

Nos. 09-1383, 09-1656

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

SHEEHY ENTERPRIZES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**LABORERS' INTERNATIONAL UNION OF NORTH AMERICA
STATE OF INDIANA DISTRICT COUNCIL**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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JURISDICTIONAL STATEMENT

The jurisdictional statement in the opening brief filed by Sheehy Enterprizes, Inc. (“the Company”) is incomplete. This case is before the Court on the

Company's petition to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Decision and Order issued by the Board against the Company on January 30, 2009, and reported at 353 NLRB No. 84. (A 1-6.)¹ The Board had subject matter jurisdiction under Section 10(c) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(c)) ("the Act"), which authorizes the Board to adjudicate and decide unfair labor practice complaints. This Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Indianapolis, Indiana. The Company's petition, filed on February 17, 2009, and the Board's cross-application, filed on March 12, 2009, were timely, as the Act places no time limit on such filings. Laborers' International Union of North America, State of Indiana District Council ("the Union"), has intervened in this proceeding in support of the Board's cross-application.

The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act. The Board's Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C.

¹ "A" references are to the abbreviated appendix appended to the Company's brief. The remaining references are to the original record: "Tr" refers to transcript of hearing, "GCX" and "RX" refer to the exhibits introduced in the hearing by the Board's General Counsel and the Company, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

§ 153(b)). In *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009), this Court conclusively held that the two-member quorum has the authority under Section 3(b) to issue decisions. Accordingly, the Company's contrary contention (Br 47-48) must be rejected.

STATEMENT OF THE ISSUE

Whether the Board reasonably determined that the Company violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining agreement with the Union.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by repudiating its collective-bargaining agreement with the Union. Following a hearing, a Board administrative law judge sustained the complaint's allegations, rejecting the Company's claim that the agreement was not valid because the Union lacked majority support among the Company's employees when the agreement was executed or because the Company's owner allegedly misapprehended the agreement's scope when he executed it. The judge also rejected the Company's argument that the Union should have been estopped from seeking to enforce the agreement, implicitly

discrediting the disputed testimony of the Company's owner that the Union had long acquiesced to the owner's pronouncement that he would not follow the agreement on nonunion projects. The judge found that the Union in fact had no knowledge of the Company's operations during a 3.5-year period during which the Company owner testified the Company had operated in a sector of the industry in which the Union had no meaningful presence. (A 5.)

The Company filed timely exceptions in which, among other issues, it raised a statute-of-limitations defense it never argued before the Board's administrative law judge. The Board (Chairman Liebman and Member Schaumber) affirmed the judge's findings and recommended order, and rejected the Company's new statute-of-limitations argument as having been waived. The pertinent facts follow.

STATEMENT OF THE FACTS

I. BACKGROUND

A. The Company, Historically a Non-Union Contractor, Began Operating on Union Projects and Executed Successive Union Agreements that Covered the Entirety of the Company's Operations

The Company, which was owned and run by James Sheehy, operated as a subcontractor specializing in concrete installation work on construction projects in the Indianapolis, Indiana area. Prior to the events with which this case is concerned, the Company operated in what was generally recognized as a nonunion segment of the industry—that is, it installed sidewalks and curbs, and sometimes

footers and slabs, on relatively small construction projects for business entities such as banks and restaurants, and also on private-housing projects. In 2003, when construction was hard hit by a building recession, the Company began performing work on larger projects in which unionized work was prevalent. Until that point, company employees operated without union representation on nonunion terms, which were generally lower than those in the unionized sector. (A 3; Tr 17-18, 36, 44, 49, 83-84, 115, 117.)

In October 2003, the Company performed as a subcontractor installing sidewalk curbs on a student housing complex being constructed on the Indiana University-Purdue University, Indianapolis campus (“the IUPUI jobsite”). The general contractor on the project, Wilhelm Construction, was party to a state-wide collective-bargaining agreement between an employer association and other individual signatories and the Laborers’ District Council and its local affiliates. Wilhem was obligated under a provision in that agreement to attempt to contract work to unionized subcontractors or to notify the Union if any was not. The Laborers’ affiliate with jurisdiction over the project was Local 120, which had jurisdiction over two Indiana counties in which between 150 to 200 union contractors operated. (A 3-4; Tr 53-56, 81-82, 117, GCX 7 p. 35.)

On October 15, 2003, Local 120 Business Manager David Frye visited the IUPUI jobsite and noticed employees wearing company uniforms installing

sidewalk curbs. Frye knew that the Company was not a union signatory and immediately pointed that out to Wilhelm Construction's project superintendent. The superintendent promptly arranged for Sheehy and Frye to meet the following day. (A 3-4; Tr 55-57.) Frye began by asking if Sheehy was prepared to sign the union agreement. He explained to Sheehy, in response to the latter's inquiry, that, aside from the IUPUI jobsite, the agreement would not apply to any job Sheehy was *currently* working or *had already* bid. Neither man said anything further about the agreement's scope, which on its face covered all concrete work a signatory performed within Indiana and four counties in Kentucky. (A 3-4; Tr 57-59, 88, 151-52, GCX 7 pp. 2-6.)

Frye handed Sheehy an "acceptance of agreement" form. dated at the top, "April 1, 1999, to March 31, 2004," which Sheehy proceeded to execute. The form reads:

The undersigned has read and hereby approves the Contractors-Laborers' Working Agreement by and between the State of Indiana District Council of the Laborers' International Union of North America and the Labor Relations Division of the Indiana Constructors, Inc., operating in the state of Indiana and herewith accepts same and becomes one of the Parties thereto. Any deletions, exceptions or alterations to this Acceptance will be void and of no force or effect.

Frye also gave Sheehy a copy of the collective-bargaining agreement itself.

Sheehy then escorted Frye to where three company employees were working, and Frye had the employees file out and sign forms for the health and welfare benefit

plan and “to get their union card.” (A 3; Tr 57-59. 86-89 GCX 3.) Thereafter, the Company paid contractual wages and made benefit-fund contributions for the duration of the project on behalf of three employees, as documented by a report Sheehy filed out and submitted to the fund. (A 4; Tr 24, GCX 5.)

After the original agreement expired on March 31, 2004, Sheehy began work on another unionized project. He attempted to make benefit fund contributions for his employees but the benefit fund refused them because the Company was not a party to the current union agreement. The benefit fund had sent all signatories to the previous agreement a copy of the new union agreement and a new “acceptance of agreement” form. Sheehy eventually executed the form on May 21, 2004, which was identical in wording to the first form except that it bound the Company to the new agreement which ran from April 1, 2004, to March 31, 2009. (A 4; Tr 64-65, GCX 4 & 6.) Once Sheehy signed the new form, the Company made benefit-fund contributions on behalf of four employees on that project until August 27, 2004, when all contributions from the Company ceased. (A 4; Tr 61, GCX 5.)

B. Unbeknownst to the Union, the Company Continued Operating on Nonunion Projects on Non-Contractual Terms; in November 2007, the Union Discovered the Company Operating Nonunion; Sheehy Disclaimed Any Obligation to Honor the Union Agreement

Thereafter, unbeknownst to the Union, the Company worked for nonunion general contractors on smaller projects outside the Union’s usual domain—that is, on the type of projects that are almost exclusively bid by nonunion general

contractors who usually employ nonunion subcontractors. The Company operated nonunion, without making benefit-fund contributions or adhering to the other terms of its extant union agreement. At the time, the Union employed seven business agents who serviced and policed the projects within its jurisdiction which industry reports showed had been won by general contractors who were signatories to the union agreement. It had no mechanism for policing projects that had been successfully bid by a nonunion general. The Company worked on nonunion projects until the Fall of 2007, when it began working on a project in Indianapolis known as the Wal-Mart project that was being run by a unionized general contractor. (A 4: Tr 74-75, 97-99, 102, 108-10, 115, 124.)

On November 1, 2007, Union Business Agent Dwight Smith went to the Wal-Mart project and saw employees wearing company uniforms performing curb work. Smith did not recognize any of the employees as union cardholders or the Company as a union contractor. He telephoned Union Business Manager Frye to report the presence of a nonunion contractor's employees at the site. Frye told Smith that the Company was a signatory to the union agreement and directed Smith to sign up any company employees at the site who were not cardholders. As Smith began to approach company employees at the site, Sheehy intercepted him, and, after identifying himself as the Company's owner, told Smith that he was not to speak to any company employees (A 4; Tr 68-71, 100, 128-29.)

Smith telephoned Frye, who asked to speak to Sheehy. When Sheehy took the phone, he immediately asked, "What was going on." Frye responded that the Company was in breach of the agreement that Sheehy had executed in 2004. Sheehy disputed that, insisting that the 2004 agreement only covered the union project that the Company had been working on at the time Sheehy signed. He stated further that the Company had no obligations under that agreement beyond the original project. Frye responded that the union agreement by its terms covered all company work and that the Union had a policy against even entertaining the notion of executing single project agreements. Frye explained further that the state-wide agreement contained a most-favored-nations clause which made an exception unthinkable because even one exception would permit all signatories to vitiate their agreements at will. Eventually, Sheehy suggested that the two "try to work something out for the Wal-Mart project." Frye responded that there was "nothing to work out" because the agreement was clear on its face and that Sheehy had left Frye with two choices: file a contractual grievance or contact the Union's lawyer. The conversation ended. (A 4; Tr 71, 128-29.)

Frye then contacted Union Attorney Neil Gath, who, in a letter dated November 7, 2007, informed Sheehy that he had agreed to be bound to the union agreement but had repudiated that agreement in his statements to Frye. Gath closed by advising Sheehy that unless he agreed to follow the agreement, the

Union would file unfair labor practice charges with the Board, which it proceeded to do on January 24, 2008. (A 4; Tr 71-73, 102 .)

II. THE BOARD'S DECISION AND ORDER

Based upon the foregoing, the Board, in agreement with its administrative law judge, found that the Company was bound by the 2004 state-wide agreement and that Sheehy violated Section 8(a)(5) and (1) of the Act by repudiating it. (A 73-74.) The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order requires the Company to give effect to the terms of the collective-bargaining agreement effective for the period April 1, 2004, through March 31, 2009, to make the employees whole for any loss of earnings and benefits due to the Company's failure and refusal to follow the union agreement, to make contractually required benefit-fund contributions for unit employees, and to reimburse those employees for any expenses ensuing from its failure to make said contributions. Finally, the order requires the Company to post a required notice. (A 2-3.)

SUMMARY OF ARGUMENT

It is well settled that in the construction industry, an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (a)) by repudiating an extant collective-bargaining agreement even when, as here, the agreement was not predicated on a prior showing of majority support for the employees' bargaining representative. The uncontroverted record evidence clearly supports the Board's finding that such a violation occurred here and could not possibly be defended by the self-serving assertion that Company Owner Sheehy signed the agreement based upon a mistake as to its reach.

The Company's claim that the Union should have been estopped from complaining about the Company's actions because it knew that the Company intended to treat the agreement as not binding on other projects is based upon testimony that the administrative law judge discredited. The Company's new argument that the Union should have discovered the Company's nonunion operations even if it had no notice was not made before the Board and therefore may not be considered by the Court and in any event is baseless. The Company's related statute-of-limitations argument was not made before the judge and therefore was waived.

The Company's argument—that the Board's current policy of making minority agreements enforceable under Section 8(a)(5) impermissibly undermines

employee free choice—attempts to rehash ground that has been considered and rejected by this Court and others. The Company’s new arguments—that Section 301 of the Act (29 U.S.C. 301)) and the strong policy favoring arbitration somehow operate to deprive the Board of jurisdiction over what it falsely claims were purely contract issues—are based upon doublespeak and, having never been made to the Board, may not be considered by this Court.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REPUDIATING ITS COLLECTIVE-BARGAINING AGREEMENT WITH THE UNION

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain with the representatives of his employees subject to the provisions of Section 9(a) [of the Act]—that is, subject to a majority of his employees’ having opted for such representation. Section 8(d) of the Act (29 U.S.C. § 158(d)), which defines the duty to bargain, specifies that that duty subsumes the obligation not to “terminate” an extant agreement.

Accordingly, it is axiomatic that, in the context of a so-called 9(a) bargaining relationship, an employer violates Section 8(a)(5) and (1) of the Act if it repudiates

an extant collective-bargaining agreement.² *See, for example, NLRB v. Cook County School Bus, Inc.*, 283 F.3d 888, 891 (7th Cir. 2002). Indeed, as has long been recognized, such violations strike at the very heart of the Act—they “frustrate the aim of the statute to secure industrial peace through collective bargaining.” *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941).

In 1959, recognizing the different realities confronting employers and employees in the construction industry, Congress enacted Section 8(f) of the Act (29 U.S.C. § 158(f)) to specifically authorize employers and unions in that industry to enter into collective-bargaining agreements without a prior showing that a union had achieved majority status—in fact, that section authorizes them to enter into such agreements before any employees have even been hired.³ Initially, the Board took the position that the interests of employee free choice required that such

² The violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1))—which makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise” of their rights under the Act—is “derivative.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

³ Section 8(f) reads, in relevant part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry and a labor organization of which building and construction industry employees are members . . . because (1) the majority status of such labor organizations has not been established under the provisions of section 9 of the Act prior to the making of such agreement . . . *Provided* . . . That any [such] agreement shall not be a bar to a petition [for a representation election] filed pursuant to section 9(c)

agreements be terminable at will by either party. However, in a decision that detailed why the interests that Section 8(f) was designed to advance—employee free choice and stability in labor relations in the construction industry—were ill-served by that rule, the Board reversed itself and made it clear that neither party could lawfully repudiate an 8(f) agreement during its term and that an employer would violate Section 8(a)(5) of the Act if it did. *See John Deklewa and Sons, Inc.*, 282 NLRB 1375, 1385-87 (1987), *enforced sub nom. Intern. Ass’n of Bridge, etc. Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). *Accord NLRB v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990).

The Board further found that employee free-choice interests were best advanced by the dictates of the statute itself, which precludes so-called 8(f) agreements from acting as a bar to a properly supported petition for a Board election, in contrast to so-called 9(a) agreements which operate as such a bar for the term of an agreement not to exceed 3 years. *Delewa* at 1385. The Board further made plain that, after a Section 8(f) agreement expired, the signatory union would enjoy no presumption of majority status, and thus employers in the construction industry who entered into 8(f) agreements were far freer than those in regular 9(a) relationships to champion the rights of their employees who might prefer to work without continued representation. *Id.* at 1386.

Thus, it is now well-settled that, just as in the 9(a) context, an employer operating in the construction industry violates Section 8(a)(5) of the Act by repudiating an extant 8(f) agreement, even though that agreement was executed at a time when its employees had expressed no desire for union representation. *See* cases cited above.

Nevertheless, a central theme of the Company's brief (Br 12-13, 26, 32-34, 39) is that the Board's unfair labor practice finding here improperly undermines the interests of employee free choice, and does so in defiance of extant Supreme Court precedent. However, as this Court squarely held, the very Supreme Court decisions upon which the Company would rely—*NLRB v. Local 103 International Association of Bridge Workers (Higdon)* 434 U.S. 335 (1978) and *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260 (1983)—“do no more than hold[] that the Board's [prior] reading of the Act was reasonable”; it poses no impediment to the Board's current judicially approved view, which this Court has embraced in a holding that the Company has inexplicably chosen to ignore. *See NLRB v. Bufco Corp.*, 899 F.2d 608, 611 (7th Cir. 1990).

In the instant case, the Board's finding that the Company unlawfully repudiated its union agreement and the Board's rejection of the Company's various defenses turn, in the main, on questions of fact that are subject to review under the familiar substantial evidence standard. *See* Section 10(e) of the Act (29 U.S.C.

§ 160(e)). Under that standard, Board findings must be upheld on review unless the Court concludes that no reasonable fact-finder rationally could have reached the same conclusion on the record evidence considered as a whole. *See Bloomington-Normal Seating Co. v. NLRB*, 357 F.3d 692, 694 (7th Cir. 2004).

This is so even where issues of fact concern the creation of a collective-bargaining agreement, as opposed to how the terms of an agreement themselves are to be construed. *See NLRB v. Cook County School Bus, Inc.*, 283 F.3d 888, 892 (7th Cir. 2002). Where findings turn on questions of credibility, the Court’s review is even more deferential—the trier of fact will not be reversed with regard to credibility absent “extraordinary circumstances.” *NLRB v. Eric Brush*, 406 F.2d 795, 801 (7th Cir. 1992).

We now show that, tested by these principles, the Board’s unfair labor practice findings are entitled to enforcement by this Court. As a preliminary matter, we first address certain new arguments the Company has made for the first time before this Court, which it falsely asserts raise jurisdictional questions that may be advanced at any time but in reality do nothing of the sort, and accordingly present nothing that the Court may properly consider.

B. Section 10(e) of the Act Forecloses Consideration of the Company's New Arguments Based Upon Section 301 of the Act and the Federal Labor Policy Favoring Arbitration

The Company argues (Br 25-29, 34-39) that Section 301 of the Act and the federal labor policy favoring arbitration somehow operate to deprive the Board of jurisdiction, and therefore the Board's unfair labor practice findings and remedial order are a nullity. However, the Company's attempt to couch its arguments in jurisdictional terms is pure doublespeak and its failure to have made those arguments before the Board precludes it from doing so before this Court. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Woelke & Romero Framing, Inc. NLRB*, 456 U.S. 645, 665-66 (1982).

It is settled that Section 301 of the Act (29 U.S.C. § 301)—which confers jurisdiction on district courts to decide questions pertaining to labor agreements—does not deprive the Board of jurisdiction to do the same in the course of deciding unfair labor practice issues, which is precisely what the Board did here. *See Litton Financial Printing Division v. NLRB*, 501 U.S. 190, (1991).⁴ Indeed, it is passing

⁴ There is no merit to the Company's contention (Br 34-37) that the Board may only decide contract issues if representation issues are also implicated. The cases the Company relies upon do no more than apply the preemptive principle of primary jurisdiction in recognizing that Section 301 of the Act (29 U.S.C. § 301) confers no jurisdiction on district courts to resolve contractual disputes that implicate issues of representational rights which fall exclusively to the Board to decide. *See* cases cited on pp. 34-37 of the Company's brief. They do not hold that the Board's jurisdiction to decide contract issues in unfair labor practice cases is somehow restricted only to those cases in which the representational interests of

strange for the Company to argue that 8(f) agreements are not enforceable under Section 8(a)(5) of the Act and to argue at the same time that the issues in this case are purely contractual.

The Company's further claim (Br 24-33, 43-44) that federal labor policy favoring arbitration raises a jurisdictional impediment to the Board's having heard this case is defeated by the plain language of the Act itself which makes the question of deferral to arbitration purely discretionary. Thus, Section 10(a) of the Act (29 U.S.C. § 160(a)) specifies that the Board's authority to hear and decide unfair labor practice cases "shall not be affected by any other means of adjustment or prevention that has been or maybe established by agreement, law, or otherwise." The Company's further argument (Br 43-44) that the Board's failure to defer this case to arbitration contravened its own deferral policy obviously raises no "jurisdictional" issue that can avoid the dictates of Section 10(e)—that is, that an argument must have been raised before the Board in order to have been preserved for review. In any event, the Company's claim that this case should have been deferred under extant Board law is plainly wrong. "The Board has consistently held that deferral is inappropriate when the dispute involves the fundamental existence of a collective-bargaining agreement, particularly when the Complaint

employees are implicated, and, as our discussion of the Board's *Deklewa* policy above makes plain, the result would be no different if they did.

alleges a contractual repudiation.” *Rappazzo Electric Co., Inc.*, 281 NLRB 471, 479 (1986).

C. The Board Reasonably Found that the Company Unlawfully Repudiated its 2004-2009 Union Agreement and that that Action Could Not Be Excused by a Self-Serving Claim of Mistake

The Board’s findings (A 73-74) that the Company unlawfully repudiated its 2004-2009 union agreement rests on uncontroverted record evidence: the agreement by its express terms covered the entirety of the Company’s operations and in November 2007, Company owner and president, James Sheehy, expressly repudiated it, insisting, contrary to the agreement’s express language, that it was limited to the project the Company was working on when he executed it.

The question presented then is whether Sheehy’s self-serving claim that he misunderstood the agreement’s import—which Sheehy’s own testimony reveals was allegedly based upon his cavalier failure to even read the agreement (Tr 118, 122.)—can somehow operate as a basis for rescinding or revising the agreement’s express terms. The Board reasonably concluded (A 73-74) that it could not. This Court has made plain that labor agreements must be enforced as written where, as here, an agreement’s terms are unambiguous (*Young v. North Druary Productions, Inc.*, 80 F.3d 203, 205 (7th Cir. 1996)), and that no exception can be made based upon based upon a party’s own self-professed carelessness or negligence “‘unless the other party was equally careless.” *Praxair, Inc. v. Hinshaw & Culbertson*, 235

F.3d 1028, 1034 (7th Cir. 2001) (relying upon *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Int'l Union*, 20 F.3d 750, 753 (7th Cir. 1994)).

Here, Sheehy himself failed to point to anything that he said to Frye that could have alerted Frye to Sheehy's avowed misunderstanding as to the agreement's reach or anything that Frye said to him that could have created it. To the contrary, the only thing that Sheehy could recall about their conversations in 2003 prior to his execution of his first union agreement was that Frye assured him that the agreement would not apply to other work that the Company had already bid. As Frye testified, it does not appear how that assurance was reasonably susceptible to any interpretation but that it would apply to all future work the Company bid upon and then performed. (Tr 86-87, 151.) Thus, assuming that Sheehy genuinely misunderstood the agreement's reach, it was due only to his own inexplicable negligence, which the Board reasonably concluded was no defense at all. *See* cases just cited.⁵ As this Court held in rejecting a nearly identical argument, if Sheehy wanted a single project agreement, "[he] should have asked for one." *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 851 (7th Cir. 2009) (holding that an employer's undisclosed misunderstanding that the Union would

⁵ *Accord Apache Powder*, 223 NLRB 191 (1976) (mistaken assumption about contract unavailing where other party had no knowledge of mistake); *Contek International*, 344 NLRB 879 (2005) (failure to read documents fatal to defense of no meeting of the minds).

hold a ratification vote of all unit employees, not just union members, was inadequate to change the agreement based upon the theory that there had been no meeting of the minds), *cert. granted on another issue*, __ S.Ct. __, 2009 WL 1468482 (U.S. Nov. 2, 2009).

D. The Board Reasonably Rejected on Credibility Grounds the Company's Equitable Estoppel and Waiver Arguments and Found that the Company had Waived Any Argument that the Complaint Was Time Barred Under The Act's Statute-of-Limitations Provision

The Company argues (Br 39-44), as it did before the Board, that the Union sat on its hands with full knowledge of the Company's position that the agreement it signed in 2004 had no application to other projects. Therefore, so the Company asserts, should have been deemed to have waived any claim before the Board that it repudiated that agreement in November 2007. More particularly, the Company relies on Sheehy's testimony that Frye telephoned him several times in late 2004 and early 2005, and that during their conversations, Frye acquiesced when Sheehy said that he "would be happy to [apply the agreement] on union projects but [not] on nonunion projects." (Tr 123-125.) However, Frye flatly denied that he had any conversations with Sheehy after the 2004 agreement was signed about this or any other subject until November 2007 (Tr 75-76), and the administrative law judge credited him, finding, as Frye claimed, that the first he learned that Sheehy was not following the union agreement was "3 ½ years" after the fact. (A 77.)

The Company has made no attempt to demonstrate the existence of “extraordinary circumstances” that might justify this Court’s rejection of this credibility determination, nor could it. *NLRB v. Eric Brush*, 406 F.2d 795, 801 (7th Cir. 1992). Frye reasonably explained that the Union never would even consider entering into a project-only agreement because of the most-favored-nations’ provision in the agreement and he obviously had no reason to make a special exception in the Company’s case, especially after the Company had already executed an acceptance-of-agreement form binding it to the 5-year 2004-2009 agreement.. The decision to credit him in this circumstance is impervious to attack as presenting an “extraordinary circumstance.

The Company now argues (Br 39-41) for the first time that there is a second ground other than “notice” for its estoppel or waiver argument—that is, the judge’s observation that “the Union’s enforcement efforts were lax.” The Company’s failure to have made that argument when the case was before the Board forecloses it from doing so now. *See Woelke & Romero Framing, Inc. NLRB*, 456 U.S. 645, 665-66 (1982). In any event, saying that the Union was lax in its contract-enforcement efforts is not the same as showing, as the Company posits, that the Union would have discovered the Company’s failure to adhere to its contractual obligations at an earlier date through some reasonable means that it failed to employ.

To the contrary, Frye testified that the Union's seven business agents were deployed to police and service jobsites that reports showed had been awarded to general contractors that operated under the 2004 union agreement. The Union received no reports pertaining to subcontractors and there is nothing to suggest that its business agents had the time to police jobsites that had been won by nonunion general contractors to see if any union subcontractors were working at those sites on a nonunion basis in violation of the union agreement. In fact, the record shows that visits to nonunion jobsites were "extremely rare" and that it was not uncommon for contractors like Sheehy to leave the Union's jurisdiction. (Tr 97-99, 108-10.) In these circumstances, if the Union can somehow be labeled lax for allowing Sheehy's small nonunion operation—Sheehy usually had only about 10 employees—to fall through the tracks, that laxity was more than eclipsed by the Company's own self-professed negligence that created the problem in the first instance.

Finally, while the Company would ignore it (Br 40, 45-46), the Board reasonably concluded (A 73 n.5) that the Company waived its attempt to invoke the Act's statute-of-limitation's provision, Section 10(b) of the Act (29 U.S.C. § 160(b)) by failing to raise that argument when the case was before the administrative law judge. It is well settled that that that Section—which precludes the Board's General Counsel from pursuing a complaint based upon an unfair labor

practice occurring more than six months prior to the filing of a charge--complaint more than 6 months after the Union allegedly received notice that the Company did not intend to follow the agreement on nonunion projects—gives rise to an affirmative defense must be plead litigated when the case is tried of it is waived. *See Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1371 n.8 (7th Cir. 1997) (Geske waived [its Section 10(b)] defense by failing to raise it either in its answer to the General Counsel’s complaint or at the administrative hearing before the ALJ”) Here, the Company not only failed to raise a Section 10(b) defense in its answer to the complaint or during the administrative hearing, but it also failed to argue that 10(b) barred the complaint in its post-hearing brief to the administrative law judge. Therefore, the Board appropriately refused to consider the Company’s 10(b) argument when the Company raised it for the first time in its exceptions and supporting brief to the Board. *Id. Accord Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 117 (D.C. Cir. 2000) (“the employers waived this argument by failing to raise it in a timely fashion before the ALJ”).

What was just said answers completely the Company’s argument (A 46) that equitable or statutory considerations should prevent the Board from ordering a make-whole order that requires such relief for any injuries suffered more than 6 months before the charge was filed. As shown, the Board reasonably rejected on credibility grounds the Company’s equitable argument that the Union sat on its

hands for several years with notice the Company did not intend to follow the agreement when working on nonunion projects, and refused to consider the Company's belated statute-of-limitations as having been waived. There, therefore, was no basis for the Board to even consider depriving company employees the traditional remedy of full make-whole relief in the face of an unfair labor practice that struck at the very core of the Act. Accordingly, the Board's remedial order should be enforced in full.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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)
)
v.) Board Case No.
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NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
LABORERS' INTERNATIONAL UNION OF)
NORTH AMERICA STATE OF INDIANA)
DISTRICT COUNCIL)
)
Intervenor

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,845 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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this 27th day of November, 2009

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OF INDIANA DISTRICT COUNCIL)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

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

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