Nos. 10-2966, 10-3688

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

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

Intervenor

v.

SHEEHY ENTERPRIZES, INC.

Respondent/Cross-Petitioner

ON AN APPLICATION FOR ENFORCEMENT AND PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

RICHARD A. COHEN
Senior Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2995

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
FRED B. JACOB
Deputy Assistant General Counsel

National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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

application of the National Labor Relations Board ("the Board") to enforce a Decision and Order the Board issued against the Company. The Company has filed a petition to review that same Order.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to adjudicate and decide unfair labor practice complaints. The Board's Decision and Order, issued on August 10, 2010, and reported at 355 NLRB No. 83 (S.A. 1),[1] is a final order with respect to all parties under Section 10(e) and (f) of the Act. The Board's Order adopts and incorporates by reference the Board's previous decision (A. 1-6), issued on January 30, 2009, and reported at 353 NLRB No. 84.

That prior decision was issued by a two-member quorum of the Board. The Company petitioned for review of that Order in this Court, and the Board cross-applied for enforcement. The parties fully briefed the case, and the Court (Chief Judge Easterbrook and Circuit Judges Cudahy and Manion) denied the petition for

[1] "S.A." refers to the August 10, 2010 Decision and Order now under review, which the Board has appended to the end of its brief. "A." references are to the abbreviated appendix containing the two-member Board's January 30, 2009 Decision and Order 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.

review and granted the Board's application for enforcement on April 20, 2010. *See Sheehy Enterprizes, Inc. v. NLRB*, 602 F.3d 839 (7th Cir. 2010). On June 17, 2010, three days after this Court issued its mandate, the Supreme Court decided *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members, as they did in the prior decision here. Accordingly, the Court recalled mandate, granted the Company's petition for rehearing, and remanded for a properly-constituted Board to decide the case. Thereafter, the Board issued its August 10, 2010 Order that adopted and incorporated by reference the January 30, 2009 decision.

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 Board's application for enforcement, filed on August 24, 2010, and the Company petition for review, filed in the D.C. Circuit on September 8, 2010 and transferred to this Court on November 19, 2010, 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 application.

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 CONCERNING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Seventh Circuit Rule 34(f), the Board respectfully submits that oral argument is unnecessary in this case. This proceeding is "a subsequent appeal in a case in which the court has heard an earlier appeal," *see* Rule 6(b) of the Court's Operating Procedures, and presents the same arguments, recast in a slightly different form, that the Company advanced against enforcement as when the case was originally before the Court. The Board therefore expects that the case will be presented to the panel (Easterbrook, Chief Judge, and Cudahy and Manion, Circuit Judges) that heard the earlier appeal, Case Nos. 09-1383 and 09-1656. *See id*. The Board does not believe that the panel, having entertained oral argument after full briefing in the earlier appeal, will be aided by hearing oral argument from the parties again.

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. (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. As previously noted, on January 30, 2009, a two-member quorum of the Board (Chairman Liebman and Member Schaumber) affirmed the judge's findings and recommended order. In doing so, it rejected the Company's new statute-of-limitations argument as having been waived. The Company filed a petition for review of that order, raising essentially the same challenges that it raises now. On April 20, 2010, the Court rejected the Company's arguments as either waived or meritless, *see Sheehy Enterprizes, Inc. v. NLRB*, 602 F.3d 839, 843-45 (2010), but subsequently granted rehearing and remanded so that a properly-constituted Board could decide the case.

On August 10, 2010, a properly-constituted panel of the Board issued the Decision and Order now under review, incorporating the reasoning of the prior decision and order that this Court had enforced. On August 20, the Company filed a motion for reconsideration with the Board, which the Board denied on September 29, 2010, finding that the Company had "not raised any extraordinary

circumstances warranting reconsideration of the Board's decision." (Order Denying Motion at 3.) This proceeding followed.

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 statewide collective-bargaining agreement between an employer association and other individual signatories and the Laborers' District Council and its local affiliates. Wilhelm was obligated under a provision in that agreement to attempt to contract work to unionized subcontractors or to notify the Union if any work 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 "April 1, 1999, to March 31, 2004," which Sheehy signed. 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 fill out and sign forms for the health and welfare benefit plan and "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 that 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 that 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 and incorporating the two-member Board's prior decision, 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. (S.A. 1, A. 1-3.) 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 (1)) 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 defeated by the self-serving assertion that company owner Sheehy signed the agreement based upon a mistake as to its reach, as the Company argued to the Board.

Before the Court, the Company has abandoned the arguments it timely made to the Board in favor of two different arguments, both of which are both procedurally defective and meritless. First, the Company contends that the Supreme Court's decision in *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009), Section 301 of the Act (29 U.S.C. § 185)), and the strong policy favoring arbitration somehow operate to deprive the Board of jurisdiction over cases involving contract repudiation. The Company, however, never made that claim to the Board—not before the administrative law judge, not it its exceptions to the judge's decision, and not in its motion for reconsideration filed last August—and the Court therefore has no jurisdiction to consider the argument under Section

10(e) of the Act (29 U.S.C. § 160(e)). Moreover, even on the merits, the claim ignores well-settled precedent to the contrary.

Second, equally meritless is the Company's claim that Section 10(b) of the Act's six-month statute of limitations precluded the Board from issuing a complaint here. As the Board explained, the Company waived any affirmative defense that Section 8(b) could provide by failing to advance a 10(b) argument while the case was being tried. In any event, the Company's continued reliance on the 10(b) argument that it belatedly advanced to the Board—that the Union had notice of the Company's contract repudiation years before the Union filed an unfair labor practice charge in 2007—is inform for the further reason that it depends on refuted testimony that the administrative law judge discredited.

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

the duty to bargain 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

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[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

took the position that the interests of employee free choice required that such 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. Int'l Assoc. of Bridge, Structural, and Ornamental Iron Workers 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 observed that the statute itself protected employee free-choice interests by precluding 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. *Deklewa*, 282 NLRB at 1385. The Board 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)

> 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 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. The Board's current view has received this Court's approval. *See Bufco Corp.*, 899 F.2d at 611.

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. Erie Brush*, 406 F.3d 795, 801 (7th Cir. 1992).

B. The Board Reasonably Found that the Company Unlawfully Repudiated its 2004-2009 Union Agreement

As shown below, tested by the foregoing principles, the Board's unfair labor practice order is entitled to enforcement by this Court, just as it was previously. The Board's finding (A. 1-2) that the Company unlawfully repudiated its 2004-2009 union agreement rests on uncontroverted record evidence: the agreement by its plain terms covered the entirety of the Company's operations and in November 2007, the Company's 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.

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). Moreover, 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, 1034-35 (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)).

Thus, to the extent that the Company suggests (Br. 18-19) that Sheehy misunderstood the agreement's import, that does not operate as a basis for rescinding or revising the agreement's express terms, as the Board reasonably concluded (A. 1-2). Specifically, 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.)

Moreover, Sheehy's own testimony reveals that any misunderstanding was based upon his cavalier failure to even read the agreement. (Tr. 118, 122.) Accordingly, 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.[4]

C. The Company's Two Defenses Are Both Waived and Meritless

As can best be discerned from its brief, the Company makes two primary arguments against enforcement of the Board's Order—one relying on federal law favoring arbitration of labor contract disputes and another focusing on the statute of limitations on Board charges. It presented neither argument to the Board at the proper time, however, and therefore has no right to bring either contention to the Court. Moreover, even if it had preserved its claims, both are flatly wrong. The Court should reject the Company's objections and enforce the Board's Order.

1. Relying on Section 301 of the Act, 29 U.S.C. § 185, and *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009) ("*14 Penn Plaza*"), the Company contends that federal policies favoring arbitration of contractual labor disputes preclude the Board from deciding a claim involving contract repudiation. (*See, e.g.*, Br. 2, 3-4, 6, 8, 13, 20, 22, 28-29, 37-39, 47-48.) The Company did not make that argument in its exceptions to the judge's recommended order, *see Respondent's Exceptions to the Decision of the Administrative Law Judge,* and its

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

failure to make 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. v. NLRB*, 456 U.S. 645, 665-66 (1982).[5]

Moreover, in any event, it is settled that Section 301 of the Act (29 U.S.C. § 185)—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, 202 (1991).[6] Nor does *14 Penn Plaza* stand for that principle, as the Company repeatedly suggests; rather, it merely holds that a union may enter into an agreement that requires employees to arbitrate federal employment discrimination

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[5] To the extent the Company suggests (Br. 2) that it could not have brought *14 Penn Plaza* to the Board's attention because the Supreme Court decided it three months after the Board issued its initial decision in January 2009, it fails to acknowledge that it had such an opportunity, but missed it. On August 20, 2010, the Company filed a timely motion for reconsideration of the reissued Board decision, but did not mention *14 Penn Plaza* to the Board.

[6] There is no merit to the Company's suggestion (Br. 29-31) that the Board may only decide contract issues if representation issues are also implicated. The cases the Company relies upon (Br. 29-30) 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 that fall exclusively to the Board to decide. 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 employees are implicated.

claims under Title VII or the Age Discrimination in Employment Act. *14 Penn Plaza*, 129 S. Ct. at 1465-66. To suggest, as the Company does (Br. 23), that the Supreme Court in *14 Penn Plaza* "overturned" the Board's authority to find an employer's repudiation of a collective bargaining agreement unlawful is pure fantasy.

Furthermore, the Company's claim (Br. 22, 28-29, 31, 34) that Section 301 and *14 Penn Plaza* raise a jurisdictional impediment to the Board's Order is defeated by the plain language of the Act itself, which makes the Board's deferral to arbitration purely discretionary. 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 may be established by agreement, law, or otherwise." The Board's discretion to refuse to defer is especially appropriate where, as here, "the dispute involves the fundamental existence of a collective-bargaining agreement, particularly when the Complaint alleges a contractual repudiation." *Rappazzo Electric Co., Inc.*, 281 NLRB 471, 479 (1986).

2. The Company also argues that the Act's statute-of-limitations provision, Section 10(b), 29 U.S.C. § 160(b)[7], precluded the Board's unfair labor

[7] Section 10(b) provides, in relevant part, "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of

practice finding here, even though the Board found that that argument had been waived. The Company attempts to sidestep the Board's waiver finding by advancing two arguments—one legal and the other factual—both of which are readily dismissed. First, the Company's repeatedly insists (Br. 7, 43-44, 57-58), that Section 10(b) does not comprise an affirmative defense that must be pled, but rather imposes a constraint on the General Counsel's authority to issue complaints that cannot be waived. To the contrary, however, this Court has squarely held that "[t]he six-month statute of limitations in section 10(b) is an affirmative defense, rather than a jurisdictional constraint"—as such, it is waived if not raised "either in its answer to the General Counsel's complaint or at the administrative hearing before the ALJ." *Geske & Sons v. NLRB*, 103 F.3d 1366, 1371 n.8 (7th Cir. 1997) (collecting cases).

The Company's second contention (Br. 43-44)—that it in fact raised Section 10(b) as a defense during the hearing before the administrative law judge and its in post hearing brief—is simply untrue. The hearing record is bereft of a single reference to Section 10(b) or more generally to the 6-month statute-of-limitations period it embodies. The same is true of the Company's post-hearing brief to the judge. Rather, the first time the Company advanced a 10(b) or statute-of-limitations argument was in its brief in support of exceptions filed with the Board,

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the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

which, as noted previously, the Board appropriately found (A. 1 n.5; Order Denying Motion for Reconsideration at 3 (Sep. 29, 2010)) came too late because the defense had been waived. *See Geske & Sons*, 103 F.3d at 1371 n.8; *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 117 (D.C. Cir. 2000).[8]

Indeed, what the Company repeatedly represents in its brief to the Court as the 10(b) argument that it made to the judge (Br. 12, 40-42, 44, 49-51, 53-54)—that the Union had notice years before it filed a charge that the Company had no intention of adhering to the agreement—was presented to the judge in very different terms that had nothing whatever to do with the six-month limitations period embodied in Section 10(b). Rather, counsel twice made clear that the Company only was arguing that the Union was precluded, based on conversations Sheehy testified he had with business agent Frye allegedly repudiating the contract in 2004 and 2005, from pursuing its repudiation claim under common-law equitable "estoppel and waiver" principles. (Tr. 56-57, 113-14.)

While the Company (Br. 41-42, 50-54) continues to rely on Sheehy's testimony as established fact, it was Frye's contrary testimony, not Sheehy's, that the administrative law judge credited, and not without good cause. Sheehy testified that Frye telephoned him several times in late 2004 and early 2005, and

[8] Although the Company's post-hearing brief to the administrative law judge and its brief in support of exceptions are not part of the record before the Board, the Board has, simultaneously with the filing of this brief, filed a motion to lodge those documents with the Court for its review.

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. 123-25.) 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.) The administrative law judge credited Frye, finding, as he claimed, that the first he learned that Sheehy was not adhering to the parties' agreement was in November 2007, "3 ½ years" after the agreement had been executed. (A. 5.)

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. Erie Brush*, 406 F.3d 795, 801 (7th Cir. 1992). Frye explained that he would never consider agreeing to such a concession because of the implications that it would have under the most-favored-nations provision in the Union's standard contract. (Tr. 71.) In fact, Sheehy did not dispute that he made precisely such a proposal to Frye in November 2007, and that Frye rejected it on precisely that ground. (*Id*.) Accordingly, the Company's continued reliance on this testimony from Sheehy must fall of its own weight.

Finally, the Company's brief (Br. 42-46) hints at another Section 10(b) argument, again different than the one that it attempted to raise before the Board in its exceptions—that is, that the Union failed to exercise due diligence in not

ferreting out the Company's repudiation of its contractual obligations sooner. However, it is difficult to comprehend how the Company expects that a Section 10(b) argument that it failed to present to the Board at the time appropriate under the Board's practice—in its exceptions to the judge's decision—could possibly be entitled to any consideration before this Court, and it is obvious that it cannot. The Company attempted to advance this argument to the Board in a motion for reconsideration after the Board's decision on remand issued, but the Board refused to consider it. The Board found no "exceptional circumstances" could possibly justify granting the Company's request when the argument it was advancing had been available to the Company at the time the complaint issued, and further observed that the Company was doing nothing more than "attempting to relitigate the Section 10(b) argument that the Board and Seventh Circuit previously rejected as untimely." (Order Denying Motion for Reconsideration at 3 (Sep. 29, 2010).)

Thus, the Company's due-diligence claim is defeated not only because any defense predicated on Section 10(b) has been waived, but also because it seeks to present to the Court an issue that Section 10(e) of the Act (29 U.S.C. § 160(e)) precludes the Court from considering. *See Parkwood Development Center, Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (raising an argument in a motion for reconsideration does not satisfy the requirement imposed by Section 10(e) to have raised the argument at the time appropriate under the Board's procedures).

What was just said answers completely the Company's suggestion (Br. 59-60) 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 six months before the charge was filed. Accordingly, the Board's Order should be enforced in full. [9]

[9] In the Conclusion section of its opening brief (Br. 56-57), the Company seems to assign error—for the first time—to the Board's decision to have a properly-constituted panel decide the case without further briefing after the Court's remand. The Company, however, failed to raise this concern to the Board in its motion for reconsideration, and the Court therefore may not consider it under Section 10(e) of the Act, 29 U.S.C. § 160(e). *Wolke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Moreover, this Court has "made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991). As in *Berkowitz*, the Company's "nonchalant treatment" of the issue should lead the Court "to conclude [the Company] considers the inquiry of little consequence." *Id*. In any event, it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 544 (1978), and, here, the Company fully briefed the case before the Board, had an opportunity to raise any new concerns in a motion for reconsideration, and received a fair hearing.

CONCLUSION

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

s/ Richard A. Cohen
RICHARD A. COHEN
Senior Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2995

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
FRED B. JACOB
Deputy Assistant General Counsel

National Labor Relations Board

May 2011

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 10-2966, 10-3688
	)	
and	)	
	)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA STATE OF INDIANA DISTRICT COUNCIL	)	
	)	Board Case No.
Intervenor	)	25-CA-30583
	)	
v.	)	
	)	
SHEEHY ENTERPRIZES, INC.	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,473 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of May, 2011

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	)	
SHEEHY ENTERPRIZES, INC.	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I certify that on May 20, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Neil E. Gath, Attorney
FILLENWARTH, DENNERLINE, GROTH & TOWE, LLP
Suite 200
429 E. Vermont Street
Indianapolis, IN 46202-0000

Bruce F. Mills, Attorney
Suite 400-109
11715 Fox Road
Indianapolis, IN 46236

s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of May, 2011

ADDENDUM

Sheehy Enterprizes, Inc. *and* Laborers' International Union of North America, State of Indiana District Council, a/w Laborers' International Union of North America. Case 25–CA–30583

August 12, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

On January 30, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 353 NLRB No. 84 (2009).[1] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-petition for enforcement. On April 20, 2010, the court of appeals denied the Respondent's petition for review and granted the General Counsel's cross-petition for enforcement. 602 F.3d 839. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, on July 21, 2010, the court of appeals granted a petition for rehearing and remanded this case to the Board "so that a properly constituted panel can resolve this dispute."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 353 NLRB No. 84, which is incorporated herein by reference.[3]

Dated, Washington, D.C. August 12, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Craig Becker, Member

(SEAL.) NATIONAL LABOR RELATIONS BOARD

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[2] Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

[3] We find it unnecessary to rely on *Sawgrass Auto Mall*, 353 NLRB No. 40 (2008), cited in fn. 1 of the prior decision.