Nos. 07-1378 & 07-1434

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FIRST TRANSIT, INC., SUCCESSOR WITH LIABILITY TO RYDER/ATE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A SUPPLEMENTAL ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1), the National Labor Relations Board ("the Board") respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters was the Charging Party.

2. First Transit, Inc., successor with liability to Ryder/ATE, Inc., was the Respondent before the Board and is the Petitioner and Cross-Respondent before this Court in Cases No. 07-1378 and 07-1434, respectively.

3. The Board is the Respondent and Cross-Petitioner before this Court in Cases No. 07-1378 and 07-1434, respectively. The Board's General Counsel was a party before the Board.

B. Rulings Under Review

The ruling under review is *First Transit, Inc. Successor with Liability to Ryder/ATE, Inc.*, 350 NLRB No. 68 (2007).

C. Related Cases

This case has not previously been before this or any other court. The Board's Order in its underlying unfair labor practice case against Ryder ATE, Inc. was previously before this Court, which enforced that Order against the Company in an unpublished decision, *First Transit, Inc. Successor with Liability to Ryder/ATE, Inc. v. NLRB*, 22 Fed. Appx. 3 (2001). The Board is unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, D.C.
this 25th day of August, 2008

GLOSSARY

1. A ..... The Joint Appendix
2. Act ..... The National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)
3. Board ..... National Labor Relations Board
4. Br. ..... The Company's Opening Brief to this Court
5. Company ..... First Transit Inc., Successor with liability to Ryder/ATE, Inc.
6. Ryder ..... Ryder/ATE, Inc.
7. SA ..... The Supplemental Appendix
8. The Union ..... Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters

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UNITED STATES COURT OF APPEALS
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FIRST TRANSIT, INC., SUCCESSOR WITH LIABILITY TO RYDER/ATE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of First Transit, Inc. ("the Company"), to review, and the cross-application of the National Labor Relations Board ("the Board"), to enforce, an Order the Board issued against the Company. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a))

("the Act"). The Board's Supplemental Decision and Order issued on August 17, 2007, and is reported at 350 NLRB No. 68 (A 89-120).[1] The Board then issued a correction to its Order. (SA 721.) The Board's Corrected Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act.

The Company filed its petition for review on September 21, 2007, and the Board filed its cross-application for enforcement on October 25, 2007. Both were timely filed because the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its remedial discretion in determining the amounts of backpay the Company owes employees as a result of their unlawful discharge by the Company's predecessor.

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[1] "A" references are to the deferred joint appendix. "SA" references are to a supplemental appendix consisting of certain materials inadvertently omitted from the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

The Board previously found that the Company's predecessor Ryder/ATE, Inc. ("Ryder") violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing a new and more onerous absenteeism policy and by then discharging certain named and other unnamed employees for having violated that policy. This Court enforced the Board's Order against the Company, which was the admitted successor to Ryder and had adopted Ryder's union contract. *First Transit, Inc. Successor with liability to Ryder/ATE, Inc. v. NLRB*, 22 Fed. Appx. 3 (D.C. Cir. 2001). (A 94-95.)

Thereafter, the Board issued a compliance specification setting forth the amount of backpay owed employees unlawfully discharged. The Company filed answers to the specification and a hearing was held before an administrative law judge. The judge issued a supplemental decision and recommended order. (A 94-120.) The Board considered the General Counsel's and the Company's exceptions to the judge's supplemental decision, overruled them in part and granted them in part, and adopted the judge's

recommended order as modified. (A 89-94.) The Board then issued a correction to its Order. This case is before the Court upon the Company's petition for review and the Board's cross-application for enforcement of the Board's Order as corrected.

STATEMENT OF FACTS

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

In late 1996, Ryder was awarded a contract to operate a portion of a bus transit system in California. It hired a majority of its predecessor's employees and voluntarily adopted its predecessor's collective-bargaining agreement with the Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters ("the Union").

In a Decision and Order issued on July 31, 2000, the Board found that Ryder violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing a new and more stringent absenteeism policy and by thereafter discharging employees pursuant to it. The Board's Order required that three named employees—Michele Woods, Edwin Lear, Maria Velasquez—and other unnamed employees who had been discharged pursuant to the new policy, be offered reinstatement and made whole for any lost earnings. 331 NLRB 889, 890-91 (2000). Thereafter, the Company's having

stipulated that it was a successor to Ryder, this Court issued a judgment enforcing in full the Board's Order against the Company. (A 94-95.)

II. THE INSTANT COMPLIANCE PROCEEDING

On May 24, 2004, following the Court's enforcement of the Board's Order, the Regional Director for Region 21 issued a compliance specification in which he identified 37 employees whom Ryder had discharged based on its unlawfully implemented absenteeism policy and detailed the amounts of backpay owed each of them. (A 95; 39-86.) The Regional Director determined gross backpay by first "determin[ing] the average number of hours each discriminatee worked per week during a representative period prior to his/her unlawful discharge and . . . multiply[ing] that figure by the hourly wage each discriminatee would have received had his/her employment continued with Ryder and [the Company]." (A 95; 40-41.) The Regional Director then determined "[t]he total gross backpay due to each discriminatee . . . by multiplying the total number of weeks in each calendar quarter (or portion thereof) during the backpay period by the average number of hours worked per week by the hourly pay rate for each discriminatee." (A 95; 40-41.)

Once gross backpay was calculated, the Regional Director proceeded to compute net backpay for each quarter by subtracting calendar quarter net interim earnings. (A 95; 42.) The compliance specification stated that backpay was

continuing to accrue for five employees because the Company had yet to offer them reinstatement. (A 95; 40, 45, 86.)

The Company admitted in its amended answer that it is appropriate for the Board to determine gross backpay by multiplying the hours that the discharged employees would have worked by the wages they would have received. (A 95; GCX 1(n).) In both its answer, and as an affirmative defense, the Company asserted that it owed no backpay to the employees because Ryder would have discharged them under the Ryder attendance policy that predated Ryder's unlawful unilateral change. The Company also asserted that some of the employees were not owed backpay because they were either probationary employees who were not governed by the "just cause" termination provision of the collective-bargaining agreement, or had resigned from Ryder. (A 95; 421-27.) The Company also asserted as an affirmative defense that the employees had failed to mitigate their damages. (A 95; 429.)

Prior to the November 2004 hearing before the administrative law judge, the General Counsel and the Company entered into a stipulation to the effect that the Company had offered reinstatement to all of the employees as of July 9, 2004. The stipulation set forth updated compliance specifications for those offered reinstatement after issuance of the May 27 compliance specification. (A 95; GCX 2, 3 and attachments.) In addition, without waiving

any of its affirmative defenses, the Company admitted to the Regional Director's calculation of gross backpay for all of the employees. (A 95; SA 724-728.)

At the hearing, the Company entered into a "Stipulation Regarding the Missing and Deceased Discriminatees" that required the Company to set aside approximately $643,000 for six employees whose net backpay entitlements—that is, the issue of offsets against the gross backpay due—the parties agreed would not be litigated during the instant compliance proceeding, but rather would be resolved afterwards, in an ensuing compliance proceeding should that prove necessary.[2] (A 95 n.3; 447-52.) The Company also identified three employees whose back pay specifications it did not dispute. (A 97, 102; 52, 58, 692.)

On July 29, 2005, the administrative law judge issued a supplemental decision and order in which, with some modifications, he found that the Regional Director had reasonably determined the amounts of net backpay—gross backpay minus interim earnings—due 28 employees. The judge ordered the Company to pay $840,347.82 in backpay plus interest, and dismissed the

[2] The parties later added another employee to the list of six whose backpay entitlements would be reserved for an ensuing proceeding. The final list included José Avalos (deceased), Denny Benavides, Shawn Howell, Ike Johnson, Marcus Nelons, Valerie Pedraza, and Tyrice Turner. (A 95 n.3.)

specification as it relates to Tom Montoya and Cindy O' Neal. (A 119-20.) The General Counsel and the Company filed exceptions to the administrative law judge's supplemental decision and order. (A 89.)

While the exceptions were pending, the Company filed a motion with the Board to accept an alleged bilateral settlement agreement which the Union refused to execute. (A 87-88; 240-54, 255-329.) As explained by the Union in its response to the Company's motion, the Union refused to execute the agreement as written because it contained a provision that was contrary to the understanding of the responsible union official, Union Business Agent Eric Tate, when he signed an agreement to agree in the form of a preliminary memorandum of understanding between the parties. (A 88; SA 722-23.)

In particular, unlike the preliminary memorandum of understanding which spoke in global terms of settling "all claims" pertinent to the titled cases for $775,000 (A 273-74), the proffered settlement agreement specified that the claims being settled included those of "any claimants who were stipulated to as 'missing and deceased claimants.'" (A 256.) The Union in its response asserted that when Tate signed the agreement to agree he understood "that the missing and deceased claimants had been removed from the case pursuant to the ALJ's ruling . . . and the 'Stipulation Regarding the Missing and Deceased Discriminatees'" and made plain its unwillingness to accept any settlement that "required the Union to allocate

payment (even the amount of zero) to the missing and deceased claimants." (A 87-88; SA 723.) The General Counsel filed an opposition to the Company's motion in which, in addition to contesting a number of factual assertions made in the motion, he opposed the proposed settlement as being inadequate in amount and improperly delegating to the Union the unfettered discretion to allot portions of the payout among the claimants as it saw fit. (A 87; 354-67.)

By order dated December 12, 2006, the Board rejected the Company's motion. The Board noted that the Company had argued "that the terms of the draft settlement are consistent with the language of the memorandum of understanding, but it [did] not dispute that the Union disagreed with that position and refused to execute a copy of the proffered settlement agreement" and, in that context, denied the motion as failing to present a proven agreement for the Board to consider. (A 88.)

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

After considering the General Counsel's and the Company's exceptions to the administrative law judge's supplemental decision and order, the Board (Chairman Battista and Members Liebman and Kirsanow) issued its Supplemental Decision and Order on August 17, 2007. (A 89.) The Board affirmed the judge's recommended order as modified. (A 89.) The Board modified the judge's backpay award in several respects that benefited the

Company (A 2 & n.12, A 3-4 & n.16), and in several respects that benefited the General Counsel. (A 92 & n.19, 93-94 & n.25). On August 17, the Board issued a correction to the amount of backpay owed to Cindy O'Neal and to the total net backpay. In all, the Board issued backpay to a total of 30 claimants in an aggregate amount of $929, 860.61, excluding interest. (A 94, SA 721.)[3]

SUMMARY OF ARGUMENT

The Board's findings with respect to remedial matters, here, whether reasonable efforts were made at securing and retaining employment, partake of nuanced decision-making that depends on the Board's special expertise, and are entitled to great weight. The Company bore the burden of proving willful losses of earnings when the backpay case was before the Board, and bears the burden before this Court of demonstrating in each instance of challenge that there are grounds for second-guessing the Board's expert judgment. The Company's brief is inadequate

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[3] The Company failed to except to the backpay awarded to 10 of the claimants—Raymond Coletti, Jana Farage, Cheryl Harris, Mary Hyemingway, Natasha McQueen, Leo Mitchell, Cheryl Ramirez, James P. Thorton, Brent Turner, and Michelle Woods—and makes no argument as to them in its brief to this Court. Accordingly, the Board's Order as to them is entitled to summary affirmance. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (court lacks jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e), to consider any argument not urged before the Board); *New York Rehabilitation Care Management v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (failure to take issue with findings in an opening brief constitutes a waiver).

to that task. It consists, in the main, of quibbling about details in witness testimony, which the Board declined to discredit, and stark assertions that employment decisions made during the course of what the Board found were reasonable efforts to find and maintain employment were not what the Board judged them to be. Those assertions do violence to the Board's fully supported findings of fact and ignore applicable precedent.

The remainder of the Company's brief is devoted to a series of legal arguments that are untenable. The Company's contention that probationary employees who were discharged pursuant to the Company's unlawful attendance policy had no right to backpay because they had no contractually enforceable rights is a nonsequitor. The rights in question here are those the Act confers on all employees, and the entitlement to backpay, as a remedy for an unlawful discharge, is beyond question. The Company's further contention that the Board erred in denying the Company's motion to reopen the record is belied by the Board's finding that the Company had made no attempt during the hearing to adduce evidence on the point in contention, or even to make an evidentiary proffer on the record that the judge could accept or reject. The Company's final contention that the Board erred in rejecting its motion to accept an alleged bilateral settlement presupposes incorrectly that the Board was somehow obligated to assume the role of an Article III Court. However, the Board acted well within its express statutory

authority in declining to even consider whether to terminate its backpay proceeding under the terms of a written settlement agreement that the Union refused to sign because they differed in material respect from what the Union avowedly understood it had agreed to agree to in the first instance.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNTS OF BACKPAY THE COMPANY OWES EMPLOYEES FOR THE LOSS OF EARNINGS THEY SUFFERED AS A RESULT OF THEIR UNLAWFUL DISCHARGE BY THE COMPANY'S PREDECESSOR

A. General Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to alleviate the effects of unfair labor practices by "order[ing] the violator 'to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act . . . .'" *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969). The object of a Board remedy is twofold. First, it is a make-whole remedy designed to restore "'the economic status quo that [the employee] would have obtained but for the [employer's] wrongful [act].'" *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Second, a backpay award serves to deter the commission of future unfair labor practices by

preventing wrongdoers from gaining advantage from their unlawful conduct. *See J.H. Rutter-Rex*, 396 U.S. at 265. "'The finding of an unfair labor practice is presumptive proof that some backpay is owed.'" *NLRB v. Madison Courier, Inc*., 472 F.2d 1307, 1318 (D.C. Cir. 1972) (quoting *NLRB v. Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968)).

The power to devise remedies "is a broad discretionary one . . . for the Board to wield, not for the courts . . . . When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the polices of the Act.'" *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346-47 (1953) (quoting *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 540 (1940)). *See also St. Francis Fed. Of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 849 (D.C. Cir. 1984)), and cases cited.

In a backpay proceeding, the burden on the General Counsel is limited to proving the gross amount of backpay due each claimant. "When that has been done, . . . the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963) (quoted in *Madison Courier*, 472 F.2d at 1318). *Accord NLRB v. P*I*E**

Nationwide, Inc., 923 F.2d 506, 513 (7th Cir. 1991). Any doubts arising about alleged affirmative defenses are to be resolved against the party who committed the unfair labor practices. *See Madison Courier,* 472 F.2d at 1318.

Notwithstanding the General Counsel's limited burden, the General Counsel often includes in his initiating document, that is, in his backpay specification, deductions for the amounts he has learned employees have earned in interim employment and makes no assessment for periods in which he has learned employees had removed themselves from the workforce and were not actively seeking employment. In so doing, however, the General Counsel does not assume "the burden of establishing the truth of all of the information supplied or of negativing matters of defense or mitigation." *NLRB v. Brown & Root, Inc.*, 311 F.2d at 454. *Accord Madison Courier*, 472 F.2d at 1318.[4]

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[4] In a decision postdating its supplemental decision in the instant case, the Board modified its approach with respect to the litigation of mitigation issues in cases where, unlike here, an employer produces competent proof to the effect that employee-claimants would have found jobs had an adequate search been made and then rests without presenting any further proof with respect to mitigation from the employee-claimants themselves. In such cases, the Board held that the burden of production, not of persuasion, shifts to the General Counsel to present competent evidence about each claimant's job search. *See St. George Warehouse and Merchandise Drivers Local No. 647, Teamsters*, 351 NLRB No. 42, 2007 WL 2963255 pp. 1, 3-4, 7 (2007). As we discuss later, n. 7, the Board's decision in *St. George* has no bearing on a proper disposition of the instant case, assuming that decision would otherwise be appropriate for retroactive application.

"The Board's conclusions as to whether an employer's asserted defenses against liability have been successfully established will be overturned on appeal only if the record, considered in its entirely, does not disclose substantial evidence to support the Board's findings." *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985). Substantial evidence, as the Supreme Court recently reiterated, exists when "a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Board's findings are therefore entitled to affirmance if they are reasonable, and a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court might have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Company does not contest the formula used in the compliance specification for calculating gross backpay or those calculations. Instead, the Company challenges some of the Board's determinations with regard to what the Company alleges were acts that should have been deemed willful loss of earnings on various claimants' parts. In addition, the Company argues that some employees are ineligible for backpay because they were probationary

employees or, if permitted, it could have established that they would have been discharged under the more forgiving attendance policy Ryder maintained before its unlawful unilateral change. We show below that the Company's arguments lack merit and do not supply a basis for reducing the Board's backpay award.

B. The Board Reasonably Rejected the Company's Claims that Claimants Incurred Willful Losses of Earnings

1. The standard for determining whether there has been a willful loss of earnings

In making an employee whole for loss of pay suffered as a result of the employer's unfair labor practices, deductions are made from gross backpay "for actual [interim] earnings of the worker, [and] also for losses which he willfully incurred." *Phelps Dodge Corp. v. NLRB*, 3l3 U.S. 177, 198, 199-200 (194l). *Accord Oil, Chemical & Atomic Wkrs. Int'l v. NLRB*, 547 F.2d 598, 602 (D.C. Cir. 1976). A willful loss occurs when the employee "'fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.'" *Oil, Chemical & Atomic Wkrs.*, 547 F.2d 602-03 (quoting *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 (2d Cir. 1965)).

However, it is important to note that the duty of employees to avoid such willful losses flows not so much from any duty to mitigate (though that term is often used), but rather from what the Supreme Court termed the "healthy policy of promoting production and employment." *Phelps Dodge Corp. v. NLRB*, 3l3 U.S. at 200. Indeed, while backpay awards "somewhat resemble compensation for private injury. . . [they are] designed to vindicate public, not private rights" and it therefore is "wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order." *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 543-44 (1940). *Accord NLRB v. Velocity Exp., Inc.*, 434 F.3d 1198, 1202-04 (D.C. Cir. 2006) (upholding the Board's refusal to deduct projected expenses drivers would have incurred operating their own trucks had they worked in computing gross backpay).

Thus, with uniform court approval, the Board has long held that a wrongfully discharged employee need only make "reasonable exertions in . . . regard [to mitigating damages], not the highest standard of diligence.'" *Madison Courier*, 472 F.2d at 1318 (quoting *NLRB v. Arduni Mfg. Co*., 394 F.2d 420, 422-23 (1st Cir. 1968)). *Accord Oil, Chemical & Atomic Wkrs.*, 547 F.2d at 603. "[A]ll that is required is an 'honest good effort'" (*Oil, Chemical & Atomic Wkrs.*, 547 F.2d at 603), and, in evaluating whether such an effort

has been made or not, the Board does not undertake a "mechanical examination of the number or kind of applications" but rather examines "the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment." *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), *enforced*, 354 F.2d 170 (2d Cir. 1965). *Accord Madison Courier*, 472 F.2d at 1318. Each individual employment decision a claimant has made is not evaluated in isolation, but rather is assessed in the context of the extent to which he or she has exhibited a general "'inclination to work and to be self-supporting.'" *Kawasaki Motors Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988) (*quoting Mastro Plastics Corp.*, 136 NLRB at 1359). *Accord NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 311 (4th Cir. 2001) (continuing efforts to secure other employment and improve earnings can make what might otherwise arguably be considered a questionable employment decision perfectly reasonable).

Consistent with these principles, while an employee will be deemed to have incurred a willful loss of earnings for refusing or quitting an interim job voluntarily without good justification, the Board will not lightly second-guess an employee's judgment that circumstances were such that a decision to refuse or quit a job was reasonable. *Firestone Synthetic Fibers*, 207 NLRB 810, 815 (1973) (employee's employment decision "should not lightly be treated as a

willful loss of earnings . . . even if he exercises what to the comfortably employed or affluent may seem a bad and hasty judgment"). For example, the Board has long held that an employee need not "seek or retain a job more onerous than the job from which he or she was discharged" (*Kawasaki Motors Corp. v. NLRB*, 850 F.2d at 527), or "which is not consonant with his particular skills, background, and experience" (*Oil, Chemical & Atomic Wkrs.*, 547 F.2d at 603), or "which is located an unreasonable distance from his home" (*Id*.), or which poses an "unacceptable disruption to [the employee's] private life" (*Shell Oil Co.*, 218 NLRB 87, 89 (1975)).[5]

In a similar vein, an employee who is discharged from an interim job, even if for cause, will be charged with a willful loss of earnings only in the rare circumstance that the discharged employee engaged in deliberate or gross misconduct. *See P*I*E Nationwide*, 297 NLRB 454 (1989), *enforced in pertinent part*, 923 F.2d 506 (7th Cir. 1991); *Ryder Systems*, 302 NLRB 608, 610 (1991). Thus, being discharged for substandard performance or production, violating company rules, or the usual type acts of misconduct that

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[5] If such a decision is deemed unreasonable, the consequence is potentially severe: backpay will be computed based upon the presumption that the employee would have continued to be employed at the job he refused or quit throughout the backpay period, and therefore the claimant's backpay entitlements are offset by projecting his earnings at that employer throughout the backpay period. *See, for example, Knickerbocker Plastic Co*., 132 NLRB 1209, 1215 (1953)

occur routinely at workplaces are to be expected and have no impact whatever on a claimant's backpay entitlements. *See cases cited above.*

2. The Company's claims are baseless

As an initial matter, the Company proffers (Br 22; A 459-60) the testimony of its former general manager to the effect that there were approximately 40 to 60 bus-driving jobs available in Southern California at any given time, and seems to suggest that any employee who did not immediately secure one was really not looking and that a search of the entire Southern California area was somehow required to make an adequate job search. Both these premises are incorrect. Employees had no obligation to search for jobs outside an appropriate commute from where they lived,[6] and the general manager offered no testimony to support the Company's premise that if employees failed to secure employment with a transit company, it was because they failed to seek it.

Indeed, any such testimony would have been pointless, since, by General Manager Eric Fritz's own testimony, the Company had the same on-going need for appropriately licensed drivers as other transit companies yet had decided nevertheless to discharge the claimants because of their

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[6] *See, for example, NLRB v. Madison Courier*, 472 F.2d 1307, 1314 (D.C. Cir. 1971) (employees not required to take jobs 50 miles from home).

absenteeism problems. Nor could Fritz have tenably claimed that he was certain other transit companies would have hired any or all the claimants given the discharge blemish Ryder unlawfully had placed on his or her employment record, and the Company's other witness on this point, Martin Gombert, a transportation consultant, virtually conceded that those discharges might well have posed an impediment to future industry employment, except if employees lied and got away with it. (A 496-97.).

The Board in these circumstances cannot be faulted for attaching no weight to the Company's "expert" testimony about the availability of transit jobs in Southern California. *See United States Can Co.*, 328 NLRB 334, 343 (1999) (rejecting as inconsequential expert testimony about job market conditions in the face of credited testimony of the employees themselves), *enforced in rel. part*, 254 F.3d 626 (7th Cir. 2001). Indeed, any probative value that the general speculations of those witnesses might have had completed evaporated when measured against the testimony discussed below that the Company elicited from virtually every backpay claimant, who to a person credibly testified that his or her job search included numerous contacts with other area transit companies that often as not were unsuccessful.[7]

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[7] In this context, it is readily apparent that the Board's new burden-of-production paradigm articulated in *St. George Warehouse and Merchandise Drivers Local No.*

Much of what remains of the Company's attacks on the Board's findings depends on errant views of the applicable law, stark assertions devoid of argument or citation of authority, and a flat disregard of the Board's findings, most particularly the Board's reasonable refusal to discredit employee witnesses for faulty memories about names and dates associated with their job searches and/or a failure to keep records. Credibility determinations are not for this Court, absent extraordinary circumstances not present here. Indeed, all the Company can point to here are faulty memories about the details of job searches years in the past and halting and sometimes confused testimony by claimants in the main who were unaided by any contemporaneous records of what their job searches entail, all of which the Board time and again has held constitute an inadequate basis for challenging the testimony of backpay claimants. *See Ernst & Young*, 304 NLRB

647, Teamsters, 351 NLRB No. 42, 2007 WL 2963255 (2007) has no bearing here. There the Board found that the General Counsel, who only introduced the compliance specification into evidence, bore the burden of producing the employee claimants to testify once the employer had presented unequivocal testimony through its expert that the two employees in question would have been hired during the periods they were unemployed had they been reasonable in their efforts to secure work. *Id*. at p. 2. Here, by contrast, the Company had no competent and unequivocal expert evidence comparable to the evidence presented in *St. George* and the Company itself called and elicited pertinent evidence from the claimants themselves. Therefore, no question of whether the burden shifted to the General Counsel to produce the claimants to testify under *St. George* is presented here, even assuming that decision's retroactive application.

178, 179 (1991) (collecting cases).[8] Indeed, such attacks on credibility have an especially hollow ring with respect to all but three of the claimants, since they did not learn that they were due backpay under the Board's initial order until well after the Board's initial decision was issued and enforced and compliance proceedings were initiated. With these thoughts in mind, we now address the specifics of the Company's arguments.

a. Clide Aaron

The Company contends (Br 26) that Aaron removed herself from the job market for various periods of time and otherwise made an inadequate search for work. However, the Board specifically noted that the General Counsel's backpay specification for Aaron awarded her no backpay for those periods when she admittedly did not seek work, and found that her efforts to secure employment, which were far more extensive than the Company indicates, during the periods which remained were more than adequate to constitute a reasonable search. In point of fact, during that abbreviated 16-month period for which the Board deemed her eligible for backpay, Aaron testified that she persistently sought work. She was able to recall by name 11 different

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[8] For other cases on this point, *see Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996) (same), *enforced sub nom., Package Service Co., Inc. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *Rainbow Coaches*, 280 NLRB 166, 179 (1986), *enforced*

employers with whom she had applied, most of them bus companies, and testified that her job search was augmented by support from state agencies that administered two unemployment programs in which she had enrolled. (A 96; 47, 590-601, 606-12, SA 714.) Since the Company's claim that Aaron made an inadequate search makes no attempt to come to terms with the true facts regarding it, that claim must fail.

Equally baseless is the Company's contention (Br 26) that Aaron somehow forfeited her right to any backpay once she reconsidered and decided to reject an offer to drive for Swift Transportation, after she initially decided to accept it. Contrary to the Company, it is now well settled that an employee does not incur a willful loss of earnings by refusing to take or later quitting a job that is not substantially equivalent to the job from which she was fired, which the Board reasonably concluded was certainly the case here. *See Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988). Aaron's testimony revealed that, while she possessed the necessary license, she never operated the large tractor-trailer rigs that driving for Swift would have

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mem., 835 F.2d 1436 (9th Cir. 1987); *Arduini Mfg. Corp.*, 162 NLRB 972, 975 (1967) (same), *enforced in relevant part*, 394 F.2d 420, 422 (1st Cir. 1968).

entailed, which required a much more demanding and complicated skill set than driving an automatic-transmission transit bus for the Company. (A 602-03.)

More importantly, Aaron testified that the job with Swift would have required her to operate in an over-the-road capacity for between "6 months and 3 years" before she would even be considered for local driving, and that her pay at Swift would have been at a per-mile rate, which would have provided her with a far more uncertain income than her hourly paid job with Ryder. (A 596-99.) Thus, while Aaron ultimately decided against taking the Swift job because her daughter was in a serious car accident and she, Aaron, could not afford to be away from home for 6 straight weeks, as her training period would have required, that fact served only to underscore the reasonableness of her refusal to start a job that she had no duty to accept in the first instance. (A 592, 596, 600.) *Compare Woodline Motor Freight, Inc. v. NLRB*, 972 F.2d 222, 237 (8th Cir. 1992) (interim job requiring "overnight layovers" not substantially equivalent); *Trading Corp*, 351 NLRB No. 33, 2007 WL 2948432 (2007) (piece-rate job not substantially equivalent to hourly-wage because income less predictable).

b. Patrice Benemie

The Board reasonably concluded (A 96) that the Company failed to establish that Benemie made an inadequate search for work simply because her recollection about the details of her job search was sketchy and confused with regard to details. Like many of the claimants, Benemie was unaware during most all the backpay period that she was a potential backpay claimant and had no reason to understand that there was any need to keep records. Nevertheless, she remembered contacting a number of employers but was unsure of dates, and in most instances could not recall names. Benemie testified that she was constantly "putting in applications" and even traveled to other cities in search of work. (A 693-98.)

While the Company insists (Br 29) that there are inconsistencies in Benemie's testimony that require that she be disbelieved, questions of credibility are not for this Court, and the Board declined to discredit her. The Board emphasized (A 89 n.8) that Benemie's work history showed earnings throughout the backpay period, and that her employment history showed a willingness to lower her sights when circumstances warranted it. During the months immediately following her discharge, Benemie contacted four bus companies for employment and was entitled to wait for a reasonable period before broadening her search for other jobs, which apparently is what she did,

taking two much lower paying jobs when nothing else proved available. *See NLRB v. Madison Courier, Inc.*, 505 F.2d 391, 402 (D.C. Cir. 1974) (employees entitled to wait on work in their chosen fields for a reasonable period of time).

Indeed, the Company's attempt to nitpick Benemie's testimony has an especially hollow ring in light of her willingness to work for much less and her ensuing persistence in securing employment driving a bus for an employer servicing a school district by first volunteering to perform other work for the school district to prove herself to them. (A 96; 693-98.)

c. Frances Carmona (Lemos)

The Company contends (Br 29) that Carmona's backpay should be reduced because she was fired from her job with Laidlaw and then quit an ensuing job with Budget Rent A Car. These claims are baseless. The record shows that, while working at Laidlaw, Carmona's child became ill, requiring emergency care. Carmona informed her supervisor about the emergency and said that she would be back in a few days. Two days later, Carmona informed Laidlaw that she was ready to return to work, but was informed that she had been terminated for job abandonment—for not having called in before the second day. (A506-13, 517-18, 521-23.) As the Board found (A 97), there is in none of this the slightest suggestion that Carmona had engaged in anything

approaching the type of gross misconduct that could possibly qualify as a willful loss of earnings.

The Company's further claim (Br 29)—that the Board failed to properly account for Carmona's decision to quit a job with another interim employer following her demotion to a lower paying job—is simply incorrect. The Board, in fact, agreed with the Company that Carmona's decision to quit was unreasonable, and modified the backpay award made to Carmona by deducting the amount attributable to her unemployment while she was between jobs after that quit. (A 90.)

Finally, the Company notes (Br 30) that Carmona's license was suspended in 2000 for failing to take care of a fix-it ticket on her personal vehicle, and suggests, but does not argue, that that suspension and her receipt of four ensuing driving-while-suspended tickets should somehow impact on her entitlement to backpay. However, the Board expressly found (A 90) that the Company had waived any such argument by failing to make an issue of the suspension when the case was before the administrative law judge. *See Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 117 (D.C. Cir. 2000) ("the employers waived this argument by failing to raise it in a timely fashion before the ALJ"). The Company's failure to address the Board's waiver finding, and its failure to offer anything in the way of argument beyond its

stark assertion of fact, require no further comment. *See New York Rehabilitation Care Management v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("'it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work'") (attribution omitted).

d. Robin Corral (Delgado)

The Company contends (Br 30) that Corral incurred a willful loss of earnings when she was fired from a job with San Gabriel Valley Tribune, but the record will not support its claim. Corral's uncontroverted testimony establishes that Corral's discharge involved no deliberate flaunting of an established employment policy and no threatening conduct of any sort. Indeed, she simply argued back when the person in charge chastised her for having brought her child to work, as Corral had seen others do on numerous occasions, on a Saturday after she had been called in on an emergency basis. (A 532-33.) The Board appropriately concluded (A 91) that Corral had engaged in no misconduct that could qualify this event as a willful loss of earnings.

Equally fatuous is the Company's claim (Br 30) that Corral incurred a willful loss of earnings by quitting a receptionist job with Lawrence Equipment that the Board reasonably concluded was not the substantial equivalent of her job with Ryder, and that Corral decided to leave for sound

and valid reasons. Lawrence was a family owned business and Corral's job as a receptionist, while it paid well, offered no opportunity for advancement or overtime and was outside her former field of work. Her return to employment as a bus driver provided both, albeit she had to start at a lower hourly rate, and therefore constituted an employment move that the Board reasonably concluded Corral was entitled to make. (A 98; 533-38.)

Finally, while the Company notes (Br 31) that Corral was fired from another job during the backpay period for having missed work due to a broken nose she incurred in an off-work incident, the Board was at a loss to see in this incident anything but evidence that that employer seemed "unsympathetic" to the plight of a relatively new employee, "despite a doctor's note" verifying her difficulties. (A 98; 538, 540-41.)

e. Donald Duplessis

The Company contends (Br 31-34) that Duplessis failed to make an adequate job search during the entire backpay period and therefore was entitled to no backpay. However, while the Company would ignore it, the Board expressly found that the Company's position before the administrative law judge was "that Duplessis's first 3 years of searching are not really challengeable," and that the Company only "asks that backpay cease beginning with the third quarter of 2001, thereby excluding the last 2 years from the calculus." The Board appropriately

treated the award of backpay for the first 3 years made in the backpay specification as unchallenged. *See Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 117 (D.C. Cir. 2000). The Company's failure to address the Board's waiver finding is itself a waiver before this Court of any challenge to the Board's computation of Duplessis's backpay entitlements for the first 3 years following his discharge. *See New York Rehabilitation Care Management v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (argument not made in opening brief waived).

On the merits, the arguments that the Company advances (Br 31-34) amount to nothing more than a contention that the Board should have discredited Duplessis based upon what the Board appropriately regarded as nothing more than the faulty memory of an individual who was being asked to testify about a job search conducted years earlier, at a time Duplessis had no reason to understand he would ever have to account for. This, the Board was unwilling to do. (A 99.) Duplessis testified that he constantly looked for work and was willing to accept it throughout the backpay period while going to school to improve his skill set, in particular, his computer and basic communication skills, to make himself more employable. He took numerous tests for a variety of state and city jobs, applied for jobs with various bus companies, with the Pomona Unified School district on two separate occasions, with several hospitals and a rehabilitation center, in addition to working

through a state unemployment office to secure work. (A 99; 614-24, 627-28, 634-44, 646.)

The Company contends (Br 31-33) that Duplessis should have applied for a job with Laidlaw, whom the Company notes had hired some of his coworkers, but Duplessis testified that he had heard that Laidlaw treated its employees poorly from any number of drivers who had worked for Laidlaw, many of whom had been fired, and chose not to apply for a job with Laidlaw for that reason. (A 628-630.) The Board has made clear that it will not micromanage an employee's job search, or second-guess the choices made. Here, the Board found that Duplessis made reasonable efforts to secure employment that included seeking work from various other bus companies and a wide variety of other employers, and that his not seeking employment with a single employer about whom he had heard bad things was not inconsistent with the good faith effort that the law required of him. *See Tilden Arms Mgmt.Co.*, 307 NLRB 13, 15 (1992) ("a discriminatee is not required to apply to each and every possible job that might have existed in the industry"); *NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 311 (4th Cir. 2001) (continuing efforts to secure other employment and improve earnings can make what might otherwise arguably be considered a questionable employment decision perfectly reasonable).

f. Pamela English

The Company contends (Br 31-34) that English's actions in applying with two bus companies 2 weeks before her discharge indicates that she "planned on voluntarily terminating her employment with Ryder" and that she made an inadequate job search during her initial 2 ½ months following her discharge by waiting to hear from those bus companies before expanding her search. However, English testified that she began applying for jobs with other bus companies after Ryder implemented its new absenteeism policy because she feared she would be discharged and that she fully expected she would be hired by one of the two when a position became available. English further testified that that confidence was dashed when approximately 2 months after her discharge she was informed by one of the companies that her application had been rejected because she had been fired by Ryder, at which point she expanded her search and sought and accepted several lower paying jobs. (A 674-75, 678-80.)

On these facts, the Board reasonably concluded that English's efforts to secure employment during the brief period immediately preceding and the two months immediately following her discharge were in all respects reasonable. *See NLRB v. Madison Courier, Inc.*, 505 F.2d 391, 402 (D.C. Cir. 1974) (printers entitled to wait a reasonable time, in that case more than a year, for printing jobs to open up before seeking other employment).

The Company notes (Br 35) that English testified that she removed herself from the job market during several unspecified periods after her discharge and implies that she received backpay for those periods. However, as the Board pointed out, the Board's backpay specification for English covered a period of 16 quarters, but only awarded her backpay during 7 of them. (A 99.) Suffice it to say, the Company adduced no testimony from English to suggest that she received backpay during the periods she testified that she failed to seek work. In a similar vein, while, as the Company notes (Br 35), English let her Class B license lapse during the backpay period, the Company introduced no evidence to show that her lapsed license interfered with English's job search in any manner. To the contrary, it was a simple matter for English to get her license reinstated by passing a test requiring no preparation when the need arose, belying any relevance to the fact that she let it lapse in the first instance. (A 686.)

Finally, while the Company insists (Br 35) that English should have applied for nursing positions to offset backpay because she possessed a nursing license, the record shows that she in fact did but received no consideration from the one place she applied because she had not practiced in the field for a number of years. (A 685.) Furthermore, having decided years earlier to abandon the nursing profession because of the stress associated with the work, particularly with being responsible for the work being performed by others for

which she was responsible as a professional, the Company cannot seriously be heard to argue that working as a nurse was a substantially equivalent choice that English was required to pursue.

g. Robert Giles

The Company contends (Br 35-36) that the Board should have tolled backpay when Ryder's then general manager allegedly made what the Company claims was a valid offer of reinstatement to Giles in March 1998, which Giles failed to accept. However, the Board found that the testimony on this point was hopelessly conflicted and manifestly inadequate to support the conclusion that a "'specific, unequivocal, and unconditional offer'"—that is, an offer that met the requirements necessary to toll backpay—had been extended at that time. (A 14), quoting *Cassis Management Corp.*, 336 NLRB 961, 969 (2001)).

Both Giles and then Company General Manager Fritz agreed that Giles often stopped by to chat on his way to work for Laidlaw in that time frame and expressed an interest to returning to Ryder, where the pay was higher. (A 482-83.) However, Giles' testimony was disjointed and conflicted about whether and what type of offer of reinstatement was made when the two spoke—his testimony ranged from a recollection that Fritz said that Giles might be able to return after the Board proceeding, to Fritz's having made an offer for Giles to return

"immediately," that very morning, to Fritz's having made an undefined statement about the Company's being willing to take him back. (A 501-504, SA 729-37.) Fritz, by contrast, was reasonably certain that, while a reinstatement offer was made to Giles it was made in writing, not orally, and that, when Giles had asked earlier about getting his old job back, he, Fritz, replied, "I didn't think so." (A 101; 467-69, 474-76,, 481-83.)

The Board found Fritz's claim that a written reinstatement offer had been made to Giles just 4 months after his discharge, to be completely untenable—not only was Fritz constrained to concede that he had rated Giles as not eligible for rehire in firing him just a few months earlier for excessive absenteeism (A 478-80), but also, as the Board emphasized (A 102), the Company never produced a copy of the letter that allegedly had been sent to Giles and four other employees at that time. In the end, the Board found it unnecessary to resolve the confused and conflicted testimony offered on this point, but instead reasonably concluded (A 102) that, "whatever Fritz said to Giles that day . . . it did not qualify as an offer of reinstatement" in terms sufficient to operate as a bar to further backpay.

The Company also contends (Br 36) that Giles incurred a willful loss of earnings when he quit his job with Laidlaw in October 2000, but the Board found that decision to have been "reasonable" in the circumstances presented. At the time, Giles was about to reach the limit under Laidlaw's absenteeism

policy and decided to avoid the possibility of being fired, which, as the Board found (A 102), would not in any event have caused a forfeiture of backpay. Therefore, as the Board emphasized, it was impossible to understand how the Company could complain about an employment decision that Giles had made when that decision served the Company's pecuniary interests, not just Giles' own.

Furthermore, Giles immediately sought and secured employment elsewhere and then moved to other employment that paid more before, after having exhausted other possibilities for improvement, he applied for and was accepted for rehire by Laidlaw, albeit at a lower rate of pay than when he left. (A 492-99.) The Board in these circumstances reasonably concluded that Giles' decision to quit Laidlaw because of a substantial risk that he would soon be fired was a reasonable employment choice and not a willful loss of earnings. *Compare NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 311 (4th Cir. 2001) (acceptance of lower paying job not unreasonable in all the circumstances including ensuing efforts to secure higher paying employment).

h. Danielle Hasberry

As the Company notes (Br 37), Hasberry became exhausted with the lengthy commute that her job with Laidlaw required and decided to quit to care for her son

who had longstanding medical issues. While the Company argues (Br 36-38) that Hasberry's decision to quit constituted a willful loss of earnings, the Board disagreed, finding instead that that decision was reasonable in all the circumstances. As the Board emphasized (A 103), Hasberry's decision that she needed to take a break and devote time caring for her son was precipitated by the extended commute that her need to relocate her residence foisted upon her. She explained that she found herself falling asleep on the extended drive home from work (48 miles of creeping traffic, nearly twice as far as her commute to Ryder), and decided that the new commute was too much to handle. (A 652-59.)

In the Board's judgment, Hasberry was entitled to attempt to retain her job despite the extended commute that her new place of residence required without incurring a willful loss of earnings when she changed her mind shortly thereafter because the new commute proved too much for her. *See NLRB v. Madison Courier*, 472 F.2d 1307, 1314 (D.C. Cir. 1971) (employees not required to take jobs 50 miles from home); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 179 (2d Cir. 1965) (quit justified because commute to interim job proved "excessive"); *Jackson Hospital Corp.*, 352 NLRB No. 33, 2008 WL593776 p. 14 (2008) (quit justified where transfer would have required 70-mile commute).

Here, moreover, the Board's determination that Hasberry was entitled to change her mind was all the more reasonable in light of her concern for her

chronically ill son, whom she determined she needed to spend time with "because of emergency situations of needing to get him to the hospital or what-have-you" and accordingly took 2 months off to get things under control. (A 658.) While Hasberry testified (A 663) that she would have quit any job to care for her son at that point in time, that testimony cannot be divorced from the strain that her lengthy commute had put on her ability to care for her son. Indeed, Hasberry's need to take time off to make sure that her son's health needs were being attended to was itself a reasonable justification for her decision to quit, especially since, as the Board emphasized (A 103), had Hasberry still been employed by Ryder, she would have qualified for unpaid leave under the Federal Family and Medical Leave Act. *Compare Tualatin Electric*, 331 NLRB 36, 40 (2000) (job not substantially equivalent and quit justified where it required an additional 40-mile commute and provided no overtime opportunities available at job from which the claimant had been fired).

The Company's remaining attacks on Hasberry's backpay entitlements are passing frivolous. While the Company asserts otherwise (Br 36), that Hasberry acted reasonably in quitting an interim job when her monthly salary was cut from $1650 to $200 is self-evident, as the Board found (A 103; 661). The Company's stark assertion (Br 36) that Hasberry would perforce have been fired under its old policy when, with prior company approval, she took a week off to attend her

niece's funeral, is devoid of analysis or argument and therefore requires no response.

i. Lola Joyner

Ryder contends (Br 39) that Joyner incurred a willful loss of earnings during the first 3 months following her discharge by failing to seek work while pursuing a grievance regarding her discharge. However, Joyner's grievance was far from frivolous—she had double pneumonia and was entitled to unpaid leave under the Family and Medical Leave Act, and had an arguable claim to an excused absence under Ryder's former absenteeism policy (A 107; 441-42). In that context, the Board reasonably concluded (A 107) that Joyner's pursuit of that grievance constituted a reasonable effort to secure employment, and that she had no duty to seek other options until she gave the grievance process a reasonable opportunity to produce a favorable result. *Compare NLRB v. Madison Courier, Inc.*, 505 F.2d 391, 402 (D.C. Cir. 1974) (printers entitled to wait a reasonable time, in that case more than a year, for printing jobs to open up before seeking other employment).

Furthermore, while the Company insists (Br 39) that Joyner was unavailable for employment during that 3-month period due to her pneumonia, Joyner testified, and the Board believed her, that her doctor released her after 30 days had elapsed, after which she was fully capable of returning to work (the work schedule at the Company was not particularly arduous as it allowed a substantial break in the

middle of two 4-hour shifts). On that basis, the Board reasonably concluded that Joyner was ineligible for backpay only for the 30 days preceding her release to returnto work. (A 108; 362-66, 569-75.)

The Company also contends (Br 39-40) that Joyner had a duty to seek work in the nursing profession, but fails to point to evidence that she had a current license, that she was still sufficiently skilled to pursue such work, or when, prior to having gone to work for Ryder and its predecessor 7 years earlier, she had last worked as a nurse. In fact, the extent of the record upon which the Company's contention rests is a passing comment by Joyner—to the effect that she "didn't want to go back into the nursing field"—which standing alone is probative as to exactly nothing. (A 568.)

j. Elbert Kellem

The Company contends that Kellem, a Gulf War Veteran, who had begun taking classes and performing volunteer work to prepare himself to be a drug and alcohol abuse counselor while employed by Ryder, pursued that path on a full-time basis after his discharge, and therefore removed himself from the work force. However, Kellem testified, credibly in the Board's view, that he made a persistent effort to secure gainful employment throughout this period, having applied for a variety of positions, including jobs as a bus driver, but was unsuccessful in his

search over a 21-month period, and was willing at all times to take a job if one had been offered. (A 108-09; 549-60.)

The Company would dispute this by claiming (Br 40) that Kellem refused an offer of reinstatement that belies his willingness to accept available work. However, the Company made no such argument when the case was before the administrative law judge and therefore no issue pertaining to the import of an alleged offer is properly before the Court. *See Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 117 (D.C. Cir. 2000) ("the employers waived this argument by failing to raise it in a timely fashion before the ALJ").

In any event, the record shows no more than that Kellem asked an unnamed manager if he could have his old job back with backpay and the same hours and route, and was told that he could return to work but not under the conditions that he had specified. (A 557.) This testimony about a brief exchange about returning to work is plainly inadequate to establish either that a valid reinstatement offer had been made or that Kellem had no interest in being employed. To the contrary, the testimony reveals that it was Kellem who initiated the conversation to begin with.

k. Edwin Lear

As the Board found, Lear sought and obtained employment throughout the backpay period and the Company does not claim otherwise. (A 109; SA 733-750.) Rather, the Company claims (Br 39) that Lear initially settled for lower-paying

jobs during the first year following his discharge when he could have applied for a higher-paying one with Laidlaw in El Monte, which he successfully did afterwards. This, the Company claims, constitutes a willful loss of earnings that should have reduced the backpay awarded Lear during those first 2 years.

However, it is well settled that an employee need only make a reasonable effort to secure and retain employment—he need not apply for every job or only seek the most lucrative jobs available. *See NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 311 (4th Cir. 2001); *Tilden Arms Management*, 307 NLRB 13, 15 (1992); *Firestone Synthetic Fibers*, 207 NLRB 810, 815 (1973). Here, Lear's initial search included seeking employment with other transit companies, which resulted in an offer that he accepted at a lower rate of pay than he had received from the Company. Upon taking this job, Lear continued searching for more lucrative work and, although he found none that paid what the Company had, he sought them out unsuccessfully, while he secured a series of low paying jobs until he eventually applied for a job with Laidlaw. The Company never asked Lear to explain his apparent reluctance, at least initially, to apply for work with Laidlaw, which by reputation was a less than ideal employer, and the

Board found nothing in that reluctance to refute what was on its face a reasonable effort on Lear's part to seek and retain gainful employment in the transit industry.[9]

l. Cindy O'Neal

The Company's stark assertion (Br 41)—that the Board employed an incorrect analysis in finding (A 92 & n.17; 701-02, SA 753-55) that O'Neal was unlawfully discharged when she was given the choice to resign and took it in lieu of being discharged—is devoid of analysis and warrants no response; nor does its equally stark assertion (*id*.) that "as argued in Petitioner's Exceptions Brief, [O'Neal] testified that she was going to quit anyway." *See Dunkin Doughnuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) ("the argument portion of the appellant's brief 'must contain' the appellant's 'contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies'") (quoting Rule 28(a)(9)(A), Federal Rules of Appellate Procedure) and cases cited; *Ahern v. Jackson Hospital Corp.*, 351 F.3d 226, 240 (6th Cir. 2003) ("'The incorporation by reference arguments . . .

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[9] While the Company notes (Br 41-42) that there was a period during which Lear left Laidlaw to try something new—teaching driving that had the potential to be quite lucrative—and then did not immediately seek reemployment with Laidlaw after that venture did not work out (A 546-47), the Company makes no argument that Lear incurred a willful loss of earnings during that period.

does not comply with the Federal Rules of Appellate Procedure' and therefore such arguments are waived") (attribution omitted).[10]

m. Marta Perez

At the close of the hearing, counsel for the General Counsel discovered a discrepancy between Perez's testimony that she voluntarily chose to be a stay-at-home mom for the period February 1999 through November 2000 and her social security records that showed that she had substantial earnings throughout much of that period. A discussion ensued, and all parties seemed to agree that it was likely that Perez misspoke and that the period she had decided to be a stay-at-home mom, was actually a shorter 10-month period for which she showed no earnings on her social security records. (A 712-17.)

The Company now insists (Br 41) that the Board should have taken Perez's testimony at face value but, when the case was before the administrative law judge, its position was that it was entirely appropriate to make a finding that reconciled her testimony with what the social security records showed—that is, to find that

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[10] In any event, presenting an employee with such a choice is tantamount to a discharge (*NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 311 (4th Cir. 2001)), and the Board reasonably declined to construe O'Neal's statement—that she took the option of resigning "rather than get fired . . . but I intended on quitting if I hadn't got those 10 points" (A 702)—as the sort of proof that the Company would make of it. To the contrary, whether and when O'Neal might have quit had she not been forced to remains a matter of pure speculation.

Perez must have been "mistaken" about the precise time-frame involved when she functioned as a stay-at-home mom and that she only "stopped working in early 2000 . . . and did not resume her job search until about a month before she began working for Walgreen's on December 5, 2006." Having taken that position when the case was before the administrative law judge, the Company's current position is untenable at best.

n. Joyce Robinson

It is undisputed that Robinson volunteered while testifying at the compliance hearing that she had been convicted of second degree robbery 12 years earlier and, when asked by counsel, recollected that she had disclosed that conviction on the Ryder application, which proved to be untrue. (A 93, 114; 648-50.) The Company, whose written policy is "[a] felony conviction is not an absolute bar to employment" (A 93), asserts that Robinson would never have been hired had it known of her conviction, and claims that that fact, combined with her having falsified her application and lied about it before the Board, should have operated to deprive her of all backpay.

The Board disagreed, finding that extant Board precedent and the policies of the Act supported only permitting that backpay be tolled as of the date that the Company discovered Robinson's conviction and the falsification in her application. As the Board emphasized, while it could not condone

Robinson's failure to disclose the conviction in her application and her apparent deliberate falsehood during the hearing about that nondisclosure, permitting the Company to escape all remedial responsibility for having unlawfully discharged her would not only provide the Company with an undeserved windfall, but also would undermine the public interest which requiring backpay for such violations is designed to advance. (A 93.)

Thus, rather than undertake to mete out punishment for such acts, the Board's longstanding practice is to modify its traditional remedies only to the extent that an employer, having learned of them, could establish that it would have discharged a claimant for those acts—that is, it would permit an employer to refuse to offer reinstatement and it would cut off backpay as of the date that the disqualifying acts were discovered. *See John Cuneo, Inc*., 298 NLRB 856, 856-57 (1990) (limiting backpay to date employer learned that unlawfully discharged employee had intentionally lied on his job application); *Smucker Co*., 341 NLRB 35 (2004), *enforced mem*. 130 Fed Appx. 596 (3d Cir. 2005) (limiting backpay to date employer learned that applicants had cheated on hiring exam); *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1315, 1317 (5th Cir. 1994) (limiting backpay to date employer learned of unlawfully discharged employee's sexual misconduct).

The Board's refusal to undertake to affirmatively punish instances where there has been proof of deliberate fabrication by employers and employees alike is solidly rooted in its recognition that there are more appropriate forums for such matters—"civil and criminal proceedings"—and its singular focus on its "primary mission," which is to adjudicate and decide unfair labor practices and design remedies that, rather than punish, promote the purposes and policies of the Act. *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323 (1994) (attribution omitted). *Accord Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1065 (D.C. Cir. 2001) (rejecting employer's argument that employee who provided "inaccurate and suspicious testimony" was not entitled to normal remedy).[11]

o. Deborah Sleets

The Company makes a similar forfeiture argument (Br 46) against Sleets based upon her failure to report on her application an alleged conviction for an unspecified concealed weapons violation, but the Board appropriately rejected it. (A 117.) The Company had admittedly hired Sleets as a dispatcher despite

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[11] While the Company seems to suggest otherwise (Br 43-44), nothing that the Court said in *McKennon v. Nashville Banner Publishing Co*., 513 U.S. 352, 362 (1995), calls into question the propriety of the Board's determination to follow its judicially-approved approach to such matters here.

her report on her application that she had been convicted of a felony by fleeing with her child from an abusive domestic situation. (A 704-05.) The Company failed to present the administrative law judge with a certified copy of her conviction, but instead relied only upon an offer of proof made by counsel during the hearing, days after Sleets testified, without ever attempting to recall her to explain what the conviction involved. (A 705.) The Board (A 117) emphasized the Company's failure to confront Sleets with this other alleged felony conviction and that there were any number of possible dispositions short of a felony that were possible with respect to an alleged gun charge, including a possible expungement. Thus, the Board found in these circumstances that the Company had failed even to establish that Sleets had falsified her application, much less that, if she had, it would have had any impact on her backpay entitlements, which under extant Board and court precedent it clearly would not. *See* cases cited and discussed above.

The Company also contends (Br 47) that Sleets incurred a willful loss of earnings when she quit her job with Roesch Lines and therefore that her backpay should be reduced "as though [she] had continued her employment at Roesch." To the contrary, however, as the Board found (A 118), the facts were straightforward and fairly supported the conclusion that Sleet's decision to quit was reasonable. Indeed, the record shows that Sleets quit her job with Roesch

only because she needed to relocate her family to less expensive lodgings and found that her new commute—40 miles each way—was too onerous to continue, given her status as the single mother of two small children. (A 581-86.)

p. Daphne Thomas

The Company's contention (Br 47) that Thomas incurred two willful losses of income is passing frivolous. The record shows that Thomas was diligent in seeking work and quickly found a job when, shortly after her discharge, she moved with her husband to another locality when he was on temporary assignment 200 miles from their home. The Company's contention that Thomas was obliged to stay at that job even after her husband's assignment ended or suffer an offset against backpay makes no sense and the Board reasonably rejected it. Upon her return to Los Angeles, Thomas immediately secured a job driving for Laidlaw, which she kept until she had an argument with a supervisor over her having worn an earring, which led to her being fired by her supervisor shortly thereafter when she called in to say she would be late. As the Board found (A 118), that Thomas was discharged for absenteeism based upon that lone incident cannot possibly qualify as a willful loss of earnings, and the Company makes no argument that we can discern to the contrary.

q. Marla Velasquez

The Company contends (Br 48) that Velasquez incurred a willful loss of earnings when she quit her job as a security guard, but, as the Board found (A 119), her decision to quit was reasonably grounded on serious health concerns—she had a problematic pregnancy—that made working alone on a night shift too risky. Thus, her decision to quit that job had no effect on her backpay entitlements. Indeed, while Velasquez appropriately was awarded no backpay during the extended period that she removed herself from the job market due to her problematic pregnancy and then to be a stay-at-home mom, the Board found that her earnings when she returned to work on a part-time basis while attending school in fact exceeded her pay at her previous job, and the Company does not claim otherwise. (A 119; 665-66.)

Furthermore, while the Company contends (Br 31) that Velasquez voluntarily removed herself from the job market beginning in early 2000 when she decided to go to college on a full-time basis while working only 20 hours per week on school-related jobs, Velasquez's credited testimony was that she structured her classes so that she could accept full-time employment if she could find it, which she sought unsuccessfully. (A 119; 668-72.) The Company insists that Velasquez had to be available to work the same hours as she had for Ryder in order to qualify for backpay, but cites no authority, and

we know of none, that would support such a proposition. Thus, the Board appropriately found Velasquez eligible for backpay until June 2001, when Velasquez testified that she concluded that obtaining a college degree was more important than obtaining full-time employment. (A 671.)

C. The Board Reasonably Found that Six of the Claimants' Status as Probationary Employees Was Without Legal Significance

The Company notes (Br 49-51) that six named claimants were probationary employees with no contractual rights and argues that they were "at will" employees who had no entitlement to backpay as a consequence of their having been discharged. However, the Board reasonably concluded that their status as probationary employees provided the Company with no license to discharge them because they had violated the Company's unlawful absenteeism policy, or to escape backpay liability after it did. *See Southland v. NLRB*, 646 F.2d 1273, 1275 (8th Cir. 1981) (probationary status did not preclude a finding that discharge of employee for proscribed reason was unlawful). Indeed, while the Company insists that probationary employees have only "at will" status that should place them on a different footing from everyone else, the law is clear that all employees are "at will" in the sense that "an employer may discharge [them] for a good reason, a bad reason, or no reason, as long as it is not for an unlawful reason.'" *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 311 (D.C. Cir. 2006) (attribution omitted.)

D. The Board Reasonably Rejected the Company's Motion to Reopen the Record

The Company contends (Br 17-19) that the Board abused its discretion by refusing the Company's motion to reopen the record to receive as an offer of proof counsel's representation that the personnel files of all backpay claimants would show that some or all of them would have been subject to discharge for absenteeism even under the Company's unlawfully replaced more lenient rule. The Company, however, made no effort during the hearing to introduce those records and offer testimony from its general manager substantiating that alleged defense as to specific claimants, even though it had raised it in its answer to the General Counsel's backpay specification. In fact, the Company's sole justification for its motion to reopen was that it intended to make an offer of proof regarding the records during the hearing but failed to do so.

The Board reasonably concluded that counsel's apparent lapse, if indeed that was what it was, was an inadequate justification to permit reopening the record. (A 89 n.7.) The Board's rules make clear that a motion to reopen will only be granted when "newly discovered evidence" is presented and then only on an adequate explanation as "to why it was not presented previously," and an explanation as to why, "if adduced and credited, it would require a different result." NLRB Rules and Regulations (29 C.F.R. 102.48(d)(1)).

Here, the Company's failure even to have attempted to adduce evidence during the hearing pertaining to such a defense with respect to particular claimants, and its failure to even specify which claimants would allegedly have been discharged under its old policy, underscored the propriety of the Board's rejection of its belated offer of proof. *See Food Store Employees Union, Local 347, Meat Cutters and Butcher Workmen of North America v. NLRB*, 418 F.2d 1177, 1182 n.6 (D.C. Cir. 1969) (enforcing denial of motion in such circumstances). *See also Parkwood Development Center, Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2007) ("motion for reconsideration presenting new argument that could have been made earlier is foreclosed"); *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 552 (D.C. Cir. 1999) ("the Board was within its authority in deciding that these incidents should have been raised [earlier]").

Indeed, to have done otherwise would have legitimatized the Company's inexplicable failure to attempt to litigate its case when the hearing was held, and opened the door to a lengthy and protracted delay of the precise sort that orderly procedure is designed to avoid. This, "'simple fairness'" to the Board and the other parties in interest, mandated that the Board decline to do. *Pace University v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) (attribution omitted).

E. The Board Reasonably Rejected the Company's Motion to Approve an Alleged Bilateral Settlement that the Union Never Executed and Was Contrary to its Avowed Understanding of the Parties' Preliminary Agreement to Agree

Section 10(a) of the Act (29 U.S.C. § 160(a)) expressly states that the Board's authority to resolve and remedy unfair labor practices shall not be affected by any other means of settlement. Nevertheless, while it thus remains clear "that the Board is not statutorily obligated to honor settlement agreements" (*Beverly California Corp. v. NLRB*, 253 F.3d 291, 294 (7th Cir. 2001)), the Board has long stood willing, consistent with the importance that encouraging such settlements plays in the statutory scheme, to consider whether to dismiss a complaint based upon the terms of a private settlement agreement between a respondent and charging party. The Board will do so, however, only if, after having given all interested persons an opportunity to be heard, it determines that the settlement's terms adequately advance the remedial interests that the Board's unfair labor practice proceeding is designed to serve. *See Independent Stave Co.*, 287 NLRB 740, 741 (1987) ("*Independent Stave*").

In the instant case, the Company did not present the Board with an executed private agreement to approve or reject, but rather asked the Board to first determine that the terms of an unexecuted written agreement should be specifically enforced against the Union which refused to sign it. The Company argued that the more general language in the parties' preliminary agreement to

agree could only be understood in the more specific terms propounded in the ensuing document. However, the Union represented in its opposition to the Company's motion that its business agent understood the preliminary agreement in very different terms and would not execute the final agreement as presented because of its inclusion of claims that the representative understood were not to be settled. (A 88.)

The Board declined to sit as an Article III Court to resolve this internecine dispute but instead dismissed the Company's motion as presenting no clear agreement, and thus no *Independent Stave* issue, for it to consider. This, while the Company would dispute it (Br 10-17), was well within the Board's statutory authority to do. *See Teledyne Economic Development v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997) ("where the plain language of the Act . . . grants the Board the discretion to assert jurisdiction," its decision to do so must be accepted by a reviewing court).

CONCLUSION

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

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August 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FIRST TRANSIT, INC., SUCCESSOR WITH LIABILITY TO RYDER/ATE, INC.	*	
Petitioner/Cross-Respondent	*	
v.	*	Nos. 07-1378 & 07-1434
	*	Board No. 21-CA-32146
NATIONAL LABOR RELATIONS BOARD	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,997 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 25th day of August, 2008

ADDENDUM

ADDENDUM
RELEVANT STATUTORY PROVISIONS

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (29 U.S.C. § 157):

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

Section 8(a)(1) and (5) (29 U.S.C. § 158(a)(1) and(53)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

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

Sec. 8(d) (29 U.S.C. § 158(d)):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * * *

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States

. . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .

Board Rules and Rgulations (29 C.F.R. § 102.48(d)(1):

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record . . . . A motion to recopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

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	*	Board No. 21-CA-32146
NATIONAL LABOR RELATIONS BOARD	*	
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by hand delivery the required number of corrected copies of the Board's final brief in the above-captioned case, and has served two copies of the corrected final brief by first-class mail upon the following counsel at the address listed below:

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