

**Nos. 08-4875 & 09-1269**

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

**ST. GEORGE WAREHOUSE, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of St. George Warehouse, 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 Second Supplemental Decision and Order issued on November 17, 2008, and is reported at 353 NLRB No. 50 (A. 1-8).<sup>1</sup> The Board's 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 because the unfair labor practice occurred in New Jersey.

The Company filed its petition for review on December 30, 2008, and the Board filed its cross-application for enforcement on January 29, 2009. Both were timely filed because the Act places no time limit on such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case.

2. Whether the Board acted within its broad discretion based upon well-reasoned credibility findings in determining backpay due discriminatees Leonard Sides and Jesus (Jesse) Tharp.

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<sup>1</sup> "A." references are to the 3 volumes of the joint appendix, the first of which, comprising the Board's Second Supplemental Decision and Order, is appended to the Company's brief. The second volume of the appendix includes the previous decisions by the Board in this matter as well as all designated portions of the record, except for newspaper listings which are included in volume 3. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## STATEMENT OF THE CASE

The Board previously found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employees Leonard Sides and Jesus (Jesse) Tharp for antiunion reasons. This Court enforced the Board's Order in an unpublished opinion. Thereafter, the Board's Regional Director issued a compliance specification. A hearing was held during which the Company maintained, but a Board administrative law judge found failed to prove, that the discriminatees had made inadequate job searches. In a Supplemental Decision, the Board remanded for the taking of further evidence, finding that the Company's evidence regarding the availability of comparable work was sufficient to shift the burden of production, but not persuasion, to the General Counsel to proffer evidence concerning the discriminatees' job-search efforts. After a reopened hearing, a second administrative law judge found that the Company failed to prove that either discriminatee had made an inadequate job search. The Board affirmed. The pertinent facts follow.

## **STATEMENT OF FACTS**

### **I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING**

In early February 1999, the Company responded to a nascent organizing effort at its warehouse by committing a broad range of unfair labor practices, including the abrupt and unwarranted discharge of the two in-plant leaders of the organizing effort, forklift operator Sides and warehouseman Tharp. Sides had worked for the Company for a year and a half and Tharp had been employed for 6 years. On June 23, 2000, the Board affirmed a decision of its administrative law judge finding that the Company unlawfully discharged Sides and Tharp and ordered the Company to offer reinstatement to both employees and to make them whole for their losses. (A. 1; 14-21.) The Company refused to comply with the Board's Order until this Court enforced it via unpublished decision on April 23, 2001. (A. 1-2; 26-35.)

### **II. THE COMPLIANCE PROCEEDING**

Following the Court's order, the Board's Regional Director issued a compliance specification computing gross backpay from the date of the discriminatees' discharges in March 1999 until September 1, 2000, when the Company extended reinstatement offers. The Regional Director deducted from the gross backpay computations whatever interim earnings the discriminatees had reported. Sides was able to find work through two temporary manpower agencies

with a variety of businesses during a 4-month period, but otherwise had no interim earnings. Tharp found no work for 5 months following his discharge, at which point he moved to Florida and, shortly after arriving, secured a job that he held for the ensuing 10 and 1/2 months of the backpay period. The Regional Director also deducted from backpay payments voluntarily made by the Company to each discriminatee after issuance of the Court's order. (A. 2; 50-58.)

At the subsequent hearing, the Company did not dispute the backpay computations but argued instead, as an affirmative defense, that jobs for the discriminatees were plentiful and the employees would have found work had they made reasonable efforts. Specifically, the Company produced an expert witness, Donna Flannery, a certified disability management specialist. Flannery, who admittedly never spoke to either discriminatee, prepared a report asserting that, in her professional judgment, "a significant number of job postings were advertised . . . during this period" and "that neither of these job seekers made a diligent effort to seek and obtain new employment." The report assumed that a 25-mile radius surrounding the Company's warehouse constituted an appropriate search area for each discriminatee, although it analyzed advertisements from the Newark Star Ledger, which lists jobs spanning a 13-county area in Northern New Jersey and New York State. The report only analyzed every other Sunday's worth of ads during the 1.5 year backpay period. Flannery admitted in her testimony that

reviewing even those Sundays “was very cumbersome and tedious,” and that it would have taken “forever” to “count every ad.” (A. 2, 8; 72-73, 75, 79, 397, 402-04.)

Neither the Company nor the General Counsel sought to adduce testimony from the discriminatees about the extent or nature of their job searches. (A. 1-2; 80.) The Company asserted, however, that Flannery’s report and testimony were sufficient to shift the burden to the General Counsel to prove that the discriminatees did not willfully lose earnings by failing to conduct reasonable job searches.

The administrative law judge found that the Company’s evidence, standing alone, was inadequate to establish that either employee had actually incurred a willful loss of earnings. In so doing, the judge rejected the Company’s claim that the expert’s report and underlying newspaper listing should shift the burden of proving no willful loss of earnings to the General Counsel. Rather, since it was open to the Company to produce testimony from the discriminatees and the burden was on the Company to prove its affirmative defense, the judge found the opinion testimony and newspaper listings inadequate to establish that either employee actually did not make an proper job search. The judge therefore recommended that the Company pay the discriminatees the amounts set forth in the backpay specification, plus interest. (A. 5-8.)

The Company filed timely exceptions.

### **III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER**

In its Supplemental Decision and Order, the Board (Chairman Battista and Members Schaumber and Kirsanow; Members Walsh and Liebman dissenting) rejected the position advanced by the Company, reaffirming the settled principle that “the ultimate burden of persuasion on the issue of a discriminatee’s failure to mitigate” lies on the respondent. (A. 39-42.) The Board, however, noted that the General Counsel has greater access to the discriminatees than respondent employers, and that either the General Counsel or the discriminatee will know what the discriminatee did to find work. On that basis primarily, the Board deemed it appropriate to modify extant Board law to the limited extent of imposing a burden of production on the General Counsel where, as here, “a respondent raises a job search defense . . . and produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period.” (A. 39.)

The Board emphasized that, by “plac[ing] on the General Counsel the burden of producing evidence concerning the discriminatee’s job search,” it was doing no more than codifying the usual practice followed by the General Counsel

in cases of this sort.<sup>2</sup> Because extant Board law had imposed no burden of production on the General Counsel in the face of substantially equivalent jobs, the Board remanded the case for the taking of further evidence. (A. 42.)

#### **IV. THE SECOND COMPLIANCE HEARING**

A second hearing was held on February 26 and March 14, 2008. At the hearing, the General Counsel presented evidence of Sides' job search efforts from Sides himself and from the head of the unemployment office that had assisted Sides with his search. The General Counsel's evidence with respect to Tharp's job-search efforts—Tharp had passed away by the time of the hearing—was presented through his mother. The Company presented evidence from the Region's compliance officer, concerning her instructions to each employee to keep on-going records of their job-search efforts, and again relied on its expert's testimony and report from the original hearing.

##### **A. Leonard Sides**

Sides testified that his job search was constrained by his reliance on public transportation that placed him within walking distance of his job. He further testified that, following his discharge, he went to the state unemployment office,

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<sup>2</sup> Specifically, the Board's Casehandling Manual instructs the General Counsel to "advise" discriminatees of their need to mitigate and asks them to keep the Region apprised of their efforts. It also directs the General Counsel to present such evidence in a backpay case when on notice that a job-search defense will be raised. (A. 41-42.)

where he was interviewed extensively, taught how to look for work, and informed that he was entitled to a veteran's preference for job referrals. Thereafter, Sides visited the office on a near weekly basis for the ensuing 9 months. In all, he received referrals to only 8 potential employers; Sides testified that he kept each referral appointment, none of which produced an offer of a job. In September 1999, to help advance his job search, Sides took and passed an exam certifying his competency as a forklift operator. (A. 2-3; 153-62, 209-11.)

Sides testified that, in addition to relying on unemployment-office referrals, he read the classifieds every Sunday in the Newark Star Ledger and would follow up on advertised jobs that were accessible through public transportation and reasonable walking distance. He also spoke to friends and associates and got leads through them. In all, he identified and applied in person for jobs at an additional 25 potential employers, none of which produced a job offer. (A. 2-3; 172-79, 202-03, 210-13, 376-88.)

On October 25, 1999, based on a friend's referral, Sides secured employment with Labor Ready, a manpower provider, which referred him for work on a part-time basis to a stocking job until November 25, 1999. At the end of November or early December, Sides went to work for a second temporary employment provider, J & J Staffing Resources, Inc., which found him part-time work for several months. During that period, Sides also checked the Sunday

papers for suitable openings; he found and applied to several, none successfully. (A. 3; 164-69, 218-19, 224-25.)

Salvatore LoSauro, the supervisor of records in the New Jersey Department of Labor's Employment Services Office, remembered Sides "as a very active job seeker," (A. 128), and verified that his records showed Sides' considerable contacts with his office, which had produced a total eight referrals. (A. 3; 109-10, 112, 120-33, 345-50.) LoSauro testified that he had no independent recollection of the jobs to which Sides had been referred, or whether Sides kept the appointments his office arranged. He also explained that "most of the time" employers did not follow through and mail back paperwork his office requested of them, and that, when they did, the return cards they sent were destroyed "after a while." LoSauro gave several reasons why utilizing his office to find employment was a preferred method—it has a relationship with many employers because its referral services are free, and those employers will accept applications from LoSauro's office for 2 weeks before the employer advertises the opening elsewhere. (A. 3; 134, 140.)

**B. Jesus (Jesse) Tharp**

Discriminatee Tharp, who died prior to the second hearing, had worked for the Company for some 6 years prior to his discharge, and, like Sides, his job search was constrained by his reliance on public transportation as he did not own a car. According to his mother, Gail Moskus, Tharp was quite upset with having been

discharged and was anxious to secure employment elsewhere. As she testified: “[H]e liked to work. . . . Jesse was used to working. He always had a paycheck coming in.” (A. 5, 7; 86.)<sup>3</sup> Moskus also testified that she spoke to her son every other week during his unemployment and that he reported to her that he was job-searching daily, unsuccessfully. She could not recall the details, but said that her son had mentioned names of places where he had looked. (A. 5, 7; 83-86, 94.)

Moskus also testified that Tharp became very concerned about his inability to secure a job after 4 months of looking, at which point she suggested that he move down to Florida where jobs were available and where he could live with her and have help from relatives in finding a job. After a month more of fruitless searching, Tharp informed Moskus that he had decided to move. Tharp received unemployment benefits from shortly after his discharge in March through mid-August. (A. 5, 7; 85-88, 342-44.)

In early September, Tharp moved to Florida and promptly began a job search. (A. 5, 7; 87-89, 101-03.) In Florida, he made job contacts and pursued them through personal interviews. Moskus testified that she drove her son to those interviews, and that, eventually, on October 18, 1999, Tharp decided to take a job with Naples Lumber because it paid “the closest to what he made in New Jersey.”

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<sup>3</sup> The administrative law judge noted that Moskus’ name was improperly reported in the hearing transcript as “Mastes,” which is how the Company refers to her in its brief. (A. 4 n.5.)

(A. 5, 7; 87-89, 105-06.) Tharp began at Naples Lumber the following day and worked there without interruption until September 3, 2000, after the backpay period ended. (A. 5, 7; 106.)

### **C. The Administrative Law Judge's Decision on Remand**

The judge found testimony presented by these witnesses not only credible, but also comports with the probability of events, which together established that both employees had made reasonably diligent efforts to secure employment throughout the backpay period. The judge further found that the report offered by the Company's expert, and any gap in employer or discriminatee recordkeeping, was wholly inadequate to prove otherwise. He therefore concluded that the Company had failed to prove that either discriminatee incurred a willful loss of earnings. The judge therefore recommended that the Company be required to pay Sides and Tharp's estate the amounts specified. (A. 6-8; 47.)

The Company filed timely exceptions challenging the judge's credibility determinations and arguing that the proof offered by the General Counsel, and the absence of comprehensive records concerning job searches, failed to meet what it claimed was the General Counsel's burden of proof to establish that the job searches conducted by Sides and Tharp met accepted Board standards.

## V. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER

After considering the Company's exceptions, the Board (Chairman Schaumber and Member Liebman) issued a Second Supplemental Decision and Order on November 17, 2008, affirming the judge's credibility determinations and other findings and adopting his recommended order that the Company pay Sides \$26,447.90, and Tharp's estate \$14,649.79, plus interest. (A. 1.)<sup>4</sup>

### SUMMARY OF ARGUMENT

1. The Company's contention that the Board's Order was not issued by a quorum of the Board must be rejected. Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. In contrast, the Company's

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<sup>4</sup> The Company contends (Br. 8 n.2, 12 n.4) that, in arriving at the above figures, the Board made an inexplicable mathematical error. However, the Company failed to note that error during the proceedings before the Board, and therefore no such argument may be considered under Section 10(e) of the Act (29 U.S.C. § 160(e)) by this Court. *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665-66 (1982).

argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

2. The Board's findings with respect to remedial matters—here, whether the discriminatees' made reasonable efforts to secure employment—partake of nuanced decision-making that depends on the Board's special expertise. Those decisions, therefore, are entitled to great weight. The Company bore the burden of proving willful loss of earnings when the backpay case was before the Board, and bears the burden before this Court of demonstrating grounds for second-guessing the Board's expert judgment. The Company's brief is inadequate to that task.

It consists, in the main, of challenging the Board's well-reasoned credibility determinations, or misstating the extent to which the Board altered extant procedures for litigating backpay issues. While the Company asserts otherwise, the Board here expressly held that the burden of persuasion on the issue of willful loss of earnings never shifts; it remains on the wrongdoer respondent, against whom all ambiguities in proof are to be resolved. The Board only shifted the burden of production to the General Counsel when, in support of a claim that an employee failed to conduct an adequate search for work, the employer produces evidence that comparable positions were available. In that circumstance, the Board

held that the General Counsel had “the burden of producing evidence concerning the employee’s job search.” (A. 39.)

Here, the Board found that the evidence established that each employee made good faith and reasonable efforts to secure work during periods following their discharges, and that the opinion and job-availability evidence offered by the Company to prove otherwise was manifestly unequal to the task. The Company’s suggestion that the General Counsel had the burden of rebutting every one of its expert’s voluminous classified advertisements serves only to turn any distinction between the burden of persuasion and burden of proof on its head, and ignores settled principles of mitigation law that the Board expressly declined to question.

## ARGUMENT

### I. CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER ACTED WITH THE FULL POWERS OF THE BOARD IN ISSUING THE BOARD'S ORDER IN THIS CASE

Chairman Liebman<sup>5</sup> and Member Schaumber, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) (“*New Process*”), *petition for cert. filed*, \_\_ U.S.L.W. \_\_ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (“*Northeastern*”), *reh'g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*, \_\_ F.3d \_\_, 2009 WL 1676116 (2d Cir. June 17, 2009) (“*Snell Island*”).<sup>6</sup> *But see* *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (“*Laurel Baye*”), *petition for reh'g filed* (May 27, 2009), and *response filed* (June 16, 2009), Nos. 08-1162, 08-1214 (discussed below). As we now show, their

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<sup>5</sup> On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the Board. See BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

<sup>6</sup> This issue has also been fully briefed in this Court in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035. The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291 on June 9, 2009. The issue has additionally been fully briefed in the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Company's contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

#### **A. Background**

The Act provides that the Board's five members will be appointed by the President with the advice and consent of the Senate, and will serve staggered terms of 5 years. *See* Section 3(a) of the Act, 29 U.S.C. § 153(a). The delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act, which provides in pertinent part as follows:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . . [29 U.S.C. § 153(b).]

Pursuant to this provision, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh)

delegated all of the Board's powers to a group of three members, Members Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired,<sup>7</sup> the two remaining members, Members Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a vacancy shall not impair the powers of the remaining members and that "two members shall constitute a quorum" of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.<sup>8</sup>

**B. Section 3(b) of the Act, By Its Terms, Provides That a Two-Member Quorum May Exercise the Board's Powers**

In determining whether Section 3(b) of the Act expresses Congress' clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly delegated, three-member group, the Court should apply "traditional principles of statutory construction." *NLRB v. United Food and*

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<sup>7</sup> Member Walsh's recess appointment also expired on December 31, 2007.

<sup>8</sup> On May 4, 2009, it was reported that the two-member Board quorum had issued approximately 400 decisions, published and unpublished. *See* BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions), Volume 353 NLRB (132 decisions), and Volume 354 NLRB (33 decisions as of June 17, 2009).

*Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n. 9 (1984). This process begins with looking to the plain meaning of the statutory terms. *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009); *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 67 (3d Cir. 2007). The meaning of a term, however, “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Deal v. United States*, 508 U.S. 129, 132 (1993); *see Kaufman*, 561 F.3d at 155. Moreover, “a statute must, if possible, be construed in such a fashion that every word has some operative effect.” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *see Kaufman*, 561 F.3d at 155 (“When the statutory language is not clear on its face, the statute must be construed to give effect, if possible, to every word and clause.”).

Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate “all of the powers which it may itself exercise” to a group of three or more members; (2) a statement that vacancies shall not impair the authority of the remaining members of the Board to operate; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board’s delegation authority.

As both the Seventh Circuit and the First Circuit have concluded, the plain meaning of the statute’s text authorizes a two-member quorum of a properly constituted three-member group to issue decisions, even when, as here, the Board has only two sitting members. *See New Process*, 564 F.3d at 845 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)”). As those decisions recognize, the three provisions of Section 3(b), in combination, authorized the Board’s action here. The Board first delegated all of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the authority of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board’s powers.

Moreover, the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42), both noted that two persuasive authorities provide additional support for this reading of Section 3(b)'s plain text. First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." *Id.* at 123. Second, the United States Department of Justice's Office of Legal Counsel ("OLC"), in a formal opinion, concluded that the Board possessed the authority to issue decisions with only two of its five seats filled, where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

The D.C. Circuit's contrary conclusion is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. In *Laurel Baye*, 564 F.3d at 472-73, the D.C. Circuit held that Section 3(b)'s provision that "three members of the Board shall, *at all times*, constitute a quorum of the Board" (29 U.S.C. § 153(b), emphasis added), prohibits the Board from

acting in any capacity when it has fewer than three sitting members, despite Section 3(b)'s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision that applies to a three-member "group" is not in fact an exception to the three-member quorum requirement for the "Board," because the former applies to a "group" and the latter applies to the "Board." *See id.* at 473. The court stated that Congress' use of the two different object nouns indicates that each quorum provision is independent from the other, and thus the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present "at all times." *Id.*

The D.C. Circuit's interpretation fails to give the critical terms of Section 3(b) their ordinary and usual meaning, thereby violating the cardinal canon of statutory construction "that courts must presume a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying "ordinary English" to determine the meaning of a statute).

The ordinary meaning of the word "except" is "with the exclusion or exception of." *Webster's New World College Dictionary* (4th ed. 2008). Thus, in ordinary English usage, the statement in Section 3(b)—that "three members of the

Board shall, at all times, constitute a quorum of the Board, *except* that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (emphasis added)—denotes that the two-member quorum rule that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.”

*Laurel Baye’s* refusal to give full effect to this express exception is based on an assumption that it would be anomalous for Congress to have used the statutory rubric “at all times . . . except” if Congress intended that there be some times when the general requirement of a three-member quorum would not apply. That assumption is erroneous. *Laurel Baye* ignores that, in other statutes, as in Section 3(b), Congress has used that same statutory rubric to state a true exception to a general rule. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except that* the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

*Laurel Baye* also fails to give the word “quorum” its ordinary meaning. “Quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.”

*Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983)

(“*Yardmasters*”) (quoting ROBERT'S RULES OF ORDER 16 (rev. ed. 1981)). Under the court’s construction of Section 3(b), however, the actual presence of a two-member quorum, possessed of all the Board’s powers by a valid delegation, is *never* a sufficient number to transact business *unless* there is also a third sitting Board member.

The *Laurel Baye* court correctly states that Congress intended that “each quorum provision is independent from the other” (564 F.3d at 473), but then flouts that clear intent by denying Section 3(b)’s two-member quorum provision *any* truly independent role. Rather, under the court’s construction, whether a two-member quorum is ever a legally sufficient number to decide a case is wholly *dependent* on the presence of a three-member quorum.<sup>9</sup> In so holding, the court violated a cardinal principle of statutory construction that ““a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

*Laurel Baye* also fails to read the words “except” and “quorum” in the context of Section 3(b)’s textually interrelated provisions authorizing three or more

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<sup>9</sup> See *New Process*, 564 F.3d at 846 n.2 (“[The employer’s] reading, on the other hand, appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.”).

Board members to delegate “any or all” of the Board’s powers to a three-member group, two members of which “shall constitute a quorum.” The court mistakenly distinguishes “the Board” and “any group” so that no “group” can continue to act if the membership of “the Board” falls below three. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that where, as here, the Board has delegated all its powers to a three-member group, that group, possessing all the Board’s powers, cannot logically be distinguished from the Board itself. *See Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of *its institutional power* to a panel that ultimately consisted of a two-member quorum” (emphasis added)).

**C. Section 3(b)’s History Also Supports the Authority of a Two-Member Quorum To Issue Board Decisions and Orders**

As shown, the meaning of statutory language cannot be determined by isolating particular terms, but must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995); *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 69 (3d Cir. 2007). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. at 578.

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the power to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its

entirety, provided: “A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.”<sup>10</sup> Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464 published decisions with only two of its three seats filled.<sup>11</sup> See, e.g., *NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), enforcing 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.<sup>12</sup> In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the

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<sup>10</sup> See Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter “*Leg. Hist. 1935*”), at 3272 (1935).

<sup>11</sup> The Board had only two members during three separate periods between 1935 and 1947: from August 31 until September 23, 1936; from August 27 until November 26, 1940; and from August 27 until October 11, 1941. See *2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Those two-member Boards issued 224 published decisions (reported at 35 NLRB 24-1360 and 36 NLRB 1-45) in 1941; 237 published decisions (including all decisions reported in 27 NLRB and those decisions reported at 28 NLRB 1-115) in 1940; and 3 published decisions (reported at 2 NLRB 198-240) in 1936.

<sup>12</sup> See James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.<sup>13</sup>

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's authority to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers "to any group of three or more members," two of whom would be a quorum.<sup>14</sup> The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.<sup>15</sup> Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage."<sup>16</sup> Senator Taft similarly stated that the Senate bill was designed to

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<sup>13</sup> See H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

<sup>14</sup> S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

<sup>15</sup> Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

<sup>16</sup> S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

“increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”<sup>17</sup> *See Snell Island*, 2009 WL 1676116, at \*9 (Congress added Section 3(b)’s delegation provision “to enable the Board to handle an increasing caseload more efficiently”) (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)). The Conference Committee accepted, without change, the Senate bill’s delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.<sup>18</sup> Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee

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<sup>17</sup> Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), 2 *Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that “[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. *See Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

<sup>18</sup> 61 Stat. 136, 139 (1947), 1 *Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), 1 *Leg. Hist. 1947*, at 540-41.

created by Title IV of the Taft-Hartley Act to study labor relations issues<sup>19</sup>

reported to Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948, established five panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).<sup>20</sup> In this way, the Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.<sup>21</sup>

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<sup>19</sup> See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

<sup>20</sup> See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity”).

<sup>21</sup> The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov’t Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens’ statement).

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. As the Seventh Circuit concluded in rejecting the contention that Section 3(b) prohibits the Board from acting unless it has three members:

To the extent that the legislative history points either way . . . , it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the act, not further it.

*New Process*, 564 F.3d at 847.

In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two seats filled. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have changed or eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it had previously exercised its delegation authority. That clear expression of legislative intent controls the meaning of Section 3(b).

**D. Well-Established Administrative-Law and Common-Law Principles Support the Authority of the Two-Member Quorum To Exercise All the Powers Delegated to the Three-Member Group**

The conclusion that the two remaining members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities.

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying the Interstate Commerce Commission (ICC)).<sup>22</sup>

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at \*5 (Pa. 1840)), and “considered joint and

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<sup>22</sup> In *Flotill*, the Supreme Court held that where only three commissioners of the five-member Federal Trade Commission participated in a decision, a 2-1 decision of those three commissioners was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at \*16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. See, e.g., *People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).<sup>23</sup>

The D.C. Circuit recognized the relevance of these common-law quorum principles in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), when it observed that the common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time.” *Id.* at 582 n.2 (emphasis in original). With that common-law principle as a backdrop, the court

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<sup>23</sup> Cases which, at first, may appear to run counter to the common-law rules are easily reconciled when it is recognized that their holdings are instead controlled by a specific quorum rule dictated by statute or ordinance. See, e.g., *Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “[t]he ordinance under which the meeting was held provided that a quorum shall consist of four members.”); *Glass v. Hopkinsville*, 225 Ky. 428, 9 S.W.2d 117 (1928) (state statute required that a school board quorum was a majority of the full board, so five of nine members were needed for a quorum).

held that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission (SEC) lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled.

The common-law principles applied in *Falcon Trading* apply as well in interpreting the quorum provisions Congress enacted in the NLRA. Consistent with those principles, Section 3(b) authorizes the Board, when it has a quorum of at least three members, to delegate all its powers to a three-member group, two members of which “shall constitute a quorum.” The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid. *See New Process*, 564 F.3d at 848 (*Falcon Trading* supports the Board’s authority to issue decisions pursuant to Section 3(b)’s two-member quorum provision). The *Laurel Baye* court incorrectly ignored those principles in deeming *Falcon Trading* inapplicable. 564 F.3d at 474-75.

The common-law quorum rule imbedded in Section 3(b)’s express exception for Board groups is also similar to the quorum rule upheld in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir 1983). There, the court recognized that the ICC’s enabling statute not only permitted that 11-member agency to “carry out its duties in

[d]ivisions consisting of three [c]ommissioners,” but also provided that “a majority of a [d]ivision is a quorum for the transaction of business.” *Id.* at 367 n.7. Based on that provision, the court held that an ICC decision participated in and issued by only two of the three division members was valid. *Id.* Section 3(b) is directly analogous to the ICC statute and similarly allows the Board to delegate its powers to groups, two members of which constitute a quorum.

The Seventh Circuit’s decision in *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980), similarly recognizes the principle of minority decision-making. There, the court held that when only 6 of the 11 seats on the Interstate Commerce Commission were filled, a majority of the commissioners in office constituted a quorum and could issue decisions. Similarly, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279.

In *Laurel Baye*, the D.C. Circuit not only failed to interpret Section 3(b) in light of applicable common-law quorum principles, it erroneously cited “basic tenets of agency and corporation law” to hold that “the moment the Board’s membership dropped below its quorum requirement of three” all authority previously delegated by the Board to the group ceased. *Laurel Baye*, 564 F.3d at 473 (citing various legal treatises). In thus giving controlling weight to “basic

tenets of agency and corporation law,” the *Laurel Baye* court failed to heed the warning of the treatises upon which it relied that governmental bodies are often subject to special rules not applicable to private bodies.<sup>24</sup>

Specifically, the court erroneously concluded that the three-member group to which a Board quorum delegated all of the Board’s powers was an “agent” of the Board. *See id.* (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). “Agency” is defined as “the fiduciary relationship that arises when one person (“the principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act.” *Id.*, § 1.01. The delegation of institutional powers to the three-member group authorized by Section 3(b) does not create any kind of “fiduciary” relationship and does not involve the three-member group acting on “behalf” of the Board or under its “control.” Instead, the Board members in the group have been jointly delegated all of the Board’s institutional

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<sup>24</sup> *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2008) (distinguishing between private and municipal corporations, stating that “the law of municipal corporations [is] its own unique topic,” and concluding that “[a]ccordingly, this treatise does not cover municipal corporations.”). Similarly, RESTATEMENT (THIRD) OF AGENCY (2006), in its introduction, states that it “deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government.”

powers, and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.

*Laurel Baye's* misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of *its Yardmasters* decision. There, the D.C. Circuit properly rejected reliance on the principles of agency and private corporation law it erroneously invoked in *Laurel Baye*. The court in *Yardmasters* discerned that the delegation and vacancies provisions of the federal statute at issue there demonstrated that Congress intended that certain operations of a public agency should continue to function in circumstances where a private body might be disabled. 721 F.2d at 1343 n.30. Similarly, in this case, the plain meaning of Section 3(b)'s delegation, vacancy, and quorum provisions manifests Congress' intent that three or more members of the Board should have the option to delegate the Board's powers to a three-member group, knowing that an imminent vacancy "shall not impair the right of the remaining members to exercise all the powers of the Board" and that "two members shall constitute a quorum of any group" so designated. As the Office of Legal Counsel properly concluded, construing Section 3(b)'s plain language to permit the two-member quorum to continue to exercise the Board's powers that were properly delegated to the three-member group "would not confer power on a number of members smaller

than the number for which Congress expressly provided in setting the quorum.”

2003 WL 24166831, at \*3.<sup>25</sup>

**E. The Two-Member Quorum Has Authority To Decide All Cases Before The Board**

The Company incorrectly argues (Br. 55-56) that the two-member quorum provision of Section 3(b) is limited to situations where a case was originally assigned to a panel consisting of three members. Under the express terms of Section 3(b), the Board may delegate “any or all of the powers which it may itself exercise” to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to

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<sup>25</sup> Although, as *Laurel Baye* noted (564 F.3d at 474), *Yardmasters* is distinguishable, the critical distinction actually points directly to the greater strength of the Board’s case. In *Yardmasters*, the D.C. Circuit was faced with the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. See 721 F.2d at 1341-42. By contrast, here, the statutory requirements for adjudication are satisfied because Section 3(b) expressly provides that two members of a properly constituted, three-member group is a quorum. Therefore, the presence of the Board quorum that adjudicated this case “‘is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.’” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting ROBERT’S RULES OF ORDER 3, p. 16 (1970)).

carry out the provisions of the NLRA (see 29 U.S.C. § 156). Thus, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group, and the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.

Section 3(b)’s broad authority permitting the Board to delegate all of its powers to a group contrasts with statutes governing appellate judicial panels, which require the assignment of at least three judges in every case. The primary judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring “the hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, “in the first instance, all cases would be assigned to [a] panel of at least three judges”) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

The Supreme Court’s decision in *Nguyen v. United States*, 539 U.S. 69 (2003), illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. *See New Process*, 564 F.3d at 847-48. In that case, the Court held that

the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. The three-member group of Board members to which the Board delegated all of its powers, however, *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. *See Snell Island* 2009 WL 1676116, at \*7 (three-member panel that took effect on December 28, 2007 was properly constituted). Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created . . . .” 539 U.S. at 83. <sup>26</sup>

The Company also relies (Br. 55) on *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), but that case involves a very different kind of delegation. In *KFC*, the Second Circuit held that the Board members responsible for deciding whether a representation election had been conducted fairly were

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<sup>26</sup> *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, 138, 144 (1947) (Urgent Deficiencies Act “require[d] strict adherence to the [statutory] command” that a case brought to enjoin an ICC order “shall be heard and determined by three judges,” where there was “no provision for a quorum of less than three judges.”).

required to make that decision themselves and could not, under the NLRA, delegate that responsibility to Board staff. As the court stated: “In view of the rather clear congressional distrust of staff assistants—who are, of course, neither appointed by the President nor approved by the Senate, as are Board members, 29 U.S.C. § 153(a)—we cannot say that Congress intended, or would have approved, the general proxies issued [to Board staff] here.” 497 F.2d at 303. Thus, *KFC* involved an improper delegation of authority to NLRB staff employees who did not have adjudicatory authority under the Act. In contrast, here, Section 3(b) expressly authorizes the Board to delegate its powers to a group of three Board members, all of whom are authorized by the Act to adjudicate cases.

## **II. THE BOARD ACTED WITHIN ITS BROAD DISCRETION BASED UPON WELL-REASONED CREDIBILITY FINDINGS IN DETERMINING BACKPAY DUE TO DISCRIMINATEES LEONARD SIDES AND JESUS (JESSE) THARP**

### **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)).

In a backpay proceeding, the burden on the General Counsel is limited to proving the gross amount of backpay due. Once that is done, “the burden shifts to

the employer to demonstrate that no backpay is due or that the amount due had been improperly determined.” *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 719 (3d Cir. 2001) (citing cases). “The burden is a heavy one,” *id.* at 721, and any doubts about alleged affirmative defenses are to be resolved against the party who committed the unfair labor practices, *Madison Courier*, 472 F.2d at 1318.

In making an employee whole, 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*, 313 U.S. 177, 198, 199-200 (1941). *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)).

The duty of employees to avoid such willful losses flows not so much from any obligation 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*, 313 U.S. at 200. Indeed, while backpay awards “somewhat resemble compensation for private injury. . . [they are] designed to vindicate public, not private rights.” *Virginia Electric and Power Co. v. NLRB*,

319 U.S. 533, 543-44 (1940). 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.” *Id. Accord NLRB v. Velocity Exp., Inc.*, 434 F.3d 1198, 1202-04 (D.C. Cir. 2006) (upholding the Board’s refusal to deduct expenses drivers would have incurred operating their own trucks absent unlawful discharge).

Further, as this Court has recognized, the Board has long held that a wrongfully discharged employee “is not held to the highest standard of diligence in his or her effort to secure comparable employment; reasonable efforts are sufficient.” *Atlantic Limousine*, 243 F.3d at 719. *Accord Madison Courier*, 472 F.2d at 1318 (quoting *NLRB v. Arduni Mfg. Co.*, 394 F.2d 420, 422-23 (1st Cir. 1968)). “The principle of mitigation . . . does not require success, it only requires an honest good faith effort.” *Atlantic Limousine*, 243 F.3d at 721 (attribution omitted). And, in evaluating whether such an effort has been made, 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.

The touchstone then, when an employee’s job-search efforts are challenged by an employer, is whether those efforts were shown not to reflect a sincere

“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). And, it is settled that an employee need not “seek or retain a job more onerous than the job from which he or she was discharged,” *Kawasaki Motors*, 850 F.2d at 527, which, here, means a job “located an unreasonable distance from [the discriminatee’s] home,” *Oil, Chemical & Atomic Wkrs.*, 547 F.2d at 603, posing an “unacceptable disruption to [the employee’s] private life,” *Shell Oil Co.*, 218 NLRB 87, 89 (1975). *Accord Madison Courier*, 472 F.2d at 1321; *Raismas v. Michigan Department of Mental Health*, 714 F.2d 614, 625-26 (6th Cir. 1983) (citing cases).

The Board’s expert judgments about issues of willful loss and other affirmative defenses are entitled to great deference on review. *See Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 543-44 (1940). Thus, the judgments made here will only be overturned if their underlying factual findings are not supported by substantial evidence, or can be said to serve ends other than those which the Act embraces. *See Atlantic Limousine*, 243 F.3d at 715; *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987). Where, as here, the Board’s findings are based on credibility assessments, the Court’s review is even more deferential: “[C]redibility determinations should not be reversed unless inherently

incredible or patently unreasonable.’’ *Atlantic Limousine*, 243 F.3d at 718-19 (attributions omitted).

**B. The Company Failed To Demonstrate That Sides and Tharp Incurred a Willful Loss of Earnings**

As noted, here, the Board modified extant procedures for litigating mitigation issues when an employer raising a job-search defense produces evidence that comparable jobs were available to the backpay claimants. In such circumstances, the Board held that it was appropriate to require the General Counsel to produce the discriminatees themselves or some other competent evidence concerning their search efforts. Throughout its brief (Br. 34-35), the Company repeatedly asserts that the Board went farther and imposed a burden of persuasion on the General Counsel. But the Board could not have been clearer that the burden of persuasion never shifts, remaining at all times on the wrongdoer respondent to prove a willful loss of earnings. As the Board stated (A. 39): “[W]e make no change in the ultimate burden of persuasion on the issue of a discriminatee’s failure to mitigate; the burden remains on the respondent to prove that the discriminatee did not mitigate his damages . . . .” This burden, after further evidence had been taken, the Board reasonably concluded the Company failed to meet here.

To the contrary, as detailed below, the Board reasonably concluded that the credited testimony offered by the General Counsel’s witnesses, together with the

probability of events, convincingly demonstrated that both Sides and Tharp made reasonable job searches, consistent with a sincere and good faith desire to secure employment. That was all the law required of them. The Board further found that the Company's newspaper advertisements and expert opinion on the Northern New Jersey job market were out of step with the actual circumstances facing the two unlawfully-discharged discriminatees, and were of no probative value. The record was therefore clear, as the Board found, that the Company failed to meet its burden to show that either employee had incurred a willful loss of earnings.

### **1. Discriminatee Sides**

Sides testified, and the unemployment office's records confirmed, that Sides diligently visited the unemployment office on a weekly basis—and sometimes more—throughout the 9 months after his termination. According to the office's manager, LoSauro, that level of activity marked Sides as a particularly diligent job-seeker. Nevertheless, even though LoSauro testified that many employers sought referrals from his office for at least 2 weeks before looking elsewhere, his office was able to refer Sides to available jobs in only 8 instances.

Sides testified that he followed up on those referrals in each instance, but failed to secure any offers, and the administrative law judge, affirmed by the Board, credited him. The Company seeks (Br. 14-16) to defeat this credibility determination based upon evidence the judge considered and found to be of no

meaningful weight—employer responses to company counsel’s letters sent several years after Sides had applied for work. As the Board noted, however, “[n]one of the responses . . . show that Sides did not make such applications,” but rather only that companies had moved, files had not been retained, or “information was not available.” (A. 6.) The Company has presented no tenable argument as to why the Board’s credibility determinations should be disturbed on review.<sup>27</sup>

Sides also credibly testified that he regularly checked the Sunday Newark Star Ledger classifieds in search of leads, and followed up when he found advertised jobs that he could identify as being reasonably accessible via public transportation. In all, he visited 25 additional employers who had advertised for work, hardly the unimpressive number the Company would make of it, given that

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<sup>27</sup> The Company claims (Br. 15) that, at least once, it had proof positive that Sides lied about applying for a job. That instance involved Sides’ application to Van Brunt Warehouse; the unemployment office’s files contained a returned Job Employer Reference form from Van Brunt, but the form was unsigned. As the Company notes (Br. 15), Van Brunt’s manager replied to counsel’s letter of inquiry by writing that: “I always sign and return cards back to job bank, when given by applicant. I also show no application for employment for Leonard Sides on file.” The same manager, however, continued: “[*B*]ut reminder, that was back on September 9, 1999.” (A. 421 (emphasis added.))

On its face, there are several explanations as to why the form was unsigned—for example, that the manager may have failed to follow his normal procedure or Sides forgot to bring the form with him and simply returned the form himself. Regardless, the judge credited Sides’ staunch assertion that he was certain that he had applied when confronted with Van Brunt’s letter on cross-examination. (A. 283-84.) And, the manager himself noted that the files could have been stale. Thus, contrary to the Company, the letter provides no basis for disturbing the judge’s finding on this point.

the unemployment office, with its free pre-screening and job referrals, could only provide Sides with 8 referrals in 9 months of weekly visits. The judge was impressed with Sides as a witness, and also with his demonstrated desire to maintain employment. (A. 5-6.) Not only had Sides worked for the Company for a year and a half without interruption before his unlawful discharge (and held many jobs before that), but also, during the backpay period, he willingly took a step down and accepted employment at very low wages through two temporary employment agencies over a period of 4 months.<sup>28</sup>

The Company also posits (Br. 43-54) that the number of job-contacts Sides made was manifestly inadequate to constitute a reasonable search in light of what it claims are the wealth of listings in the Sunday Star Ledgers it offered into evidence. However, Sides testified that he did the best he could to find listings that were within reasonable reach through public transportation and walking, and the

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<sup>28</sup> The Company notes (Br. 20 n.8) that Sides testified that he probably did not engage in an active job search during the 1-month period he worked for the first of the two temporary-service employers (A. 255), and contends that failure constitutes a willful loss of earnings. However, to the extent that Sides might not have actively looked for other employment during that first month of working part-time, the Board reasonably refrained from second-guessing Sides, given that he actually worked during that period. *See Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629-30 (4th Cir. 1989) (“[T]olling back pay for workers who accept part-time or seasonal employment and discontinue otherwise reasonable job searches has the effect of condemning those workers for accepting part-time jobs, despite the fact that the earnings from such jobs serve to mitigate the employer’s back pay liability.”).

collection of newspapers produced by the Company does not speak to the contrary. The Company's argument does not take into account the difficulties posed by searching newspaper listings for jobs that would be accessible through public transportation.

Next, the Board was plainly warranted in concluding that the Company's newspaper listings and opinion testimony counted for nothing. The Company's expert, Flannery, conceded that identifying jobs within a 25-mile radius of the Company's warehouse (which she misidentified as a logical center from which Sides' "reasonable" job search could be measured) was a "very cumbersome and tedious" task, even for someone with her resources and skills (A. 72), and that it would have taken her "forever" to locate all of them, (A. 75). In forming her opinion based upon a selective sampling of the advertisements on three Sundays, Flannery did not even bother to find out where Sides lived, much less contact him or the General Counsel to find out how he commuted to work. Thus, the Board reasonably concluded that Flannery's testimony and report were manifestly inadequate to prove that Sides made less than a good faith and reasonable effort to secure employment.<sup>29</sup>

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<sup>29</sup> See *NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 427 (7th Cir. 2007) ("[I]t is reasonable for the Board to reject expert testimony regarding generalized labor market analysis as evidence that particular discriminatees failed

At bottom, the Company claims that the burden of *persuasion* on the issue of a reasonable job-search shifted to the General Counsel and that it was up to the General Counsel to prove which of the listings in all those papers were inaccessible to one or the other discriminatee or both. (Br. 49, 51.) The short and decisive answer to this contention is that it turns the Board's Supplemental Decision, not to mention decades of settled mitigation law, on its head. (A. 38-40.)

The Company's cases also provide no support for its claims. *Arlington Hotel Co. v. NLRB*, 876 F.2d 678, 680-81 (8th Cir. 1989), is inapposite. Contrary to the Company (Br. 45-48, 53), that case did not involve a discriminatee whose contacts were restricted by his reliance on public transportation, or whose unsuccessful efforts to find employment through newspaper advertisements mirrored the state unemployment office's inability to generate more than an average of 1 contact per month. Similarly, the one paragraph decision in *NLRB v. Pugh & Barr Inc.*, 207 F.2d 409, 409-10 (4th Cir. 1953), is distinguishable. There, in declining to enforce the Board's backpay award, the court noted that the discriminatee had been out of work for more than a year and apparently had relied exclusively upon the unemployment office as his exclusive basis for a job search. Nothing in that decision speaks to the reasonableness of Sides' job-search effort, which was not similarly limited.

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to perform a reasonably diligent search.”); accord *United States Can Co.*, 328 NLRB 334, 343 (1999) (same), *enforced in rel. part*, 254 F.3d 626 (7th Cir. 2001).

Finally, the Company flatly misstates the record by asserting (Br. 47-52) that there is no evidence of job search efforts on Sides' part during 7 of the 17 months the backpay period comprises. The Company's assertion ignores the applications it contends Sides never made, the 4-month period during which Sides was actually employed (during 3 of which Sides was also actively looking for other work), Sides' regular weekly visits to the unemployment office in search of referrals for a 9-month period, and Sides' credited testimony. Thus, the Company's attempt to prove an inadequate job search fails, in light of the credited evidence showing a good faith and reasonable effort to find work throughout the backpay period.<sup>30</sup>

## **2. Discriminatee Tharp**

As noted, the Board credited Tharp's mother, Gail Moskus, who testified that she spoke to her son regularly following his discharge and that he reported to her that he was out every day looking for work, but could find none. Tharp, like Sides, was dependent on public transportation. Moskus explained that her son had

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<sup>30</sup> See *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (employee's job search reasonable, even though his need to care for his mother limited his search to sending letters to prospective employers and networking); *Kentucky River Medical Center*, 352 NLRB 194, 199-203 (2008) (nurses who made limited contacts in health field while registering with state unemployment office not shown to have made inadequate searches); *Avery Heights*, 349 NLRB 829, 835 (2007) (respondent's contention that 39 job contacts were an inadequate search for employment not established where it failed to "show that the nursing homes not contacted by Caldwell were within reach of her home consistent with her driving ability").

always been self-supporting and had a strong work ethic, and that after 5 months of fruitless looking, he agreed to relocate and live with her in Naples, Florida, where jobs (and help finding them) were available. And, within a few weeks of moving to Florida, he was working full-time.

Moskus was unable to provide details concerning her son's job search while he was in New Jersey, but the Board (A. 7) nevertheless credited her testimony. Her description of her son as being industrious and anxious to work comported with his long and uninterrupted 6-year work history with the Company, which began when he was in his early twenties. It was also consistent with his quick actions in securing a job in Florida and retaining it throughout the backpay period, even though he had no overhead expenses since he lived with his mother. That he was unable to find work in New Jersey comported with Sides' experience, and with Sides' difficulty of conducting a job search via public transportation. Furthermore, as the Board emphasized, Moskus' testimony was fortified by the fact that her son received unemployment benefits while in New Jersey, which under settled law, "is prima facie evidence of a reasonable job search," because an unemployment claimant's benefits would be denied if he did not engage in a search for work. (A. 7) (quoting *Avery Heights*, 349 NLRB 829, 834 (2007).) *Accord NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 424 (7th Cir. 2007) (citing cases).

The Company insists (Br. 38) that Moskus' hearsay testimony was not "competent" evidence to prove Tharp's employment efforts, as the Board's Supplemental Decision contemplated. However, the Board in its Supplemental Decision did not require the General Counsel to prove anything; rather, it shifted to the General Counsel only a burden of production, which it specifically stated could be met "by someone familiar with the discriminatee's job search." (A. 39.) As the Second Circuit held in an identical context:

Even if the testimony here received would be inadmissible hearsay in a civil action, we are not prepared to require the Board to exclude it from a backpay hearing. As the discriminatee could not be produced, the Board could accept other evidence which tended to establish the facts. Here, the evidence was testimony as to the deceased's discussions of his search for alternative work. We do not consider it 'practical' as that word is used in Section 10(b)<sup>[31]</sup> to exclude this relevant testimony. Moreover, since the burden of proving lack of a diligent search was on [the employer], we fail to see how the admission of this testimony was prejudicial. As we stated above, the Board can only be expected to make available for the employer's cross-examination such evidence as it may reasonably obtain.

*NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 179 (2d Cir. 1965). *See also Conley Trucking v. NLRB*, 520 F.3d 629, 640 (6th Cir. 2008) (use of hearsay appropriate where "the relaxation of the Federal Rules of Evidence by the administrative law judge was reasonable under the circumstances and limited in its application to the practicalities of this situation").

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<sup>31</sup> Section 10(b) of the Act (29 U.S.C. § 160(b)), in pertinent part states that "[a]ny proceeding, shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States \* \* \*."

Here, as noted, the Board found that Moskus' testimony was corroborated by Sides' experience, and that the Company's evidence to the contrary—newspaper listings and the opinion of the Company's expert—was, as also noted above, untethered to the discriminatees' individual circumstances. The Board reasonably concluded that the Company failed to prove that Tharp incurred a willful loss of earnings during the backpay period.

The Company contends (Br. 38-40) that Tharp's failure to maintain records of his job search as requested by the Board's Casehandling Manual, Section 10558.2, combined with Moskus' inability to provide details, should relieve it of the obligation to prove a loss of earnings. This claim is specious. It is well settled that the Casehandling Manual creates no binding law. *Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998). And, even if it were binding, the cited provision of the manual only directs that discriminatees be "advised" to keep records, not that they should forfeit all rights to backpay if they do not.

In any event, with court approval, the Board has consistently held that backpay claimants will not be "disqualified from receiving backpay because of poor record keeping or uncertain memories," neither of which will relieve an employer of its burden of persuasion on the issue of willful loss. *Rainbow Coaches*, 280 NLRB 166, 179 (1986), *enforced mem.*, 835 F.2d 1436 (9th Cir. 1987). *Accord Ernst & Young*, 304 NLRB 178, 179 (1991) (noting that "it is not

unusual or suspicious that backpay claimants [fail to keep records and] cannot remember the names of employers with whom they applied”) (citing cases).<sup>32</sup> Indeed, to rule otherwise would be to ignore that backpay is a remedy designed to vindicate public rights, not simply private ones governed by “conventional common law or chancery principles,” *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 543-44 (1940), not to mention the well-settled rule that all ambiguities in proof are to be resolved against the wrongdoer—here, the Company.

Equally fatuous is the Company’s misleading assertion (Br. 40) that Tharp completed a Board form showing that he failed to search for work diligently until his move to Florida. As the Board’s Regional Compliance Officer explained, “we sen[d] a letter out when the complaint issues, which [was] probably before [June 24]. . . . It looks like [Tharp] filed it out in June. . . .” (A. 317.) Tharp’s form, which covers Tharp’s job search efforts for a 1-week period beginning June 24, showed that Tharp contacted 7 potential employers for work in that week alone. Thus, far from indicating that Tharp only looked for work in June, it appears more likely that Tharp simply misunderstood what he was supposed to do and reported only those jobs he had looked for during the week he dated the form, which was

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<sup>32</sup> See *Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996), *enforced sub nom.*, *Package Service Co., Inc. v. NLRB*, 113 F.3d 845 (8th Cir. 1997); *Arduini Mfg. Corp.*, 162 NLRB 972, 975 (1967), *enforced in relevant part*, 394 F.2d 420, 422 (1st Cir. 1968).

June 24. (A. 342.) Indeed, except for a period when he was temporarily denied benefits on the faulty ground that he had been discharged for cause, Tharp's unemployment records show that he received unemployment benefits through mid-August. (A. 330-35.) As noted earlier, the receipt of unemployment benefits "is prima facie evidence of a reasonable job search" under Board law. (A. 7) (attribution omitted).

The Company's final argument (Br. 40-41)—that Tharp should have been penalized for relocating and taking a job that paid a few dollars less per hour than he earned at the Company—is no argument at all. Indeed, to rule otherwise would be to punish a sound judgment made in good-faith to secure new employment, and turn the public policy underlying the duty to mitigate—that is, the "healthy policy of promoting production and employment," *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 200—on its head. This, the Board reasonably declined to do.

**CONCLUSION**

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

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National Labor Relations Board

June 2009

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

ST. GEORGE WAREHOUSE, INC.

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Petitioner/Cross-Respondent

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v.

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Nos. 08-4875 &  
09-1269

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NATIONAL LABOR RELATIONS BOARD

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Board Case No.  
22-CA-23223

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Respondent/Cross-Petitioner

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**COMBINED CERTIFICATES OF COMPLIANCE WITH TYPE-VOLUME  
REQUIREMENT AND CONTENT AND VIRUS SCAN REQUIREMENT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 13,848 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Office Word 2003. Board counsel certifies that the contents of the pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and was scanned for viruses using Symantec Antivirus Corporate Edition, program 10.0.2.2000 version June 18, 2009 rev.4, and according to that program, was free of viruses.

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Dated at Washington, DC  
this 22nd day of June 2009

UNITED STATES COURT OF APPEALS  
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	*	
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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 electronic filing and by overnight mail the required number of copies of the Board's brief in the above-captioned case, and has served that brief by electronic filing and by sending two copies by first-class mail upon the following counsel at the address listed below:

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