

**No. 08-2724**

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

**UNITED ELECTRICAL, RADIO AND MACHINE  
WORKERS OF AMERICA (UE)**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**ALUMINUM CASTING & ENGINEERING  
COMPANY, INC.**

**Intervenor**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

The jurisdictional statement of United Electrical, Radio and Machine  
Workers of America (UE) (“the Union”) is correct, but incomplete. The Board

also 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 award backpay whenever it is an appropriate remedy for the unfair labor practices found. The Board submits that this Court has jurisdiction over this case under Section 10(f) of the Act, 29 U.S.C. § 160(f), because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). (A. 14-20.)<sup>1</sup>

The Union filed its petition for review on July 10, 2008. The petition is timely; the Act places no time limit on the institution of proceedings to review Board orders. Aluminum Casting and Engineering Company, Inc. (“the Company”), the Respondent before the Board, has intervened in this proceeding on behalf of the Board.

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<sup>1</sup> In 2002, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had authority to issue decisions under those circumstances. See *Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

## STATEMENT OF THE ISSUE

Whether the Board reasonably determined that the Company was obligated to pay the 381 discriminatees 25 cents for each hour worked in 1995 only, and whether, after the lawful adoption of a merit raise system, the Company had no obligation to add that amount permanently in the discriminatees' base pay.

## STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board found that the Company unlawfully withheld a 1995 across-the-board wage increase in retaliation for its employees' vote for the Union. *See Aluminum Casting & Engineering Co., Inc.*, 328 NLRB 8 (1999) (A. 21-22, 26-29, 40.)<sup>2</sup> This Court enforced the Board's Order directing the Company to make the employees whole for the withheld raise, but specifically instructed the Board to allow the Company to attempt to show that it abandoned across-the-board increases in favor of merit pay in future years,

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<sup>2</sup> "A." refers to the appendix filed by the Union with its opening brief containing, *inter alia*, the Board's underlying Decision and Order, which issued on April 9, 1999, and is reported at *Aluminum Casting & Engineering Co., Inc.*, 328 NLRB 8 (1999); the Court's Decision enforcing that Order in relevant parts, which issued on October 13, 2000, and is reported at *NLRB v. Aluminum Casting & Engineering Co., Inc.*, 230 F.3d 286 (2002); the Board's Second Supplemental Decision and Order, which issued on January 31, 2007, and is reported at *Aluminum Casting & Engineering Co., Inc.*, 349 NLRB No. 18 (2007); and the Board's Third Supplemental Decision and Order, which issued on January 18, 2008, and is reported at *Aluminum Casting & Engineering Co., Inc.*, 352 NLRB No.2 (2008). "SA." refers to the short supplemental appendix the Board is submitting simultaneously with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Union's opening brief.

thereby creating a “new baseline” for employee wages after 1995. (A. 41-52.)

After the Court enforced the Board’s Order, the Board’s General Counsel instituted compliance proceedings to determine the amount of backpay due, and to consider the Company’s contentions. (A. 2, 3, 9, 11.) The Board’s General Counsel issued a compliance specification, to which the Company filed an answer. (A. 9; SA. 1-9.) After a hearing, an administrative law judge issued a recommended decision and order, directing the Company to pay an across-the-board wage increase for the year 1995 only. (A. 9-12.) On January 31, 2007, the Board affirmed the judge’s decision, adopted his recommended order, and remanded for specific calculations of backpay. (A. 2, 5.) On January 18, 2008, following the methodology of its earlier decision, the Board issued an Order on summary judgment directing the Company to pay liquidated amounts to specific employees. (A. 14-20.) The Union then petitioned this Court for review of the final Board Order.

## **STATEMENT OF THE FACTS**

### **I. BACKGROUND**

#### **A. The Company’s Pre-1996 Compensation System**

The Company manufactures aluminum castings for the automobile industry in Milwaukee, Wisconsin. In 1989, the Company instituted a compensation system that included annual across-the-board increases, program pay adjustments,

training and development increases, and merit and incentive increases. (A. 22, 26-29; 45, 48, 66, SA. 96.)

The objective of annual across-the-board wage increases was to keep the Company's wages competitive. (A. 23, 27; 46.) To that end, the Company conducted an annual wage survey to determine whether to grant these increases and in what amount. It examined the cost-of-living index for increases, if any, over the preceding 12 months, discussed with its competitors if they planned to raise wages, and consulted general industry publications. (A. 23; 46.) Thus, for five of six consecutive years, from 1989 to 1994, the Company granted across-the-board increases to all eligible employees—that is, to those who had been employed for at least 90 days prior to the date of the increase—in the following amounts: 15 cents in 1989; 20 cents in 1990; and 25 cents in 1992, 1993 and 1994, respectively. It did not grant an increase in 1991 because its wage survey disclosed that an increase was not economically warranted. (A. 27; 45, SA.12-19.) In each of the years that the Company granted these increases, it simultaneously adjusted individual employee's base rates proportionately. (A. 27; 45.)

The other components of the Company's wage system were program pay adjustments, training and development increases, and merit and incentive increases. (A. 22, 26-29; 45, 48, 66, SA. 95.) The Company designed each of these wage components to meet specific objectives. For example, the program pay

adjustment guaranteed a minimum pay level for employees in particular job titles and classifications. Specifically, each employee who completed a probationary period—usually about 18 months—automatically received an upward adjustment to the minimum base rate for his/her specific job. (A. 27; SA. 96.)

The Company also significantly expanded its training and development program in 1993-1994 to encourage employees to learn more skills and increase their earnings, thereby becoming more valuable to the Company. (A. 27; SA. 10-11.) This decision was driven by the Company's desire to stem its high employee turnover rate, as well as by pressure from its primary customer, Chrysler, to reduce costs and deliver "zero-defect" products, or risk losing Chrysler's business. (A. 26; SA. 10-11, 17-19.)

The expanded training and development program provided for three tiers of training. Tiers I and II provided mandatory training for all employees on basic company policies, rules and work practices, followed by training on individual job skills and proficiency. Upon successful completion of Tier II, employees received a 25-cent hourly increase. Tier III provided advanced training only for qualified employees on the recommendation of their supervisors, and upon successful completion, employees received a 50 cents increase. During 1995, virtually all employees received the Tier II increase, and 70 to 80 of those employees also received the Tier III increase. (A. 26-27; SA. 10-11.)

The Company focused its merit increase program on rewarding and recognizing outstanding employees based on job performance, meeting or exceeding work standards, their attendance, and absence of major discipline. (A. 27; SA. 81, 89.) While the criteria for the selection of a merit award remained essentially unchanged over time, the number of recipients changed annually. For example, in 1993, 60 employees received an award of about 28 cents; in 1994, 240 employees received about 32 cents; and in 1995, 190 employees received about 34 cents. (A. 27; SA. 20-57, 96-97.)

**B. The Company Responds to Its Employees Support for the Union by Withholding Their Annual Across-the-Board Increase; the Union Files Unfair Labor Practice Charges; the Company Lawfully Abandons Across-the-Board Increases**

In July 1994, the Union began a drive to organize the Company's 400 maintenance and production employees. In January 1995, the Company refused to grant the annual across-the-board wage increase, informing employees that the Union was responsible for their failure to get that raise. (A. 22; 45.) Thereafter, acting on several unfair labor practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint, alleging, in relevant part, that the Company violated the Act by withholding the 1995 across-the-board increase because employees supported the Union. (A. 25.)

In January 1996, while the unfair labor practice case was pending before the Board, the Company completely abandoned its use of annual across-the-board

increases as a compensation tool, in favor of a merit-and-training wage adjustment system based exclusively on performance considerations. There is no allegation that this change was unlawful. (A. 2, 12; SA. 66.)

The factors underlying this change included the Company's desire to "meet a zero defect [product] goal set by its [customers, primarily Chrysler], reduce its own costs, retain employees who really wanted to work [for the Company], and keep a more stable and experienced workforce that really wanted to and ha[d] the work ethic." (SA. 73-78.) To that end, the change reemphasized the Company's desire to build on the success of its expanded training and development program, which had been in effect for 3 years at the time of the switch, and under which virtually all the unit employees had already successfully completed at least two tiers of training, and had received accompanying performance-based merit raises. In that respect, according to the Compliance Officer, who prepared the compliance specification in the Board's Regional Office, once the Company "had the system in place for training and development and the merit raises, employees who worked for them [merit increases] got them." (SA. 73.)

In calculating the new baseline for how it would compensate employees based on merit, the Company kept its wage rates even with actual 1995 figures. As it implemented its new program, the Company treated all employees equally, giving them the same opportunities to increase their base pay by participating in

the expanded training and development program, and by earning merit performance awards. It also evaluated employees by the same performance standards. (A. 2, 12; SA. 78.)

From 1996 to 2000, the total amount of increases granted under the merit system exceeded any across-the-board increase that the Company may have granted in that same period. (SA. 10-11, 58-59, 60, 65, 73-74, 90-93.) Moreover, employees received average annual increases that exceeded the withheld 25-cent across-the-board increase of 1995, and, on average, no one received an annual merit increase less than 25 cents. (A. 2, 12; SA. 20-57, 58-59, 60.)

The payroll record of unit employee Linda Bolden demonstrates the adjustments in wages before and after the new merit-and-training pay system. (SA. 10-11.) Bolden began her employment with the Company in 1988. (SA. 62.) By 1993, she earned \$6.92 an hour. In 1994, she received a 25-cent across-the-board increase, a 25-cent merit pay increase, and—under the newly implemented training-and-development program—a 25-cent Tier II increase, for a total of 75 cents, which bumped her base wage to \$7.67 an hour. In 1995, excluding the unlawfully withheld 25 cents, she received two merit pay increases of 23 and 25 cents each, and a 50 cents Tier III raise, for a total 98 cents, changing her base to \$8.65 an hour. (SA. 62-70.) After the new program was implemented, in both 1996 and 1997, she received a 25-cent merit pay increase, bringing her hourly base

pay to \$9.15. In 1998, she received two merit pay increases of 35 and 50 cents each, totaling 85 cents, and changing her base pay to \$10.00. And, in 2002, she received a 50 cent merit increase, bringing her base to \$10.50 an hour. (SA. 63-79, 83-88.)

## **II. THE UNFAIR LABOR PRACTICE PROCEEDINGS**

On April 9, 1999, the Board found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to grant its unit employees the 1995 annual across-the-board wage increase because they voted for the Union. (A. 21-40.) The Board ordered the Company to cease and desist from engaging in the unfair labor practices found, and to make whole all employees who were not granted across-the-board increases in 1995 and each year thereafter. (A. 22, 40.)

On the Board's application for enforcement to this Court, the Company argued that the scope of the Board's remedial order was overbroad and that backpay should be limited to 1995, the year that the wage increases were unlawfully withheld. (A. 41-52.) In enforcing the Board's Order in relevant part, the Court acknowledged that the Company's argument could have merit if the Company established requisite facts to support limiting the remedy in compliance. (A. 51-52.) Specifically, the Court noted that "as long as [the Company] has a fair opportunity to prove the proposition it has argued so strongly here—that general

[across-the-board] wage increases are *passé* . . . the present order does no more than require payment of the 1995 increase . . . and any later ones supported by the [C]ompany's normal practice at that later time." (A. 51-52.) The Court also noted that it read the Board's remedial order as not binding the Company to "a perpetual practice of granting this particular kind of wage adjustment." As the Court explained:

[I]f, for example, in the compliance proceedings relating to the year 1996, the Company introduced evidence that it had abjured across-the-board raises forever, and the General Counsel could not show that this was untrue or pretextual, not only would this suffice to excuse the company from making any adjustments for 1995, but it would establish this new baseline for future years as well.

(A. 50-51.)<sup>3</sup>

### III. THE COMPLIANCE PROCEEDING

To determine the exact amount of backpay due to the discriminatees, the Board's General Counsel instituted compliance proceedings pursuant to the Board's Rules and Regulations. *See* 29 C.F.R. § 102.52. After a substantial investigation, the General Counsel agreed that the Company had lawfully abandoned across-the-board increases as a compensation tool in 1996. (A. 2, 3, 9, 11.) On March 11, 2002, the Board's Compliance Officer for Region 30 informed

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<sup>3</sup> Following the Court's enforcement of the Board's Order, the Board issued a Supplemental Decision and Order substituting a new Order consistent with the Court's opinion on issues not relevant here. (A. 53-55.)

the Union of the determination that the Company's backpay liability was limited to the across-the-board wage increases for 1995. The Union "declined to receive a formal compliance determination letter" to that effect. (GCX 1(q), Attachment A, n.3.)

Thereafter, on April 30, 2003, the Board's Regional Director for Region 30 issued a compliance specification detailing the gross amounts of backpay owed to 381 discriminatees, the basis for those calculations, and a notice of hearing. (A. 9; GCX 1(q), Attachment A.) The amounts due each discriminatee as set out in the compliance specification included not only the 25 cents for each hour worked in 1995, but also an application of 25 cents per hour "through the discriminatees' last day of employment or the present." (GCX 1(q) Exhibit A, p.3.) The Company filed an answer, and amended answer, to the compliance specification. (A. 9.)

Following a 2-day hearing, Administrative Law Judge Bruce D. Rosenstein issued his decision and order on November 14, 2003. (A. 9-12.) Among other things, the judge agreed that the amount of the unlawfully withheld 1995 wage increase was 25 cents per hour. (A. 2, 9-12.) The judge, however, rejected the General Counsel's argument that the amount of the 1995 increase should be built into the 1995 employees' base wages for subsequent years, so that all 1995 employees (but no others) would receive 25 cents for every hour worked from the beginning of the backpay period until their employment ended or the backpay

period was concluded. Instead, the judge limited the Company's backpay liability to the wage increases withheld in 1995, without factoring that increase into the employees' subsequent pay. (A. 9-13.) The General Counsel, the Company, and the Union all filed exceptions to the judge's decision. (A. 1.)

#### **IV. THE BOARD'S SECOND SUPPLEMENTAL DECISION AND ORDER**

On January 31, 2007, the Board (Chairman Battista and Member Schaumber, Member Walsh dissenting in part) issued its Second Supplemental Decision and Order. (A. 1-5.) First, the Board found, in unanimous agreement with the judge, that the unlawfully withheld 1995 wage increase was 25 cents per hour and that the judge's associated findings were correct. (A. 2.) The Board also unanimously found, in agreement with the judge, that, on January 1, 1996, the Company lawfully abandoned across-the-board increases as a compensation tool in favor of a system of wage determinations based exclusively on merit, incentive, and training considerations. (A. 2, 11-12.)

In further agreement with the judge, the Board (Chairman Battista and Member Schaumber, Member Walsh dissenting) rejected the General Counsel's request to permanently add the 1995 increase into the employees' base wages for subsequent years, so that they would receive an extra 25 cents for every hour worked from the beginning of the backpay period until either their employment or the backpay period ends. (A. 2.) Guided by the Court's instructions, the Board

found that, by switching to a new merit-and-training pay system based exclusively on performance considerations, the Company changed the method in which future wage increases would be calculated, thereby establishing a new baseline that did not incorporate a 25-cent increase from 1995. (A. 5.) In so finding, the Board relied on the undisputed fact that, from 1996 forward, the Company fairly and equitably compensated the discriminatees according to their level of merit, training, and other lawful factors based on a formula that did not incorporate a 25-cent increase for 1995. The Board found that under that new formula, the Company used as its baseline for determining wage increases the overall labor costs of the unit at the end of 1995. (A. 3.)

Thus, the Board found that, because the labor costs baseline from which the Company calculated the 1996 increase and all further increases did not include the 25 cents per hour, requiring the Company to continue to pay the discriminatees 25 cents per hour after more 1995 is to give the discriminatees a fictional baseline and provide them with compensation that they did not in fact lose. (A. 3.) For those reasons, the Board found, in agreement with the judge, that the backpay period should be limited to 1995, and directed the Regional Director to amend the compliance specification accordingly. (A. 2, 5.)

## **V. THE BOARD'S THIRD SUPPLEMENTAL DECISION AND ORDER**

Following the Board's Second Supplemental Decision and Order, the Regional Director recalculated the backpay and issued an amended compliance specification setting forth the amounts that the Company owed the 381 discriminatees for the hours worked in 1995. (A. 14-20.) The Company filed an answer admitting all the allegations in the amended compliance specification. The parties then stipulated that the amended compliance specification accurately reflected the amount of backpay owed under the Board's Second Supplemental Decision and Order. (A. 14.) On September 13, 2007, the Union clarified its position, noting that, by signing the stipulation, it agreed only to the accuracy of the calculations therein, and it was not waiving its right to challenge the Board's underlying decision with regard to the backpay period. (A. 14 n.5.)

Because the parties admitted that the Region's calculations were consistent with the Board's Decision, the General Counsel filed a motion with the Board for summary judgment as a matter of law. (A. 14.) The Board issued an order transferring the proceeding to itself and a notice to show cause why the motion should not be granted. (A. 14.) The Union filed an opposition to the summary judgment motion, acknowledged that the allegations in the motion were correct, but challenged the Board's Second Supplemental Decision limiting the backpay period to 1995. (A. 14.) The Union urged the Board to deny the motion, modify

its earlier decision, and find that the backpay period extends from 1995 to the present. (A. 14.)

On January 18, 2008, the Board (Members Liebman and Schaumber) issued its Third Supplemental Decision and Order granting the General Counsel's motion for summary judgment. (A. 14-20.) With respect to the Union's challenge to the underlying methodology, the Board found that the challenge did not warrant discussion as the Union had made essentially identical arguments earlier. (A. 14 n.6.)

The Board's Order directed the Company to pay the 381 discriminatees specific amounts of backpay, plus interest. (A. 15-19.)

### **SUMMARY OF ARGUMENT**

Where, as here, the Board is called upon to exercise its broad discretion to devise a backpay award, it "must first be convinced that the award would 'effectuate the policies' of the Act." *International Union, UAW v. NLRB*, 356 U.S. 634, 642 (1958) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1938)). In this case, the Board reasonably determined that the appropriate remedy for the Company's unlawful withholding of a 25 cents per hour annual across-the-board increase in 1995 is to order it to pay the 381 discriminatees the extra 25 cents for every hour worked in 1995.

The Union challenges the Board's Order, arguing that the only appropriate remedy is to require the Company to build the withheld 25 cents into the base pay of the 1995 employees by paying them an extra 25 cents for every hour worked from 1995 to the last day of their employment or the present. Specifically, the Union argues that because the Company's practice had been to permanently incorporate all pre-1995 across-the-board wage increases into employees' base pay, the Board abused its discretion by limiting the 1995 increase to 1995 only.

The Union's argument should be rejected. As the Board pointed out, in 1996, the Company undisputedly and lawfully changed the method by which it calculated wage increases by switching to a merit pay system based exclusively on performance considerations. It is true that the new system did not incorporate the 1995 across-the-board increase into discriminatees' base pay; however, when the Company shifted to a merit pay system, it lawfully created a new baseline wage that did not include the 25 cents. Then, it provided every employee with the same opportunity to obtain larger increases through their individual performance. And, in practice under the new system, the discriminatees' wages generally increased and exceeded the 25 cents across-the-board increase of 1995. Thus, the Board properly concluded that awarding the discriminatees 25 cents per hour, plus interest, for each hour worked between 1996 and the termination of their employment would provide a windfall. As shown below, the Board—in the

reasonable exercise of its broad remedial discretion, and guided by the Court’s instructions to address the Company’s contention that backpay should not extend beyond 1995—properly considered the factors relevant to its choice of remedy, selected a course that is remedial rather than punitive, and chose a remedy that can fairly be said to effectuate the purposes of the Act.

## ARGUMENT

### **THE BOARD REASONABLY DETERMINED THAT THE COMPANY WAS OBLIGATED TO PAY THE 1995 UNLAWFULLY WITHHELD 25-CENTS-PER-HOUR ACROSS-THE-BOARD WAGE INCREASE FOR HOURS WORKED IN 1995 ONLY, AND HAD NO OBLIGATION TO MAKE THAT INCREASE A PERMANENT ADDITION TO THE DISCRIMINATEES’ BASE PAY**

#### **A. The Board Has Broad Discretion to Devise Backpay Awards that Effectuate the Policies of the Act, Subject Only to Limited Judicial Review**

The Board’s broad authority to award backpay as a remedy for an unfair labor practice is well settled. *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262-63 (1969); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 198-200 (1938). That authority derives from Section 10(c) of the Act (29 U.S.C. § 160(c)), which provides that, upon finding an unfair labor practice has been committed, the Board shall order the violator “to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of the Act . . . .” *Accord NLRB v. Midwestern Personnel Services, Inc.*, 503 F.3d 418, 422-23 (7th Cir. 2007); *NLRB v. United Contractors, Inc.*, 614 F.2d 134, 136 (7th Cir. 1980).

The purpose of a backpay award is to restore “the economic status quo that [the discriminatees] would have obtained but for the [employer’s] wrongful [act].” *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). *Accord Phelps Dodge*, 313 U.S. at 198. It also serves to deter future unfair labor practices by preventing wrongdoers from gaining any advantage from their unlawful conduct. *See J.H. Rutter-Rex*, 396 U.S. at 265; *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

However, because the purpose of a backpay award is to make employees whole rather than to punish an employer or a union, *see Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940); *Phelps Dodge*, 313 U.S. at 194, it “must ‘be tailored to the unfair labor practice it is intended to redress . . .’ [and] must not be punitive,” *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 437 (7th Cir. 1993) (internal citation omitted). *Accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1322 (7th Cir. 1991) (en banc) (collecting cases). Indeed, “any award ordered by the Board must compensate for the injury actually suffered, that is, expunge the actual, and not merely speculative, consequences of the unfair labor practice.” *Ron Tirapelli Ford*, 987 F.2d at 438 (citation omitted). *Cf. Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961) (punitive backpay award “beyond the power of the Board”).

The Board's discretion in fashioning backpay relief is subject to limited judicial review. *NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 423 (7th Cir. 2007) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 207 (1964)). Accord *J. Huizinga Cartage Co. v. NLRB*, 914 F.2d 616, 622 (7th Cir. 1991). As the Supreme Court has repeatedly noted, “[w]hen the Board, ‘in the exercise of its informed discretion,’” makes an order of restoration by way of backpay, that order will not be overturned by a reviewing court “‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’” *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346-47 (1953) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). Accord *NLRB v. My Store, Inc.*, 468 F.2d 1146, 1149 (7th Cir. 1973).

As this Court has recently reemphasized, in backpay proceedings, it “will affirm and enforce the Board’s findings if they are supported by substantial evidence and if the Board’s conclusions have a reasonable basis in law.” *NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 423 (7th Cir. 2007) (citations omitted). As shown below, the backpay award in this case is supported by substantial evidence and is a reasonable exercise of the discretion that the Congress has given the Board in this area.

**B. The Board Reasonably Limited the Backpay Period to 1995, in Accordance with the Court's Instructions in the Underlying Unfair Labor Practice Proceedings**

In enforcing the Board's underlying unfair labor practice Order, the Court instructed the Board to address the Company's contention that the backpay period should not extend beyond 1995. Specifically, the Court stated that, "as long as the Company has a fair opportunity to prove . . . that general wage increases are *passé* and it has found a better way to maintain competitive wage levels and corporate quality—the present order does no more than require payment of the 1995 increase (which the record as it stands shows would have been given but for the anti-union actions) and any later ones supported by the Company's normal practice at that later time." 230 F.3d at 296-97 (A. 51-52). With respect to the remedy, the Court read the Board's Order as not binding the Company to "a perpetual practice of granting this particular kind of wage adjustment," noting that:

If, for example, in compliance proceedings relating to the year 1996, [the Company] introduced evidence that it had abjured across-the-board raises forever, and the General Counsel could not show that this was untrue or pretextual, not only would that suffice to excuse [the Company] from making any adjustments for 1996, but it would also establish a new baseline for future years as well.

230 F.3d at 296 (A. 51).

Guided by the Court's invitation and concerns, the Board conducted a detailed fact-finding analysis and found that the employees were due 25 cents for

every hour that they worked in 1995, as a remedy for the unfair labor practice.

Neither the Company nor the Union has challenged that finding.

Next, the Board found that, in January 1996 (while this litigation was pending), the Company undisputedly and lawfully abandoned across-the-board wage increases in favor of only merit-and-training wage raises. That decision was tantamount, as the Board found, to a conversion from an across-the-board system (with several components including merit pay) to an exclusive merit-and-training-pay system that is based upon individual performance. (A. 2.) In lawfully creating such a system in 1996, the Company looked at its overall unit labor costs *at the time* (not including the across-the-board increase withheld in 1995), and legitimately allocated that existing pot of money to employees based on merit. As the Board found, at the time the Company lawfully implemented a merit raise system in 1996, “[t]he new system was not based on a ‘baseline’ for bargaining unit labor costs that incorporated a 25-cent increase for 1995.” (A. 2.)

Thus, the Company, in 1996, lawfully allocated the money *actually* available to it for wage increases solely to merit and training raises, without consideration of an across-the-board increase. Because its determination of the total amount of money it wished to spend on raises in 1996 is unchallenged and lawful, adding 25 cents per hour to the merit-based increases—thereby dramatically increasing the pool of money the Company legitimately decided to devote to labor costs—would

be a windfall. As the Board explained, “[i]f the baseline [in 1996] had included the 25 cents per hour, all subsequent raises would have been affected because the baseline would have been different, and based on the overall labor costs of the unit, the [merit-and-training] increases would likely have been smaller.” (A. 3.)

Consequently, because the Company lawfully implemented its new baseline in 1996, adding 25 cents per hour to employees’ wages would “provide [employees] with compensation that they did not in fact lose.” (A. 3.) It is notable that the total merit raises exceeded the likely across-the-board raises that employees would have received from 1996-2000. (SA. 74.)

While the Union has accepted the Board’s finding that the Company lawfully abandoned across-the-board increases as a compensation tool in 1996, it nonetheless contends (Br. 17-18) that the Board erred in finding that the Company “instituted,” or “switched to,” a new merit-and-training-based compensation system in 1996. In support, the Union points (Br. 4-6, 14, 17-19) to evidence that merit increases have always been a component of the Company’s wage system, and that training-and-development increases began in 1994. Contrary to the Union, however, the fact that the merit-and-training raises existed alongside across-the-board increases before 1996 is of no moment. It is undisputed that in 1996, the Company completely abandoned the across-the-board increase component of its wage package, and it *lawfully* allocated the existing pool of

money for labor costs only to merit-and-training increases, thereby creating a “merit pay system that is based upon individual performance.” (A. 2.) In any event, to the extent that the Union now contends that there was no “switch” to a new merit-and-training pay system, that claim must be rejected as an untimely attempt to relitigate an issue that was properly settled in the compliance proceeding. (SA. 1 n.3.)

Contrary to the Union (Br. 25-26), the Board did not ignore the principle that, in unfair labor practice cases, uncertainties must be resolved against the wrongdoer. The Union misses the mark on two levels. First, although there is a general presumption, in compliance-related cases, that a wrongdoer employer owes backpay for the entire period between the date the unfair labor practice was committed and when it was remedied, that presumption is rebuttable. Thus, an employer is entitled to establish facts that would negate or mitigate liability. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198-200 (1941).

Here, the Board found (A. 4) that the Company met its burden by showing that it instituted a merit-increase-and-training compensation system in 1996. There is no allegation or evidence that this action was unlawful. As the Board also found (A. 4), but for the Company’s lawful action—i.e., the switch to the new pay system—the 25-cent across-the-board increase of 1995 likely would have continued into 1996. However, according to the Board, “[b]ecause of that change

[to a merit pay system], it cannot be said, with any degree of certainty, what would have happened in 1996 if [the Company] had not denied the 25-cent increase in 1995.” (A. 4.) Accordingly, the Board found (A 4-5), “the burden was then on the General Counsel to show that a given employee would have received, in 1996, the 25-cent increase denied him in 1995, *and* the merit increase that he received in 1996.” The Board reasonably concluded (A. 5) that the General Counsel failed to meet that burden.

Second, the Union’s argument fails to recognize the Board’s duty and “broad discretionary” authority under Section 10(c) to tailor its remedies to varying circumstances on a case-by-case basis, in order to ensure that its remedies are congruent with the facts of each case. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969). *Accord NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938) (“the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Here, in fashioning an appropriate remedy that would restore the status quo, the Board required the Company to pay the discriminatees for the wage increase that they would have been given in 1995 but for the Company’s unlawful act. As the Board stated (A. 5), however, the backpay liability period ended on January 1, 1996, when the Company changed to a merit-increase-and-training compensation system and established a new baseline. Moreover, as the Board further noted (A. 5), there is

no dispute that after 1995, across-the-board increases were permanently eliminated as a means of compensating the employees and that the new system changed the method in which future wage increases would be calculated. Therefore, the Board designed a backpay remedy that restores the discriminatees as closely as possible to the economic position that they would have been in, but for the Company's unlawful failure to grant them an increase in 1995.

Next, contrary to the Union's claim (Br. 21-24), the remedy reflects the Board's reasonable interpretation of the Court's opinion. Thus, the Board found (A. 2, 3), as contemplated by the Court's remand, that the Company established the requisite evidence to demonstrate that as of January 1, 1996, it had not only lawfully abandoned the use of across-the-board increases as a compensation tool, but also implemented a new merit-and-training pay system based upon individual performance that established a new baseline for future wages. Neither the Union nor the General Counsel presented contrary evidence. Under those circumstances, the Board properly refused to require the Company to make wage adjustments for 1996 based on the 1995 across-the-board increase. *Cf. East Bay Union of Machinists, Local 1304, United Steelworkers of America v. NLRB*, 322 F.2d 411, 415 (D.C. Cir. 1963) (rejecting union's challenge to the Board's refusal to make backpay order operative to the date of termination of employment), *aff'd sub nom. Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

Finally, the Union's reliance on *Florida Steel Co.*, 220 NLRB 260 (1975), and *Achilles Construction Co.*, 290 NLRB 240 (1988), *enforced*, 875 F.2d 308 (2d Cir. 1989), to challenge the Board's refusal to build the withheld 1995 increase permanently into the discriminatees' base rate is misplaced. In *Florida Steel Co.*, the employer, which operated 11 facilities, stopped providing general increases to unit employees at one facility on the advent of the union, but continued the practice of conducting its annual wage survey and providing general increases at the other 10 plants. 220 NLRB at 260, 264. The Board accordingly ordered the employer to make the affected employees whole for any loss of pay they may have suffered because of its refusal to give them the general increase by building that lost wage into employees' base wage rate. *Id.* As the Board noted (A. 4), however, there was no evidence that the employer in *Florida Steel* changed its overall compensation practices, unlike the situation here, where the Company implemented a new merit pay system. Indeed, in *Florida Steel*, the remedy there was to make unit employees whole for the withholding of the established general wage increases that the employer continued as a normal practice in subsequent years. *Id.*

*Achilles Construction Co.* also is distinguishable. There, the Board ordered the employer to pay backpay to strikers whom it had unlawfully refused to reinstate in accordance with its expired collective-bargaining agreement with the

union. 290 NLRB at 241. Again, in that case—unlike the situation here—there was no change in compensation methods affecting base pay. Thus, as the Board explained (A. 4), the employer there “did not establish any fact to negate or mitigate its liability.”

In sum, the Board has framed what it deems to be an appropriate remedy, and the Union has shown no basis to depart from the general rule of allowing the Board wide latitude in shaping remedies. *See NLRB. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953); *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 198 (1938).

**CONCLUSION**

For the foregoing reasons, the Board respectfully asks that the Court deny the Union's petition for review.

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