable as an employee.

An official of the Florida Department of Labor, Nancy Osborne, testified as an expert witness on how job seekers can maximize their chances of being hired. She testified that as a general rule, a person applying for a job should present himself alone to show himself in the most qualified light. Bringing along someone else for moral support could suggest to the prospective employer a lack of self reliance. Additionally, bringing along another job applicant is not wise because, in essence, the other person is competing for the same job opening.

Based upon Osborne's testimony, which I credit, I find that Cox did not go to job interviews with the primary purpose of seeking employment. Rather, Cox exalted the Union's objectives over the goal of getting a job.

In this regard it is necessary to return again to the Union's organizing manual in evidence as Respondent's Exhibit 23. This document details the Union's strategy of having its members and supporters get jobs with nonunionized companies. But it should be noted that such a goal is only part of the Union's strategy. From the manual it is clear that another part of its strategy involves mounting unfair labor practice litigation against nonunionized Employers. The Union's manual states in part, as follows:

Generally speaking, contractors are entrepreneurial craftsmen. They are not qualified by training or experience to handle legal filings or defenses. Legal fees can become substantial financial drains within short periods of time.

The last sentence, "Legal fees can become substantial financial drains within short periods of time," appears in boldface type.

Certainly, there is nothing improper about filing an unfair labor practice charge in good faith. To the contrary, that is a statutory right.

However, the Union strategy is relevant here because, to maximize evidence gathering, the Union organizer must take along someone who can be a witness. On the other hand, applying for a job with someone else along detracts from making a favorable impression on the prospective employer. That is the case whether the second person is another Union organizer or, to cite an example used by Osborne, the job applicant's mother.

I find that Cox made minimal efforts to find other work and the efforts he did make were constrained by a different objective which took priority over obtaining a job, the objective set forth in the Union's organizing manual. Therefore, I conclude that Cox did not satisfy his duty to mitigate in any of the quarters set forth in the Compliance Specification.

Cox was an extremely personable individual and highly qualified to perform work as a journeyman electrician, with extensive experience in the field. Although one cannot infer from a failure to find work that there was not an effort to seek employment, I believe that in this case the disparity between Cox's manifest exemplary qualifications and his inability or lack of finding other employment is consistent with the conclusion that he did not give job seeking the highest priority.

On the other hand, I do not find that Cox's salary from the Union constitutes interim earnings, which must offset back pay. In accordance with *Ferguson Electric Company*, 330 NLRB [514] (2000), I find that this salary falls into the category of earnings from secondary employment.

With respect to the amount of backpay which Respondent must pay to Cox, I will now make a preliminary estimate, which will be checked and refined for the Certification of Bench Decision, which will issue after the transcript is received. The Board has held that the individuals listed in the appendices to the Compliance Specification are the proper comparators. I will use one of them, Harold Kincaid, for a preliminary estimate of Respondent's backpay liability.

I have found that Cox would have worked for Respondent five weeks. During a comparable five weeks of Kincaid's employment, for the pay periods for weeks ending July 22, 1993 to August 19, 1993, Kincaid earned a total of $1,975. Subject to further calculation, including averaging, I find that Respondent's backpay obligation will be discharged by paying $1,975, plus interest accrued to the date of payment, minus the tax withholding required by Federal and State law.

When the transcript of this proceeding has been transcribed and served on the parties, and upon me, I will issue a Certification of Bench Decision, which will include as an attachment, portions of the transcript which report this Bench Decision. Upon service of the Certification of Bench Decision upon the parties, the time for filing an appeal with the Board will begin to run.

I appreciate the civility and professionalism of counsel in this proceeding, and the hearing is closed.

PROCEEDINGS

(TIME NOTED: 1:00 P.M.)

JUDGE LOCKE: On the record.

We're here for oral argument. I guess, of course, counsel for General Counsel can start.

MS. KORSCHGEN: Thank you, your Honor.

May it please the Court, Discriminatee Cox' status as a paid full-time Union organizer or "salt," does not deprive him of protection of the Act.

Employment applicants are, "employees," within the meaning of Section 2(3) of the Act even if they are paid by a Union to organize their prospective Employer. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995.)

The Board's traditional remedy for an employer's discriminatory refusal to hire an employee is a "make whole Order," including an aware of backpay. See *M.J. Mechanical Services*, 325 NLRB 1098, a 1998 case.

JUDGE LOCKE: I'm sorry. That's 325 NLRB what?

MS. KORSCHGEN: 1098.

JUDGE LOCKE: And what was the name of that again?

MS. KORSCHGEN: M.J. Mechanical Services.

JUDGE LOCKE: Okay, thank you. 325-2098.

MS. KORSCHGEN: 1098.

JUDGE LOCKE: 1098. Okay. I only missed it by a thousand. Thank you.

MS. KORSCHGEN: The burden is on the General Counsel to prove the gross amount of the backpay due. *Roman Iron Works,* 292 NLRB 1292 (1998).

Once the General Counsel proves the gross amount of backpay due, the burden shifts to the Respondent to affirmatively establish by a preponderance of the evidence that the discriminatee is not eligible for backpay. *United States Can Company, 328 NLRB Number 45.*

JUDGE LOCKE: 328 Number 45.

MS. KORSCHGEN: Correct. April 30th of 1999.

Thus, it is the Respondent, not the General Counsel which must produce facts to show that no backpay is owed because the discriminatee failed to mitigate his damages.

Suspicion and surmise, the Board has long held, are no more a valid basis for a decision in a backpay hearing than in an unfair labor practice hearing. *Laidlaw Corp.,* 207 NLRB 591 (1973).

Turning first to General Counsel. General Counsel has met his burden to prove the amount of gross backpay due Winson Cox. The Board's supplemental decision and order dated March 20th of 2000, has already deemed that most of the elements necessary to be proven has been established.

Specifically referring to the Compliance Specification, Paragraph 1, the Board struck Respondent's amended answer, deemed an admission by Respondent, and granted summary judgment as to the definition of gross backpay.

Regarding Paragraph 2, the Board, in its supplemental decision, struck Respondent's amended answer as to the beginning date of the backpay period, July 12th, '93, and deemed an admission by Respondent as no alternative date was given and the matter had already been litigated and adjudicated in the ULP proceeding. Summary judgment was granted as to the beginning date.

The amended answer alleged an alternative ending date, which was that the ending date would not have exceeded two weeks. The Board in its supplemental decision, said that the ending date is a litigable matter for the compliance hearing.

Regarding Paragraphs 4, 5, 6 and 7, relating to the appropriate measure for computing gross backpay, in the Board's supplemental decision the amended answer was struck as to all paragraphs.

The Board found that the comparator was appropriate as a journeyman electrician, as that matter had been litigated and decided in the underlying ULP proceedings. Summary judgment was granted as to all paragraphs, 4, 5, 6 and 7.

Regarding Paragraphs 10 and 11 of the Compliance Specification, the Board's supplemental decision struck the amended answer.

JUDGE LOCKE: I'm sorry. The paragraph, what was it that you said?

MS. KORSCHGEN: 10 and 11.

JUDGE LOCKE: Thank you.

MS. KORSCHGEN: The Board's supplemental decision struck Respondent's amended answer as to the "make whole portions" of those two paragraphs.

Summary judgment was granted as to those portions of Paragraphs 10 and 11 related to Respondent's general backpay obligation, except insofar as the allegations relating to interim earnings.

The Board also struck the Respondent's affirmative defense regarding Mr. Cox' status as a tester, insofar as it challenges Cox' status as a bonafide applicant, except as those allegations relate to interim earnings.

Based upon the aforementioned Board's supplemental decision and order, the only matter left in General Counsel's burden of proof of gross backpay is that of the ending date of the backpay period.

Based upon the testimony of Compliance Officer Karen Marksteiner, and the record evidence at GC Exhibit 3, which is Respondent's letter dated March 30th of '98 offering Cox employment as an electrician, which was received by Cox on April 1st of '98, the General Counsel has met his burden of proving the ending date of the backpay period, that being the date of offer of employment.

I also note in my argument that GC Exhibit 3 is also part of the record evidence as an attachment to the formal papers, which were received into evidence.

Counsel for General Counsel argues that she has satisfied her burden to show the gross amount of backpay to which Cox is entitled. The Respondent thus has the burden to produce evidence that would mitigate its liability. See, among others, *Ferguson Electric Company*, 330 NLRB [514] (2000).

At issue, I believe in the instant case, are the following.

One, whether Cox' salary received from his position as assistant business manager during the backpay period should be counted as interim earnings and offset against gross backpay.

Second, whether Cox would have continued to work for Respondent during the entire backpay period.

And, third, whether Cox mitigated his damages.

Looking first at the—

JUDGE LOCKE: I'm sorry, what was the third?

MS. KORSCHGEN: The third one is whether Mr. Cox mitigated—

JUDGE LOCKE: Okay.

HEARING OFFICER: —those damages.

Turning first to the status of wages paid to Cox by Local 606. It must be decided whether Cox' earnings from the Union, as a full-time organizer, are earnings from secondary employment, as counsel for the General Counsel contends, or interim earnings, as Respondent contends. The distinction is a critical one.

A discriminatee's interim earnings are offset against back pay while earnings from secondary employment held by a discriminatee prior to the backpay period, are not offset. Citing *Plumbers Local 305 (Stone & Webster*, 297 NLRB 57 (1989.)

The Board held in *Sundlin Construction Company,* 309 NLRB 1224 (199_)

JUDGE LOCKE: 309 NLRB what?

MS. KORSCHGEN: 1224 (1992)—

JUDGE LOCKE: All right.

MS. KORSCHGEN: —that, "A person may be the servant of two masters, not just Employers, at one time as to one act if the service to one does not involve abandonment of the service to the other."

I contend, as did the General Counsel in Ferguson Electric, that there is no basis for applying the law regarding backpay differently to Union salts than to other discriminatees who hold secondary jobs prior to and during the backpay period.

The Respondent will contend, I believe, as the Respondent contended in Ferguson Electric Company that Cox' full-time organizing position with the Union is by its very nature, inconsistent with the definition of secondary employment or "moonlighting," because it's not supplemental or secondary in nature and performed outside full working hours.

The Respondent will further contend, I believe, as the Respondent contended in Ferguson Electric Company that Cox' purpose in seeking employment was to organize –

JUDGE LOCKE: Excuse me. I just lost power.

Okay. I'm sorry, go ahead.

MS. KORSCHGEN: I'll back up just a moment.

The Respondent will further contend, I believe, as the Respondent contended in Ferguson Electric Company that Cox' purpose in seeking employment was to organize the Respondent's employees, and that while so engaged, Cox would have been furthering the Union's interests rather than the Respondent's and would have remained under the direction and control of the Union.

Thus, according to Respondent, Cox' Union wages are not akin to earnings from moonlighting because they would not have been earnings from "extra effort" extended outside full working hours.

The Board in Ferguson Electric Company did not find the Respondent's arguments persuasive and, accordingly, found that the wages paid to the discriminatee by the Union, were earnings from secondary employment akin to moonlighting, and were not properly offset against gross backpay.

The record in this case, established through the testimony of Witnesses Brown and Cox, and corroborated by Cox' September 12th, 1994 affidavit, a verbal agreement was reached between Brown and Cox prior to Cox' July 12th, 1993 application for employment with Respondent, which provided that if Cox was hired as a non Union contractor, he would retain his position, salary, benefits from his Union position as assistant business manager.

Although Brown and Cox testified that there had been no discussion between them relating to whether Cox would retain any earnings from a non Union contractor, if employed, Cox testified that it was his belief he would retain such earnings in addition to his Union salary.

Both Cox and Brown testified that their arrangement regarding Cox' organizing efforts, relating to attempts to be employed at non Union contractors, did not change between the time they first discussed the matter and when Cox received his employment off from Respondent in April '98.

The record establishes that Cox, in fact, retained both his Union salary and earnings from Respondent since his employment in April 1998.

Thus, counsel for the General Counsel contends that the facts in the instant case are analogous to those in Ferguson Electric Company, and that the Board's findings and conclusions in Ferguson Electric Company establish existing Board law to be followed in this case.

Relying on the principles of Ferguson Electric, Cox' secondary earnings from the Union should not be offset against gross backpay. To decide otherwise, would be contrary to established Board law and would permit the Respondent to benefit from its own misconduct. See, among others, *Big 3 Industrial Gas,* 263 NLRB 1189 (1983).

Turning to the second issue, that being whether Cox would have continued working for Respondent throughout the entire backpay period, in its amended answer Respondent alleged that Cox would not have worked longer than two weeks at Respondent, if he had been fired, contending that his organizing efforts would have been complete, either by organizing Respondent's employees or acknowledging the futility of that attempt.

Cox testified that had he been employed by Respondent on July 12, 1993, he would have remained for as long as he was advancing his objectives of organizing Respondent's employees.

Cox testified that since he was not hired by Respondent at that point in time, he could not place any definite date that he would have terminated his employment with Respondent.

Respondent's counsel questioned Brown regarding several organizing efforts undertaken by Local 606 at other non Union contractors.

Although Brown testified that in 1998 a petition for an election at a Company called E&E was withdrawn within a week of its filing, he also testified that the organizing campaign at E&E had lasted several years.

Brown also testified that in the late 1980s at Respondent, Aneco itself, Local 606 conducted an organizing campaign, which had lasted several years in length.

He further testified that Local 606's organizing campaign at a non Union contractor called Southeast Electric also lasted about two years and that in late 1980 an organizing campaign at Power Electric lasted approximately four years in length.

Brown and Cox both testified that the duration of an organizing campaign varies, based upon existing circumstances at any given Employer.

Counsel for General Counsel contends that since Cox was unlawfully refused employment with Respondent on July 12th, 1993, —

JUDGE LOCKE: Wait a minute. You're contending that because counsel was unlawfully denied employment in 1993. Okay, go ahead.

MS. KORSCHGEN: —it is pure speculation and conjecture as to whether Cox would have terminated his employment prior to the end of the backpay period, the date he received the 1998 offer of employment.

The generalized evidence offered by Respondent is too speculative and imprecise to warrant a departure from the formula set forth in the specification for redressing the unlawful discrimination in this case.

Suspicion and surmise are no more a valid basis for decisions in a backpay hearing than in an unfair labor practice hearing, again citing Laidlaw.

Turning next to the issue of whether Cox mitigated his damages. I believe this issue is two-fold.

JUDGE LOCKE: I'm sorry. You believe it is two-fold?

MS. KORSCHGEN: Two-fold. First, was Cox required to include in his search for work Union contractors. And second, did Cox make a reasonable search for work.

Counsel for General Counsel contends that Cox was not required by Board law to include in his search for work Union contractors, and that the record evidence taken as a whole establishes that Cox made a reasonable search for work for the ten calendar quarters during the backpay period, for which Respondent is alleged in the Compliance Specification to have gross backpay liability.

First, a discriminatee must make reasonable efforts to seek and hold "substantially similar employment subsequent to the unlawful discrimination," citing *Mastro Plastics Corp.,* 136 NLRB 1342 (1962).

If I may, your Honor, if it's been enforced by a Circuit and denied, I could give you the full cite if you would like or I'll just—

JUDGE LOCKE: Well, I follow the Board law, so take your pick. If you want to fine, if you don't fine.

MS. KORSCHGEN: Okay. I'll go ahead in this instance. Enforced as modified, 354 F.2d. 170 Second Circuit (1965) and Cert was denied 384 U.S. 972 (1966.)

The discriminatee must merely engage in an "honest, good faith effort" to find work. He is held only to a "reasonable assertion" in this regard, not to the highest standard of diligence, citing *Aircraft & Helicopter Leasing and Sales, Inc*., 227 NLRB 664 (1976).

Thus, the discriminatee satisfies the duty to mitigate by applying at some, but not all, appropriate Employers in the area. *Florida Tile Company, 310 NLRB—*

JUDGE LOCKE: I'm sorry, you said what title company?

MS. KORSCHGEN: Florida Tile.

JUDGE LOCKE: Florida Title. T-i-t-l-e?

MS. KORSCHGEN: T-i-l-e.

JUDGE LOCKE: Okay. T-i-l-e.

MS. KORSCHGEN: Company—310 NLRB 609 (1003).

The Board looks to the record as a whole in determining the reasonableness of the discriminatee's job search. *Lorado Packing Co.,* 271 NLRB 553 (1984).

Factors include the discriminatees specific attributes, such as his skills, qualifications, age, as well as labor conditions in the area.

A Respondent may reduce its backpay liability by establishing that the discriminatee "willfully" incurred loss by a "clearly unjustifiable refusal to take desirable new employment."

The Respondent has the burden affirmatively to establish that the discriminatee "neglected to make reasonable efforts to find interim work," citing *Future Ambullette, Inc.,* 307 NLRB 769 (1992).

Evidence of lack of success is insufficient and any uncertainty on this issue must be resolved against the Respondent as the wrong-doer, again citing *Aircraft & Helicopter Leasing,* 227 NLRB at 646.

The Board has looked beyond the terms and conditions of an interim job in considering whether it amounted to "substantially similar employment."

In a variety of cases, the Board has held that interim employment, which would degrade the discriminatee's lifestyle is not substantially similar to its prior position and thus may be declined without penalty.

For instance, a discriminatee was held not obligated to search for or accept work which, one, required work on day shifts where the discriminatee previously worked nights, and was the primary care provider for her grandchild during the day.

Second, required the discriminatee to give up active duty service in the Air Force Reserve.

A third example required substantial separation from family.

Four, required substantial travel from home.

And, five, required the discriminatee to live away from his lifetime residence.

Furthermore, the Board has not required the discriminatee to violate his or her Union convictions under the guise of mitigation. Thus, a discriminatee is not required to accept employment behind a picket line at an interim employer's facility since, "the duty to mitigate has never been held to encompass a duty to engage in strike breaking." *Big 3 Industrial Gas & Equipment Company*, 263 NLRB 1189 (1982).

JUDGE LOCKE: 19 what?:

MS. KORSCHGEN: 1982. Counsel for General Counsel contends that a Union agent discriminatee, who searches for interim employment only at non Union firms satisfies his duty to mitigate, first requiring Union agents to mitigate damages by seeking interim employment with unionized companies would necessarily require the agent to jeopardize or relinquish his secondary employment with the Union.

A secondary job is a lifestyle choice, similar to the lifestyle choices found privileged in the examples I gave such as night shifts, Air Force Reserve service, commuting distances, etcetera, thus requiring a discriminatee to violate his responsibilities to a second Employer during the interim period, the very time when an employee otherwise is out of work. It goes beyond the Board requirement of "due diligence."

Second, it is clear that the Union agent chose to work or to apply for work with the Respondent Employer partly because of its non Union status.

Thus a position with an organized Employer arguably is not, "substantially similar," even though the actual job duties at unionized Employers may be identical to the work which the agent may perform with a non Union Employer.

As noted above, the definition of "substantial similar work," extends beyond the precise job duties involved. Moreover, the Board has held that a discriminatee need not compromise his or her Union convictions, i.e., by engaging in strike breaking.

Cases in which the Board is told backpay because a discriminatee engaged in a limited search for interim employment for "personal or no valid reasons that excludes jobs for which the discriminatee may otherwise be qualified," are distinguishable from our instant case.

Thus, the Board has held that a discriminatee failed to mitigate by neglecting to look for work for which he or she was qualified, limiting a job search to a segment of available Employers, and declining a job offer because of a personal preference.

Counsel for General Counsel contends that Cox' refusal to apply for positions at unionized companies does not constitute a "personal" preference resulting in a willful failure to mitigate.

Because the cases that I cited, and I will provide case cites, I didn't list all the case cites for the examples I gave, your Honor, but in those cases concerning the discriminatees limited job search, because of mere personal preferences, did not involve the requirements of a secondary job.

Rather, the discriminatees themselves limited their job searches because of their own person predilections, such as a desire to move into another line of work.

In contrast, Cox, while engaged in a salting campaign, is constrained by his Union Employer from apply for work at a unionized Company, i.e., the agents secondary Employer is the cause of the limited job search.

The record in this case, through the testimony of Cox, establishes that he never considered the possibility of applying for employment with Union contractors, because his purpose in seeking employment was to lawfully organize the unorganized employees, while being employed with their Employer.

Cox further testified that it was his belief that had he sought and obtained work through the Union hiring hall, to work at a unionized Employer, he would have jeopardized his retaining his job as assistant business manager with Local 606.

Brown also testified that although the issue had not come up, he would have had to have a "real heart-to-heart discussion," with Cox should he have obtained employment at a unionized contractor for any duration of time, with the resulting probability of Cox having to choose between working for the unionized contractor or continuing his job as assistant business manager.

Counsel for General Counsel contends that based upon the record evidence and existing case law, including Ferguson Electric, where the discriminatee solely sought work from non–unionized Employers, Respondent has filed to meet its burden through presentation of probative evidence to establish facts that would reduce the gross amount of backpay owed to Cox.

Finally, counsel for the General Counsel contends that Respondent has failed to meet his burden through presentation of probative evidence that Cox did not engage in a reasonable search for work.

Respondent's burden is not to create doubt, but to establish by a preponderance of the credible evidence that Cox did not engage in any diligent search for work, and that any doubts in this regard are resolved in favor of Cox as the wronged party, rather than the wrong-doer, citing *Teamsters Local 469(Coastal Tank Lines,* 323 NLRB No. 23 (1997).

A backpay claimant is not held to the highest standard of diligence in seeking interim employment, but is only required to have made reasonable exertions. Thus an Employer does not satisfy its burden by showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment, by showing an absence of a job application by the claimant during a particular quarter or quarters of a back pay period or by showing the claimant failed to follow certain practices in his job search, such as reading or responding to job ads in newspapers. Citing *S.E. Nichols of Ohio*, 258 NLRB 1 (1984).

Finally, any uncertainties or ambiguities must be resolved against the wrong-does if his conduct made such doubts possible. Again citing the *Teamsters Local 469* case.

The record evidence establishes that throughout the ten calendar quarters during the backpay period for which the Compliance Specification alleges gross backpay liability is owed, Cox did, in fact, search for work.

Cox testified that on a weekly basis, he reviewed newspaper advertisements for employment opportunities for electricians, and filed applications for some, if not all, Employers listed.

He further testified that for the period July 12, '93 through 8/30/94, he made weekly visits to the Florida Job Service to search for work and obtained referral for those listings that he believed he was qualified for and did not already have a current on file.

Cox testified that he sought work through word of mouth referrals from other employees in his trade. He also testified he sought work by observing construction sites in progress in the area, and inquiring whether the contractors were hiring.

Cox testified that he also attended a job fair seeking employment. The documented efforts by Cox were received into evidence in Employer's Exhibit 3.

It is pointed out by counsel for General Counsel that as substantiated in Cox' September 12, '94 and July 3rd, '96 affidavits and in his May 1998 letter to Stephen Jacoby, not all searches for work that he performed were contained in his documentation.

JUDGE LOCKE: Was that Respondent's 3 or 2. You said 3, I believe.

MS. KORSCHGEN: I said 3 and I believe you're right, it's 2. Excuse me, your Honor, Exhibit 2. Thank you.

Not all searches for work Cox performed were contained in his documentation due to his inability to recall some employer's names or dates when he sought employment with them.

Cox testified that he is a "horrible record keeper," although he made a good faith effort to keep records of his search for work. Cox' poor memory and lack of record keeping does not automatically disqualify him from receiving backpay. *Citing Allegheny Graphics*, 320 NLRB 1141 (1996).

Cox testified that while preparing for hearing, he was able to recall three additional Employers which he had failed to record in his documentation, one being at a job fair with Tri City, one being with Williams Electric and one with an unidentified Employer at the Orlando Airport.

Respondent will argue, I believe, that an inference should be drawn by the Administrative Law Judge that one, through the Southern Bell Telephone Company's yellow pages for electric contractors in the Orlando, Florida area that was published in November of 1994, also through testimony of Susan Collins and Shane Bradshaw regarding the volume of newspaper advertisements seen by them, and through statistical data demonstrating a decrease in unemployment rate from 1993 to 1998 in the Orlando metropolitan area, and an increase in "number employed," in electrical contractors for Orange County, all show that jobs were available during the backpay period.

Cox should have been able to find work had his efforts been more diligent and that his failure to do so is proof that he did not engage in serious search for work efforts.

This same argument, however, was previously considered and rejected by the Board in *Food & Commercial Workers Local 1357* at 301 NLRB 617 (1991).

In doing so, the Board held that the Employer's "attempt to equate a discriminatee's lack of success with a lack of trying is a bootstrap argument that runs counter to Board and Court precedent." Same case—

JUDGE LOCKE: The bootstrap argument runs counter to Board and Court what, precedent?

MS. KORSCHGEN: Precedent.

JUDGE LOCKE: All right. Thank you.

MS. KORSCHGEN: Same case at 621.

Like the Respondent here, the Employer in decided case asked the Board to infer, from testimony of an expert in labor market economics and a compilation of statistics, that because "comparable work was plentiful," discriminatee in question, "could not have exercised reasonable diligence in seeking work because she remained unemployed."

The Board, however, declined to do so, reiterating the long held view that a "Respondent's burden is not met by presenting evidence of a lack of employee's success in getting interim employment." Rather, a Respondent must affirmatively demonstrate that the employee neglected to make a reasonable effort to find interim work.

Counsel for General Counsel contends that no weight should be given to any testimony regarding the number of advertisements in the local newspaper during the backpay period, because the testimony of Bradshaw, Sims and Osborne was hearsay as to the truth of the matter asserted, meaning the actual existence of the advertisements in the numbers testified to.

And that the record does not contain actual copies of the newspaper advertisements published during the backpay period.

Counsel for General Counsel further contends that the unemployment statistics and the numbers of electrical contractor's statistical information is not proof that Cox did not engage in serious search for work efforts.

I also note that the number of individuals employed by construction companies and by the electrical contractors, listed in Employer's Exhibit 24, which was the summary sheet that Ms. Osborne introduced, contains all classifications of employees, and is not limited to the classification of journeymen electrician or electrician.

Thus, the statistical evidence is not probative evidence upon which to base a determination of whether Cox engaged in serious search for work efforts.

Respondent will argue, I believe, that Witness Nancy Osborne's testimony that in her opinion Cox did not make a reasonable search for work, should persuade the Administrative Law Judge that Cox did not, in fact, make a reasonable search for work.

Osborne based her testimony not on any actual knowledge of Cox' circumstances surrounding his own job search, but rather based her testimony on hypothetical questions by Respondent's counsel.

Respondent's counsel asked Osborne, and I believe this is, "whether a qualified electrician applicant during the 1993 to 1998 period of time would have been able to obtain employment as an electrician if he made a reasonable search for work."

To which Osborne responded, an applicant with good electrical skills, based upon my knowledge of openings we have had, if someone would do a reasonable job search, would have been hired readily within a few months.

Respondent's counsel asked Osborne, "whether an applicant who does no more than eleven cold calls in the Orlando area during a calendar quarter, would be engaging in a reasonable search for work."

Osborne responded that eleven or fewer cold calls in a calendar quarter would not be a reasonable search for work.

Although Osborne provided that testimony in response to hypothetical questions, your Honor, Osborne had no knowledge of Cox' circumstances surrounding his own work. Osborne had no knowledge that Cox was forty-nine years of age in 1993, a matter of record in the underlying unfair labor practice hearing at Transcript Page 335.

Also, when asked on cross examination whether the fact that an applicant had placed on his application that he worked full-time as a Union organizer/ assistant business manager, would cause her opinion that he would "readily be able to obtain employment within a few months," to change.

Osborne was unable to state her opinion, since she had not encountered that particular question. So her testimony as to what she believed Cox could do is limited to, she has no opinion because she has not encountered that, your Honor.

Counsel for General Counsel urges the Administrative Law Judge to reject Ms. Osborne's testimony as not probative on the question of whether Cox himself engaged in a reasonable job search during the backpay period.

Further, counsel for General Counsel urges your Honor to find that the yellow page telephone directory listing of names of electrical contractors, the unemployment statistics, especially since they are not solely for journeymen electrician/electrician classifications, and that the average annual employment in Orange County for construction companies and electrical contractors, which do not specifically track the journeymen electrician/electrician classification, do not serve to meet Respondent's burden of proving that Cox failed to make reasonable efforts to find work. Citing *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Based upon the foregoing, your Honor, counsel for the General Counsel urges you to find that it met its burden of proving gross backpay due to Cox, and to find that Respondent failed to affirmatively establish by a preponderance of the evidence, that Cox is not eligible for backpay for any or all of the calendar quarters alleged in the Compliance Spec.

Finally, your Honor, should Respondent's counsel urge an adverse ruling be made against the General Counsel in this proceeding, because Witness Marksteiner refused to answer certain questions posed by Respondent's counsel and then ordered by you to answer, counsel for General Counsel urges that you give considerable deliberation to the restrictions under which Ms. Marksteiner had been placed.

By letter dated March 17th, 2000, the General Counsel had denied Respondent's request for production of documents and accompanying testimony for, among other things, documents and accompanying testimony that, "reveal a formula, criteria or other objective basis for the determination that Winson Cox made a reasonable search for the quarters listed in the specification for which backpay is allegedly due," for documents that show the Region's internal deliberative process or relate to the Region's investigation of this backpay case, and the Region's verification of Cox' search, and "for documents for periods where the General Counsel concedes no backpay is due."

Further, during the proceeding, you ordered counsel for General Counsel to direct Witness Marksteiner to answer questions specifically related to the application of the formula, criteria or other objective basis for the determination that Cox made a reasonable search for the quarters listed in the specification, for which backpay is allegedly due.

For the extensive reasons placed into the record at the time you issued counsel for General Counsel your order, and for the same reasons just stated, no adverse ruling should be attached to counsel for General Counsel's declination to carry out your order.

Further, should Respondent argue that Respondent was prejudiced by the witness' refusal to answer on matters described above, counsel for the General Counsel contends that Respondent presented no evidence of prejudice.

And any reliance on the two Circuit Court cases he cited in the record, are distinguishable from the instant case, in that those cases involved matters that were central issues in a representation matter, and the issues that the questions sought in our case were not relevant to the matters in the proceeding, and that those two Circuit cases are not dispositive of the issue.

On the basis of the foregoing argument, your Honor, counsel for General Counsel urges the Administrative Law Judge to find and conclude that Respondent is liable for the backpay due Winson J. Cox in the amount of $47,349.29, plus interest accrued to date of payment pursuant to the Board's order, plus FICA tax contributions being made, minus tax withholding required by Federal and State law.

Thank you, your Honor.

JUDGE LOCKE: Does the Union have an oral argument?

MS. PISCITELLI: No. I think Ms. Korschgen covered absolutely everything that I would want to bring up, very well too.

JUDGE LOCKE: Respondent, any time you want.

MR. SIZEMORE: May it please the Court, let me please start with thanking you for the level of attention that you paid to the parties in this case, to the level of diligence that you applied, and particularly to the level of patience that you applied under some circumstances that I had certainly never witnessed before, and in a very contentious case.

I have a presentation for you, but if I can at all be helpful to you in your deliberative process, if there are questions you have about my position, about what you think—questions about what the evidence shows, I would invite you to interrupt me and have a dialogue.

We might be able to get more accomplished that way than me just making a speech to you, but I do want to make an argument to you.

It seems to me that after the summary judgment after the hearing on the merits, there really are only four issues left in the case.

One is the duration of employment. He was denied employment unlawfully on July 12th, 1993. The issue is how long he would have stayed.

And the second issue is the interim earning issue. And if you find as a fact that there was an agreement prior to the time that Mr. Cox applied, that Mr. Cox and his Employer had agreed that he could keep both the Union money and the Aneco money, then I've got to lose that in face of Ferguson.

I think Ferguson's wrongfully decided, but I'm not going to urge you to overrule Ferguson. I don't think that would do me a lot of good to argue that.

But I believe that the evidence shows that there was no agreement of that nature. And I believe that there was no plan to do that until it became expedient to do that I 1997, when the International President changed the rules on salting.

So I believe the evidence does not show that there was that agreement to keep both. And that, your Honor, I believe is a burden on the General Counsel, rather than a burden on Respondent, to prove the gross backpay. And I think that's a burden they have and I'll talk more about that in a few minutes.

The third issue goes to whether or not Mr. Cox made a reasonable search for work. I acknowledge I have the burden of proving that. There's some interesting comments by Board Member Herkin about that, as it relates to this unique sort of circumstance.

Again, I agree with him, but it was a two-to-one decision, and I'm on the one side, so I accept that burden for the purpose of trying to convince your Honor.

There really are two sub issues to that last issue. The first is whether or not the Union's restrictions on Mr. Cox' search activities and the sources for search impose an unreasonable restriction so that his search became less than good faith, less than diligent.

Not anything Mr. Cox himself did in that issue, but simply the restrictions imposed by his Employer. And just—you've not limited me a time and I would like to just talk about this case a little bit with you, instead of just making a speech.

One of the interesting things, in terms of the vocabulary we're using is that by equating the Union job with moonlighting we, at Ferguson, attached the label of "secondary" to the Union job and the Aneco job that was denied be the "primary job.

And that's so interesting because Ms. Korschgen then turns around and says that the reason that he's excused from searching for the primary job, the Aneco job, is because of the restrictions imposed by the secondary job.

And that really seems to me primary means something. It means first in time. That fits here. It means first in priority. That fits here. It means perhaps the most remunerative. That fits here, $37,000 to twenty.

And so I think that's just an interesting academic discussion of how you can, by trying to take this square peg and put it in a round hole, which is to call a job that takes place during the very same time of day as your first job, to call that—well, no.

I mean to call a job that you get your primary job and then the job you already had your secondary job, seems to me to certainly make it difficult to discuss the issue, but that perhaps is some frustration I have with the Ferguson decision.

But I really—I think I understand the Board's—some of the Board's dilemma in Ferguson is that they weren't presented with any evidence. And that's dangerous in one real respect, your Honor and if I could highlight that for you now, and that's at Footnote 16.

The majority disagreed with Member Herkin by saying that—I'm sorry, Footnote 17. They disagreed with Member Herkin because—I'm sorry, I've got the wrong one. Just give me a minute, your Honor, if you don't mind.

It's Footnote 18, the last footnote by the majority. And it says assuming for the sake of argument we would not find that Carr—the organizer in that case—we would not find that he had to lower his sights to look for non Union work not targeted by the Union, because we note in other cases involving a Union member's duty to seek employment, the Board has not required Union members, Union member discriminatees to seek non Union employment, for to do so would subject the individual to discipline or expulsion by the Union.

So what that stands for, and they acknowledge that it's dicta, because they're just making a suggestion about the parameters of reasonable search where, in the Ferguson case there was no—the Employer tried it as a matter of law, there were no facts like we have here.

But if you follow that logic, then Ms. Korschgen says that you can't penalize him for not looking for Union work because his secondary job, the Union job, says you can't do that.

And then you can't penalize him for looking for non Union work that's not targeted, because that goes against, A, his Union principles and, B, his secondary Employer's instructions.

And then third, that flies horribly in the face of the fact that everything that the man was trying to do was to work non Union.

And then to say no, you can't work—that you can stop looking non Union and still mitigate your damages, now that's an area where the Union has control and says you can't work Union and you can't work non Union, that's a very good situation for the Union.

I mean that's not what we have here. I don't really think we have—I don't think this is a salting case. I don't think you have to consider, and I hope you don't consider this as a salting case, in terms of the mitigation issue.

The law hasn't changed about mitigation. The Board, in Ferguson, cited Lundy, which is a long-time and that cites other cases and goes back—I don't think you need to consider salting in the mitigation issue of this case because Mr. Cox said that except for one or two Employers like Tri City, where the Union had discounted them, he said he could have looked anywhere except for Union.

And, obviously, he couldn't do that, but I don't think that's necessarily because of salting. But I mean, I think even if you just look at this as just a straight, you know, discriminatee, did you go really try to find a job case, we win because he didn't do it. He didn't do anything.

I mean just look at the presentations. Well, I'll get into it in a minute. So any way, there's two issues about the reasonableness of the job search.

One is whether the restrictions from the Union unreasonably interfered with the universe of the search. And secondly, whether Cox made a good faith effort, even assuming the restrictions were—and I apologize if I say Cox, it's easier than Mr. Cox every time—whether Mr. Cox made a good faith effort, even if the restrictions were reasonable.

That's the third issue. The last issue is what do we do about the behavior of Ms. Marksteiner, and what do we do about the behavior of Ms. Korschgen? And I'll save that, I'll save that issue to talk about last.

And then again, if you have any questions before you deliberate, I would certainly enjoy talking about them with you.

There's two preliminary things I would like to say before—or discuss before I go into the four issues. The first deals with trying to keep focused on the purpose and intent of the National Labor Relations Act. The National Labor Relations Act is one of the earlier pieces of social legislation and it has a real social component to it. It is designed to provide employees the freedom to form, join and assist labor Unions to take other action for their concerted protection.

And to press that social aspect, the law provides for the public condemnation of Employers. The law provides for a finding of a violation of the law, and then the law provides the Employer must humble itself and provide a notice to the public, including the employees, that no, I won't do that again and basically, I was wrong doing that.

That's the social remedy under the National Labor Relations Act. There's another component of the remedy and that's just pure economic. And it's make whole. It has no punitive damages, it has no damages for pain and suffering, paying suffering and humiliation like you see now under Title 7. It's purely economic.

And what's so important about that, your Honor, is that Mr. Cox was applying for work at Aneco to make something like $10 an hour, and that's all that we're talking about is his effort to get a $10 an hour job with us and then what did he do to find a $10 an hour replacement.

And the salting thing, what's interesting about that is that you take this $10 an hour and then they have to piggyback on top of that saying, well, it's not just $10 an hour, it's his freedom to try to earn $37,000 as an organizer. It's his freedom to work as an organizer.

And the restrictions on that freedom somehow should impede the ability of him to make the ten replacement dollars. That's where, to me, the logic of her entire argument falls down.

We're talking about dollar-for-dollar and it's make whole. It's not punitive and there's a social purpose behind that, behind the duty to mitigate. The whole concept of the National Labor Relations Act is to increase productivity, is to improve commerce.

And you don't improve commerce by having people stay out idle waiting for a backpay remedy without having to work. I mean that's the opposite of what the law requires.

So we're the wrong-doer, we violated the law. We have paid our social price, but that doesn't mean that we have to be punished. That doesn't mean that Mr. Cox gets a windfall.

That doesn't mean that Mr. Cox can keep a $37,000 a year job and over a six-month period, when they're trying to get backpay, that he can go look for one job at one Employer. That's turning the social purpose of the National Labor Relations Act absolutely on its head.

The second thing I want to talk to you about in terms of a broad thing before I talk about the issues, is about credibility. This area of the law is not complicated at all. I mean mitigation itself is not a complicated area of the law.

And I've practiced for a long time, I know Ms. Korschgen has practiced for a long time, and I believe this is both of our backpay specification hearings because you always settle it.

I mean, you know, the law is easy to apply and usually the facts are fairly easy to apply. But why we are having this hearing is because of credibility, who is telling the truth about the certain circumstances in the case.

And, you know, I think if I were in your shoes and I never will be, I would dislike the responsibility of determining who is being candid and who is not. I'd dislike that probably more than any aspect of the job and I think Judges sometimes seek to find a way to say that everybody is telling the truth, but there's just some mistake here.

That's not the case here. That's not the case here. Mr. Cox had a need to further the interest of the Union at one time, and then Mr. Cox later, as a desire, and certainly I understand the desire, to collect $47,000 plus interest.

And I suggest to you, your Honor, that interest, those combined interests led him to do some fairly, fairly big storytelling in connection with this case, and I think that that's your responsibility to find if that's true.

And, if it did, then deal with it because he was not candid, and his lack of candor is the entire reason that we are here today.

The record contains evidence of Aneco settling all of the remaining cases involving the same day that he came out, and I'll talk about the importance of that document later, but clearly, credibility is an important resolution in this case.

I think the most important single credibility issue is whether or not Mr. Cox made job searches besides those documented in the eighty pages in the record, and whether he visited the Job Service for the purpose of seeking employment beyond the limited number of visits set forth on Page 43 and 44 of the record.

Those are two major credibility issues. If you find that he did not make those visits, then what you are left with is Respondent's Exhibit Number 13, as the record of his trips to Employers.

And then you are left with his NLRB search reports that says that he went, for a limited period of time at least, that he went to the Job Service from time to time. So I think that those are two really important things.

Now, let me talk about that because it's so critically important. If you look at Quarter 2 and Quarter 3 of 1994, that's the 6-month period I just talked to you about, Mr. Cox visited one Employer in the 6-month period and that's out of 200 non Union Employers in the area.

That 200 is a number that he agreed with and Mr. Brown agreed with. You might want to make it 199 because they discounted Tri City, the single largest Employer in the County employing a thousand people, but you might want to make it 199.

But let's just say it's 200. In those two quarters of '94, he visited one. And then we flip over to the two quarters in '96, the first and second quarter of '96—I'm sorry, I'm sorry, I misspoke myself.

In '96, the second quarter of '96 and the fourth quarter of '96, that's another six-month period and he visited one Employer. And you know what, your Honor? Those last two, the Government says I don't owe any money, my client doesn't owe any money.

And so the only underlying basis, the only even argument they have, is either a lack of memory about other searches, or this week-to-week, every week diligently going to the job search.

Without either one of those two things, then there's absolutely no—it's apples and apples. I mean they're identical.

So, you know, that, to me, was why it was so important for Mr. Cox to embellish on the affidavit, for Mr. Cox to embellish on the records and that's when you have credibility problems because people don't lie unless there's an extreme need to lie. And so, you know, that's what happens.

But let's talk about how you go about doing the credibility resolution. Ms. Korschgen suggests that Mr. Cox is some bumpkin that doesn't—isn't a very good record keep and he's just some neophyte in this litigation arena.

Well, what's the record say about it? It says that he was trained in documentation as a business manager. It says that he was trained in documentation as part of the Comet or salting program.

He even developed his own form, your Honor, he developed his own form which is throughout Exhibit 2, for the purpose of documenting his visits. He trained others in the documentation.

So he even interfered with his job search by bringing a group of people to one Employer, so that he would have documentation.

So I mean to say that he's a neophyte or just an average electrician that, you know, is pulling wire and doesn't understand the need to document, you know, you layer that experience on top of the extreme amount of

documentation that he does have, and then you layer that on top of repeated contact with the Government, where the Government says you have to document, your Honor, there's no conclusion you can reach other than this is, Exhibit 2 is the sum and substance of what he did.

And he tried yesterday, and it's really interesting why he would do it, but he came back after 7 years, after being unable to remember something in '94, unable to remember it in '96, unable to remember it in '98, and now that the $47,000 is on the line, he remembers Williams and he remembers the job fair and he remembers—well, he remembers going to another Employer.

And the other thing about that, it would seem to me to be—unless he contends and he certainly doesn't, unless he contends that he actually made bulk visits, a multiple of say by a factor of ten visits the number that he said, if he made four it would seem to me that when he made the fifty one, it would still be a fairly dramatic thing to do and that you would still remember it.

I mean can you imagine that? Going two or three guys, getting in their car, going over, getting all the Union hats on, everything, and they come in and they're talking with a non Union contractor that doesn't know what Comet is, and what salting is.

And they've got all these receptionists running around saying what do we do now, what do we do now, the Union's business agent is here? You wouldn't remember that event? You wouldn't remember that occasion?

So I think those factors, your Honor, those factors are things that lead you to have to find credibility in favor of Aneco and against Mr. Cox on the number of visits that he made.

Then the next issue is the number of visits to the Job Service. We have a document that shows, I think, ten or twelve referrals in a five-year period, but they're not satisfied with that document. They have to say, no, he went on a weekly basis.

Well, I think you go back to why is it you go to the Job Service. And this may be the best fact for you to use because we have pitted against each other Mr. Cox and a witness, Ms. Osborne, who has no ax to grind in this case at all. No ax to grind in this case at all.

Why do you go to the Job Service? You go to get the names of Employers with whom you can apply. I mean without getting the name, what good does it do?

And so Mr. Cox says he could go in, look in the computer and see the names of the Employers and, therefore, there was no need for him to go any further in the process, because he could go apply or he knew whether he had already applied, etcetera, etcetera.

Well, Ms. Osborne came in and explained to you the word suppressed. And she said the names are suppressed. And the only way you can get to the names is to go and actually talk to an interviewer, talk to a clerk.

So if Mr. Cox—if Ms. Osborne is correct about the procedure, and how can she not be correct about the procedure, then what Mr. Cox has done is come in, looked in the computer and see there's either one or a hundred jobs, but without any identification of the Employer.

I mean there may be a poster from Disney, but the Union says he can't go to Disney. Remember? That's another 700 jobs that they said he can't go to. So he goes and he can't get the names and he leaves and that's part of a reasonable job search?

That makes no sense at all. So he has to get the names. Well, if he gets the names, if you assume that he was mistaken about the names, if he actually gets the names, that means he's actually talking to an interviewer.

And if he's talking to an interviewer about openings, why not get a referral slip? He got a bunch of referral slips, why not get some more? You know? I mean that's the whole purpose of going there, is to get referral slips. It gives you a leg up on the general public.

So the convenient and the good thing to me about this particular credibility issue and this critical fact within that, the number of visits to the Job Service, is that you got a very bright line. You've got Ms. Osborne versus Mr. Cox.

Ms. Osborne is a reasonable person, she has no ax to grind. She's subpoenaed by both Ms. Korschgen and myself, and she's not trying to get the $47,000.

And really, probably as to Mr. Cox, as important as the $47,000, she's not trying to drag down a non Union Employer. And that's his job and I understand that, but it seems to me at some point, particularly when you go under oath, you need to leave that, you know, you leave those considerations behind.

So I think that it's an absolute fabrication that he went any more than what the record says that he went. It is absolutely—it's inconsistent. That's one thing about falsehoods, your Honor.

And the jury instructions in the Federal system provide for looking at internal consistency. He says, in an affidavit taken by Ms. Korschgen, that at all times on a weekly basis.

He says that in September of '94 in the immediate two quarters before that. If you'll look at his NLRB search reports, he uses the phrase from time to time. Now, there's a vast difference. Obviously, there's a difference. Time to time is the least, is the absolutely least descriptive you could be about how often you went somewhere.

So I think that credibility resolution is important in and of itself, critically important in and of itself because when you strip away the undocumented, the eleven quarters that they want the money for, look incredibly like the nine quarters they didn't get the money for, they don't want the money for.

So it's a critical fact find. I think it's critical for two reasons. Number one, that fact in and of itself, and secondly is how you view Mr. Cox, the rest of his testimony because, obviously, if you're going to be less than candid about one critical fact, why wouldn't you be less than candid about other facts.

And let me touch, while I can, on this Osborne. Clearly she was neutral. She's not an advocate. She was the only witness that appeared, witnesses of any duration that did not appear as an advocate.

She's experienced, knowledgeable. She's an expert. There was no rebuttal. There was no other expert, nobody brought in to rebut the expert testimony.

I hope you will use her as a guidepost in making your decision, not only about availability, not only about the process of the Job Service, but about the ultimate question, the reasonableness of the search.

I mean you and I, everybody can walk around and have a good idea, particularly if we've been in labor law, a good idea about what it should be to make a reasonable job search.

This lady's devoted thirty years of her life to that. She's told people how to go get a job. And she suggests twenty hours a week. And I hope that most people that are unemployed would at least spend half that time trying to get a job that they would spend on the job.

So I hope you will—and there are other cases involving experts and we're not using her to say that he should have gotten a job, and the proof of that is that he didn't get a job.

We're using her to say that when you look at the quality of his search, then it's obvious why he didn't get a job, because he didn't use a reasonable search. We argue for her to say that had he made a reasonable search, he would have gotten a job because there were plenty of jobs. Unfortunately for him, he didn't explore the market to anything like a reasonable extent.

Now, I guess, you know, that the next topic to talk about is the duration. And again, I would contend that the burden is on the General Counsel.

And the only suggestion that they've made, your Honor, the only suggestion they've made to you and it's the point that they've stuck on, is to say that the evidence shows that Mr. Cox would have worked for one out of 200 Employers for a period of five years.

That's what their contention is. And so then if I'm supposed to have the burden of proving that that's untrue, how in the world do I do that? I mean physically how do I go about that?

Mr. Cox is going to say, oh, no, I would have stayed one place for five years, even though there were maybe only a hundred people at Aneco in 4,000 I wanted to organize, I would have stayed that one place.

Mr. Brown says, yeah, I think it would have made sense, you know, as long as he was doing good. Well, how long does it take? And certainly this is an area, it seems to me, that the Board has expertise in.

This is not a Court, this is the Board and you're an agent of the Board, you're a Judge of the Board, and you have the expertise about this.

And it would be very difficult for me to think that anybody who has expertise in the area really believes that an organizing campaign in the construction industry lasts 5 years, particularly in this case.

See, the other thing about duration here that's interesting is that you would eliminate from the duration examination, any kind of representation case proceeding, because the salting book makes very clear, and the witnesses make clear, that really is kind of a useless act for construction Unions.

So they have to organize other ways. And one way is litigation. We know that, that's in the books and wouldn't it make more sense to litigate against more people that are depriving you of the labor market than just one Employer?

And secondly, there's recruiting. And again, I mean it's so absolute common sense clear to me that you would be so much more effective if you got involved in many different Employers than if you stuck with one Employer for any significant period of time.

I think perhaps the best proof, and if Ms. Korschgen can say that Mr. Cox not handing the money back to the Union after he worked four weeks with Aneco, if she can say that's the best proof that there was an agreement 5 years before that as to who would keep the money, then why can't—then why don't I have the same prerogative, why don't I have the same right to say this is what happened, this is how it played out?

He came, he worked ninety-nine hours over a 4-week period and quit over an unfair labor practice in Tampa, and it's incredible to me that he would say that the motivation for the unfair labor practice strike was a problem in Tampa.

My goodness, your Honor, he was going to work for a violator of the labor law in an unresolved case. I mean our case isn't resolved yet. And at the time that he came back, there had been no resolution of the case.

It was a wonderful unfair labor practice to use as a reason to go on strike, work one day and go on strike or what I believe the evidence shows is that he worked four weeks, did what he could and went on and did somewhere else, which is the reasonable thing to do, which is the non wasteful of assets reasonable thing to do.

So if the Government thinks that the pay issue is resolved by what happened in April of '98, then I suggest to you that what happened in April of '98 as to duration should carry the day as well.

I don't even think it would have taken that long. I don't think Mr. Cox would have stayed that long at any one Employer. I think that—well, it doesn't matter why, but he clearly—your Honor, it was in his interest to move from job to job.

It was in the Union's interest to move from job to job, and I do not believe—you can't look at this case the way—this is one difference in salting, I guess, then in other construction cases.

You can't look at this case and say, well, this man just was looking for a job and he was going to stay on an indefinite basis. That's not the case. Mr. Cox has said he was there only so long as it served the Union's interest.

And at some point, it has to stop serving the Union's interest. I don't believe I have the burden of proving that precise point. I think that's the Government's burden to prove the duration of the backpay period.

But if I have the burden, I think it's satisfied by the evidence and by common sense and by just what happens generally in the field. If Ms. Korschgen has the burden, I really don't believe that she's met any burden in that regard.

Ferguson, to me, is unclear about how that burden is allocated, your Honor. Ferguson discusses that issue, the duration issue. And then after the majority is through discussing that issue, then they switch to mitigation and say we have found that the General Counsel has satisfied his burden to show gross amount of backpay.

The way I read that is that the issue of the formula and the amount of money and the duration all came before mitigation, and those were all part of the burden of the General Counsel.

I think Member Herkin read it the other way and said the duration was a burden that I have, but either one who has the burden, I think that the evidence is clear that a very, very short

period of time would be the maximum time that a business agent would stay at one out of 200 nonunion Employers in the area.

Of course, we don't have any other inference, I think, that should be helpful to me if we don't have any proof of that, because he never got a job, because he never looked for a job.

If he had looked for a job the way any reasonable person would look for a job, then I think we would have some evidence about that, but we have to go on what we have, and I think that's adequate to meet the burden.

In terms of the next issue, whether there was an agreement or plan to have Mr. Cox keep both the wages from Aneco and the wages from the Union, to me I think that burden clearly is on the General Counsel, on the issue of interim earnings.

And I do not believe they've met the burden of proving that there are no interim earnings. There's no documentation on this issue at all. There's no documentation on the issue of an agreement or understanding between the parties as to where the pay from Aneco would go.

There's an affidavit from Mr. Cox that says that it says he could keep his Union money, but that doesn't tell the other side of the story. That's the $37,000 pay. He doesn't address the $20,000 pay.

And for him to turn that over to the Union coffers as being a benefit somebody gained by virtue of working, I mean that happens in employment all the time.

I mean if one of my young lawyers goes out and attracts a new client and the client happens to write a check to my associate, he brings me the check. He doesn't—I hope he does. I hope he doesn't put it in the bank.

I mean that's—because the obligation is, you know, I'm paying you $37,000, I'm entitled to the money you gather from that. That to me is a logical, consistent, normal, ordinary every day way of doing it and if it's something different than that, then somebody ought to be put to the burden of proving it.

And it's without question, it's without question that that process was happening all across the country because four years after this deal started, the discrimination started, in 1997 the International President was compelled to write a letter saying, no, let him keep the money.

And I don't see how in the world you can escape the inference that other people weren't keeping the money. There would be no need to write the letter. And so if you have that, if you see this as a 4-year later refinement of the salting program, that's all it is, it's an amendment or a refinement or a tweaking of the salting program.

Then what do we have? What does the evidence show four years later, four years before? Mr. Brown says he never discussed who would keep the Aneco money with Mr. Cox. Mr. Cox says, reluctantly, that he never discussed who would keep the money.

What he puts in is an affidavit saying it was his intention to keep the money. What does that mean? That's a unilateral expectation that you can't have as an employee. You can't create a compensible economic factor based upon what I intend to do.

It has to be an emolument of employment. It has to be a benefit of employment. And in this case, there's absolutely nothing to that. And then you take on top of the lack of any documentation and certainly everyone by then knew how important documentation was, the lack of any documentation, the fact that there was a historical way of setting the assistant business manager's pay.

He got what a general foreman got because he didn't have to go—you know, he wasn't working out of—

JUDGE LOCKE: He got what a general foreman got plus $30.

MR. SIZEMORE: I think that's what—I think Mr. Cox got a general foreman plus thirty—a foreman plus thirty, and Mr. Brown, the business agent, got a general foreman plus some.

JUDGE LOCKE: Yes, sixty I think.

MR. SIZEMORE: Yes.

JUDGE LOCKE: I'd have to check my notes on that.

MR. SIZEMORE: Yes, sir. But the important thing is that the pay from the Union to Mr. Cox was tied to a field wage and the idea that you can, for doing the job, doing the organizing job, they're going to pay him $20,000 more?

I mean if I were one of their members, I would have to worry about that. If I were Mr. Brown, I'd have to be a little bit concerned about that.

Why is a guy that's doing what I tell him to do making $20,000 a year more and now significantly more than what I'm making and I'm the boss and I can tell him what to do at any point, and most hierarchies don't have that sort of arrangement.

The other thing that's—again, where there is doubt, the inference should come to us, is that there's no proof of a pattern. There's not even proof of a single incident before the International President wrote this is the way we're going to do it.

There's no proof that it happened because Mr. Cox, again, didn't get a job. If Mr. Cox had gotten a job and we knew how it was worked out, we wouldn't be here on that issue.

So he's compounded a number of legal issues by not getting a job. And so I think that the absence of proof, there's no proof, they offered no proof of him keeping a single dime from any settlement, from any other awards or anything like that.

I was glad to see in her closing argument that Ms. Korschgen didn't argue the way she presented to Ms. Osborne the fact that Mr. Cox' Union activity made a difference in him getting a job.

I was glad to see she didn't argue that because to me if the starting point is the reason he didn't get a job was his Union activity, then I'm sunk, I have nothing to talk about at all, and it creates a presumption of unlawfulness, and I think you recognized early in the case, that's a totally inappropriate presumption.

So I don't think that they've met their burden of proving that there was this deal. If there's no proof that there was the deal, then at the time that he went with Aneco, under the best version for them, he would have surrendered his Aneco money to the Union and kept his $37,000.

By not getting the Aneco money and still getting the $37,000 from the Union, he is now mitigated because he's whole. He's not earning—he didn't earn less net than he otherwise would have.

And that to me is not contrary to Ferguson. In Ferguson the facts were that he kept all the money. In this case, I'm arguing, that those are not the facts and, obviously, he would not have made more money under the version of the facts that I argued than he would have.

Finally, or the next substantive argument, your Honor, is the reasonable efforts to find replacement employment. I guess the first thing—there's a couple of things I want to say—is again to emphasize that this is an economic pattern.

This isn't a social pattern, this isn't a social exploration and that it seems to me that you have to look at normal in the eyes of or with the surroundings of what an unemployed person would do.

Normal, reasonable in the sense of what an unemployed person would do. If that's not the starting point, then you just—you lose all sense of any reliability, any consistency, any predictability.

For example, if Mr. Cox, instead of investing in a restaurant had invested in Microsoft and had a net worth of $8 million when he sought work with Aneco, and then he didn't seek work the way an unemployed person sought work, he just did it on a time to time basis because he had all this money, could he use that as an argument to say, well, I mitigated because I did what a reasonable person in my circumstances would do?

I think that would be a ludicrous argument to make. If a child was supported by a parent and the child was discriminated against and didn't go out to work because, well, I didn't need to, my daddy was taking care of me, to look at it from the reasonableness of anybody other than an unemployed person is just fraught with all sorts of danger.

So the Lundy factors, the Lundy decision is cited in Ferguson, your Honor. They don't include need, they don't include compliance with restrictions from a moonlighting job, and that's—can you imagine that, your Honor, that you have, when you were discriminated against you had two jobs.

Your real job, your primary job, and then you had a moonlighting job. You worked on the weekends somewhere and then when you went to try to find a replacement for the primary job, you were talking about that with the boss of your moonlighting job, and the boss says, I don't like you doing that.

You're too tired when you come to work on the moonlighting job. Don't go and try to replace that primary job because if you do, I'll fire you.

So the moonlighting Employer says no, you can't go look for a replacement for your primary job.

Well, I mean, that's not what a reasonable search is like, where you let your moonlighting Employer deprive you of trying to replace your primary income.

So Lundy doesn't look at need, Lundy doesn't look at being too busy from your moonlighting job to look for work, particularly when the moonlighting job is in the very same hours.

The Board in Ferguson, your Honor, talked about quote, "normal," unquote, or quote, "regular," unquote method by which an employee finds work and to me this case—if that doesn't mean the twenty-five or thirty years that Mr. Cox worked out of the hiring hall, I can't imagine what it would mean.

The last time he worked as a full-time electrician, he worked out of the hiring hall and did for thirty years. To put blinders on that and say that's not true, that his normal method of looking for work is occasionally to go out and look for a non Union job to see if he can't salt, that's just an absolutely strange reality.

And if that's the standard, if that's the standard, then what we're doing is we're promoting idleness. We're lowering the commerce and lowering productivity because we're making it worthwhile not to go out and find a second job.

The Government or the factors in Lundy are skills. This is what we're supposed to evaluate the discriminatee's—these factors in looking at the reasonableness and whether or not he made a good faith search. The skills.

In this case, there's no question Mr. Cox had all the skills, all the licenses, all the trainings. He'd been a very successful electrician, is experienced. He had thirty years as an electrician. There's no question about that.

He had qualifications. There's no question on the record that he's qualified and, in fact, the Board, the Board in the underlying case, clarified and I think is now bound by the only thing that might have been held against him and that was that he hadn't worked in the trade for 8 years.

But as a matter of law, the Government says that doesn't matter. That no Employer would really take that into account. Only a discriminating Employer would take that into account.

So I don't think that we can now say that, well, that wasn't a legitimate factor for Aneco to consider at the time, but his absence from work from the trade for eight years made it harder for him to get a job.

Those would be intellectually inconsistent and I certainly don't think that the Board would do that.

His age, Ms. Korschgen mentioned his age, there was absolutely not a scintilla of evidence that his age made a difference.

I, in fact, asked him whether or not weren't most of the guys that he went with to the salting things younger, and he said no, we were all about the same age.

And I mean, I think that certainly everything I've heard about the construction industry is that the entire trades are aging up, that young people are trying to go into computers and sell used cars instead of going into the trades.

So I don't see how in the world his age could make a difference. The labor conditions in the area, there's been a veritable boom in the Orlando market and all the witnesses agreed to that.

Ms. Osborne presented statistics that certainly the Department of Labor did not fudge in order to help Aneco. There's been increasing employment. Every time you have increasing employment, you have job openings, people looking for work.

And if you just walk—I don't even know how you get back to your hotel around here. You know, the hotel you're staying in is evidence of the boom.

The museum across the street where we are is evidence of the boom. And that's been going on and the record shows, from Ms. Osborne, that's been going on for a long time.

Ms. Korschgen says we should totally discount the ads, that the ads mean nothing. That's interesting because both Mr. Brown and Mr. Cox followed the ads. Both Mr. Brown and Mr. Cox indicated there were jobs available.

Ms. Sims counted 1,600. It's not hearsay, she counted the 1,600. The other gentleman counted around a thousand. Ms. Osborne said the ads were unceasing and they were available.

So, you know, I think he clearly had an unjustified refusal to take steps to find work. And again, there's nothing in dicta and nothing in Ferguson, really not even in dicta that touches upon or deals with his job search.

You had these records in front of you, your Honor. It's just incredible to me July, six Employers out of 200 in a three month period. The third quarter of—the fourth quarter of the first year, four Employers out of 200.

That's not what a reasonable unemployed person does. And it seems silly to me to even be arguing that, frankly. It seems so obvious, so incredibly obvious that we shouldn't even be talking about that.

The last issue that I'll address, your Honor, is what to do about the inability of the Respondent to either cross examine Ms. Marksteiner, in connection with the issues involved in the General Counsel's burden of proof or the deprivation of her testimony on cross examination about issues on which I bear the burden of proof.

Now, how do we deal with that? It obviously is prejudicial to me, your Honor. The first day, I got a number of good answers from her, and I think you were struck by the lack of difference between the quarters that were in and the quarters that were out.

And you talked about arbitrariness and the need for a non-arbitrary ruling. And I think I got a lot of very good information from her.

Now, Ms. Korschgen says that I'm not prejudiced by the answers I didn't get. Well, how do I know that, your Honor? She didn't answer. I mean how do I know that? Do I accept her representation, Ms. Korschgen's representation that it didn't hurt me?

I think not. So I don't know how you repair it. It seems to me that if your evidentiary rulings were correct, the absolutely least that their stance has done to my client, is requiring a new trial.

That's the absolutely least that's going to happen if your evidentiary rulings are correct, and I believe your evidentiary rulings were correct. You gave them a clear definition of what the deliberative process was.

I think every time I tried to ask a question that could invade that, she objected, you sustained. I had to do what I could to stay within the limits of what you said.

And so if those rulings are correct, then at the very least—if one of them is correct on all the ones she refused to answer, at the very least, we're going to have a new trial, and we're going to duplicate the expense to my client of this behavior, as a result of this behavior.

So what do you do? One alternative is to strike the testimony of the witness. I believe that Ms. Marksteiner's testimony would be important, critical to the General Counsel on the issue of duration.

That would be the only thing in the record besides a complaint and answer, or specification and answer, that deal with duration from the General Counsel's case. I mean, obviously, you can't—so that would have been the only testimony in the record about duration.

I urge you to strike that testimony as a sanction to the General Counsel, as a sanction to the General Counsel's office, for allowing two agents—and, your Honor, let's make sure we're clear about what happened.

At any given moment, Ms. Korschgen could have called her office, Ms. Marksteiner could have called her office.

And I suggest to you, and I think Ms. Korschgen said it on the record, that she had spoken to her office several times or a couple of times during the proceedings.

So, you know, it isn't like you have these two free agents or two people that are not working with the knowledge of their superiors. And to me, you know, it's incredible to me that I don't believe Ms. Korschgen would have not called her superiors.

I think Ms. Korschgen is a very, very loyal, capable Board attorney, and I don't think she would have acted totally on her own in this regard. So then we have—now we have the General Counsel even more intimately involved in what went on.

And from Ms. Marksteiner's standpoint, I take it a little bit differently. I don't believe that the evidence shows that Ms. Marksteiner did what she did out of a matter of principle.

I think Ms. Marksteiner did it out of a matter of embarrassment over what the record shows. When I asked her questions the first day about what were the differences between this quarter that you didn't count and this quarter you did count, she had no answer because there is no answer.

But she answered all those questions. The first day Ms. Korschgen objection. You sustained some, you overruled some, and then the witness answered.

The second day, asking the very same kinds of questions, she said no, I won't answer. And you asked Ms. Korschgen to instruct her and Ms. Korschgen said no.

So I think I'm entitled to an inference that it's not a matter of principle. Your Honor, if it was a matter of principle, what is the principle involved? It isn't like I'm asking for the formula for Coca Cola, you know, that's a trade secret.

So what if she said the deliberative process? What if she said, well, the Regional Director said this and the Assistant Regional Director said this and the Supervising Attorney said this, assuming it was all about the deliberative process of the case, so what?

Then the objection is on the record. If your ruling is incorrect, the Board doesn't consider it. And so where is the harm in that?

And you know, particularly, your Honor, in light of the fact that Ms. Korschgen called her as a witness and the General Counsel's office said, well, you know, of course she's going to be here and you can cross examine her.

But then they pick and choose which questions it can be. And once she's here and once she's put on the witness stand, then it's up to you as the Judge. And to me, it's without an apology to you, without—it's just such an affront to you, it's such an affront to my client, that I think it deserves sanctions.

I think that it deserves a recommendation that the specification be dismissed. And I don't think, under the underlying facts, I don't think that's harmful to Mr. Cox, because I don't think he deserved the money in the first place.

But secondly, I don't think Mr. Cox is bigger than the system. I don't think Mr. Cox is bigger than the system. And in practical terms, your Honor, what the stance the General Counsel could take, could cost my client more money than what the backpay is to Mr. Cox, by the time we're all through.

What if it takes the Eleventh Circuit or the Fourth Circuit or the D.C. Circuit to have your rulings vindicated? Then how much is that going to cost compared to this?

So why punish—I didn't do anything with this at all. Mr. Cox' counsel never said anything to you. They never said anything to Ms. Korschgen, at least on the record that I know of, never urged them—Ms. Marksteiner to answer the question, never urged Ms. Korschgen to have her answer the question.

That's Mr. Cox' job. That was his opportunity to do that. So I don't think you should be swayed by that. They stayed back, Mr. Cox and counsel stayed back and said this is fine with me, this is fine with me.

She didn't object. Counsel for the Union didn't object when all this was going on. So if you balance what my client is sacrificing versus what his is sacrificing, he is sacrificing, I think my client comes out very much the loser.

So I know I've gone on a long time, your Honor. I've gone on for seven years with this case. Do you mind if I—I want to look just one moment at my notes and see if there's anything she said that is important that I didn't touch on.

Going quickly through it, she said in her argument, Ms. Korschgen, that there was a verbal agreement reached. That's misstating the record, your Honor. Neither witness said there was an agreement reached that Mr. Cox would keep the Aneco pay. Both of them said there had been no discussion. As a result, there cannot be any agreement.

In terms of the limitations of the universe, your Honor, Exhibit 14 shows what Mr. Cox' Union brothers would have made. I think that to limit the universe to non Union contractors is patently unreasonable.

It limits his best opportunity for employment, it limits him to the most lucrative opportunity for employment, it limits him to the, for him, the most desirable—it restricts him from the most desirable thing.

And even, your Honor, it seems to me that the Union's rule that says if you've not been in the field for a year or however long, that you have to stay in the field before you get on the A list at the hiring hall, that to me is even an unreasonable restriction even of itself.

Because it punishes him because he's a business agent. And so they say, they say, go out and work non Union. He can't get the job and then they tell him, well, you can't mitigate for that one year, and so you're going to have to go lower on the list.

But when I asked Mr. Brown what he thought would have happened to Mr. Cox, whether Mr. Brown thought that Mr. Cox would have had a similar experience to these gentlemen, he said yes, and we paid a total of $6,700, which I believe is precisely eighty percent of the total relief.

You're familiar with the Government's need for total relief, complete relief. And if you disagree with us about job search, an average of what—and you disagree with me about duration and if you disagree with me about pay, the absolutely most you could find for Mr. Cox would be the average of what all of his brothers, who applied the same day, have.

And that's for the two-year period. And after that, it drops off as far as she's concerned, as far as Ms. Korschgen's concerned.

And then the other part of the limiting the scope, the targeting Employers, I don't know whether—there was testimony that there wasn't any limitation. He could have done anything he wanted to.

But when you count out the total number of Employers that he looked at over a five year period, over a five year period, it's less than thirty percent of the Employers available.

So if that's the limitation, whether it's the limitation because that's while he thought he should do his job or it's a limitation directly from Brown, that to me is incredible.

To leave out seventy percent of the job market is an incredible, unreasonable restriction. And then in and of itself, I think that anything more—Tri City, and Mr. Brown testified that he made it clear that they were discounting Tri City.

Mr. Cox says, well, I went out there after that. That's not what we're here about, whether he went out there after. What we're here about is would he accept an employment and been retained in employment over any period of time at all by Tri City.

Mr. Brown said I'm not sending him to Tri City because they're big enough and they have small jobs and they'll put the salt away, you know, somewhere on a small job and he can't see anybody.

Well, that's worse for Mr. Cox than if he wasn't employed by Tri City. So he's got one foreman that he's helping pull wire and the foreman isn't going to go Union forever.

And so by putting that restriction on him, he's eliminated—he's eliminated the best Employer to go see in Orange County, an Employer that employs a thousand employees.

And whether that's a thousand journeymen, which obviously it's not, but it's the most journeymen in the County, and to say no, you can't go there, that's not the right place to go, or clearly, there's no way in the world with Mr. Brown's testimony that you could support the idea that Mr. Cox would have gone to and stayed with Tri City for any period of time.

Your Honor, we were guilty. This happened in 1993. This was at the early stages of salting. My client messed up. My client violated the law.

As to Mr. Cox, it was on an issue that once the United States Supreme Court, or certainly some Court at one point agreed with the position that my client had. And we've settled those cases, we've posted the notices.

We've posted the notice as to Mr. Cox. We've had no subsequent unfair labor practice charges from Mr. Cox. We've done our side of the thing.

But to say that because we were wrong-doers that we should turn one job search in six months, one job search in six months into a reasonable search, and that one job search is ambiguous and, therefore, stick it to the one wrong-doer, you know, that's not justice and that's not social policy that's promoted by the National Labor Relations Act.

And that's the reason you should deny backpay. Thank you very much.

JUDGE LOCKE: Thank you all very much.

We will be in recess until 8:00 o'clock and we'll meet here at 8:00 o'clock to deliver the Bench Decision.

Off the record.

(Whereupon, at 3:00 p.m., a recess was taken until 8:00 p.m. for the Bench decision, the same evening, in the same place.)

BENCH DECISION

(Time Noted: 8:00 p.m.)

JUDGE LOCKE: On the record.

This is a supplemental decision in Aneco, Inc., and International Brotherhood of Electrical Workers, Local Union Number 606, AFL–CIO, Case 12–CA–15738.It is a Bench Decision issued pursuant to Section 102.35(a)(10) of the rules and regulations of the National Labor Relations Board.

On February 27, 1998, the Board issued a decision and order in this matter, finding that the Respondent, Aneco, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act

by refusing to hire Winson Cox on July 12, 1993, because Cox was a business agent of the Union, International Brotherhood of Electrical Workers, Local Union Number 606, AFL–CIO.

On June 15, 1998, Respondent and the General Counsel of the Board entered into a stipulation in which Respondent waived its right to contest either the propriety of the Board's order or the findings of fact and conclusions of law underlying that order. The parties also agreed that the Regional Director for Region 12 of the Board could issue an order setting a date for hearing to determine the amount of backpay due in this case.

On May 28, 1999, the Regional Director issued a Compliance Specification and notice of hearing. On June 15, 1999, the Respondent submitted his answer to the Compliance Specification, and on June 26, 1999, filed its amended answer to the Compliance Specification.

On October 22, 1999, the General Counsel filed with the Board a motion to strike Respondent's amended answer in part, and for a partial summary judgment.

The Board issued a supplemental decision and order on March 20, 2000, which granted portions of the General Counsel's motion. The Board struck portions of the Respondent's answer to the Compliance Specification, and deemed admitted the corresponding portions of the Compliance Specification.

Also on March 20, 2000, the compliance hearing in this matter began in Orlando, Florida. The parties presented evidence in this matter on March 20, 21 and 22, 2000, and on March 23, 2000, presented oral argument. I am issuing this Bench Decision on March 23, 2000.

The Board's supplemental decision and order of March 20, 2000, has significantly narrowed the issues to be resolved in this proceeding. I will begin by summarizing what the Board already has determined. The Board has deemed admitted the allegation in Paragraph 1 of the Compliance Specification, that the gross backpay due Winson J. Cox is the amount of earnings he would have received, but for the discrimination against him.

The Board has deemed admitted the allegation in Paragraph 2 of the Compliance Specification, that the backpay period for Cox commences on July 12, 1993, when Respondent discriminatorily denied his employment as a journeyman electrician. However, the Board denied the General Counsel's motion to strike the remaining allegation in Paragraph 2 of the specification, which states that the backpay period ends on April 1, 1998, when Cox received an offer of employment from the Respondent. Therefore, the Board has left open for resolution in this hearing when the backpay period ends.

The Board has deemed admitted all allegations in Paragraph 4 of the specification. This paragraph establishes the appropriate measure of the gross backpay for Cox by identifying employees of Respondent who performed work similar to that which Cox would have performed if Respondent had hired him on July 12, 1993. The specification calls these employees, whose hours reflect what Cox would have worked, "comparator journeymen electricians."

The Board has deemed admitted all allegations in Paragraph 5 of the specification. This paragraph, which incorporates Specification Appendices A-1 through A-10 and part of Appendix C, alleges what hours the comparator journeymen electricians worked during the backpay period.

Further, the Board has deemed admitted all allegations in Paragraph 6. This paragraph, which incorporates Appendix B and part of Appendix C, alleges the average wage rates earned by comparator journeymen electricians in each calendar quarter of the backpay period.

The Board also has deemed admitted the allegations in Paragraph 7 of the Specification, which alleges that Cox' gross backpay by calendar quarter as set forth in Appendix C.

Additionally, the Board has struck those portions of Respondent's answer which contested a general obligation to pay backpay. The Board rejected Respondent's defense that when Cox applied for work with the Respondent, he was acting as a tester. However, the Board's order did not strike Respondent's tester defense as it related to the issue of interim earnings.

In addition to the issue of Cox' interim earnings, the Board's order also left open for resolution in this hearing, the issue of when Cox' backpay period ended. When Cox applied for work at the Respondent's business on July 12, 1993, he was already working full time for the Union as an assistant business manager and organizer. He has retained that position at all material times.

Union rules prohibit members from working for a nonunionized Employer with one exception. With the Union's permission, a member or Union official may accept employment with a nonunionized contractor as part of an effort to organize the employees of that company. When the Union official or member obtains employment with the non-unionized company, with the intent to organize the employees, it is called "salting", and the official or member so employed is called a "salt".

When Cox applied for work with the Respondent, it was part of the Union's attempt to salt Respondent's work force with pro Union employees.

It is undisputed that, as an employment applicant, Cox was entitled to the protection of the National Labor Relations Act, even though he was also working full time for the Union. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1985).

In the typical compliance proceeding involving a construction industry employer, the issue litigated concerns how long a discriminatee would have worked for the employer if it had hired him, rather than unlawfully refused to hire him. Typically, a construction contractor will argue that if the discriminatee had been hired and put to work on a particular project, the discriminatee's employment would have ended when the project was completed.

In such a case, the Board places the burden on the employer to show that when the first project had been completed, the discriminatee would not have been transferred to work on another project. For example, in *Laben Electric Company*, 323 NLRB 1 (1997), the Board found that the Respondent unlawfully had laid off employees named McDermott and Chavez. The Board stated that it was, "including a conditional order of reinstatement that entitles the Respondent to avoid the reinstatement obligation and terminate the backpay obligation at the completion date of the project in question, if the Respondent shows at the compliance stage that under its established policies and practices employees hired into positions like those held by McDermott and Chavez would not have been transferred or reassigned to another job after the project at issue ended."

If a Respondent may show that its own policies would have resulted in the termination of a discriminatee's employment, it is logical that a Respondent also should be allowed to demonstrate that the employee's own interests would have led him to quit as of a particular time. In the present case, for reasons I will discuss, I conclude that if Respondent had hired Cox on July 12, 1993, Cox would have ended his employment with Respondent 5 weeks later.

In his testimony, Cox made clear that his first allegiance was to the Union he served as assistant business representative and organizer. If any conflict arose between his obligations to the Union and his efforts to seek or hold other employment, he would choose to serve the needs of the Union.

For example, Cox testified that if he were not trying to organize nonunionized companies, he would not have applied for work at such companies, but instead if he had wished to work as an electrician, Cox would have used the Union's hiring hall. Thus, Cox' allegiance to the Union objective of organizing took precedence over Cox' own preferences in looking for work.

From the testimony of both Cox and his superior in the Union, Business Manager Harry Brown, it is clear that Cox limited his search for employment to nonunionized companies, which appeared to be, in Brown's phrase, "doable". This requirement that Cox would not apply for work for a contractor unless it appeared possible for Cox to organize that company's employees, imposed significant limitations on where Cox could apply for work. It totally ruled out going through the Union's hiring hall, because companies which obtained employees from the Union's hiring hall already had a relationship with the Union.

It also ruled out applying to large non–unionized companies, if the likelihood of organizing the employees appeared small. On the other end of the scale, there were many small contractors with employee complements so small they would not be worth Cox' time as an organizer. Business Manager Brown estimated that there were about 100 such electrical contractors in the Orlando area. His testimony also suggests that Cox' job with the Union would be in jeopardy if Cox went to work at one of these small non–unionized shops.

In other words, Cox' duties as a Union organizer severely limited the number of nonunionized employers at which he could apply for work. Similarly, Cox' duties as an organizer limited the time he could spend working for any particular employer.

If Cox got a job with a particular nonunionized employer and his worked there continued to attract new members to the Union, Business Manager Brown would have no objection to Cox continuing working there. Conversely, if Cox were employed by a company, but did not make progress organizing the employees, at some point the Union would decide that Cox should not spend further time cultivating that infertile field.

On cross–examination by the General Counsel, Brown testified that he never instructed Cox not to apply for work with a particular nonunionized employer, and never told Cox to limit his

search to exclude any nonunionized employer. However, on direct examination, Brown has stated that he would probably not put up with Cox having another job, which would not further the interests of the Union. Brown also acknowledged that some Employers were too large to be a good target for organizing, and many were too small.

Both Business Manager Brown and Assistant Business Manager Cox had attended training sessions conducted by the International Union on techniques for organizing employers in the construction industry. This training contemplated that at times, it would be advantageous for salts already employed by a non–unionized Company, to leave their employment with that company.

One training manual, called "Union Organization in the Construction Industry", told Union officials how to leave when the time came. It emphasized that the organizers employed by a nonunionized Company should not, "drag up," an expression which Cox testified meant to quit or resign. Under the heading "Never Drag Up—Always Strike", the organizing manual stated in part, as follows:

Craftsmen who voluntarily drag up have no guaranteed re-employment rights. An economic strike has the legal right to be placed on a preferential hiring list upon making an unconditional offer to return to work. A ULP striker has the right to immediate reinstatement, upon making an unconditional offer to return. Therefore, the experienced construction organizer encourages his salts or other supporters, who are leaving the job or Employer anyway, to never drag up—always strike.

From this manual and the record as a whole, I conclude that the Union's organizing strategy contemplated that the Union salts would cease working for a Company when it appeared that further organizing efforts would be unfruitful, and that they would make their exit in the form of a strike.

Cox did exactly that. On April 1, 1998, the Respondent offered Cox employment, which Cox accepted. Cox could not recall his date of employment, but estimated that it was four to five weeks later. Then he left during what he described as an "unfair labor practice strike".

Local 606 did not call this strike. Rather, a local from the Tampa area called it, but the record does not reflect that the Respondent had engaged in any unfair labor practices to prompt it. According to Cox, the Tampa local had filed an unfair labor practice charge, but Cox believed later withdrew this charge.

Cox testified that he did not make an offer to return to work for the Respondent or request reinstatement. In these circumstances, and particularly considering the instruction in the Union's training manual, never drag up, always strike, I conclude that Cox, really was "dragging up", that is resigning even though he ostensibly was going on strike.

Deciding how long Cox would have worked if Respondent had hired him in July 1993, is somewhat speculative, but no more so than other aspects of the compliance proceeding. Backpay issues typically involve deciding what would have happened if unlawful discrimination had not occurred. There never can be absolute certainty in deciding what would have happened, but did not.

However, the evidence in this case is highly persuasive Cox would have spent no more time working for Respondent than necessary to organize its employees or conclude that such organizing would not be practical. In 1998, Cox decided to leave Respondent's employment after about five weeks. I find that there is no better indication of how long Cox would have continued his employment with Respondent in 1993, than how long Cox actually did continue his employment with the Respondent in 1998.

Certainly, conditions were different to some extent in 1993, than were conditions in 1998, but there is no evidence that organizing the Respondent's employees would either have been easier or more difficult in 1993 than it proved to be five years later. Indeed, at the time Respondent offered Cox employment in 1998, it had been chastened by the Board's finding that it had committed unfair labor practices, and it had waived its right to appeal that finding to the Court of Appeals. I cannot conclude that Cox would have found organizing Respondent's employees any more doable in 1993 than in 1998.

In sum, based upon Cox' actions in 1998, I conclude that he would not have worked for Respondent more than five weeks in 1993. Therefore, I find that his backpay period extends from July 12, 1993 to August 19, 1993.

In view of this conclusion, it is not necessary to discuss whether Cox made sufficient efforts to find employment and, therefore, to mitigate during the backpay period alleged in the Compliance Specification. However, I will reach this issue in case the Board disagrees with my conclusion that the backpay period ends on August 19, 1993.

Already I have discussed how Cox' duties to the Union limited the scope of his search for employment. It placed off limits all jobs with companies which got their craftsmen through the Union's hiring hall. Additionally, it excluded applying for work with non–unionized contractors at which the prospects of organizing the employees appeared small. Further, it excluded the small companies which had too few employees to be of interest to the Union.

The evidence also indicates that the role of Union organizer limited the manner in which Cox applied for work at the remaining companies. He took along at least one other person, and sometimes more, to the job interview. Cox did not do so, because having someone else along improved his chances of being hired, but did so that he would have witnesses. Such a practice would help Cox support an unfair labor practice charge, but it did not make him appear more desirable as an employee.

An official of the Florida Department of Labor, Nancy Osborne, testified as an expert witness on how job seekers can maximize their chances of being hired. She testified that as a general rule, a person applying for a job should present himself alone to show himself in the most qualified light. Bringing along someone else for moral support could suggest to the prospective employer a lack of self-reliance. Additionally, bringing along another job applicant is not wise because, in essence, the other person is competing for the same job opening.

Based upon Osborne's testimony, which I credit, I find that Cox did not go to job interviews with the primary purpose of seeking employment. Rather, Cox exalted the Union's objectives over the goal of getting a job.

In this regard it is necessary to return again to the Union's organizing manual in evidence as Respondent's Exhibit 23. This document details the Union's strategy of having its members and supporters get jobs with non–unionized companies. But it should be noted that such a goal is only part of the Union's strategy. From the manual it is clear that another part of its strategy involves mounting unfair labor practice litigation against non–unionized Employers. The Union's manual states in part, as follows:

"Generally speaking, contractors are entrepreneurial craftsmen. They are not qualified by training or experience to handle legal filings or defenses. Legal fees can become substantial financial drains within short periods of time." The last sentence, "Legal fees can become substantial financial drains within short periods of time," appears in bold faced type.

Certainly, there is nothing improper about filing an unfair labor practice charge in good faith. To the contrary, that is a statutory right.

However, the Union strategy is relevant here, because to maximize evidence gathering, the Union organizer must take along someone who can be a witness. On the other hand, applying for a job with someone else along detracts from making a favorable impression on the prospective employer. That is the case whether the second person is another Union organizer or, to cite an example used by Osborne, the job applicant's mother.

I find that Cox made minimal efforts to find other work and the efforts he did make were constrained by a different objective, which took priority over obtaining a job, the objective set forth in the Union's organizing manual. Therefore, I conclude that Cox did not satisfy his duty to mitigate in any of the quarters set forth in the Compliance Specification.

Cox was an extremely personable individual and highly qualified to perform work as a journeyman electrician, with extensive experience in the field. Although one cannot infer from a failure to find work that there was not an effort to seek employment, I believe that in this case the disparity between Cox' manifest exemplary qualifications and his inability or lack of finding other employment is consistent with the conclusion that he did not give job seeking the highest priority.

On the other hand, I do not find that Cox' salary from the Union constitutes interim earnings, which must offset back pay. In accordance with *Ferguson Electric Company*, 330 NLRB [514 (2000)], I find that this salary falls into the category of earnings from secondary employment.

With respect to the amount of backpay which Respondent must pay to Cox, I will now make a preliminary estimate, which will be checked and refined for the Certification of Bench Decision, which will issue after the transcript is received. The Board has held that the individuals listed in the appendices to the Compliance Specification are the proper comparators. I will use one of them, Harold Kincaid, for a preliminary estimate of Respondent's backpay liability.

I have found that Cox would have worked for Respondent five weeks. During a comparable five weeks of Kincaid's employment, for the pay periods for weeks ending July 22, 1993 to August 19, 1993, Kincaid earned a total of $1,975. Subject to further calculation, including averaging, I find that Respondent's backpay obligation will be discharged by paying $1,975, plus interest accrued to the date of payment, minus the tax withholding required by Federal and State law.

When the transcript of this proceeding has been transcribed and served on the parties, and upon me, I will issue a Certification of Bench Decision, which will include as an attachment, portions of the transcript which report this Bench Decision. Upon service of the Certification of Bench Decision upon the parties, the time for filing an appeal with the Board will begin to run.

I appreciate the civility and professionalism of counsel in this proceeding, and the hearing is closed.

(Whereupon, at 8:30 p.m., the hearing in the above-entitled matter was closed.)