

Spring 2010

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Online ISSN: 2643-7759

Recommended Citation

Thomas W. Brudney, *Victims on Trial? A Backpay Case at the NLRB*, 5 FIU L. Rev. 465 (2010).

DOI: <https://dx.doi.org/10.25148/lawrev.5.2.12>

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Victims on Trial? A Backpay Case at the NLRB

Thomas W. Brudney*

I. INTRODUCTION

This is the Court . . . which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give – who does not often give – the warning: “Suffer any wrong that can be done you, rather than come here!”¹

- *Bleak House*, Charles Dickens

On September 27, 1996, forty-four hotel workers went on strike at the Hanover hotel, which sits four miles outside the entrance to Disney World. They were seeking a new contract. Three days later, the Hanover fired them all. After a trial, the National Labor Relations Board (NLRB) ruled that the Hanover had illegally discriminated against the strikers by firing them. It ordered the Hanover to pay each worker backpay to September 1996. The Hanover exhausted all appeals, losing at each level, but still did not pay the fired workers.

I was one of two NLRB field attorneys assigned to get these workers their backpay. As it turned out, this required a second trial, known as the backpay trial, which took place over a four-month period in late 2004 and early 2005. I was not the lawyer for these workers; my client was and is the NLRB. Still, I felt the need to record my impressions of the backpay trial, and some personal thoughts about its significance for workers who exercise their labor law rights.

* Thomas W. Brudney is Senior Trial Attorney for the NLRB. This article is based on his best recollections of the case discussed, supplemented by the trial transcript and filed briefs. The views expressed in this article are his own. They do not represent those of the NLRB or the United States Government. He has changed the names of the hotel and all workers and attorneys in an effort to protect confidentiality.

¹ CHARLES DICKENS, *BLEAK HOUSE* 2 (1868).

II. THE BACKPAY PROCEEDING

Jean Raymond stepped lightly up to the witness chair, as though walking on a layer of ice he feared would break at any moment. A sixty-two-year-old Haitian immigrant, Raymond appeared lean and bony but still showed traces of the graceful, sinewy man he must have been during the nine years he had worked as a dishwasher at the Hanover. Now it was December 2004. More than eight years had passed since Raymond was fired. As the translator administered the oath in Creole, Raymond placed his hand on the Bible, looked toward the administrative law judge (ALJ), swore to tell the truth and sat down. Throughout his subsequent testimony, he leaned slightly forward in the witness seat, trying to hear each question in English, before leaning to his side to hear the translator say it in Creole.

As Raymond started to answer detailed questions from the Hanover's labor attorney, Joseph Gossett, it became clear that testifying through the interpreter was not his only challenge. Gossett asked him about many facets of his work record and searches for work, beginning the day after the Hanover fired him. His answers would help the ALJ decide how much backpay he received.

Raymond testified that his first job after being fired by the Hanover was as a dishwasher at a hotel in Disney World. Gossett asked why he was fired from that job. Raymond answered that he had told his supervisor that he could not scrub with his hands. Gossett tried to prove that Raymond had in fact been fired for misconduct, and that he should be denied backpay for the period following his termination by the Disney World hotel. Gossett then asked Raymond why he left the Ramada Inn in January 1997, shortly after starting. Raymond explained that the Ramada decided to use a temporary agency to supply unskilled workers. When the temporaries arrived, he was assigned a job he couldn't do, and was fired. Gossett attempted to show that Raymond was at fault for leaving that job as well. Raymond next worked at a Hampton Inn in March 1997. Gossett asked why he left after only a few weeks. Raymond said he was laid off because of slow business. Gossett tried to prove that Raymond quit because he did not like that job.

Raymond next found a job in July of 1997 at a hotel whose name he could not recall. Gossett first asked Raymond to identify every place he had searched for work from March until July 1997, seeking to have Raymond found ineligible for backpay during those months for failing to search hard enough for work. Gossett then asked repeatedly for the name of the hotel where Raymond was hired in July 1997. Raymond could only recall that it was on State Road 50 in Orlando, and that he was laid off after a short time when it closed for remodeling. Gossett asked for the location of the hotel. Raymond could not recall, and might well have wondered why Gossett was so probing about his work history from years earlier; wasn't this case about how the Hanover had unlawfully fired forty-four workers?

Gossett continued questioning Raymond about his reason for leaving each interim job, and about his searches for new ones. In his post-trial brief to the ALJ, Gossett wrote that the periods of Raymond's unemployment resulted from "willful idleness." An outside observer, or Raymond himself, may well have wondered: Why did it appear that the victim was the one on trial?

The NLRA entitles workers fired illegally to backpay.² The problem confronting Raymond and the other fired workers at the backpay trial was that NLRB case law requires each illegally fired worker to "mitigate," or try to reduce her backpay by seeking employment that is "substantially equivalent" to the job from which she was illegally fired.³ The NLRB initially computes backpay by calculating the worker's "gross backpay," the amount the worker would have earned had she remained working for the offending employer throughout the backpay period. (The backpay period begins with the illegal termination and generally ends when the employer offers the fired worker reinstatement to her former position.⁴ In the Hanover case, the backpay period ran from September 30, 1996, when the strikers were fired, until December 9, 2002, when the Hanover offered them reinstatement.) Then the NLRB subtracts from gross backpay the fired worker's "interim earnings," or income from the jobs she held during the backpay period, to determine her "net backpay," which is the amount the employer actually must pay her.⁵

That the interim earnings of an illegally fired worker are deducted dollar-for-dollar from her gross backpay is helpful to the offending employer. Also of benefit for such employers, NLRB cases hold that a worker who fails to mitigate for any portion of the backpay period, by not seeking and maintaining suitable interim jobs, is ineligible for backpay for that portion.⁶ Thus, employers have an incentive to try to prove that workers they fired illegally have failed to mitigate since being fired. Gossett was trying to prove that each of the forty-four fired strikers had not mitigated during some or all of the backpay period of more than six years.

One of the problems with this procedure is that people working a series of unskilled or semi-skilled jobs may well have difficulty recalling

² 29 U.S.C. § 160(c) (2006); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941); *see also* *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

³ *See* NLRB CASE HANDLING MANUAL, PART THREE: COMPLIANCE PROCEEDINGS, § 10558.1 (2007) [hereinafter COMPLIANCE MANUAL]; *Tubari, Ltd. v. NLRB*, 959 F.2d 451, 453-54 (3d Cir. 1992); *S. Silk Mills*, 116 N.L.R.B. 769, 773 (1956), *enforcement denied*, *NLRB v. S. Silk Mills*, 242 F.2d 697 (6th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966).

⁴ *See* COMPLIANCE MANUAL, *supra* note 3, § 10536.2.

⁵ *Id.*

⁶ *St. George Warehouse*, 351 N.L.R.B. 961, 963 (2007); COMPLIANCE MANUAL, *supra* note 3, § 10558.1.

their work history from several years earlier. Such difficulties are compounded under questioning on a witness stand from an employer attorney seeking to elicit certain answers. The importance of accurate responses is magnified by the NLRB's case law on mitigation, which gives employers opportunities to try to reduce the amount of backpay they owe their victims.⁷

For example, an illegally fired worker often changes jobs more than once after being fired before finding a steady one. Her backpay stops accruing if she is fired from an interim job for "gross misconduct," or "unreasonably" quits an interim job for personal convenience or other "unjustified" reasons. The NLRB says that the victim in these situations incurred a "willful loss of earnings." Her backpay only starts accruing again once she finds another job, and she continues to be penalized unless the new job pays as much as the one she quit or from which she was fired for gross misconduct.⁸ In addition, many illegally fired workers experience extended periods of unemployment before finding work, and between the jobs they do hold. NLRB cases hold that such workers are completely ineligible for backpay during any period when they were unemployed unless they were conducting a "reasonably diligent" search for work.⁹

In his decision, the ALJ would later find that Raymond had not been fired from any interim jobs for gross misconduct, had only quit one for personal reasons, and had adequately searched for work during each period of unemployment. During the trial, Gossett sought to prove otherwise. Raymond was forced to try and recall the circumstances of each job separation and job search from September 1996 until December 2002.

The testimony regarding Raymond's eligibility for one three-week portion of the backpay period was especially poignant. Gossett asked what Raymond had done after quitting a job as a dishwasher at the Sizzler restaurant in early 1999. Raymond explained that he traveled to Haiti for three weeks to help care for his sick three-year-old child. The child died. Raymond then returned to Orlando and found a job as a concrete laborer.

Gossett asked: "Did you leave Sizzler because you went to Haiti to attend to your child, is that the reason you left Sizzler?"

The translator asked Raymond the question in Creole. Raymond answered: "Yes, I went to Haiti."

⁷ See *infra* notes 8-9, 25-37 and accompanying text.

⁸ See, e.g., *Ryder Sys., Inc.*, 302 N.L.R.B. 608, 610 (1991) (backpay tolled upon showing that discriminatee was discharged from interim job for deliberate or gross misconduct); *Big Three Indus. Gas*, 263 N.L.R.B. 1189, 1198-99 (1982) (holding that backpay is tolled if discriminatee quits interim job absent reasonably compelling and extraordinary circumstances); COMPLIANCE MANUAL, § 10558.4.

⁹ *St. George Warehouse*, 351 N.L.R.B. at 963; *NLRB v. Arduini Mfg., Co.*, 384 F.2d 420, 422-23 (1st Cir. 1968); *Aircraft & Helicopter Leasing*, 227 N.L.R.B. 644, 646 (1976); COMPLIANCE MANUAL, *supra* note 3, § 10558.3.

Gossett rephrased his question to make sure the transcript reflected the reason Raymond went to Haiti: "Is that why you went to Haiti?" Raymond answered again, this time in English: "Yes."

The relevance of these questions was that Raymond might be ineligible for three weeks of backpay during the period when he was in Haiti. Under NLRB case law, quitting an interim job for a "personal" reason makes a worker ineligible for backpay until he starts his next job, and the illness or even death of a child is considered a personal reason. Even so, Raymond's backpay eligibility resumed when he returned to Orlando and started work as a laborer for another company. Raymond had been earning \$6.90 per hour when the Hanover fired him. So at most, asking him to relive the circumstances around the death of his child could save the Hanover backpay for fifteen working days – \$828 – as a result of the trip to Haiti.¹⁰

In his brief to the ALJ following the trial, Gossett argued that Raymond was ineligible for six portions of the backpay period, totaling more than sixteen months. Gossett depicted Raymond as "relatively unemployable," someone who "couldn't manage to hold onto a job in 1996 and 1997 any longer than six weeks." Gossett ignored Raymond's uninterrupted nine-year tenure with the Hanover. He challenged Raymond's claim that he could not remember dates: "Unraveling [Raymond's] history of employment during the hearing was frustrated by his evasiveness, failure to listen carefully and respond to questions, and his repeated invocation of the response, 'I don't remember.'"

Gossett's questioning of Raymond filled eighty pages of transcript and took over two hours.

The vast majority of the fired Hanover strikers were unskilled. Only two of them received more than \$7.29 per hour. These are the hidden underbelly of the tourism attractions at Disney World: housekeepers, laundry aids, housemen, stewards, bellhops, and room service attendants.

The Hanover strikers were hardly the transient, disinterested workers one might encounter at roadside motels. They worked hard and drew satisfaction from their jobs, and most planned to retire in them. Thirty-one of the forty-four fired strikers (seventy per cent) were older than forty in 1996, sixteen were over fifty and nine were over sixty. They had served the Hanover loyally for years; twenty-four of the strikers had worked at the Hanover for at least seven years and seventeen of those had been there more than ten years. Many were hard-working immigrants from Haiti, Cuba, and other Caribbean and Latin American countries, seeking a better life.

¹⁰ Ultimately, Gossett's argument regarding the trip to Haiti was rejected. Because Raymond would have used accrued paid vacation time to cover his trip to Haiti had he not been illegally fired, the judge awarded him backpay for the three weeks anyway.

Almost half (twenty-one) required Spanish or Haitian Creole translators at the backpay trial.

Gossett subpoenaed almost every fired worker, including the estate representatives of the three who had died. He required each fired worker to defend her interim work history in minute detail, covering events that had occurred eight years earlier. Each witness bore a different expression approaching the witness chair. Some appeared eager to face their former employer in court. Others seemed wary, perhaps wondering how an employer that refused to remedy its violations after eight years nonetheless had the chance to cross-examine them in court. Many witnesses wore looks of resignation, as though holding out little hope that the legal process which had dragged on would finally bring them justice.

David Belanger was one of those who seemed to embrace the challenge. At seventy-eight, he cut an impressive courtroom figure. A solidly built man who still stood tall in his six foot frame, Belanger had worked as a banquet server for three decades, the last ten years for the Hanover. As he took the oath wearing a white dress shirt, his thick forearms bore witness to thousands of heavy trays carried across miles of hotel carpet.

Belanger had been seventy when the Hanover fired him. His interim earnings were less than half of what he would have earned had he not been fired by the Hanover. After being fired, he submitted applications to several hotels and was hired as an on-call banquet server at two of these. On-call workers don't work regular schedules, but place their names on rosters and are called as needed. Employers usually call servers with whom they are most familiar. Once Belanger had been fired illegally, he had to start from scratch searching for work at hotels where he had never worked. He did not get called as much as on-call servers who had been working on-call for years.

Gossett tried to prove that Belanger would have gotten more calls for work if he had placed his name on more on-call rosters. Belanger disagreed. When Gossett asked whether Belanger knew that there were numerous work opportunities as an on-call banquet server in Orlando in the late 1990s, Belanger responded: "There probably was, but not for me. Not for a 70-year old going to apply for that type of work."

In his brief to the ALJ after the trial, Gossett wrote that Belanger chose to "change his lifestyle and work far fewer hours" than he had for the Hanover. Gossett suggested that Belanger had preferred to sit idly by and run up his backpay entitlement until he retired in 2000 at age seventy-four. Yet Belanger hardly fit the profile of a malingerer, having worked hard all his life until the Hanover fired him.

Gossett also asked Belanger about the ailments he had experienced in the late 1990s, from rotator cuff surgery to prostate cancer. Each question was designed to show that Belanger should be disqualified from backpay for certain parts of the backpay period when medical problems had

prevented him from working. NLRB cases hold that an employer does not owe backpay for any portion of the backpay period when the worker it fired could not have worked anyway due to a medical problem; the theory is that the worker would have experienced the same medical problem had she not been fired, so she did not incur a loss of earnings attributable to the employer during that period.

Gossett asked Belanger about his chin surgery in early 1998:

“What was the nature of the surgery?”

Belanger explained that he had a growth, and it was removed.

Gossett asked: “It wasn’t outpatient? How many days did you stay in the hospital?”

“It was one day.”

“It certainly prevented you from working that day. How long did it prevent you from working, while you had the surgery and recovered?”

Belanger tried to recall. He estimated: a couple of weeks.

“Okay. You say a couple of weeks. Could you try to be more precise about that? How long did you have bandages on?”

Belanger looked hard at Gossett, and said, “I don’t remember exactly but more than a week, it must have been.”

Gossett then tried to show that part of the reason Belanger did not get more offers for on-call work in 1999 was because he was recuperating from two operations on his left shoulder in the second half of 1998:

“Were you able to go to work immediately after the second surgery?”

“Not immediately, but I was able to go to work.”

“When?”

“Exactly, I don’t remember.”

“Would it at least have been into 1999 and so forth?”

“Yes.”

When it was my turn to question Belanger, I tried to show that he had been fit for work quickly after his second shoulder surgery. Belanger had testified that he attended physical therapy after this surgery, in early 1999. I asked him to explain how he had known when he was ready to return as a banquet server. He explained that after he had had open-heart surgery in 1991, he knew when he was ready to return because he practiced at home, carrying a tray loaded with heavy books while looking at himself in the mirror to make sure his posture was correct. I then asked Belanger whether he had gone through the same ritual of practicing at home facing the mirror after the second rotator cuff surgery in 1998. He said yes. I hoped the ALJ

would sense Belanger's pride, professionalism and candor, and not view him as the person Gossett had tried to portray.

Gossett's trial examination of Raymond, Belanger, and many other discriminatees (victims of discrimination) did not come as a complete surprise. A few weeks before the backpay trial started, I received copies of the subpoenas that Gossett had issued to more than thirty of the discriminatees. The sheer volume of subpoenas sent a message: the Hanover intended to vigorously contest backpay.

I tried to imagine how the discriminatees must have felt upon receiving these subpoenas. The subpoenas directed each discriminatee to bring to trial fifteen types of personal, financial, and medical documents. These included "any documents which relate to or corroborate any explanation for any period of unemployment since your last day of employment with the Hanover in 1996 through December 9, 2002;" "all medical records which reflect or explain the nature of your illness or disability" during "any period of unemployment . . . explained by the fact that you were ill or disabled;" "any logs, journals, calendars or other records of events which you have maintained pertaining to any personal activities;" and "if you have ever been terminated voluntarily or involuntarily, from any employment since your last day of employment with the Hanover in 1996 through December 9, 2002 . . . any and all such documents relating to the termination of employment."

Some discriminatees receiving the subpoenas must have felt frustrated or anxious that after eight years, they would be required to locate and produce such extensive documentation. Many must have found it disconcerting that their former employer, having already fired them unlawfully and been found liable by the NLRB and the court for doing so, could have its attorney cross-examine them in a separate trial about their mitigation efforts.

Workers fired because of discrimination in violation of the NLRA have a two-part remedy: reinstatement and "make whole" monetary relief.¹¹ The employer can contest both parts. Once an employer has exhausted its appeals in the unfair labor practice case, it is often willing to offer reinstatement, though discriminatees frequently decline such offers. According to the NLRB 2008 Annual Report, just over fifty per cent of discriminatees offered reinstatement pursuant to an ALJ's decision or a final court order accepted the offer.¹² Indeed, only one of the forty-four fired Hanover strikers accepted reinstatement once it was offered pursuant to the order of the Eleventh Circuit Court of Appeals in December of 2002.

¹¹ 29 U.S.C. § 160(c) (2006); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); COMPLIANCE MANUAL, *supra* note 3, § 10530.1.

¹² NLRB ANNUAL REPORT (2008), Table 4.

Illegally fired workers reject reinstatement for many reasons. Some fear retaliation from the very employer that fired them. This concern is not usually allayed by NLRB attorneys who tell them retaliation would be illegal, as their former employer has already demonstrated its willingness to break the law. Discriminatees can't afford to lose their jobs a second time and wait while a second unfair labor practice case wends its way through the legal process. Additionally, by the time the Board decision has been issued, most discriminatees have settled into new jobs, established new routines, and met new co-workers. Some have relocated in order to pursue other employment.

The NLRB provides a barebones monetary remedy for illegal termination. It does not award damages for pain and suffering, punitive damages, or attorney's fees.¹³ NLRB cases have ruled that the sole purpose of its remedy is to make the discriminatee "whole" by restoring the income and benefits she lost as the result of being illegally fired.¹⁴ The main feature of this remedy is backpay.¹⁵ Thanks to the dollar-for-dollar deduction of interim earnings, an employer who breaks the law owes nothing if the discriminatee finds and keeps a job paying as much as the employer would have paid. If the discriminatee can only find a job that pays ninety percent of what she would have earned had she not been fired, the discriminating employer owes her the ten percent difference. And as Gossett's examination of Raymond demonstrated, NLRB cases establish several ways a discriminatee's employment decisions during the backpay period may reduce her entitlement to backpay regardless of her interim earnings.

If, after being found liable for an unlawful termination, the employer refuses to pay the amount of backpay claimed by the Regional Office on behalf of the discriminatee, then the Regional Director issues an administrative complaint known as a "compliance specification," which alleges the amounts of backpay (including any claimed medical expenses and pension contributions) owed to the discriminatee for each calendar quarter of the backpay period. The employer may then deny that it owes the amounts alleged in the compliance specification. This triggers the backpay trial, which is held before a different administrative law judge than the unfair

¹³ See, e.g., *Ryan Iron Works, Inc.*, 345 N.L.R.B. 893, 902 (2005) (employees fired in violation of Section 8(a)(3) entitled to backpay with interest but not punitive damages); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997) (finding that the Board lacks authority under NLRA to award attorney's fees incurred by charging party or General Counsel).

¹⁴ See, e.g., *U.S. Steel Corp.*, 293 N.L.R.B. 640, 641 (1989).

¹⁵ The discriminatee is also entitled to retroactive pension contributions if the employer that fired her had a pension plan, reimbursement for any medical expenses that would have been covered by the employer, and reimbursement for any increased transportation costs to her interim jobs.

labor practice trial. The employer can then appeal that ALJ's backpay decision to the NLRB, and its decision to the court of appeals.¹⁶

Employers found to have violated the NLRA may benefit collaterally from the delays entailed when their victims undergo a second set of trials and appeals to resolve backpay. The lengthy process sends the message to employees that it takes years to vindicate their rights under the NLRA, and that by doing so, they risk prolonged financial hardship. One plausible consequence is to discourage workers from supporting union representation, as those who consider organizing watch their illegally fired co-workers wait years to receive justice.

III. UNLAWFUL ACTS OF DISCRIMINATION AND SUBSEQUENT DELAYS

A history of the Hanover case brings to mind *Jarndyce v. Jarndyce* in Dickens' *Bleak House*. As an inheritance dispute proceeds through the endless stages of the 19th century British legal system, it becomes clear that by its conclusion, legal fees have eaten up most of the estate.

On October 31, 1995, the collective bargaining agreement expired between the Hanover and the union representing its employees. The parties bargained throughout late 1995 and the first half of 1996. In June 1996, the Hanover violated the NLRA by declaring that it would not bargain further with the union, before the two sides had reached impasse. On June 27, a supervisor committed another unfair labor practice by telling a long-term maintenance employee, who was also the union's chief steward, to take off his union button. On July 2, another supervisor committed an unfair labor practice when he told the chief steward to take off his union baseball cap and not to wear it at work again. Later in July, the Hanover unilaterally, and thus illegally, implemented its proposals. This is considered a serious unfair labor practice because it undermines workers' faith in their union. Why support the union if it can't stop the boss from doing what he wants? The Hanover's unilateral changes included an increase in group health insurance premiums. The union subsequently filed several unfair labor practice charges at the Tampa Regional Office.

On September 27, 1996, while these charges were being investigated, the union went on strike to protest the earlier unfair labor practices. The union made a tactical decision to call the strike in response to the unfair labor practices, rather than in support of its bargaining demands.

As of that moment, September 27, 1996, when the strike started, the Hanover had essentially two legal options. It could try to make a deal with the union to bring about a conclusion to the strike. Or it could stand by its bargaining position and hire replacements. As to what type of replacements

¹⁶ NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, §§ 102.54-102.56, 101.16 (2009) [hereinafter RULES AND REGULATIONS].

it could hire, the Hanover was legally free to hedge its bet as to whether the NLRB would ultimately find that the strike was an unfair labor practice strike or an economic strike. That is, the Hanover could hire replacements as soon as the strike began, and postpone a decision on whether to reinstate the strikers until the strike was settled or the strikers offered to return unconditionally, assessing the risks at that later time.

The Hanover, though, chose the one option not legally open to it: firing the strikers for going on strike.

On the morning of September 27, 1996, the Hanover handed all forty-four strikers letters telling them to return to work immediately or risk being replaced. Then, on September 30, the strikers received a different set of letters telling them to turn in their uniforms, timecards, and hotel IDs. The September 30 letters were illegal, and the Board ruled years later that by issuing them to the forty-four strikers, the Hanover had unlawfully fired the strikers. The Board also ruled that the Hanover had committed many other unfair labor practices as alleged by the union, and that the strike was an unfair labor practice strike.

Meanwhile, through the end of 1996, the workers maintained a picket line in front of the Hanover. They walked back and forth along the sidewalk and across the driveway used by guests and other employees to enter and leave the hotel. As they picketed, they handed out leaflets to guests informing them of the strike and the Hanover's unfair labor practices. Of the forty-four fired strikers, forty-three picketed regularly. (The remaining striker's religion prohibited picketing.) They asked for support from passing tourists who had come to Disney to escape. It was as if they were saying: Enjoy your dream holiday, but don't do it at the expense of those who clean your rooms, carry your bags, and bring you room service.

The strikers picketed all that autumn, from the sultry humidity and lingering thunderstorms of early October, through the busy Thanksgiving rush into the cheery sunshine of another Florida Christmas season. The chief steward and a union organizer directed the picketing and insured that it was orderly. Picketing was continuous, from 7 a.m. to 7 p.m., seven days a week.

As the Hanover welcomed another round of snowbirds that year, the prospects looked increasingly bleak for the fired strikers. When the strike started, the union represented about 150 workers. Although only forty-four went on strike on the first day, the union hoped that others would join the picket line over time.

But by November 15, 1996, there was no hope of broadening the strike, and the Hanover did not appear to be changing its position. That day, the union sent the Hanover letters on behalf of each fired striker, effectively ending the strike and unconditionally offering to return to work. The Hanover refused to reinstate the strikers. Instead, it sent them a new round of letters on December 27, 1996, claiming incorrectly that the strike had

been an economic one, and stating that the Hanover refused to accept the unconditional offers to return.¹⁷ Some discriminatees continued to picket well into 1997, but most stopped in late 1996 when they found interim jobs.

After several months, the Regional Office completed its investigation of all the unfair labor practice charges, finding sufficient evidence to prove many of the allegations. The Hanover would not settle, and the unfair labor practice trial was set for September 8, 1997, in Orlando. At the Hanover's request, it was postponed twice. The trial eventually took place in January 1998.

The ALJ issued his decision in the Hanover unfair labor practice case on May 18, 1998, finding numerous violations, including the illegal firing of all forty-four strikers. The Hanover appealed to the Board. The case remained pending there for more than three years.

It is not clear whether the delay at the Board stage was because of the complexity of the case, reduced efficiency, or other factors. In any case, the Board withheld its decision for an unusually long time. According to the Board's 2000 Annual Report, the average time from issuance of an ALJ's decision to issuance of the Board's decision was 637 days, or 1.75 years.¹⁸

In September 2001, the Board issued its unanimous decision, affirming the ALJ. The Hanover appealed to the Eleventh Circuit Court of Appeals in Atlanta. On December 6, 2002, the Court of Appeals affirmed the Board's decision.

By then, the Hanover had spent more than six years, and presumably tens of thousands of dollars in attorney fees. It had exhausted its appeals and lost at every stage. A business enterprise found to have violated labor laws by three levels of adjudicators might have agreed at that point to pay what was demanded, or at least offer something close. Moreover, reluctance to further prolong the proceedings might have been reinforced by how successfully the discriminatees had mitigated their backpay. Their diligence was reflected in the average backpay claim per discriminatee.

The total amount of net backpay sought by the Regional Office after trial was \$960,051.53.¹⁹ In other words, the Hanover was being asked to pay an average of about \$21,819.35 for each discriminatee, or \$3,491 per year for each worker, covering the period of 6.25 years from the September 30, 1996, discharges to the December 2002 order by the Court of Appeals affirming the Board. Especially given that seventy per cent of the discrimi-

¹⁷ As the strike was ultimately judged to be an unfair labor practice strike, the Hanover thereby committed more unfair labor practices by refusing to reinstate the strikers.

¹⁸ By 2007, the average time from issuance of the ALJ decision to issuance of the Board decision had risen to 840 days. NLRB ANNUAL REPORT (2007), Table 23.

¹⁹ This does not include interest that the Region was seeking on the backpay, as well as \$17,502 in medical expenses on behalf of nine discriminatees.

natees had been older than forty when fired, these averages seemed to reflect highly diligent mitigation by the discriminatees as a group.

If the Hanover preferred to look at how thoroughly the discriminatees had mitigated during any given year, 1998 seemed a representative year. By then, the discriminatees had abandoned the picket line and should have been doing their best to mitigate. And in fact, they were. The average backpay claim per discriminatee for 1998 was only \$3,260.²⁰ Yet if every discriminatee had worked every day that year at an interim job paying seventy-five per cent of what the Hanover would have paid, the average backpay claim per discriminatee for 1998 would have been \$4,041. For 1998, that is, the average discriminatee earned more than seventy-five per cent of what she would have earned at the Hanover.

To be sure, the NLRB allows employers who illegally fire any number of employees to contest each one's backpay for each calendar quarter of the backpay period, and to ignore the overall mitigation trend of the discriminatees as a group.²¹ Even then, though, there seemed little cause to contest as many backpay claims as the Hanover challenged. The Regional Office was claiming less than \$10,000 per person for fourteen discriminatees, and between \$10,000 and \$15,000 per person for another eight. It seemed the Hanover had little reason to force a lengthy backpay trial with respect to these twenty-two victims.

There was another reason it appeared that the Hanover should agree to pay what the Regional Office was seeking for many discriminatees, or close to this amount. Regional Offices track a discriminatee's work searches and interim job history using lengthy work search forms, which are sent to the discriminatee on a quarterly basis, and which the discriminatee (usually) completes and returns. Several weeks before the backpay trial, pursuant to NLRB practice, the Tampa Regional Office had sent Gossett these work search forms, as well as almost every discriminatee's annual Social Security Administration earnings report for the entire backpay period, and relevant personnel documents the Region had gathered from interim employers. Such disclosures are required by NLRB policy.²²

Gossett therefore would likely have seen that most discriminatees worked in almost every quarter.²³ The documents also showed that the Regional Office was not seeking backpay for quarters when discriminatees did not search for work, were disabled, or otherwise unable to work or had retired.

²⁰ This figure was derived by adding the net backpay amounts for each discriminatee for each calendar quarter of 1998, and dividing the result by forty-four.

²¹ RULES AND REGULATIONS, *supra* note 16, §§ 102.55-102.56.

²² COMPLIANCE MANUAL, *supra* note 3, § 10650.5.

²³ Indeed, they had little choice, given their likely inability to put aside savings during careers of low-wage hotel work.

I hoped that Gossett's perusal of these documents would encourage him to make a realistic settlement offer. And if ever it made sense for a business to settle at a reasonable amount rather than incur further costly litigation that may not significantly reduce its liability, it made sense in this case.

The Disney empire seemed impregnable throughout the 1990s. Then the terrorist attacks of September 11 caused a decline in occupancy rates at all Disney resorts. The attacks helped precipitate a cash-flow crisis at the Hanover, causing it to default on its mortgage loan. Lawyers for both the Hanover and the lender tried to renegotiate the loan. When no agreement had been reached by June 2003, the lender filed a foreclosure action in state court in Orange County, Florida, where Orlando is located.

On February 4, 2004, the Hanover filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. In May 2004, the Hanover filed its original Chapter 11 reorganization plan with the U.S. Bankruptcy Judge in Orlando. The backpay trial was scheduled to begin that September, but was postponed until mid-November by a series of hurricanes. Meanwhile, in October 2004, the Bankruptcy Judge approved an amended reorganization plan.

The Hanover's Chapter 11 plan provided that the discriminatees would receive the full amount of backpay awarded after all appeals were exhausted by the Hanover. Under the plan, the Hanover was to make small monthly payments into a U.S. Treasury account. The payments were \$10,000 per month, except for the months of February-April of 2007, 2008, and 2009, when the payments were \$20,000. Starting in June 2009, the monthly payments escalated to \$23,000. Under the plan, should the Hanover be ordered to pay the full amount of backpay and interest sought by the Regional Office, the monthly payments would not end until 2012.

IV. INSUFFICIENT GUIDANCE IN BACKPAY SETTINGS

The backpay trial finally began on November 15, 2004. It lasted twelve days, largely because the Hanover disputed almost every backpay claim. It finally closed on January 19, 2005.²⁴

NLRB backpay proceedings often display an absence of precise rules regarding what qualifies as sufficient mitigation. This lack of clarity allows employers several chances to try to prove that victims of discrimination failed to mitigate.

One illustration of the lack of clear rules involves the work search requirements. Cases require the discriminatee to conduct a "reasonably diligent" search for new work.²⁵ Does the fired worker have to search a mini-

²⁴ The trial adjourned twice, for roughly one month each time.

²⁵ *Glenn's Trucking Co.*, 344 N.L.R.B. 377, 377 (2005).

mum number of employers per week or per month? Does she have to search at least five, ten, or more employers? Does it matter how the search is conducted, whether by phone, in person, over the internet, or by some other means? How do the fired worker's skill level, work experience, and age factor into the NLRB's definition of a "reasonably diligent" search? Backpay cases repeat the same generalized verbiage: "the Board considers the discriminatee's skill level, work experience, and age in determining whether he has conducted a reasonably diligent search."²⁶ Rather than provide a way to calibrate these factors, the Board uses a case-by-case approach.²⁷

Ironically, the Board's 3-2 decision in this backpay case would partially clarify another nebulous area, but in doing so increased the burden on discriminatees. Board case law had been vague as to how soon after being unlawfully fired a discriminatee must start looking for work.²⁸ Almost all of the fired strikers walked the picket line for at least a few hours each day during the first three months after being fired (the last calendar quarter of 1996). Some searched for work when not picketing. But several of those who picketed long hours did not start searching for new jobs until after November 15, 1996, when the Hanover ignored the union's offer to have the workers return.

Prior to the Board's decision, cases often contained the adage: "A discriminatee is not required to seek work instantly"²⁹ after being illegally fired. That begged the question: How soon after being illegally fired must the discriminatee start searching? One case held that it was permissible to wait forty days, but in that case the discriminatee also registered for work with his state unemployment agency a week after being fired.³⁰ Another

²⁶ See, e.g., *Mastro Plastics, Corp.*, 136 N.L.R.B. 1342, 1359 (1962), *enforced in pertinent part*, *NLRB v. Mastro Plastics, Corp.*, 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966) (whether individual discriminatee has satisfied work search requirement "depends necessarily upon the facts and circumstances in each particular case" and "is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances" including "the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations."); *United Aircraft Corp.*, 204 N.L.R.B. 1068 (1973); *Flannery Motors, Inc.*, 330 N.L.R.B. 994, 996 (2000).

²⁷ The Board, in a 3-2 decision on September 30, 2007, altered long-established precedent and placed the burden of production on the General Counsel to prove that the discriminatee took reasonable steps to search for interim employment. *St. George Warehouse*, 351 N.L.R.B. 961 (2007). This enhances the employer's incentive to dispute backpay, as it forces the General Counsel to recreate each discriminatee's work search over often lengthy backpay periods.

²⁸ See *infra* notes 29-31.

²⁹ See *Keller Aluminum Chairs S., Inc.*, 171 N.L.R.B. 1252, 1257 (1968); *A.S. Abell Co.*, 257 N.L.R.B. 1012, 1015 (1981).

³⁰ *Nickey Chevrolet Sales, Inc.*, 195 N.L.R.B. 395, 398 (1972), *enforced*, *NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103 (7th Cir. 1974).

case allowed the discriminatee to delay searching for four weeks.³¹ Another case found that six weeks was too long.³² The cases did not suggest any transferable rules. Was a discriminatee permitted to delay searching or search less if she faced special obstacles? For example, if a discriminatee had to make new child care arrangements after being fired, or had been sharing a ride to work and had to find another means of transportation, did she enjoy a grace period before being expected to start looking for work? The absence of clear guidance from the Board allowed Gossett to claim that each discriminatee had failed to adequately search soon enough for interim jobs.³³

Another example of the problem created by the NLRB's case-by-case approach to mitigation is the requirement that interim jobs must be "substantially equivalent" to the one from which the discriminatee was illegally fired.³⁴ What is a "substantially equivalent" job? Does it have to pay as much or almost as much as the job from which the discriminatee was illegally fired? How much less compensation is too little in order for the new job to qualify as "substantially equivalent" to the former one?

This requirement presents an especially troubling dilemma for the discriminatee who can only find part-time work, or cannot find the type of job from which she was illegally fired, but needs an immediate source of income. On the one hand, such a discriminatee feels compelled to accept a part-time job or a job requiring fewer skills or less experience than her former job, just to make ends meet. On the other hand, accepting such a job could be ruled by the Board in hindsight to have been a violation of the duty to mitigate; in other words, the Board could conclude that the new employment was not "substantially equivalent" to the old one.³⁵

NLRB mitigation cases on this issue sometimes impose what seem like Hobson's choices. For example, the Board has ruled that discriminatees who search for a long time without finding interim jobs that are substantially equivalent to their previous jobs must "lower their sights," meaning they must accept lesser paying but still "suitable" employment.³⁶ However, if they "lower their sights" too much or too soon before seeking "substantially equivalent" work, then the Board rules that they have incurred a "willful loss of earnings," which makes them ineligible for back-

³¹ I.T.O. Corp. of Baltimore, 265 N.L.R.B. 1322, 1322-23 (1982).

³² Marlene Indus. Corp., 183 N.L.R.B. 50, 54-55, 59 (1970).

³³ As explained in the text below, the Board used this case to announce a new rule that a discriminatee must begin searching for work within two weeks of being unlawfully discharged in order to avoid being disqualified from backpay. The period of disqualification ends if and when the discriminatee begins conducting a reasonable search.

³⁴ Tubari Ltd. v. NLRB, 959 F.2d 451, 454 (3d Cir. 1992).

³⁵ *Id.* at 2813-14.

³⁶ Delta Data Sys. Corp., 293 N.L.R.B. 736, 738 (1989); NLRB v. Madison Courier, 505 F.2d 391, 402-04 (D.C. Cir. 1974).

pay from the date they started the new job. As one Board decision acknowledged: discriminatees are “damned if they do, damned if they don’t.”³⁷

Jorge Padilla must have felt this way. He was fifty-eight when the Hanover fired him from his job as a laundry attendant. The Regional Office claimed only \$9,806.37 on his behalf, less than \$1,600 per year, showing how steadily Padilla had worked throughout the backpay period. Padilla first obtained a custodial job at a condominium complex. That job was eliminated and Padilla was laid off in June 1998. Padilla then applied to five companies for a new full-time job without success, so he accepted a part-time custodial job at Toys ‘R Us in August 1998, where he worked until 2000 when he managed to get rehired at the condominium complex. Gossett argued that Padilla should be denied backpay from 1998-2000 because he accepted the part-time position at Toys ‘R Us. Gossett wrote in his brief: “By accepting part-time work, Mr. Padilla failed to exercise reasonable diligence in obtaining a position substantially equivalent to the position from which he was discharged.” Yet had Padilla rejected the part-time job, Gossett could have cited Board precedent to argue that he had failed to search diligently for work.

In disputing whether discriminatees searched for work soon enough after being fired, Gossett was taking advantage of the NLRB’s rudderless case law on this issue. But he was also using what appears to be an imprudent aspect of the Board’s mitigation doctrine. This is the requirement that workers who have been illegally fired for engaging in a strike that was caused by their employer’s unfair labor practices must choose between picketing, in an effort to get their jobs back, or mitigating, in an effort to protect their entitlement to backpay.³⁸

The Board and the courts have long held that economic strikers who are illegally fired for striking have to choose between mitigating (searching for and accepting interim work) and picketing. As a policy matter, this rule may be viewed as giving an employer involved in an economic strike an advantage if it illegally fires the strikers: once fired, these strikers are likely to abandon their picket line to preserve their backpay entitlements, thereby weakening the strike.³⁹

But even assuming that the Board’s rule is sound in cases of illegally fired economic strikers, it seems unfair in the case of illegally fired unfair labor practice strikers, like the Hanover discriminatees. Unfair labor prac-

³⁷ *Delta Data*, 293 N.L.R.B. at 738.

³⁸ *Tubari Ltd.*, 303 N.L.R.B. 529 (1991), *enforcement denied on other grounds*, *Tubari Ltd. v. NLRB*, 959 F.2d 451 (3d Cir. 1992).

³⁹ Absent such a rule, economic strikers who have been unlawfully fired might continue picketing in the hope that their former employer will be unable to maintain production, give in to their demands and rehire them.

tice strikers who have been fired for striking are in a different position than all other illegally fired workers, even fired economic strikers: their employer has provoked them to strike by violating the NLRA, then fired them for striking, again violating the law. In short, they have exercised their NLRA rights twice, and been victimized both times by the same employer. A strong argument could be made that workers doubly victimized in this manner by their employer should not be disqualified from backpay if they picket the culpable employer for a reasonable period rather than searching for interim work. It would seem unjust if their former employer incurred little or no liability for backpay during such picketing.

Many Hanover strikers did not search for work prior to the union's November 15, 1996, offers to have them return, or searched only one location, believing it was important to show solidarity on the picket line. With thousands of tourists in the vicinity driving or walking by every day, the picket line was the workers' best means of pressuring the Hanover to begin to remedy its unfair labor practices by hiring them back. Once the Hanover refused to accept the union's November 15 offer, the discriminatees apparently realized they were not getting reinstated, and increased the frequency of their work searches.

The problem they faced eight years later was that NLRB backpay cases do not make an exception for illegally fired unfair labor practice strikers who picket in an attempt to get their jobs back. The Board's failure to create such an exception to its mitigation doctrine creates a windfall for offending employers, while in effect punishing those most victimized – unfair labor practice strikers illegally fired for striking – because they subsequently picketed.

V. THE HANOVER'S ECONOMIC APPROACH

As the backpay trial progressed, I was aware of an apparent misfit between the cost of some of Gossett's efforts on behalf of his client, and their likely immediate financial return.

Suppose Gossett proved that a given discriminatee was not owed any backpay for a given six-week period because she quit an interim job for personal reasons and did not find her next job for six weeks.⁴⁰ The resulting savings for the Hanover would be roughly \$1,680 for a discriminatee earning \$7 per hour when fired, as many were. To prove this aspect of the case, the Hanover would have to pay legal fees to have Gossett's firm perform several time-consuming tasks. At the least, Gossett's firm would subpoena the discriminatee, subpoena her interim work records from her interim employers, review these documents, prepare trial questions, exam-

⁴⁰ For example, Gossett argued that Raymond should be ineligible for backpay during a six-week period in 1997 between when he left the Ramada Inn and was hired at the Hampton Inn.

ine the discriminatee at trial, and write a portion of the Hanover's post-trial brief on the particular six-week period.

I thought about this subtext as I watched Gossett examine Darius Lane. He was a sixty-two-year-old dishwasher when he was fired after working at the Hanover for ten years. Lane had applied for the same position at a Disney World hotel on November 11, 1996, was hired on December 12 and worked steadily at that job for the rest of the backpay period. The Regional Office only sought \$4,936 in net backpay on Lane's behalf – less than twenty-five percent of the average claim. A demure African-American man with a distinguished shock of grey near his temples and a quiet demeanor, Lane took the witness stand looking confused as to why Gossett had subpoenaed him to defend a claim in this amount eight years after he had been fired.

At trial, Gossett made it clear that he only disputed \$2,029 of Lane's claim, the amount that accrued during the fourth quarter of 1996 from September 30 to December 12, when Lane started working. In his brief, Gossett asked the judge to reduce Lane's backpay because he had not applied for enough jobs before December 12. What incentive structure was driving the expenditure of lawyer fees and litigation costs to dispute \$2,029 in backpay that accrued during seventy-two days?

There were other examples. Marie Diaz was a Spanish-speaking housekeeper who, after being fired, found a similar job at a Disney hotel in late 1996 and worked there steadily for the rest of the backpay period. Her entire backpay claim was \$13,405.57. But Diaz was out of work briefly on medical leave in 2001. Backpay cases hold that a discriminatee is not entitled to backpay for any period, however short, when she could not work because of a physical impairment. The legal principle is that backpay is not intended to punish the wrongdoer, but simply to make the victim whole; if she would not have been able to work for some period of time regardless of whether she had been fired illegally, the wrongdoer cannot be responsible for backpay during that period of time.

The Hanover argued that the Regional Office should not be seeking three weeks of backpay for Diaz – about \$787 – that accrued during her 2001 medical leave. In other words, to save \$787, the Hanover, despite its apparent financial distress, incurred the costs of serving one subpoena on Diaz and another on her Disney hotel to produce her personnel records, lawyer fees for conducting Diaz' examination at trial and writing a section on her medical leave in its post-trial brief, and the cost of translating her trial testimony into English.

Gossett also presented three management witnesses and an "expert witness." They each testified about the job market for hotel workers in Orlando from 1996 to 2002. They each claimed it was so fertile that anyone who used reasonable diligence could have gotten a job at any time. These witnesses testified that even the nine discriminatees who had been

older than sixty when fired should have been able to find plenty of work. The collective message of all four witnesses was summarized in one phrase by the expert, who described the Orlando labor market for hotel workers from 1996 to 2002 as “close to being almost a worker’s paradise.”

The three management witnesses were human resources directors or consultants for Orlando hotels, including one who was the Hanover’s director of human resources at the time she testified. Seeking to demonstrate how easy it had been to find hotel work in Orlando in the late 1990s, one of the human resources witnesses testified that she had hired “people off the streets that were living in their cars that hadn’t worked for years.”⁴¹ All three witnesses were asked whether discriminatees would likely have been disadvantaged by having to disclose on their applications for interim jobs the fact that they had been fired by the Hanover during a strike. They all denied that discriminatees would have been impeded by disclosing such information. In a moment of perhaps unintended irony, Gossett asked the Hanover’s human resources director whether any employer would consider such information as a negative factor: “Never. Absolutely. For one thing, that would be against the law.”⁴²

NLRB case law recognizes that the older a discriminatee, the harder it is for her to find another job after being illegally fired.⁴³ Yet the Hanover’s human resources witnesses testified that a discriminatee’s advanced age should have actually helped when seeking hotel employment in Orlando. They testified that employers preferred hiring hotel workers older than fifty because they are more “mature,” “reliable,” and “stable.” Gossett cited this testimony in his brief to the judge, and concluded: “With respect to age . . . the evidence is clear that this is in no way an impediment to obtaining a job in the unskilled market in Orlando. This is Florida, after all. A state known famously for its abundance of retirees.”⁴⁴

The expert witness was an economist from an out-of-state university. He had prepared a statistical “probability” report using aggregate Orlando unemployment data and Orlando newspaper ads for hotel jobs from random dates during the backpay period. His report contained elaborate charts and tables that overlooked the daily grind of searching for an actual job. The report’s final section was entitled: “Implications for Successful Job Searching.” The expert testified at some length about his probability report, and then made a series of estimates about the probability of finding a job by conducting a given number of searches in a month. For example, he testified, any discriminatee searching for work in Orlando between 1996 and

⁴¹ This seemed to clash somewhat with the image Disney projects.

⁴² The A.L.J. found that this testimony conflicted with common sense.

⁴³ See *In re Taylor Mach. Prod.*, 338 N.L.R.B. 831 (2003); see also *Domsey Trading Corp.*, 351 N.L.R.B. 824, 867 (2007).

⁴⁴ Brief on file with author.

2002 would have had an 87.1% chance of being hired in one month by applying for work at two locations per day that month.

On cross-examination, I tried to bring out the flaws in the expert's method. He did not talk to the hiring personnel at any hotels. He did not review any job applications, whether from discriminatees or others. He did not factor in an applicant's age. He never checked to see whether any of the jobs advertised in the newspaper ads were filled. His probability report did not account for language barriers, or distinguish between the chances of success applying in person, by phone or over the internet.

The expert acknowledged that the Hanover paid him \$290 per hour, and that he spent twenty-six hours on the case before testifying (he testified for about two hours). In other words, the Hanover apparently spent roughly \$8,100 on the expert, or more than the backpay claims of twelve subpoenaed discriminatees.

NLRB cases historically give very little weight to statistical evidence supplied by labor economists and to the type of generalized impressions provided by the human resources witnesses.⁴⁵ The decisions reject employer claims that such evidence shows a particular discriminatee failed to mitigate. The cases criticize such evidence as failing to prove that particular discriminatees would have been hired into identifiable positions, or even that such positions were filled.⁴⁶ It seemed counterintuitive that the Hanover, in Chapter 11 bankruptcy, would spend thousands of dollars to have four witnesses present evidence that appeared unlikely to reduce its backpay liability.

Lisa Henderson had worked at the Hanover as a laundry aid since 1986. She was earning \$7.00 an hour when she was fired in September 1996. Henderson took jobs at K-Mart and Winn Dixie before finding a better one at Publix, where she stayed long enough to receive periodic raises. By January 2001, she was earning \$7.85 per hour – more than she would have been earning at the Hanover. Then her sister got sick and needed emergency surgery.

Henderson's sister was, ironically, one of the other discriminatees. She had moved to Ohio. After undergoing surgery, she needed Henderson's help with daily living. As a result, Henderson had to take a six month leave of absence from Publix, during which she cared for her sister in Ohio and worked part-time at whatever jobs she could find nearby.

⁴⁵ See, e.g., *Arlington Hotel Co.*, 287 N.L.R.B. 851, 853 (1987) (finding that ads do not establish that jobs would have been available if discriminatee had applied or that he would have been selected for any available position); *United Food & Commercial Workers Int'l Union, Local 1357*, 301 N.L.R.B. 617, 621 (1991) (expert's testimony regarding "probability of job opportunities" is unrelated to the particular circumstances of the discriminatee's work search).

⁴⁶ See, e.g., *U.S. Can Co.*, 328 N.L.R.B. 334, 343 (1999); *Murbro Parking, Inc.*, 276 N.L.R.B. 52, 57 (1985).

At trial, Gossett asked Henderson about the six month leave of absence. After she acknowledged taking it, he worded his next question so that Henderson's leave would be legally indistinguishable from a six month leave of absence to take a vacation:

"Again, this was your own personal choice —"

"Yes."

"— you needed to go, wanted to go help your sister, is that right?"

"Right."

In his brief, Gossett argued that Henderson should receive no backpay for the six months when she was living with and caring for her sister's children in Ohio, because she reduced her interim earnings for reasons that were "purely personal." It occurred to me that if Henderson and her sister hadn't been illegally fired, she may not have had to take a leave of absence when her sister became ill. Perhaps they both would have remained in Orlando, and Henderson could have cared for her sister while working for the Hanover. But NLRB cases view that argument as too speculative.

Francois Manet was a sixty-five-year-old houseman at the time of the firings. He managed to find some work in every quarter except the final quarter of 1996. His net backpay was \$18,837, or \$3,013 per year.

Gossett asked Manet about his work searches. His work search form showed that he had applied at three hotels in the Disney area during the final three months of 1996 and ten during the first six months of 1997. He testified that he also applied at other hotels not recorded, but it was so long ago, he could not recall their names. Not surprisingly given his age, Manet had difficulty finding work. He was hired at a Holiday Inn, but laid off after two weeks because of lack of business at the hotel.

Because Manet continued having difficulty finding hotel work, he registered with a blue-collar union named International Association of Theatrical Stage Employees (IATSE). IATSE refers unskilled laborers to work for contractors setting up trade shows and conventions in the Orlando area. Other discriminatees registered for such work as well, but they were younger. Convention set-up work is only episodic, concentrated in the winter months when tourism peaks. The work is also physically strenuous, requiring endless hours of transporting heavy rolls of carpet and then getting on your hands and knees to lay them down. Manet was not referred for much work by IATSE. That he even sought such work at sixty-five, and accepted it when offered, should have been marks in his favor.

Instead, Gossett tried to depict Manet as lazy and idle, content to draw Social Security and wait to receive his backpay award. He argued in his brief that Manet quit the Holiday Inn because he didn't want to work. He cited the testimony of his three human resources witnesses, that it would be "unlikely" for any hotel to hire Manet and lay him off two weeks later due

to lack of business. (None of the human resources witnesses had worked at the Holiday Inn where Manet worked.) Gossett also argued that Manet must have been shirking to receive so few referrals for convention set-up work, and suggested that Manet had been untruthful about having searched for hotel work at places he could not recall. Gossett wrote in his brief:

[G]iven the jobs-abundant economy and the fact that hotels and other employers were scrambling for workers, it is simply not credible that [Mr. Manet] was making a genuinely honest, good faith effort to find a substantially equivalent position. . . . What appears is that this 65-year old gentleman, now blessed with receiving Social Security, did not want to work any more than he was.⁴⁷

Jim Green, a bellman, was sixty-seven when he was fired by the Hanover. He died in early 2004, several months before trial. Green had worked at the Hanover the longest of all discriminatees – since May 1973, thirteen years before it was purchased by its current owners. He was unable to find a job for the first eighteen months after being fired, despite searching at twenty-one employers. Then, after enduring various illnesses during periods for which the Regional Office indicated no backpay was claimed, Green started to work again in 1998 as a bagger for Publix and K-Mart, and in 2000 became a breakfast greeter for Embassy Suites – at age seventy. He retired in early 2001 for health reasons, so no backpay was sought for Green at any time after 2000.

Gossett subpoenaed Green's stepson (Green's wife was dead) and asked him to identify Green's doctors. Gossett said his intention was to subpoena these doctors to determine whether Green had been unable to work, and was therefore ineligible for backpay, during more of the backpay period than the Regional Office had identified. The stepson was not familiar with Green's doctors, and Gossett was unable to prove additional periods of ineligibility for Green based on his medical limitations.

In his post-trial brief, Gossett criticized the deceased Green for first failing to search hard enough for interim jobs, and then accepting jobs that were not substantially equivalent to his position at the Hanover. Gossett wrote: "In a jobs-abundant, retiree-friendly area like Orlando, it is not conceivable that an individual who is making a genuinely honest, good faith effort to find substantially equivalent work could not find at least one job." Gossett also complained that Green's death made it difficult to prove Green's ineligibility for backpay: "[The Hanover] is substantially prejudiced" "as Mr. Green is deceased and could not be called as a witness."⁴⁸ This argument seemed to capture many of the ironies in the entire case,

⁴⁷ Brief on file with author.

⁴⁸ Brief on file with author.

among them that the perpetrator of Green's workplace injury would claim to be the victim.

VI. THE DECISIONS OF THE ALJ AND THE BOARD

On June 29, 2005, the ALJ issued his forty-three-page decision, awarding \$669,440.19 in net backpay and \$17,502 in medical expenses, plus interest, to forty-one discriminatees and their estates. This is about eighty percent of the net backpay and medical expenses the Regional Office had sought when the trial began.⁴⁹

The judge rejected most of Gossett's arguments.

The Haitian dishwasher, Jean Raymond, was awarded the full amount sought by the Regional Office. So were Darius Lane, Francois Manet, Jim Green's estate, and six of the seven housekeepers who found work at Disney hotels; the seventh received all the backpay sought except for twenty-one days, for the time she had been on maternity leave from Disney.

The ALJ ruled in favor of the discriminatees on several legal issues that affected large groups of them. He ruled that discriminatees who picketed rather than searching for work for the first six to eight weeks of the backpay period were not thereby automatically disqualified during such weeks. He deemed credible the testimony of discriminatees who said they had searched for work at places they did not record on their work search forms. The ALJ found that the testimony of Gossett's "expert" and human resources witnesses deserved little weight. The ALJ rejected the claim by the Hanover's director of human resources that discriminatees searching for work were not disadvantaged by their past association with the strike, writing that such a contention was "contrary to the wisdom contained in 344 volumes of the Decisions and Orders of the National Labor Relations Board."

The ALJ was one of the agency's most esteemed and experienced, having adjudicated unfair labor practice cases for more than twenty-five years. Gossett appealed his decision to the Board, filing thirty-three "exceptions," or arguments why the ALJ was wrong. Gossett argued that discriminatees who waited six weeks after being fired to apply for their first job should have been disqualified from backpay for the entire last quarter of 1996. (That quarter represented a disproportionate amount of each discriminatee's backpay, so a ruling to this effect would severely reduce many awards.) Gossett argued that the ALJ was biased, writing that his "blanket

⁴⁹ Three discriminatees subpoenaed by Gossett had never come to court, and according to NLRB case law, their alleged backpay, a total of roughly \$97,000, could not be distributed until the Hanover was given the opportunity to examine them under oath. The Regional Office would have one year from the final decision in the case to contact these three discriminatees and present them for cross-examination. If they could not be located, the Hanover would get back the money set aside for them.

reference to 344 volumes of NLRB decisions is about as blatant a substitution of bias for ‘analysis of the evidence’ as one can imagine.”⁵⁰

The Board issued its decision in the backpay case in September, 2007. During the intervening twenty-two months, I received periodic phone calls from discriminatees, wanting to know whether I had heard anything new since the judge’s decision. One discriminatee wanted to update me on her contact information: she would be staying at a relative’s home for the foreseeable future because she had been diagnosed with cancer.

In its 2-1 decision on September 11, 2007, the Board majority, consisting of Chairman Battista and Member Schaumber, upheld the ALJ on a few issues and some individual backpay awards, but reversed him on several other issues and reduced portions of nineteen backpay awards. The Board reduced the total backpay award by approximately nine per cent. Member Walsh wrote a strong dissent.

The majority found that several discriminatees failed to search enough during parts of their backpay periods. In analyzing certain discriminatees’ searches, the majority appeared to ignore or discredit their testimony that they had searched additional employers not listed on their work search forms, whose names they could not recall after eight years. For example, the majority found that a banquet server whose work search form listed only one application in two months was ineligible for backpay for those months, reducing his award by more than \$7,200, yet he had testified that he searched additional employers not listed on his work search form. Dissenting Member Walsh noted that the ALJ had expressly credited the banquet server on this point, and added: “The majority simply ignores that inconvenient fact.”

The majority ruled that Padilla, the laundry attendant who applied to three employers in three months, had not searched diligently and was ineligible for all three months, reducing his backpay award from \$9,109.49 to \$6,171.68. It ruled that a room attendant who had died six months after being discharged was ineligible for the first two months of the backpay period because she had searched only two employers during that time. The majority reduced her estate’s award from \$5,254.01 to \$1,579.97. Member Walsh dissented with respect to both discriminatees.

The majority also reduced several awards because, although the discriminatees involved had been hired for particular interim jobs, there had been a delay of three to four weeks between the date of hire and the dates when the discriminatees actually started work. The majority reasoned that “they did nothing further to mitigate their damages during this time.”⁵¹ (Padilla was one such discriminatee.) As Member Walsh noted in dissent:

⁵⁰ Brief on file with author.

⁵¹ ALJ decision on file with author.

[T]here is no policy (and no case support for the notion) that discriminatees must look for work while waiting for their interim employment to begin. Simply as a practical matter, an employer is not likely to hire an applicant who it knows will be leaving for another job in several weeks; it is unreasonable to expect a discriminatee to continue to look for employment in such a situation.⁵²

The majority rejected the ALJ's position that discriminatees fired for engaging in an unfair labor practice strike could picket for a brief period of time before conducting an initial search for work (six weeks or so), in an attempt to convince their employer to rehire them.⁵³

In perhaps the most controversial portion of its decision, the majority used this case to announce a bright line rule applicable to all illegally fired workers:

[W]e find that, absent circumstances justifying a longer delay, the discriminatees here should have begun their initial search for interim work within the 2-week period following their discharges. If a discriminatee began a reasonably diligent search anytime within this period, then his or her backpay would run from the date of the Respondent's unlawful action. If, however, a discriminatee failed to commence a search at some point within this 2-week period, then his or her backpay would not begin to accrue until the discriminatee commenced a proper job search. . . . Under these circumstances, to award backpay to discriminatees who delayed their initial search for interim work beyond an initial 2-week period would be to reward idleness.

The majority's ruling on this issue reduced the backpay of fourteen discriminatees.

One final aspect of the Board's decision bears noting. The Board reversed what it terms the ALJ's "wholesale rejection" of the "expert" testimony regarding the fertile labor market for hotel workers in Orlando during the backpay period. The Board wrote in a footnote:

In addition to [the labor economist], Respondent also called [two human resource witnesses]. Relevantly, [both] testified that prospective employees would never be handicapped in seeking interim work because they had been discharged because of a labor dispute. The judge found their testimony "contrary to the wisdom contained in 344

⁵² *Id.*

⁵³ On December 13, 2007, a housekeeper whose backpay award was reduced from \$10,024 to \$7,639 as a result of the Board's decision, testified before a joint subcommittee of the House and Senate on the delays and obstacles imposed by the Board's procedures. She stated: "Requiring a worker who has been fired to look for a new job instantly, without trying to get their job back, is like surrendering without a protest, without a fight. It is like having no rights in the first place."

volumes of the Decisions and Orders of the National Labor Relations Board.” The Chairman and Member Schaumber disavow this statement by the judge.⁵⁴

VII. CONCLUSION: SUGGESTIONS FOR REFORM

Like any administrative agency, the NLRB’s effectiveness depends on a degree of voluntary compliance. Most employers who violate the NLRA do not dispute the amount of backpay, at least not to the point of forcing a separate trial about it. Only fourteen percent of 17,204 employees who received backpay from employers in NLRB cases in 2008 did so after a backpay trial,⁵⁵ and the NLRB issued only seventeen backpay decisions.⁵⁶ Having exhausted their appeals in the unfair labor practice case, employers who violate the NLRA generally comply voluntarily by paying the amount of backpay that the Regional Office says they owe, or they offer something close in settlement. A degree of economic rationality and a modicum of civility often prevail. And many employers want to be considered respectable corporate citizens.

But what about employers like the Hanover? The NLRB’s approach to enforcement in such cases may have been appropriate in the middle of the last century, when a much higher percentage of the workforce was represented by unions. A generation ago, employers who fired strikers and then dragged out their backpay cases would have had to deal with strong unions that might use economic self-help to shut them down. A company designated by organized labor as “union busting” suffered from the opprobrium. Now, however, union density (the proportion of the private sector workforce represented by unions) has decreased to less than eight per cent, after peaking at thirty-five to thirty-seven per cent in the 1950s. The decline has accelerated since 1980.⁵⁷ Yet recent surveys indicate that many unrepresented workers would prefer to be represented by unions. One study esti-

⁵⁴ In 2006, the Hanover entered into an agreement with a real estate investment partnership. The new owners assumed the Hanover’s then-still-undetermined backpay liability to the NLRB. The parties stipulated that the new entity was the successor to the Hanover for the purpose of liability for backpay, pursuant to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). On March 29, 2007, the bankruptcy judge entered a final decree closing the bankruptcy case. Ultimately, the new owners and the NLRB settled the case. Under the terms of the settlement, the new owners agreed to forego future appeals and to pay substantially all of the backpay sought by the General Counsel into a previously established escrow account, plus interest, and to accelerate the final installment to March 2010, thereby enabling all discriminatees to receive their backpay two years sooner than had been the case under the Chapter 11 plan. The final checks have been disbursed.

⁵⁵ NLRB ANNUAL REPORT (2008), Table 4.

⁵⁶ *Id.* at Table 3A.

⁵⁷ MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, *LABOR LAW CASES, MATERIALS AND PROBLEMS* 96 (2003); see also Steven Greenhouse, *Most Union Members Are Working for the Government, New Data Shows*, N.Y. TIMES, Jan. 22, 2010 (reporting only 7.2% of private-sector workers were union members in 2009 – the lowest percentage since 1900).

mated that forty-four percent of private sector employees would choose union representation if given a genuinely free chance to exercise their choice.⁵⁸

It seems clear that one reason workers who want union representation don't choose it is because they know that they face far greater risks if they exercise their rights than their employers face if they violate those rights. This is especially the case if their employer reacts as the Hanover did. Most discriminatees are wage-earners who need to find new jobs right away. They cannot afford to wait for the NLRB's two-track trial system to run its course. When they finally get backpay, it is reduced by their interim earnings, and may be further reduced if they ran afoul of NLRB mitigation case law during the backpay period. Employers who vehemently oppose unionization know these realities. They may find the risk of compliance with the NLRA greater than the delayed, minimal remedies imposed on them for discriminating. They may also benefit from chilling support for the union among their victims and remaining employees.

Scholars and labor supporters have long argued that NLRB remedies for discrimination are ineffective.⁵⁹ Yet Section 10(c) gives the Board the power to "*take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the purposes of*" the NLRA. Since Congress passed the NLRA to promote collective bargaining and protect the right to form unions, reinstatement and backpay are arguably only the floor when considering remedies for discrimination.

A strong argument can be made that the NLRB should adjust its remedial approach to changing political and economic realities. Perhaps unions are weaker than in the past in part because workers lack strong protections when they risk their jobs by exercising their NLRA rights. The NLRB's mitigation principles date back to cases decided in the 19th century. At that time, the only limits on an employer's right to fire its workers were contractual; no federal laws guaranteed workers the right to be free from discrimination. Judges routinely declared that workers who had been fired in breach of an employment contract had the moral obligation to avoid idleness, which the judges perceived as a far greater social evil than the employer's unlawful termination. One widely cited 1839 case stated that an illegally fired worker has the "duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continues idle for the purpose of charging another, he superadds a fraud, which the law had rather punish than countenance."⁶⁰

⁵⁸ See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 89 (1999).

⁵⁹ See, e.g., Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 (2002) (arguing that employers committed to avoiding unionization may view reinstatement and backpay minus interim earnings as minor cost of doing business).

⁶⁰ *Shannon v. Comstock*, 21 Wend. 457, 462 (N.Y. Sup. Ct. 1839).

The application of such attitudes, even implicitly, toward workers who exercise their NLRA rights seems anachronistic. The existence of the NLRA and employment discrimination statutes reflects Congressional recognition that employers have “moral obligations” worthy of codification. Employers know they may face significant penalties if they discriminate on the basis of race or sex. Why should they be permitted to discriminate based on union activity with relative impunity simply because the discriminatee fails to mitigate?

The mitigation principles also seem to frustrate basic notions of fairness. Proof of discrimination against union supporters requires proof that the employer knew what it was doing and intended to break the law. Why should such employers reap a windfall if their victims find steady interim work, as most are constrained to do in order to avoid economic ruin? As one scholar has pointed out, a victim who has mitigated enough to be owed little or no backpay is less likely to pursue any legal action than if she has a financial stake.⁶¹ Her co-workers likely know the reason for her termination, yet unless she at least files a claim, they must continue to work in a discriminatory atmosphere without the prospect of seeing it remedied by litigation.⁶² As with delay, mitigation sends remaining workers a chilling message about what it means to exercise their NLRA rights.

Perhaps the NLRB could issue a decision (or rule) stating that, for policy reasons, every worker fired for exercising her rights under the NLRA will normally receive at least one calendar quarter of backpay, calculated as gross backpay with no offsets, regardless of whether she properly mitigated during that quarter.⁶³ Guaranteeing one quarter of gross backpay would effectuate a more realistic view of what it means to be “made whole” by providing the discriminatee with a recovery period in which to reorganize her financial and personal affairs after being fired. It would neither penalize employers nor generate an incentive for discriminatees to shirk interim employment, since a disproportionate amount of backpay under current Board case law already accrues in the months immediately after the illegal termination, before discriminatees can find such employment. And it would send employers the message that if they fire workers illegally, they will not get off free.

⁶¹ Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating Its Negative Impact*, 69 U. CIN. L. REV. 7, 18 (2000).

⁶² In this regard, the NLRB, unlike the EEOC, cannot initiate a charge on its own. See 42 U.S.C. § 2000e-5(b) (2006) (authorizing the filing of EEOC charges “by persons aggrieved or [a] member of the Commission”).

⁶³ Although some will argue that the NLRB must determine appropriate remedies via case-by-case decision making, there is long-standing NLRB precedent for setting minimum levels of backpay to ensure that a remedy is effective. In *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), the Board guaranteed a minimum of two weeks of backpay for employees whose employer violates its duty to bargain in good faith over the effects of eliminating their jobs.

In addition, the NLRB should replace legalistic and hazy mitigation standards with clear guidelines, either through rulemaking or far more consistent case decisions. Employer attorneys should not be invited to litigate whether each discriminatee conducted a “reasonably diligent” search for a “substantially equivalent” job, or quit for “personal convenience.” Clearer guidance would justify imposing financial sanctions on employers if they advance baseless claims at a backpay trial; because they receive all quarterly work search forms, annual Social Security earnings records and other interim work documents well before trial, they should not be permitted to engage in an attrition strategy.

The agency should explore ways to curtail the inordinate time it takes to enforce a remedy when an employer contests backpay. The NLRB should devise a method of deciding most backpay issues on an expedited basis without the need for live trial testimony, perhaps within thirty or sixty days of the final decision in the unfair labor practice case. Clearer mitigation principles and speedy determinations on backpay issues would eliminate any justification for a lengthy backpay trial, and thereby spare the victims of discrimination the added insult of being relentlessly cross-examined by their former employer about their mitigation efforts.

There remain employers determined to break the NLRA and unwilling to remedy their violations. The NLRB should devise strategies for effectively dealing with such employers instead of letting them delay justice and further victimize their former employees.