IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWN & ROOT	*	
	*	
And	*	
	*	**Case Nos. 15 – CA – 12752 – S and**
	*	**12875 – S (351 NLRB No. 20)**
INTERNATIONAL BROTHERHOOD	*	
OF BOILERMAKERS, IRON SHIP	*	
BUILDERS, BLACKSMITHS	*	
FORGERS & HELPERS, AFL – CIO	*	
	*	
And	*	
	*	
UNITED ASSOCIATION OF	*	
JOURNEYMAN AND APPRENTICES	*	
OF THE PLUMBING AND	*	
PIPEFITTING INDUSTRY OF THE	*	
UNITED STATES AND CANDAD,	*	
LOCAL UNION NO. 229	*	

Respondent's Response to Charging Party's Supplemental Authority in Support of Motion for Briefing and/or Consolidation or in the Alternative Stay in the Above-Referenced Case

Respondent, Brown & Root Power Manufacturing ("Brown & Root"), hereby responds to the Supplemental Authority submitted by Charging Party, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers ("Charging Party"), in support of its motion for briefing and/or consolidation or in the alternative to stay proceedings in the above-referenced case, filed on June 17, 2010. Contrary to Charging Party's position, the recent United States Supreme Court decision in *New Process Steel, L. P., v. NLRB*, Case No. 08-1457 (June 17, 2010), provides no basis for the Board to reconsider its August 29, 2008 order denying Charging Party's motion for reconsideration.

On September 28, 2007, a three-member panel of the Board, including *Oil Capitol*-dissenter Member Liebman, issued a Supplemental Decision and Order requiring that the case

On September 28, 2007, a three-member panel of the Board, including *Oil Capitol*-dissenter Member Liebman, issued a Supplemental Decision and Order requiring that the case proceed to the compliance phase and instructing the ALJ to determine backpay in accordance with *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007). Thereafter, Charging Party filed a motion for reconsideration asking the Board to overrule *Oil Capitol* and apply the *Dean Contractors* back-pay rule. On August 29, 2008, a two-member Board, by Member Liebman and Chairman Schaumber, denied reconsideration. Thereafter, Charging Party appealed the backpay issue presented by *Oil Capitol* to the U.S. Court of Appeals for the Second Circuit.

In its appeal to the Second Circuit, Charging Party challenged only the prospective application of *Oil Capitol* to the calculation of backpay during the compliance phase. Charging Party did not argue that the Board's August 29, 2008 Order denying reconsideration was invalid because it was issued by a two-member board.

It is well settled law that "[w]hen a party could have raised an argument in [its] initial appeal, and failed to do so, [it] has generally waived his right to raise that argument on remand or on appeal from remand." *Labor Rels. Div. of Constr. Indus v. Teamsters Local 379*, 156 F.3d 13, 17 (1st Cir. 1998) (citing *United States v. Adesida*, 129 F.3d 846, 849-50 (6th Cir. 1997); *Harmon v. Thornburgh*, 278 U.S. App. D.C. 382, 878 F.2d 484, 496 (D.C. Cir. 1989); *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 506 (4th Cir. 1992)). *See also Harmon v. Thornburgh*, 878 F.2d 484, 496 (D.C. Cir. 1989) ("An argument not raised on an initial appeal will thereafter be deemed waived."); *Northwestern Indiana Telephone Co., Inc. v. FCC*, 277 U.S. App. D.C. 30, 872 F.2d 465, 470 (D.C. Cir. 1989) (same); *Tronzo v. Biomet,* 236 F.3d 1342, 1347-49 (Fed. Cir. 2001) (by failing to appeal damages award in first appeal, defendant waived issue and was barred from raising it on remand); *United States v. Morris,* 259

F.3d 894, 898 (7th Cir. 2001) ("Parties cannot use the accident of remand as an opportunity to reopen waived issues."); *Barrow v. Falck,* 11 F.3d 729, 730 (7th Cir. 1993) ("An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand and used as a reason to disregard the court of appeals' decision.").

Accordingly, because Charging Party did not challenge the two-member Board issue in its appeal to the Second Circuit, it cannot assert that issue following its appeal.

The Second Circuit's summary order dismissing Charging Party's appeal in this proceeding has become the law of the case. In its Summary Order, the Second Circuit instructed the Board to proceed with the compliance phase and to do so applying *Oil Capitol.* The Second Circuit dismissed the appeal *without prejudice*, however, and noted that Charging Party may appeal again *after the compliance phase* to challenge *Oil Capitol* on the grounds asserted previously to the Court. The *New Process Steel* issue, however, was not one of those grounds.

"Under the doctrine of law of the case, once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case." *Patterson v. Apfel*, 1999 U.S. App. LEXIS 29883, *6 (10th Cir. 1999) (citing *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah,* 114 F.3d 1513, 1520 (10th Cir. 1997)). The doctrine applies to issues both explicitly and implicitly decided. An issue is implicitly decided if its resolution would negate the effect of the prior appeal, but not if its resolution would be merely consistent with the prior outcome. *Patterson v. Apfel* at *6; *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9,* 10 F.3d 700, 707 (10th Cir. 1993), *modified on other grounds*, 39 F.3d 1078 (10th Cir. 1994). The doctrine also applies to adjudications by courts as well as administrative agencies such as the NLRB. *NLRB v. Goodless Bros. Elec. Co., Inc.,* 285 F.3d 102, 107-08 (1st Cir. 2002); *NLRB v. Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 24 Fed. Appx. 104 (2nd Cir. 2001); *NLRB v. Coca-*

Cola Bottling Co. of Buffalo, Inc., 55 F.3d 74 (2nd Cir. 1995). *See also Patterson v. Apfel, supra,* at *6; *Manbeck v. Consolidated Coal Co.*, 884 F.2d 580 (6th Cir. 1989).

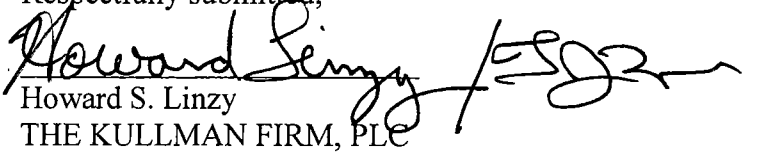
Reconsideration of the Board's prior D&O in this case, by Charging Party's much-too-late attack on the two-member Board's August 29, 2008 denial of reconsideration, would allow Charging Party not only to attack collaterally the Board's previous decision in *Oil Capitol* by an improper procedural vehicle, but it would allow Charging Party to negate the effect of its prior appeal to the Second Circuit by immediately presenting the issue to the Board, and potentially to the Court, without proceeding to compliance as directed by the Court.

In addition, Charging Party's prior motion to reconsider presented no new facts that came to light following the Board's prior D&O (and thus was not in compliance with 29 C.F.R. § 102.48) and was denied by two of the three Board members, including Member Liebman, who issued the Supplemental D&O compelling application of *Oil Capitol* during the compliance phase. Charging Party's prior motion for reconsideration was not necessary to preserve its prior appeal and flew squarely in the face of a decision by a fully constituted five-member Board. While the Board may ultimately change its mind regarding the legal underpinnings of *Oil Capitol*, this case is not the proper vehicle for such change, and any further delay in compliance proceedings would only serve to cause already potentially failing memories to fade further.

Charging Party has waived its right to challenge the lawfulness of the order denying reconsideration. Charging party cannot have a second bite at the apple. *New Process Steel* has no bearing on Charging Party's current motion.

For the reasons stated in Brown & Root's prior opposition, the motion to establish a briefing schedule or consolidation and/or stay should be denied and the compliance proceeding commenced without delay.

Respectfully submitted,



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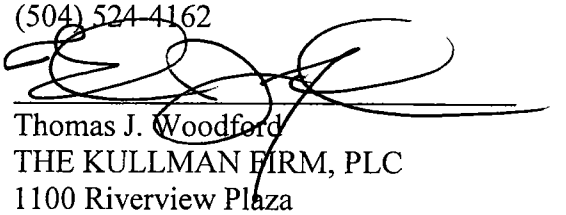

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response to Supplemental Authority was sent to the following via U.S. Mail, postage prepaid, this 6th day of July, 2010.

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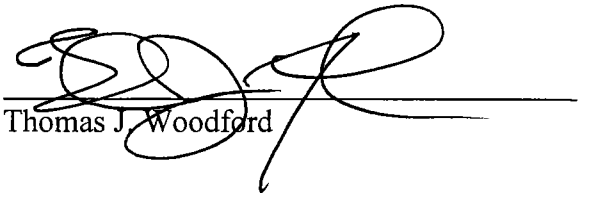

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