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Cassis Management Corporation *and* Local 32E, Service Employees International Union, AFL–CIO. Case 2–CA–29311

October 31, 2001

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 10, 1999, Administrative Law Judge Howard Edelman issued the attached decision.[*] The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Cassis Management Corporation, Dobbs Ferry, New York, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.[2]

Charles Allien	$ 24,312.96
Louis Cioffi	19,456.00
Estate of Donald Hoy	9,900.00
Nicolas Michel	37,275.33
Joe Elias Moody, Jr.	33,751.07
Charles Morrow	72,970.88
TOTAL BACKPAY:	$197,666.24

Dated, Washington, D.C. October 31, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Burt Pearlstone, Esq., for the General Counsel.
Robert M. Ziskin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. On March 15, 16, 17, May 18, 19, and June 1, 1999, a trial pursuant to a compliance specification was held in New York, New York.

[*] The numerous inadvertent errors in the judge's decision have been corrected. Consistent with standard Board practice, we have deleted the judge's Notice to Employees.

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

We reject as completely unsupported by the record the Respondent's assertion that employee Charles Morrow concealed interim earnings.

The judge inadvertently omitted from his quotation of the Respondent's January 6, 1999 letter to employee Nicolas Michel the relevant introductory portion of the letter. The letter read in pertinent part:

> [Y]ou are hereby offered reinstatement to your former position of employment. . . . Please contact our attorney Robert M. Ziskin . . . to confirm your date of return to work. Should you fail to contact Mr. Ziskin within five business days of receipt of this letter, we shall have no alternative but to conclude that you do not wish to return to our employ.

In addition to the reasons the judge gave for finding the Respondent did not make a valid offer of reinstatement to Michel, we also rely on the following facts. Michel replied to the Respondent's January 6, 1999 letter by telephone on several occasions, leaving messages for the Respondent's attorney, Robert Ziskin. After Ziskin failed to return any of Michel's calls, Michel replied by letter to Ziskin on January 20, 1999. Ziskin responded on January 30, 1999, with a letter explaining the Board's procedure for determining backpay and inviting Michel to contact him by letter or telephone about reinstatement. Michel telephoned Ziskin and left messages for him on several occasions after receiving the January 30, 1999 letter, but Ziskin never returned any of Michel's calls.

Chairman Hurtgen finds that the 5-business-day period allowed by the Respondent to respond to its reinstatement offers made to employees Allien and Michel was unreasonably short, indicating that the offers were open for only 5 business days. On this basis alone, the Chairman finds that the offers were invalid.

[2] The amounts reflect the backpay due through the first quarter of 1999. Inasmuch as the Respondent has not made a valid offer of reinstatement to Charles Allien, Louis Cioffi, Nicolas Michel, or Charles Morrow, their backpay periods will continue to run until the Respondent makes such an offer.

Consistent with the judge's finding at fn. 3 of his decision, we have modified the amount of backpay due Joe Elias Moody, Jr.

On April 14, 1997, the National Labor Relations Board, called the Board, issued a decision finding that Respondent, Cassis Management Corp. had violated Section 8(a)(1) and (3) of the Act by discharging all of its employees.[1] 323 NLRB 456.

On August 29, 1997, the Board issued a Supplemental Decision concerning alleged Laura Modes misconduct by the picketing of 8(a)(3) employees, *Laura Modes Co.*, 144 NLRB 1592 (1963). The Board found that no misconduct had occurred. *Cassis Management* 324 NLRB 324. In that opinion at fn. 3 the Board stated:

> The mere fact that the Respondent may have subcontracted out this work does not relieve the Respondent of its obligation to reinstate unlawfully discharged employees. See *Stalwart Assn.,* 310 NLRB 1046, 1055 (1993): *Central Air Corp.*, 216 NLRB 204, 214 (1975). Rather, the Respondent must prove that it would have subcontracted the work in question even if the discriminatees had not been terminated, and during the compliance stage of this proceeding the Respondent will have an opportunity to present evidence bearing on that issue.

On September 10, 1998, the United States Court of Appeals for the Second Circuit entered a summary order as mandate, enforcing the reinstatement and backpay provisions, as well as the bargaining order provisions, of both of the above-cited Board decisions and orders. The United States Supreme Court denied Respondent's petition for writ of certiorari on November 9, 1998, 525 U.S. 983.

On November 23, 1998, the Regional Director for Region 2 issued a compliance specification and notice of hearing in the instant case. On January 16, 1999, Respondent submitted an answer to backpay specification, disputing the General Counsel's calculation of gross backpay, and the discriminatees' interim earnings and search for alternative employment. Respondent's answer alleged that it: (1) offered reinstatement to discriminatee Charles Allien by letter of December 14, 1998; (2) offered reinstatement to discriminatee Nicholas Michel by letter of January 6, 1999; and (3) offered reinstatement to Joseph Moody on or about December 29, 1998, which offer Moody declined on or about January 5, 1999.

On March 11, 1999, counsel for the General Counsel filed a motion to strike certain paragraphs of Respondent's answer to the compliance specification and to adopt the General Counsel's gross backpay formula. Respondent responded to that motion on March 14, 1999.

At the hearing, the General Counsel argued that its motion to strike certain paragraphs of Respondent's answer to backpay specification should be granted, inasmuch as Respondent's answer failed to deny with sufficient specificity, the gross backpay calculations and the backpay period for each discriminatee. I granted the motion in part. I concluded that the General Counsel established its prima facie case with respect to the gross backpay due and that the compliance officer need not testify as to the gross backpay formula. Respondent was granted leave to respond to the General Counsel's motion to strike by amending its answer to comply with the Board's Rules and Regulations. In making my ruling I noted that Respondent had not really complied with the rules, as it should have. Specifically, although Respondent's original answer claimed that certain subcontracting, which began after the mass discharge "significantly" reduced its backpay liability, I noted that this claim was so vague that one could not really compute "exactly how much each employee was affected." I also pointed out that Respondent had not pled alternative figures or a formula as to how much each employee was affected, how any such figures were computed and what was taken into consideration with respect to each and every employee. Respondent filed an amended answer on April 9, 1999. The amended answer, it provided "alternate backpay computation" charts for the discriminatees. Although still somewhat vague, I did not strike the answer, as it was clear to me that the figures would become clear with the presentation of evidence. However, the answer, at paragraph 3 states that it "acknowledges that Allien earned $8.00 per hour based on a 40 hour week would have earned $320 per week in gross pay." With respect to Michel, the alternate computation page also provides no gross backpay figures. In a footnote, Respondent asserts its position that Michel's position of employment was not filled subsequent to his discharge. With respect to Charles Morrow, no alternative gross backpay figures were provided in the alternate computation, with a footnote arguing that Morrow was not entitled to backpay because he was an independent contractor and that his alleged position of employment was not filled subsequent to his discharge. With respect to Donald Hoy, Respondent's alternate backpay computation lists his gross backpay average weekly salary as $100 per week. There was no explanation for this figure in the footnotes to the computation chart, but at paragraph 6 (B) of the amended answer, Respondent argues that Hoy only earned $100 per week "on the books." Finally with respect to discriminatee Louis Cioffi, the alternate backpay computation charge lists no figures for average weekly salary or for gross backpay. In footnote 2 of that chart, Respondent asserts Cioffi's position was not filled subsequent to his discharge. Respondent's counsel however, asserted at the hearing that with respect to Cioffi specifically and the discriminatees generally, that Respondent was not contesting what the discriminatees' weekly gross salaries were at the time of their termination.

On the issue of the average weekly predischarge wages of the discriminatees, the Board, in its decision in the unfair labor practice case found that Donald Hoy's "wages were $450 per week, the same as those of handyman Joseph Moody." (Cassis Management Corp., 323 NLRB 456, 457 (1997).) Further, the administrative law judge (ALJ) in the unfair labor practice case, specifically credited Charles Morrow's testimony that he was hired at $500 net pay per week and that Respondent property manager figured out he would have to have gross weekly pay of between $696 and $704 per week to reach the net weekly pay of $500. (See 323 NLRB 456 (1997).)

[1] The Board also concluded that Respondent had violated Sec. 8(a)(5) under the principals set forth in *Gissel Packing Co.*, 395 U.S. 575 (1969).

ARGUMENT

I conclude the General Counsel has met its burden of proof with respect to establishing the gross backpay due to the discriminatees.

It is well established that a finding by the Board that loss of employment was caused by a violation of the Act is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). It is also well settled that the General Counsel's sole burden in a backpay proceeding is to establish the gross amount of backpay due. *Kansas Refined Helium Company*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB* 683 F.2d 1296 (10th Cir. 1982). The burden then shifts to the Respondent to establish facts which would mitigate its liability. *U.S. Telefactors Corp.*, 300 NLRB 720, 721 (1990). Any doubts or ambiguities are resolved in favor of the wronged party and against the wrongdoer. Any formula used to calculate backpay is acceptable, "if it is not unreasonable or arbitrary in the circumstances." *Laborers Local 158 (Worthy Bros. Pipeline)* 301 NLRB 35 (1991); and *Kansas Refined Helium,* supra, 252 NLRB at 1157. The formula need only be reasonably designed to produce a close approximation of the actual pay a discriminatee would have earned but for the Respondent's unlawful activity. Respondent had failed to plead, in its initial answer, any alternate figures as to gross backpay amounts owed. The General Counsel moved to strike the answer with respect to gross backpay and to have the gross backpay amounts in its compliance specification be deemed admitted. I granted that motion, but only in part. That is, the average weekly pay earned by the discriminatees prior to discharge would be deemed admitted on a prima facie basis. The formula, which can be seen as a multiplication of those weekly amounts on a quarterly basis throughout the backpay period, was also deemed admitted. However, I gave Respondent an opportunity to revise its answer in order to "cure" its insufficient specificity and was permitted to introduce evidence regarding subcontracting to attempt to rebut the gross backpay amounts established by the General Counsel.

Respondent, in its amended answer specifically admitted, in its alternate backpay computation table, that Joseph Moody's predischarge average weekly pay had been $450, the amount in General Counsel's compliance specification. As noted above, the Board, in the underlying case specifically found that Moody earned $450 per week at Respondent. With respect to Charles Allien, Respondent's amended alternate backpay computation table contained no figures, but Respondent acknowledges at paragraph 3 of that answer, that: "Allien earned $8.00 per hour, and that based on a 40 hour work week would have earned $320 per week in gross pay." With respect to Nicholas Michel and Louis Cioffi, Respondent did not plead any figures as to average weekly earnings for purposes of gross backpay in its amended alternative backpay computation. Thus, the figures of $128 per week for Cioffi and $320 for Michel stand unrebutted, and I find them to be accurate. Michel also testified, without contradiction, that he earned $8 per hour while at Respondent.

With respect to Charles Morrow, Respondent also did not, in its amended answer, offer any alternate weekly average amount of gross backpay. I find that such failure to offer any alternative figures is itself sufficient to be deemed admitted. Thus, the $700 average weekly pay amount for Morrow, alleged in the compliance specification is accurate. Respondent's sole reason for refusing to admit any gross backpay amount for Morrow is its contention that he was an independent contractor. This issue however, was decided in the underlying unfair labor practice trial. I find it may not be relitigated at the compliance stage. *Imac Energy Inc.*, 322 NLRB 892, 894 (1997), quoting *Transport Service Co.*, 314 NLRB 458, 459 (1994). In ruling that Morrow was hired as an employee, and not as an independent contractor, the ALJ in the underlying case specifically found that Morrow was hired at $696 to $704 per week, *Cassis Management*, supra, 323 NLRB at 464–465. I find this is the figure to be considered in their compliance hearing.

With respect to Donald Hoy, Respondent revised its amended answer and included a figure of $100 per week as Hoy's predischarge weekly gross backpay. However, as found by the Board in the underlying case, Hoy earned $450 per week, 323 NLRB 456 (1997). Moreover, during the instant hearing, counsel for the General Counsel quoted page 2 of Respondent's petition for writ of certiorari to the United States Supreme Court, specifically asserting, inter alia, that Hoy earned $450 per week.[2] Accordingly, I find this is the figure to be considered accurate at this compliance hearing.

Based on all of the above, it is clear beyond any doubt that the evidence establishes that subsequent to the discharge of the entire bargaining unit on April 4, 1996, as set forth above, Respondent substantially increased the work of one contractor who was already performing certain work for Respondent, not performed by the bargaining unit employees. The additional work performed by the contractor, Kevin McGovern, following the discharges, was work previously performed by the discharged bargaining unit employees. The evidence conclusively establishes that the remaining unit work was thereafter subcontracted to other contractors set forth and described below.

The Board in its Supplemental Decision and Order in the underlying unfair labor practice case, stressed that "the mere fact that Respondent may have subcontracted out" [the maintenance work that the discriminatees had performed] "does not relieve Respondent of its obligation to reinstate unlawfully discharged employees. Rather, the Respondent must prove that it would have subcontracted the work in question even if the discriminatees had not been terminated, and during the compliance stage of this proceeding the Respondent will have an opportunity to present evidence bearing on that issue."

In this proceeding Respondent has not claimed that it would have increased the use of certain contractors and contracted with new contractors, as it did, even if the discriminatees had not been terminated. Respondent adduced only, testimony only that it decided, *after the mass discharge on April 4, 1996,* to increase greatly its use of contractor Kevin McGovern, and to contract with two new companies, Gateway Services and Colo-

[2] Significantly, counsel for Respondent made no attempt to deny the contents of its pleading to the Supreme Court. To claim at this late date that Hoy earned only $100 per week is disingenuous, to say the least.

nial Landscaping, to perform work formerly done by the discriminatees. I find this evidence does not come close to supporting any argument of a prediscrimination intent to subcontract out the bargaining unit work.

George Cassis and Kevin McGovern, who testified on this issue for Respondent, conceded there had been no plan prior to the April 4, 1996 discharges to increase the use of subcontractors in maintaining and repairing Respondent's Mountainview apartment complex, the facility in issue. McGovern readily admitted that although he had worked as a contractor for Cassis for several years, he was not requested, until after April 1996, as a result of the discharges, to perform "additional services" at the complex. Prior to April 4, 1996, he had done mainly plumbing repairs such as shower and toilet replacement, and bathtubs. After the discharges he also began to do ceramic tile work, any broken pipes that needed replacing, as well as replacing wood floors, and vinyl floor tiles. At a certain point, McGovern even took over the task of checking the boilers two times daily. He shoveled snow as well, which he admittedly had never done prior to the discharges. This increase in work was not minor by any means. McGovern admitted that, by summer of 1996, after the April 1996 discharges, his monthly work volume from Cassis had increased SEVEN TO EIGHT–FOLD as compared to before April 1996. I find from such testimony that McGovern took on a substantial amount of work that had been done in combination by some or all of the discrimiatees. Moreover, there is no evidence that he would have gotten this windfall of extra work, but for the mass discharge on April 4, 1996. I find that Respondent has not shown that it would have increased the amount of work given to McGovern even absent the discriminatory discharges.

In addition to the greatly increased use of McGovern as a result of the discharges, George Cassis engaged the services of two contractors which he had not used previously: Gateway Cleaning Services and Colonial Landscaping. By his own admission, Cassis did not contract with Gateway to clean the hallways of the complex until the middle of April 1996, after the discharges. Cassis admitted much the same for Colonial Landscaping, in that he did not contract with them until after the April 4, 1996 discharges. The record therefore, is clear that Respondent would not have even contracted with these companies had it not been for the discharges. Finally, Cassis admitted that another contractor, Norby Davila, who he had used in the past prior to the discharges, did thousands of dollars of roof work after the discharges and that some of the discriminatees had done some of the same type of roof work which Davila did after the discharges. Again, there was no suggestion that Davila would have gotten the additional work he received had it not been for the discharges. Two additional contractors, a painter named Joseph Leddy and James Cristello, who did tile work, wall repairs, and floor work, were engaged by Respondent both before and after the discharges. The record simply does not reflect whether these individuals picked up extra work as a result of the discharges. Nor is this fact material. The material point is that Respondent, which respect to the admitted bargaining unit work subcontracted out (Colonial Landscaping, Gateway Cleaning, Norby Davila, and greatly increased use of Kevin McGovern) failed to prove what the Board properly ruled it must: that it would have subcontracted out that unit work even if the discriminatees had not been terminated. The evidence is overwhelmingly to the contrary, based on the testimony of Respondent's own witnesses. Nor can Respondent argue that the decision to subcontract out a large portion of unit work, although made after, and a result of the unlawful discharges somehow tolls backpay or relieves it of reinstatement obligations because it "changed the nature of its business." In this regard it is clear that the nature of Respondent's business, operating the Mountainview apartment complex, was precisely the same before and after the time of the discharges. The evidence clearly establishes that Respondent merely changed the mix of how it would accomplish these tasks after unlawfully firing the entire bargaining unit. Respondent's combined increased reliance on existing contractors, use of new contractors, as well as hiring a few unit employees, to accomplish the same tasks of maintenance and repair as before the unlawful discharges establishes conclusively that such subcontracting was solely motivated to avoid hiring the discriminatees. Respondent contends that its purported decision, admittedly postdischarge, was to do more complete "rehabs" of apartments and also relieves it of any reinstatement or backpay obligations. I find such contentions to be without merit. First, the record evidence on this point is vague. George Cassis and Kevin McGovern's self-serving, vague testimony, that "sometime" in 1996, after the discharges, they began doing more complete rehabs of vacant apartments was not supported by a single document. Respondent did not even attempt to introduce evidence as to how many vacancies occurred since April 1996, inasmuch as these purported "rehabs" were only done in vacant apartments. Nor was Property Manager Kathy Shea called as a witness, and the General Counsel contends, and I agree, that an adverse inference is warranted with respect to her failure to testify. It was Shea, as the record in the instant proceeding and the decision in the unfair labor practice case establishes, who maintained the records as to how many vacancies arose and what types of repairs were made to each. Yet Shea was not called as a witness in the instant proceeding, and no records of any kind were introduced to substantiate the claim that Respondent commenced, on any systematic basis, "complete rehabs" of vacant apartments "sometime" in 1996. I find such adverse inference warranted. Moreover, I find the vague testimony, unsupported by any documents self serving and worthless.

However, even if such testimony were credited, this change came by Respondent's own admission only after and as a result of the unlawful discharges, I conclude such unsupported contention cannot operate as a defense to Respondent's backpay obligations to the discriminatees. The Board has stressed that "if due to the variables involved, it is impossible to reconstruct with certainty what would have happened in the absence of a respondent's unfair labor practices, we will resolve the uncertainty against the respondent whose wrongdoing created the uncertainty." *Alaska Pulp Corp*. 326 NLRB 522, 523 (1998), and cases cited therein.

Accordingly, I conclude Respondent did not meet its burden of showing that it would have subcontracted out the work in question even if the discriminatees had not been terminated. Having failed to do so, Respondent must offer immediate and

full reinstatement to the discriminatees (other than Moody and Hoy), dismiss (if necessary) any persons newly hired after the discriminatory terminations, and also discontinue (if necessary) all subcontracts for work which Respondent's employees are capable of doing. See *Central Air Corp.* 216 NLRB 204, 214 (1975); and *NLRB v. Izzi*, 395 F.2d 241, 242–243 (1st Cir. 1968).

Respondent argues in its amended answer, the discriminatees Charles Allien and Nicholas Michel were hired as temporary employees, solely to perform snow shoveling and related clean-up work because of the severe 1996 winter, and that consequently their services were "no longer required" as of mid-April 1996. Respondent contends that this purported fact tolls backpay for both discriminatees, and relieves it of any reinstatement obligation as to both. However, Respondent adduced no evidence, which would support a finding that Allien and Michel were hired specifically as temporary employees for this purpose. The sum total of the record on this point consists of the vague and incredible testimony of George Cassis that both were hired primarily for the purpose of snow removal and "stuff like that," Cassis offered no documents, payroll records, or any other evidence to support this ridiculous contention. Allien and Michel testified credibly, without contradiction, that their duties entailed more than merely snow removal. In this regard, Allien pointed out that he swept floors, repaired plumbing, painted, and cleaned the grounds of the complex. When asked about snow shoveling, Allien noted that on the days that the employees shoveled snow, all unit employees shoveled, not just he and Michel. Michel testified that in the 4 days that he worked at Respondent before his discharge, he cleaned apartments, raked leaves, and worked outside in the yard. Respondent's counsel adduced no testimony from either Michel, Allien, or George Cassis for that matter, that either employee was **ever told** that they had been hired for a fixed temporary period, or that they were hired only to help with snow shoveling.

Moreover, Cassis admitted, and the findings in the unfair labor practice case reflect, that the regular complement of maintenance employees at the apartment complex in the past was from four to six employees, including Donald Hoy.

I conclude that Allien and Michel were part of Respondent's regular complement. There is simply no support in the record for Respondent's contention that Allien and Michel were temporaries, hired only for snow removal, above and beyond the normal complement of permanent hires. I find them to be unit employees as of the date of their discharge.

Once the General Counsel establishes the amount of gross backpay due, the burden shifts to Respondent to show that the backpay liability should be mitigated or eliminated.

NLRB v. Brown & Root, 311 F.2d 447, 454 (8th Cir. 1963); *Hagar Management Corp.*, 323 NLRB 1005 (1997). In this regard, the Respondent has the burden of establishing the amount of any interim earnings that are to be deducted from the backpay amount due, and has the burden of establishing any claim of willful loss of earnings. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). An employer may thus mitigate its liability by showing that a discriminatee "willfully incurred" a loss by a "clearly unjustifiable refusal to take desirable new employment." *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 198–200 (1941). It is also well settled that any uncertainties are to be resolved against the Respondent, as the wrongdoer, and in favor of the employee discriminatee. See, *Airport Park Hotel*, 306 NLRB 857, 858 (1992), and cases cited therein. Further, with respect to a discriminatee's search for interim employment, Respondent must establish *affirmatively* that the discriminatee failed to make a reasonably diligent search for equivalent interim employment. In evaluating the search for work, the Board has stated that a discriminatee's efforts need not comport with the highest standards of diligence but merely needs to be a good faith effort. *Lundy Packing Co.*, 286 NLRB 141 (1987).

The Board in *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996), affirmed the administrative law judge who concluded that an employee's diligent search for work was established by the fact that he was able to find various jobs during the backpay period from the various sources he used.

The Board in *Alaska Pulp Corp.*, 326 NLRB 522 (1998), addressed an employer's affirmative defense to paying backpay where the individual admitted only that he sought interim work "off and on." The employer claimed that this statement proves the individual failed to make reasonable efforts to find interim employment. The Board disagreed: although the record was "devoid of such essential details as what type of employment [the individual] applied for, how many contacts or applications he made, and when," the employer failed to meet its burden of showing that the individual did not engage in a reasonable search. The Board declined to infer that the individual's efforts were not adequate; " at the most, the evidence creat[ed] only an element of doubt which must be resolved in [the individual's] favor, and not the [employer's]."

In *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420 (1st Cir. 1968), the employer was able to show that an individual (1) only went to the Employment Security Office to see about unemployment benefits; (2) did not believe in reading "help wanted" ads; (3) could not show that he sought jobs where his carpentry skills could be utilized; and (4) could not explain gaps in his chronology of job-hunting events. 394 F.2d at 422. The court held that the NLRB could find that a reasonable search was conducted here despite these indications that the individual did not do all he could to mitigate his loss of pay. The individual was able to make over 70 percent of his prior earnings, he collected and provided W-2 forms, and was otherwise cooperative. The court agreed with the Board that the individual satisfied his standard in the case.

The Board in *Airport Park Hotel*, 306 NLRB 857 (1992), held that the "fact that [an individual] could not recall the names of all the establishments she contacted during [the interim employment] period" does not invalidate the conclusion that the individual made reasonable exertions to find employment. 306 NLRB at 861. See also, *The Blue Note* 296 NLRB 997, 999 (1989) (that an individual could not remember the names of all the places she called or visited does not invalidate a backpay claim since it is not unusual given the length of time that has passed (2 years)). It is clear that the Board places a heavy burden on the employer to show that an individual did not engage in a reasonable job search. Where the record reflects that *some kind* of job search occurred, this seems to be

enough for the Board, even if specific names and places cannot be recalled. *Castaways Management* 308 NLRB 261, 262 (1992).

With respect to Allien, a discriminatee, he was employed virtually continually for almost two thirds of the backpay period, up to and including the first day of his testimony on March 17, 1999. He was only unemployed, therefore, for the first 14 months of that period, from April 1996 through May of 1997. The evidence is very clear, moreover, from Allien's extensive testimony that he continuously and diligently searched for work during that time. Allien began searching around the middle of April 1996. Allien testified in detail, both during direct, and extensive cross examination, regarding the efforts he made to followup on job prospects in the weekly Pennysaver newspaper, pages of which he kept to document his search. Allien had found his job at Respondent through an ad in the Pennysaver. Allien applied for janitorial openings, but also sought driver jobs, and jobs at facilities for the handicapped. In addition to the Pennysaver, Allien sought out his church pastor, who sent him to several job fairs. Allien recalled one job fair he attended during the summer of 1996 in Rye, New York, which in turn led to him filling out 10–15 job applications. He attended another job fair in Newark, New Jersey, either in late 1996 or early 1997, but was unclear at to the exact month. Allien produced a xerox copy of a number of business cards reflecting jobs he followed up on as a result of attending that job fair. Allien recounted staying for several weeks in Baltimore, Maryland, with his mother in August 1996, wherein he continued his search for work. In Baltimore, Allien applied for a job at the Sheraton, referred by his daughter. He also looked in the Baltimore Sun and kept a copy of the classified section to document his search. While in Baltimore, Allien also applied to three hospitals for work in the housekeeping department. Later in 1996, Allien applied unsuccessfully for a job at East Orange General Hospital as housekeeper, and through his stepdaughter applied for a job at a rehabilitation facility called Westhab. He interviewed at Westhab, and continued to go back to that facility several times through early 1997, but was not able to secure employment there during the period he was unemployed. Allien also applied for a job at the Newark Housing Authority in early 1997, but did not have the necessary car required for that job. Allien described other efforts to search for work, including looking regularly in the daily or weekend newspaper classifieds and in certain trade magazines to which he subscribed.

Allien was living in White Plains, New York, until in and around February 1997, when he moved to Ellenville, New York. After a couple of months in Ellenville, Allien stayed with a friend in nearby Westbrookville, New York, until he secured his job at Mount Airy Lodge in June 1997. During his months in Ellenville and Westbrookville, he employed various means in continuing his search for work. Allien contacted ministers, such as Reverend Younger, and his friend Reverend Collins, in Ellenville. Collins sent him to a community center called Ellenville Community Action, where Allien searched the bulletin board notices of job openings. While in Ellenville, Allien also looked in such places as supermarkets, the Ellenville Hospital, and the Ellenville town hall to look at the bulletin board for civil service jobs. Weis Supermarkets later called Allien with a job offer, but he had already secured his job at Mount Airy.

Respondent offered no evidence to cast doubt on Allien's credible testimony regarding his consistent and diligent search for work until he secured his job in June 1997. As set forth above, he persisted and was ultimately successful as shown by his continuous employment from June 1997 to the present. The Board looks at the backpay period as a whole, and not isolated portions, to determine if there has been a reasonable search for employment. *Airport Park Hotel*, 306 NLRB 857, 858 (1992), and cases cited therein. It is evident from Allien's detailed account of his search, the written documents he produced corroborating his efforts, and by the two jobs he did secure and retain for two thirds of the backpay period, that he was actively seeking employment.

Respondent, in its amended answer, contends that Allien should not receive backpay during the period of time during which he sustained an injury and "was required to utilize first crutches and then a cane for a period of time, thereby rendering him unavailable to perform maintenance work." However, the backpay specification was adjusted to take account of the approximately 1 week to 10 days Allien was unable to work because of a sprained ankle suffered on his last day at Respondent. Respondent failed to adduce any evidence that Allien's period of disability rendering him unable to work, was any more than a week to 10 days. The fact that Allien admitted to using a cane for several months after April 1996, but only when he walked long distances, does not prove otherwise. Respondent did not seek to introduce any evidence which would establish that Allien was truly unable to work for any specific period of time. His testimony that he was ready to work in a week or so stands unrebutted and the compliance specification takes account of that by crediting him with only 11 weeks of gross backpay in the second quarter of 1996.

Respondent also contended in its amended answer that since Allien moved from White Plains to Ellenville, New York, then to Westbrookville, New York, and finally to Mount Airy, Pennsylvania, and Flanders, New Jersey, such period should be deducted from the backpay period. However, such movement did not render him unavailable to return to work at Respondent. It is clear from the foregoing that Allien continued to search for work and eventually found work as he moved from place to place. As the Board has noted, "a discharged employee is not confined to the geographical area of former employment; he or she remains in the labor market by seeking work in any area with comparable employment opportunities." *Rainbow Coaches*, 280 NLRB 166, 191 (1986), quoting *Mandarin v. NLRB*, 621 F.2d 336, 338 (9th Cir. 1980).

The evidence in this case establishes conclusively that each discriminatee had jobs throughout the entire backpay period. Periods of unemployment were short. For example Charles Morrow produced 39 invoices showing interim earnings received from self-employment. These invoices covered the entire backpay period. Moreover, the record also establishes conclusively that each discriminatee made a thorough and documented search for work. This trial took 6 days to complete. Most of this time was devoted to the search for work issue.

It is absolutely clear to me that under the Board's guidelines that each discriminatee made a good faith search for work.

The evidence adduced with respect to Michel's interim employment and search for work establishes conclusively a persistent, diligent search for work and fails to establish any unjustified refusals to accept work or other facts constituting a willful loss of earnings. Michel sought work throughout the backpay period from April 1996 to the time of his testimony in the instant case. He was successful in finding six different jobs during that period, although most turned out to be temporary in nature. Michel worked at the Barnes and Noble bookstore in Greenburgh, New York, from almost immediately after his discharge to in and around the middle of June 1996, earning $6 per hour for 20–25 hours per week. However he lost the job as it turned out to be temporary. He next secured work through a temporary agency at Saks Fifth Avenue in Yonkers, New York, working for 2 months from September to November 1996. Immediately following this job he secured a sales job at Bostonian Shoes in the Westchester Mall. He worked there for about 2-1/2 months from the end of November 1996 to the middle of February 1997. He grossed about $600 per week. Michel lost his job at Bostonian when he was fired after he was in a car accident and lost the company payroll. There ensued a period of time when he searched for work until November 1997, when he secured a temporary position at Aunti Anne's pretzel shop in the Galleria Mall in White Plains, New York. Michel worked at the same shop for 3 weeks or so, 6 months later in and around June of 1998. Each time he earned $5.15 per hour for 20–25 hours of work per week. He continued searching and was hired by the Great American Cookie shop in February 1999. He was still employed there at the time the trial in the instant case began in March 1999. He earned $6.50 per hour for a 40 hour week. Michel described in detail his search between jobs. During the periods he was unemployed, he looked on the computer list of jobs at the labor department office on Church Avenue in White Plains, applied at Borders bookstore, and at such clothing stores as Lord and Taylor in Eastchester, and Brooks Brothers in White Plains. Michel testified prior to his job at Respondent that he had 5 years of experience selling men's clothes at Syms in Elmsford. Michel did not limit himself to sales jobs. He went to a factory in Hastings on Hudson, a tennis club in the same town, supermarkets such as the Food Emporium in Eastchester, Cornell University Hospital in White Plains and the Holiday Inn Plaza (front desk job) on Hale Avenue in White Plains. He continually looked in classifieds in newspapers, and applied additionally for a teller job at the Bank of New York in Harrison, a nursing home on East Post Road in White Plains and another front desk job at the Marriott Hotel in Tarrytown, New York.

Thus the record establishes conclusively that Michel was diligent in his efforts to secure interim employment, as evidenced by the fact that he did in fact secure six jobs during the backpay period. Respondent *adduced no evidence* that his search was deficient in any way. Nor can Respondent argue that his involuntary loss of his job at Bostonian Shoes constitutes willful loss of employment. The Board has consistently held that discharge from an interim job, without more, is not enough to constitute willful loss of employment. The Board requires deliberate and gross misconduct which is so outrageous that it suggests deliberate courting of discharge. See, *Ryder System, Inc.* 302 NLRB 608, 610 (1991), and cases cited therein. Respondent has not shown that Michel's loss of his job at Bostonian met this standard.

Respondent does not appear to contest that Moody made sincere good-faith in the attempts to search for work. Moody, in fact, was employed continuously from the end of September 1996 right up through the time he first testified in the instant trial in March 1999. He was only unemployed, therefore, for some 5 months during the entire backpay period, from April 4 to September 1996. He credibly testified, moreover, to his efforts to search for work during that period. Respondent's principal contention is that Moody's backpay period should be cut off as of the time he moved to Baltimore, Maryland, which was at the beginning of April 1997. However, it is clear that Respondent has not sustained its burden of proof on this point. A discriminatee may move from the vicinity of prior employment with a respondent without incurring a willful loss of earnings unless the move would have occurred even if the discriminatee had been properly reinstated. *Alaska Pulp Corp.*, 326 NLRB 522 (1998); *Sorenson Lighted Controls, Inc.*, 297 NLRB 282, 283 (1989).

In the instant case, the record is devoid of any evidence establishing that Moody would have moved when he did even if he had already been properly reinstated to his job at Respondent. The record only reflects that his wife moved to Baltimore "for her job, her job moved to Maryland," and that Moody eventually moved and joined her there, but only 3 months later. There is no evidence regarding the details of Moody's wife's job, or further details concerning the circumstances surrounding his wife's move to Baltimore. She might have moved, for example, because the family needed the money because Moody's job at the time paid substantially less than his job at Respondent. To put it another way, she might not have moved had Moody kept his job at Respondent. Any number of factors, none of which appear on the record, might have contributed to her decision to move and to his decision to follow her after he secured employment. At Respondent, Moody earned $450 per week. At the time he moved to Baltimore he was not employed at a substantially equivalent interim job. His hourly rate was $9.05 per hour, but as his pay stubs reflect, he did not always get 40 hours of work per week and hence averaged only about $338 per week for the 24 weeks he worked at the Marriott Hotel. There is no evidence as to what Moody would have done or exactly when he would have done it had he been reinstated to his higher paying predischarge job at Respondent instead of working at the Marriott Hotel. What is clear, is that he was doing his utmost to mitigate damages and did not move from New York or leave his job at the Marriott until he had secured a job in Baltimore at Master Security. Thus he credibly testified that only about 3 days elapsed between his last workday at the Marriott in New York and his first workday at Master Security in Baltimore. Based on all of the above, I find that Respondent has not met its burden of proving that Moody would have moved and that his employment with Respondent would have terminated, even if it had properly reinstated him at the time.

I also conclude Respondent made two errors in its alternate backpay computation table for Moody. At footnote 4 of that table, Respondent asserts that Moody's 2 weeks in the National Guard should result in the further reduction of gross backpay of $900 during the second or third quarters of 1996. However, no further reduction is necessary because the amended backpay computation takes into account Moody's 2 weeks of military service in April 1996. As can be seen, Moody was credited with only 10 weeks of gross backpay for the second quarter of 1996. Respondent's second error is at footnote 3 of the alternate backpay computation where it asserts Moody's interim earnings for the both the third quarter of 1996 **and** for the first quarter of 1997 should be $4706. The General Counsel agrees that the proper figure for the first quarter of 1997 should be $4706. But the correct figure for the fourth quarter 1996 is $3424.56, as shown by Moody's W-2 form for that year.[3]

Respondent contends that Louis Cioffi "made no reasonable effort to secure interim earnings and is not entitled to any backpay. However, as set forth above, Respondent bears the burden of proof on this issue. I conclude he has not met this burden. Mr. Cioffi testified credibly about his reasonable efforts to seek interim employment during the backpay period. He looked regularly in the weekly Pennysaver newspaper beginning after his discharge in April 1996. Cioffi even testified that he had just followed up on a job prospect in the Pennysaver as of May 1999, the time of his testimony in the instant trial. I find this is reasonable given all the circumstances, including the fact that he found his job at Respondent through the Pennysaver. Cioffi applied for and received unemployment benefits from June through December 1996. In addition, Cioffi looked for possible openings on the computer listings at the unemployment office in Mount Vernon until he stopped this in early 1997 because "it wasn't very fruitful." Cioffi also detailed in his testimony, many names of businesses in Westchester that he visited in search of work. He visited stores such as Pergament, Bradlee's , Rickels (hardware), as well as golf courses, and even cemeteries. He applied at Franks Nursery in Yonkers and returned again several months later. Most of these in person visits, by his own admission, occurred in 1996, or early 1997, but were unsuccessful. Cioffi, who had worked only part time for 4 hours per day, 16 hours per week at Respondent, admittedly limited his search to a comparable part time position. While there was clearly not much part-time work available, he continued inquiring after 1996–1997, and has continued to date. For example, he asked his son-in-law periodically about possible openings at the Dodge dealer in Yonkers where his son-in-law worked. As mentioned above, he had consistently looked for openings in the Pennysaver and has asked friends to tell him if they hear of any openings.

The reasonableness of a backpay claimant's search for interim employment is measured in light of all the circumstances including the individual's skill, qualifications, age, and labor conditions in the area. *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). Cioffi's registration with the state employment service is prima facie evidence of a reasonable search and evidence that he did, in fact, seek work. *Greyhound Taxi Co.,* 274 NLRB 459 (1985); *Firestone Synthetic Fibers Co.*, 207 NLRB 810, 812 (1973); and *Madison Courier*, 202 NLRB 808, 813 (1973). Moreover, Cioffi's age (he was 64 when he began at Respondent in 1994), part-time status, and the fact that he was already receiving Social Security benefits when he began at Respondent led me to believe that Cioffi was reasonable in limiting his search to part-time employment. First, Social Security benefits are reduced when an annuitant reaches a certain threshold of earnings. Cioffi acted prudently to avoid forfeiting any benefits. Second, the Board requires discriminatees only to search for comparable employment and they are not penalized for limiting their search to substantially equivalent employment to the job they had before their unlawful discharge. Further, the Board and the courts hold, that in seeking to mitigate loss of income a backpay claimant is held only to reasonable exertions in this regard not the highest standard of diligence, and that the principle of mitigation of damages does not require success, but only requires an honest good faith effort. *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (1st Cir. 1968); and *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir. 1977). As the Board made clear in a recent backpay case:

> Thus an employer does not satisfy its burden showing that no mitigation tool place because [of] the claimant was unsuccessful in obtaining interim employment, by showing an absence of a job application by the claimant during a particular quarter or quarters of a backpay period, or by showing the claimant failed to follow certain practices in his job search. . . .

United States Can Co., 328 NLRB 334 (1999).

Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the Respondent's wrongdoer whose conduct made such doubts possible. *Teamsters Local 469 (Coastal Tank Lines)* 323 NLRB 210 (1997); and *United Aircraft Corp*., 204 NLRB 1068 (1973). Considering all of the above factors, I find that Respondent has failed to provide a reasonable basis for concluding that Cioffi failed to conduct a reasonable search for work or that, under any governing standard, he might be considered as having sustained a willful loss of earnings. Finally, Respondent concedes it has not made any offer of reinstatement to Cioffi, so that his backpay does not toll until such an offer is made.

Respondent's contentions with respect to Charles Morrow's entitlement to backpay, are based almost entirely on one central contention: Morrow is allegedly an independent contractor and as such is not entitled to any backpay. However, as set forth above the Board found that Morrow was not an independent contractor in the unfair labor practice case, Respondent hired Morrow as an employee, to start at weekly gross salary of $700. As such he is entitled to reinstatement and backpay measured

[3] That figure was inadvertently omitted from the General Counsel's revised backpay computation, but the General Counsel introduced into evidence Moody's W-2 forms for the Marriott Hotel for 1996 and 1997 (GC Exhs. 22(a) and (b)), as well as all of Moody's weekly pay stubs from the Marriott Hotel (GC Exh. 24). While these exhibits do reflect the $4706 earned at the Marriott during the first quarter of 1997, they reflect $3424.56 earned at that hotel during all of 1996. It appears from the pay stubs that this was earned in the fourth quarter, not in both the third and fourth quarters, but the figure of $3424.56 rather than $4706 is correct nonetheless. Based on all of the above, the proper net backpay figure for Moody is **$33, 751.07**, *instead of $38, 454.07.*

from the date of his unlawful discharge in April 1996, until such time as Respondent makes him an unconditional offer of reinstatement to his former position, or a substantially equivalent one. Much of Respondent's examination of Morrow was devoted to placing into evidence some 39 invoices showing interim earnings Morrow received from self employment. First, the dates on these invoices, ranging from June 1996 through January 1999, support the fact that Morrow sought reasonably to mitigate Respondent's backpay liability by seeking self-employment throughout the backpay period. It is well settled that under Board precedent that self-employment is an adequate and proper way for a discriminatee to attempt to mitigate loss of wages. *Black Magic Resources, Inc.,* 317 NLRB 721 (1995); and *Fugazy Continental Corp.*, 276 NLRB 1334 (1985) (citing *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968). In *Heinrich Motors*, 166 NLRB 783 (1967), the Board stated: "That self employment is an adequate and proper way for the injured employee to attempt to mitigate loss of wages hardly requires citation . . . and a claimant in that category need not seek other employment." In *Heinrich Motors*, supra, the Board also stated: "A person is not required to look for other employment while employed, even though that employment may be at a rate of pay less than that from which he was discharged." See also *F. E. Hazard, Ltd.*, 297 NLRB 790 (1990). The Board treats interim income from self-employment like any other income. *Boilermakers Local 27 (Daniel Construction),* 271 NLRB 1038, 1041 (1984); and *Kansas Refined Helium Co.* 252 NLRB 1156, 1157 (1980). Only the net profits from self-employment are included as interim earnings.

In applying these principles to the instant case, the record reflects that Morrow not only properly utilized self-employment opportunities to mitigate his losses, but sought out more traditional employment and was marginally successful. In this regard, he worked for 5 or 6 months at Harvest Plumbing and Heating from approximately October 1996 to March 1997. He worked for 3-1/2 months in 1998 at Johnny's Plumbing and Heating. Morrow also described unsuccessful attempts at securing employment, such as Mr. Rooter and Spano Plumbing and Heating. He looked in the Pennysaver and other newspapers and asked friends for work. With respect to Mr. Rooter, he actually interviewed and was employed in some sort of provisional training position at five dollars and hour, but left that job after a few weeks because of the extremely low pay. With respect to Spano, he decided not to take the job, which paid only $12 per hour, compared to the $17.50 rate he earned at Respondent. Neither of these jobs can be said to be substantially equivalent to his job at Respondent, because of the significantly lower pay rates. A discriminatee may leave one interim job to obtain another one in order to improve his earnings and is not required to continue employment which is not suitable or not substantially equivalent to the position from which he was discriminatorily discharged. *Ryder System, Inc.*, 302 NLRB 608, 609 (1991); and *Alamo Express*, 217 NLRB 402 fn. 17 (1975). Nor must the discriminatee engage in the most lucrative interim employment. See, e.g., *Fugazy Continental Corp.* 276 NLRB 1334, 1338 (1985), enfd. 817 F.2d 979 (2d Cir 1987) (discrimatee Monahan did not incur willful loss of earnings by leaving employment with an interim employer to engage in self-employment that was less lucrative).

More important, Morrow kept busy mitigating his losses by continually seeking income through self-employment. See, *Chem Fab Corp.*, 275 NLRB 21, 24 (1985) [quitting interim job not unreasonable in light of pay difference and subsequent efforts to find work]. As noted above, the Board does not even require discrimatees to further seek interim employment while self-employed. Morrow should not be penalized for simultaneously seeking both regular and self-employment during the backpay period.

I find that Morrow met the standards for mitigating losses through seeking interim employment. In addition, the amounts listed for his interim earnings in the revised compliance specification reasonably approximate the amounts adduced by Respondent through testimony, W-2 forms, and invoices from self-employment.

Respondent contends a valid offer of reinstatement were sent to Charles Allien and Nicolas Michel. Counsel for the General Counsel contends the offers were invalid on their face and, when Allien contacted Respondent through its attorney, Robert M. Ziskin, Esq. Ziskin made it clear that the offer was conditional with respect to Michel. He repeatedly tried to contact Ziskin, left messages, but Ziskin never responded to his phone calls.

A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll backpay. *Tony Roma's Restaurant*, 325 NLRB 851 (1998); *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992); *L. A. Water Treatment* 263 NLRB 244, 246 (1982); and *Standard Aggregate Corp.*, 213 NLRB 154 (1974). It is the employer's burden to establish that it made a valid offer of reinstatement to the discriminatees. *L. A. Water*, supra at 246–247. For a reinstatement offer to be valid, it must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee's former or a substantially equivalent position. *Standard Aggregate*, supra at 154; *Adsco Mfg. Corp.*, 322 NLRB 217, 218 (1996). In addition, the Board does not evaluate a discriminatee's reply to a reinstatement offer until the respondent proves that the offer is a valid one, i.e., consistent with the principles above. See, e.g., *CleanSoils, Inc.*, 317 NLRB 99, 110 (1995); *Consolidated Freightways*, 290 NLRB 771, 772–773 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 498 U.S. 817 (1990).

With respect to Charles Allien, a letter offering reinstatement, dated December 14, 1998 was sent to Allien. The letter stated in relevant part: "You are hereby offered reinstatement to your former employment . . . Please contact our attorney Robert M. Ziskin . . . to confirm your date of return to work. *Should you fail to contact Mr. Ziskin within five business days of receipt of this letter, we shall have no alternative but to conclude that you do not wish to return to our employ."* [Emphasis added.]

The Board has stated that a letter offering reinstatement to a discriminatee will be deemed invalid "if the letter on its face makes it clear that reinstatement is dependent on the em-

ployee's returning on the specified date or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date. *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988). In *National Management Consultants, Inc.*, 313 NLRB 405 fn. 6 (1993), the Board found the following language did not meet the second prong of *Esterline*, supra: "Should you decide that you would like to return to work, please notify me within five (5) business days. If I do not hear from you I will have no choice but to search for permanent replacements." The Board found this language invalid, because, *inter alia*, the language suggested that the offer could lapse if the employees did not respond within 5 days. In *Martel Construction,* 311 NLRB 921 (1993), the offers to discriminatees stated, in pertinent part: "Report to work no later than 24 hours after receipt of this letter, or Friday, August 4, whichever occurs first. If you do not report by those deadlines, we will assume that you are no longer interested in working for our company." The Board found that this language would not lead any reasonable person to believe that the offer survived after August 4 and thus under *Esterline* was not a valid offer of reinstatement. Any reasonable interpretation of Respondent's December 14 offer of reinstatement would lead me to conclude that such offer was invalid because it did not meet the second prong of *Esterline,* supra.

The last sentence, italicized above, clearly suggests that the offer will lapse if the discriminatee does not make a decision on reinstatement within 5 business days. On the basis of *Esterline* and its progeny as cited above, I find the offer is invalid on its face. Accordingly, I further find that Allien had no duty to respond to the offer.

Moreover I would conclude a 5-day period is unreasonably short. A discriminatee could be sick, visiting a relative or in any number of situations where he would not be able to respond to such a short period.

Nevertheless, Allien, who did not receive the letter until early to mid January 1999 because it had been mailed to his ex-wife's address in Pennsylvania. When he received the letter Allien immediately responded by phoning Mr. Ziskin's office in the middle of January, Ziskin did not return Allien's call until at least a week later. In that first phone conversation, Allien asked Zisken if he was supposed to be coming back to work and said that he was willing to do so. Ziskin said only that he would have to get back to Allien, because George Cassis was in the hospital. Allien did not receive a return call until he called once again and left a message with the receptionist. In the second phone conversation, Ziskin told Allien that there was no work available, that the work he had spoken to Allien about was snow removal, and that the weather was not bad so there was no reason to call him back. These two conversations establish beyond any doubt that Respondent was not making an unconditional offer of reinstatement to the same or substantially equivalent job. Ziskin's explanation that the so-called offer in the letter was for temporary snow removal, is not an offer to a substantially equivalent job. In this regard, I conclude that Allien was hired as a full time employee. Moreover, Ziskin's noncommittal response in the first phone conversation, to the effect that he had to speak to George Cassis before telling Allien whether he would be reinstated, demonstrated that the letter, whatever its facial language, was not intended to be unconditional. Finally, Ziskin made transparently clear that during his second conversation with Allien, that such offer was in effect being withdrawn.

With respect to Michel, Respondent sent an offer of reinstatement to Michel dated January 6, 1999. The offer stated in relevant part as follows:

> "Please contact our attorney Robert M. Ziskin at (516) 462–1417 to confirm your date of return to work.
>
> Should you fail to contact Mr. Ziskin within five business days of receipt of this letter, we shall have no alternative but to conclude that you do not wish to return to our employ.

I find this offer invalid for the same reasons as set forth above with respect to Allien. Accordingly, I find Michel had no duty to respond.

However, Michel did respond by a letter to Ziskin dated January 20, 1999. Such letter was sent only after Michel made several unsuccessful attempts to reach Ziskin by telephone. Michel's January 20 letter notes specifically that he phoned Ziskin several times but his calls were not returned. Michel further indicated that he appreciated the offer but could not accept it until he received his 3 years of backpay.

Ziskin acknowledged Michel's letter with a letter dated January 30. In the letter he apologized his inability to return Michel's telephone calls. Concerning Michel's statement in his January 20 letter that he "could not accept it until he received his three years backpay," Ziskin responded as follows:

> "With regard to Cassis Management's offer of reinstatement, I must point out to you that your entitlement, if any, to back pay, will be determined at a back pay hearing by the National Labor Relations Board at which time the Board will consider the amount, if any, of interim earnings that you've had and your good faith efforts to secure other employment since you have been out of work.
>
> As I anticipate that such hearing regarding that matter might well take as much as a year and the issue as to wages you are entitled to is in question, my client is not in a position to offer you three full years of back pay. If you are in fact interested in returning to work with the understanding that the issue of your back will be determined some time in the future by the National Labor Relations Board please contact me.
>
> You may do so by writing to my office at the address which is set forth above. Alternatively, you may call me at my office, but please understand that I am often out of the office."

Thus it is clear that Ziskin did not interpret Michel's January 20 letter as a rejection.

I find that Ziskin's offers of reinstatement to Allien and Michel were invalid as set forth above, and did not toll reinstatement.

On the above findings of fact, and conclusions of law, I make the following recommended[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

Respondent, Cassis Management Corp., Dobbs Ferry, New York, its officers, successors, and assigns, shall make the employees named below by paying to them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded* 283 NLRB 1173 (1987), accrued to the date of payment minus tax withholding required by Federal and State laws. However, since I have concluded that Respondent's offers of reinstatement as to Charles Allien and Nicolas Michel were not valid, backpay shall continue to accrue until a valid offer of reinstatement is made to them.

Louis Cioffi	$ 19,456.00
Donald Hoy	$ 9,900.00
Charles Morrow	$ 72,970.88
Nicolas Michel	$ 37,275.33 +
Charles Allien	$ 24,312.96 +
Joe Elias Moody, Jr.	$ 32,038.79[5]
TOTAL BACKPAY	$ 195,951.92 +

Dated, Washington, D.C. November 10, 1999

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] During the trial of this case counsel for the General Counsel introduced an amended specification concerning the backpay calculations only, (GC Exh. 2). At a further point in this trial counsel for General Counsel further amended the amended specification with respect to the backpay of Joe Elias Moody, Jr. to reflect that Moody's interim earnings for the fourth quarter of 1996 is $3424.56 and the first quarter of 1997 is $4706.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE, Respondent, Cassis Management Corp., its officers, successors, and assigns, shall make the employees named below by paying to them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded* 283 NLRB 1173 (1987) accrued to the date of payment minus tax withholding required by Federal and State laws. However, since I have concluded that Respondent's offers of reinstatement as to Charles Allien and Nicolas Michel were not valid, backpay shall continue to accrue until a valid offer of reinstatement is made to them.

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TOTAL BACKPAY	$195,951.92 +

CASSIS MANAGEMENT CORP.

[6] During the trial of this case counsel for General Counsel introduced an amended specification concerning the backpay calculations only, (Exhibit GC 2). At a further point in this trial counsel for General Counsel further amended the amended specification with respect to the backpay of Joe Elias Moody, Jr. to reflect that Moody's interim earnings for the fourth quarter of 1996 is $3424.56 and the first quarter of 1997 is $4706.00.