

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 17-1130**

**September Term, 2017**

FILED ON: MAY 23, 2018

M.D. MILLER TRUCKING & TOPSOIL, INC.,  
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT

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Consolidated with 17-1166

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On Petition for Review and Cross-Application  
for Enforcement of an Order of the  
National Labor Relations Board

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Before: WILKINS and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

**J U D G M E N T**

This petition for review and the cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs and arguments of counsel for the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is hereby

**ORDERED** and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

M.D. Miller Trucking & Topsoil, Inc. challenges an award of backpay to its former employee Edward McCallum. The sole question presented is whether McCallum conducted reasonable searches for employment during the backpay period and thus incurred no willful loss of earnings. *See generally Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *St. George Warehouse*, 351 N.L.R.B. 961 (2007). An Administrative Law Judge found no willful loss of earnings, and the Board affirmed. *See M.D. Miller Trucking & Topsoil, Inc.*, 365 N.L.R.B. No. 57 (2017), J.A. 18–25. Substantial evidence supports these decisions, so we deny the petition for review.

The ALJ credited McCallum’s testimony that he “applied for work every 2 weeks, and learned about available work through internet sites like Craigslist and monster.com, by looking through local newspapers, driving by advertisements, and walking into businesses to ask if they were

hiring.” J.A. 20; *see* J.A. 24. Miller describes this testimony as poorly corroborated and highlights McCallum’s failure to pursue some seemingly obvious job prospects. While those may be fair criticisms, they do not establish that the ALJ’s credibility determinations were “hopelessly incredible,” “self-contradictory,” or “patently insupportable.” *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 33 (D.C. Cir. 2017) (citation omitted).

The ALJ considered McCallum’s receipt of unemployment benefits as evidence of a reasonable search for employment. J.A. 24. The governing statute requires a recipient to certify that he “was actively seeking work” while receiving the benefits. 820 Ill. Comp. Stat. Ann. 405/500. Despite Miller’s characterization of this certification as pro forma, “Board precedent establishes that “[t]he receipt of unemployment compensation pursuant to the rules regarding eligibility constitute[s] *prima facie* evidence of a reasonable search for interim employment.” *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 548 (7th Cir. 2012) (first alteration in original) (quoting *Taylor Mach. Prods., Inc.*, 338 N.L.R.B. 831, 832 (2003)). The ALJ did not err in considering this evidence.

In the backpay proceeding, the ALJ refused to consider Miller’s objection that McCallum did not possess a valid medical certification qualifying him to drive a truck. *See* J.A. 20, 154–55, 221–22. Despite Miller’s arguments to the contrary, this issue was resolved by a prior, unchallenged order of the Board in this case. *See M.D. Miller Trucking & Topsoil, Inc.*, 363 N.L.R.B. No. 49 (2015), J.A. 13–17.

The Board also asks that we summarily enforce its 2014 decision finding that Miller’s actions with respect to McCallum violated the National Labor Relations Act. *See M.D. Miller Trucking & Topsoil, Inc.*, 361 N.L.R.B. No. 141 (2014), J.A. 1–12. That decision, which was the basis of the Board’s later backpay determinations, has not been challenged here. We summarily enforce uncontested Board orders, *see, e.g., Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1304 (D.C. Cir. 2011), and therefore grant the Board’s request.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

**PER CURIAM**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Ken Meadows  
Deputy Clerk