

No. 10-3300

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL UNION

Intervenor

v.

KSM INDUSTRIES, INC.

Respondent

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JULIE B. BROIDO
Supervisory Attorney

AMY H. GINN
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2942

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
National Labor Relations Board

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order issued against KSM

Industries, Inc. (“the Company”) on September 30, 2010, and reported at 355 NLRB No. 220 (2010). (PA 1.)¹ The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“the Union”) has intervened on behalf of the Board. The Board timely filed its application for enforcement on October 4, 2010.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Germantown, Wisconsin.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings as to backpay owed that the Company has not challenged in its opening brief.

2. Whether the Board acted within its broad remedial discretion in determining the amount of backpay owed to discriminatees for the loss of earnings they suffered as a result of the Company’s unlawful delay in offering reinstatement.

¹ “PA” references are to the Board’s appendix as Petitioner. “RA” references are to the Company’s appendix as Respondent. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

The Board previously found that the Company discriminatorily denied recall or delayed recall of its employees after their participation in an unfair labor practice strike, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). *See KSM Industries, Inc.*, 336 NLRB 133 (2001), *motion for reconsideration granted in part on other grounds*, 337 NLRB 987 (2002). Following a compliance hearing, an administrative law judge determined backpay amounts for the discriminatees. The Company filed exceptions to the judge's decision with the Board. In its Second Supplemental Decision and Order, which it now seeks to enforce, the Board ordered the Company to pay specific amounts of backpay to 42 discriminatees. The procedural history of the case is set forth below; facts relevant to the backpay awards are discussed in the Argument.

I. THE UNFAIR LABOR PRACTICE PROCEEDING

On December 31, 1996, the parties' collective-bargaining agreement expired. *KSM Indust.*, 336 NLRB at 138. A few days later, on January 3, 1997, the Union began a strike at the Company. *Id.* On October 5, the Union ended the strike with an unconditional offer to return to work. *Id.* at 139. Acting on charges filed by the Union, the Board issued a complaint alleging, in relevant part, 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 reinstate the strikers upon their unconditional offer to return to work.² *Id.* at 138. An administrative law judge held a hearing and found that the Company violated the Act as alleged. *Id.* at 145.

On September 28, 2001, the Board (Members Liebman, Truesdale, and Walsh) issued a decision affirming the judge's finding. *KSM Indust.*, 336 NLRB at 133. The Board determined that the Union's strike converted from an economic strike to an unfair labor practice strike on March 19, 1997. *Id.* at 134. 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 and refusing to reinstate strikers to their former positions upon their October 5, 1997 unconditional offer to return to work. *Id.* The Board ordered the Company to make whole the former strikers for any loss of earnings suffered by reason of the Company's refusal and failure to timely reinstate them after the strike ended. *Id.* at 136.

² Section 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." A Section 8(a)(1) violation is "derivative" of a violation of Section 8(a)(3). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

II. THE COMPLIANCE PROCEEDING

On October 3, 2006, the parties entered into a Stipulation and Partial Settlement Agreement in which the Company waived its right to contest the Board's September 28, 2001 Order and the findings of fact and conclusions of law underlying the Order. (PA 4.) Following this stipulation, in the absence of further agreement on remedial issues, the Board's Regional Director issued a compliance specification alleging the gross backpay amounts owed to the former strikers under the make-whole provision of the Board's Order, plus interest accruing to the date of payment. (PA 4.) The Company submitted an answer, disputing the amounts owed. In March 2007, the Regional Director issued an amended compliance specification followed by two additional amendments, to which the Company also filed answers. (PA 4.)

An administrative law judge held a hearing on the second amended compliance specification. Following the hearing, the judge issued a supplemental decision in which he made findings of fact and credibility determinations on the issues of whether certain strikers abandoned their employment during or after the strike, the order of reinstatement and the availability of work for former strikers, and mitigation of backpay. (PA 5-6.) The judge entered a recommended order requiring the Company to pay specific backpay awards to each of 42 former strikers who were unlawfully denied recall, or whose recall was unlawfully delayed. (PA 5.)

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER AND THE PRIOR APPEAL

On March 26, 2009, the Board's two sitting members issued a Supplemental Decision and Order requiring the Company to pay specific amounts of backpay to the former strikers. Thereafter, the Company filed a petition to review the March 26, 2009 Supplemental Decision and Order in the Court of Appeals for the D.C. Circuit, and the Board filed a cross-application for enforcement. *See KSM Industries, Inc. v. NLRB*, Nos. 09-1126, 09-1120 (D.C. Cir. filed May 1, 2009). On July 24, 2009, the D.C. Circuit ordered the consolidated case held in abeyance.

On July 9, 2010, the Board filed a motion to remand the case in light of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) ("*New Process*"), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. On September 20, 2010, the D.C. Circuit issued an order granting the Company's petition for review, denying the Board's cross-application for enforcement, and remanding the case for further proceedings before the Board. (RA 1.)

IV. THE BOARD'S CONCLUSIONS AND ORDER

On September 30, 2010, the Board (Chairman Liebman and Members Becker and Pearce) issued its Second Supplemental Decision and Order affirming the administrative law judge's findings, and adopting his proposed order to the extent and for the reasons stated in the March 26, 2009 Supplemental Decision and Order,

which the Board incorporated by reference. (PA 1.) The Board made two modifications to the judge's proposed order. The Board increased backpay to discriminatee Allen Curtis based on an earlier recall date for Curtis than that found in the amended compliance specification. (PA 2 n.5.) The Board decreased backpay to discriminatee Hans Eusch based on Eusch's failure to mitigate backpay for a 6-month period. (PA 3.) The Board ordered the Company to pay a total of \$383,461.11 in backpay, plus interest, to 42 discriminatees. (PA 3-4.)

SUMMARY OF ARGUMENT

The Company has failed to contest in its opening brief numerous Board findings supporting the Board's determination of the Company's overall backpay liability. As such, the Company has waived any challenges to backpay owed based on those findings and the Board is entitled to summary enforcement with respect to all unchallenged portions of its Order.

With respect to the limited portions of the Board's Order that the Company does contest in its opening brief, the Board reasonably rejected those challenges. First, the Company errs in claiming that its backpay liability to five discriminatees ended when, out of economic necessity during and after a lengthy strike, they submitted letters of resignation in order to access much-needed 401(k) funds. They had no other way, even with penalties, to get that money for themselves and their families at a time when the strike and the Company's reinstatement delays had

placed them in a precarious financial position. Board precedent is clear that in these circumstances, a striker's resignation to obtain retirement funds does not, on its own, provide unequivocal evidence that he intended to permanently sever his employment relationship.

The Company also errs in challenging the Board's adoption of a seniority-based formula (which the Company itself used to recall strikers immediately after the strike) to determine the order of reinstatement for former strikers whose recall the Company had delayed. The Board adopted the seniority-based recall formula because it most closely approximated what would have happened absent the Company's unfair labor practices. The Board reasonably rejected the Company's highly subjective method, which was also tainted by its unfair labor practices.

The Board also reasonably rejected several claims by the Company concerning individual discriminatees. The Company failed to meet its burden of showing that work was not available for Douglas Wiedeman, a stockroom employee whose recall the Company delayed for six years after the end of the strike. The Company also failed to meet its burden of showing that certain discriminatees incurred a willful loss of earnings based on their interim employment situations. Laverne Jung was recalled so soon after the strike (although not immediately as was his right) that he reasonably had not yet commenced a job search. Hans Eusch and James Malson met their obligations to engage in good-faith efforts to find interim

employment; their lack of success did not negate those efforts. Three additional discriminatees who quit interim jobs had justifiable reasons for doing so: Thomas Cooper left an interim job because of unsafe working conditions; Lawrence Wetzel took a new interim job because it offered retirement benefits that compensated for the ones he lost at the Company; and Allen Curtis left an interim position with onerous working conditions in favor of a new job that was substantially equivalent to his job at the Company. The Board also reasonably rejected the Company's claim that Wiedeman incurred a willful loss of earnings when he was discharged from interim work but was not shown to have engaged in deliberate and gross misconduct.

Finally, the Court should reject the Company's attempt to avoid enforcement of the backpay order issued against it by impugning the Board's processes on remand. Because the Company failed to raise its argument before the Board, the Court lacks jurisdiction to consider its belated claim. In any event, the Company fails to show that the Board acted improperly in any way.

ARGUMENT**I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS AS TO BACKPAY OWED THAT THE COMPANY HAS NOT CHALLENGED IN ITS OPENING BRIEF**

In its opening brief, the Company challenges several aspects of the Board's backpay order, which we address in the remainder of this brief. The Company, however, has failed before this Court to contest any of the other aspects of the Board's backpay order. For example, the Company has failed to present any challenge to the Board's finding that it made an invalid offer of reinstatement, which did not cut off its backpay liability, to former striker Michael Servi. By failing to contest this and numerous other Board findings in its opening brief, the Company has waived any defense concerning the backpay owed to those discriminatees. It is well-settled that "[a]rguments not raised in an opening brief are waived." *Hentosh v. Herman M. Finch Univ.*, 167 F.3d 1170, 1173 (7th Cir. 1999).

Accordingly, the Board is entitled to summary enforcement of its order with respect to all backpay owed that the Company has not challenged in its opening brief. *See, e.g., Masiongale Elec.-Mech. v. NLRB*, 323 F.3d 546, 557 (7th Cir. 2003) (granting summary enforcement of portion of Board order with respect to uncontested findings); *Beverly California Corp. v. NLRB*, 227 F.3d 817, 831 (7th Cir. 2000) (same); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314 (7th Cir. 1991) (en banc) (same).

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF BACKPAY OWED TO DISCRIMINATEES FOR THE LOSS OF EARNINGS THEY SUFFERED AS A RESULT OF THE COMPANY'S UNLAWFUL DELAY IN OFFERING REINSTATEMENT

The Board reasonably rejected the various claims the Company raises to this Court in an effort to have its backpay liability reduced. The Company failed to show before the Board that five strikers intended to permanently sever their employment when they resigned to access their 401(k) funds; that the Board erred in adopting a seniority-based recall method; and that certain strikers incurred a willful loss of earnings based on interim employment situations. Having failed to meet its burden on these points, the Company has not succeeded in providing any reason for the Court to deny enforcement of the Board's exercise of its broad remedial discretion.

A. A Backpay Award Is a Make-Whole Remedy Designed to Restore the Economic Status Quo that a Discriminatee Would Have Obtained but for the Employer's Unfair Labor Practice

Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that the Board, upon finding that an unfair labor practice has been committed, "shall order the violator to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies of the Act." *NLRB v. J.H. Rutter-Rex*, 396 U.S. 258, 262 (1969) (internal citation omitted). Accordingly, Section 10(c) authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor

practices. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Under the Act, an award of reinstatement with backpay is the “normal” remedy in cases of employer discrimination that results in an employee’s temporary or permanent loss of employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). *See also NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 755 (7th Cir. 1981) (a “just result” requires reinstatement and backpay for a discriminatee). Indeed, a finding of a failure to reinstate an unfair labor practice striker upon an unconditional offer to return to work “is presumptive proof that some back pay is owed by the violating employer.” *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972).

A backpay award is a make-whole remedy designed to restore “the economic status quo that [the discriminatee] 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). A backpay award 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; *Madison Courier*, 472 F.2d at 1316. To restore the economic status quo, the discriminatee is ordinarily entitled to the difference between his gross backpay—the amount that he would have earned but for the wrongful conduct—and his actual interim earnings. *See Phil Smidt & Son, Inc. v. NLRB*, 810 F.2d 638, 642 (7th Cir. 1986). The backpay period normally runs from the date of the unlawful action to the date that

the employer offers the discriminatee valid, unconditional reinstatement. *See, e.g., NLRB v. My Store, Inc.*, 468 F.2d 1146, 1148 (7th Cir. 1972).

The burdens of proof in a backpay proceeding are matters of settled law. The General Counsel's sole burden is to show the gross amounts of backpay due. *See NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976); *Madison Courier*, 472 F.2d at 1318.³ Once that has been done, the burden is on the employer “to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.” *Madison Courier*, 472 F.2d at 1318 (quoting *Brown & Root*, 311 F.2d at 454). *Accord NHE/Freeway, Inc.*, 545 F.2d at 593. Uncertainties or ambiguities in determining a backpay remedy are resolved in favor of the employee, not the employer. *See NHE/Freeway, Inc.*, 545 F.2d at 593.

B. Standard of Review

The Board's remedial power is “a broad, discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord NLRB v. Midwestern Pers. Servs.*, 508 F.3d 418, 423 (7th Cir. 2007); *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616, 622 (7th Cir. 1991). As the

³ The General Counsel ordinarily will also include in the backpay specification any mitigating amounts that he has discovered during his backpay investigation. *See* Section 102.53 of the Board's Rules and Regulations (29 C.F.R. § 102.53). By doing so, however, the General Counsel does not “assume[] the burden of establishing the truth of all of the information supplied or of negating matters of defense or mitigation.” *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963).

Supreme Court has explained, “[i]n fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n. 32 (1969). The authority to fashion remedies under the Act “is for the Board to wield, not for the courts.” *J.H. Rutter-Rex*, 396 U.S. at 263 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

Specifically, the Board “has wide latitude in computing the amount of backpay to award to a discriminatee.” *NLRB v. Akron Paint & Varnish Co.*, 985 F.2d 852, 854 (6th Cir. 1992). When the Board, “in the exercise of its informed discretion,” awards backpay, the Board’s order “should stand 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.” *Seven-Up Bottling*, 344 U.S. at 346-47 (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). *Accord NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir. 1992).

The findings of fact underlying the Board’s decision are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). The Court must uphold the Board’s legal conclusions if they have a reasonable basis in the law. *See Midwestern Pers. Servs.*, 508 F.3d at 423. A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it

de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).
*Accord NLRB v. P*I* E Nationwide, Inc.*, 923 F.2d 506, 513 (7th Cir. 1991). As
this Court has recognized, making credibility determinations is “uniquely within the
province of the Board” and its determinations will not be overturned “absent
extraordinary circumstances.” *Augusta Bakery*, 957 F.2d at 1477.

**C. The Board Reasonably Rejected the Company’s Claim That
Discriminatees Who Resigned During the Strike or While Awaiting
Recall Solely to Obtain 401(k) Funds Forfeited Their Right to
Backpay**

The Board reasonably ordered the Company to reinstate with backpay certain
discriminatees who, during the strike or while awaiting recall, resigned solely in
order to obtain payouts from their 401(k) accounts. (PA 2-4.) The Board found
(PA 9-22) that these discriminatees, by accessing needed funds to cope with an
economic necessity precipitated by the Company’s unfair labor practices, did not
intend to permanently sever their employment relationship with the Company. On
review, the Company (Br 13-23) challenges the Board’s finding with respect to five
discriminatees, contesting only their right to backpay, but not to reinstatement after
they resigned. As shown below, the Board reasonably rejected the Company’s
challenge.

1. The Board reasonably found that the strikers did not intend to permanently sever their employment when they resigned to access their much-needed 401(k) funds

To establish that a striker has abandoned his job, the employer must present “unequivocal evidence of intent to permanently sever [the striker’s] employment relationship.” *S&M Mfg. Co.*, 165 NLRB 663 (1967). *Accord Augusta Bakery*, 957 F.2d at 1475. Furthermore, the employer has the burden to rebut the presumption that the strikers did not intend to abandon their employment. *See Marchese Metal Indus., Inc.*, 313 NLRB 1022 n.1 (1994). As shown below, the Board reasonably found that the Company did not meet this burden.

Board law is settled that resigning to obtain retirement funds during a strike or while awaiting recall is not on its own sufficient evidence of a striker’s intent to abandon his right to future employment. *See, e.g., Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990) (rejecting employer’s argument that strikers abandoned their employment by seeking pension benefits that were only payable upon resignation), *enforced*, 957 F.2d 1467 (7th Cir. 1992). Where strikers resign in order to obtain retirement funds, the employer must “affirmatively establish[]” that they also “intended to permanently abandon their former positions.” *Rose Printing Co.*, 289 NLRB 252, 276 (1988). Among the relevant circumstances that the Board considers are whether the striker expressed an economic need to obtain the funds and whether

he abandoned the strike following his resignation. *See Augusta Bakery*, 298 NLRB at 59; *Rose Printing*, 289 NLRB at 276.

The Board reasonably found (PA 9-22) that the Company failed to rebut the presumption that the strikers who submitted resignations in order to obtain their 401(k) funds did not intend to permanently sever their employment relationship. As the Board found (PA 8), the strikers sought to access their 401(k) accounts out of economic necessity. Moreover, as the Board noted (PA 8), the Company was complicit in this arrangement. David Oechsner, the Company's administrative manager at the time, informed several strikers, according to their credited testimony, that the only way to obtain the 401(k) money was by quitting.⁴ (PA 12-14, 17, 19; 63, 102, 133, 149.) Indeed, the Board found "hard to miss . . . the consistent alacrity with which Oechsner suggested that they would need to resign in order to obtain their funds." (PA 8.)

The Board has consistently found that strikers, by seeking retirement benefits to counter the economic strain caused by a strike, do not on that basis alone establish

⁴ The Company's 401(k) plan was provided for in the parties' 1994 collective-bargaining agreement. (PA 7; 135-36.) However, some of the features of the plan were unilaterally set by the Company through its outside benefits advisors. (PA 7; RA 41-68.) One of those features was a provision for hardship withdrawals, which were limited to four situations that did not assist the discriminatees at issue here. (PA 7; RA 93-94.) Participants did not have the option of taking a loan from their 401(k). (PA 7; 136, RA 63.)

an intent to permanently and unequivocally abandon their employment. For example, in *Augusta Bakery*, 957 F.2d at 1476, this Court agreed with the Board that three strikers who applied for pension benefits out of economic need, and who had no other way to obtain the funds, did not intend to permanently sever their employment. Accordingly, this Court upheld the Board's finding that the employer violated the Act by refusing to reinstate them simply because they had received pension benefits. *Id.* Likewise, in *Rose Printing*, 289 NLRB at 276, the Board found that strikers who executed statements of resignation because they had an "existing economic need" for their retirement contributions did not abandon their employment or forfeit their reinstatement rights. Similarly, in *Medite of New Mexico, Inc.*, 316 NLRB 629, 629 (1995), the Board found that a striker who submitted a letter of resignation after being told by his employer's personnel office that it was the only way he could obtain his 401(k) funds did not intend to permanently sever his employment relationship.

The Company's strikers who submitted resignations in order to obtain their 401(k) funds also acted out of an expressed economic need, just like the strikers in *Augusta Bakery*, *Rose Printing*, and *Medite*. As the Board reasonably found (PA 9-22), the strikers here similarly did not intend to sever their employment. As shown below with respect to the five strikers whose resignations the Company discusses

(Br 26-33), it failed to meet its burden of showing that they abandoned their employment by resigning based on their economic need for the 401(k) funds.⁵

- Anthony Bannenberg resigned solely to receive a distribution from his 401(k) account. His credited testimony shows that he, like the strikers in *Augusta Bakery*, 957 F.2d at 1476, would not have resigned if he had not been “put in the position to do so” by the unfair labor practice strike; he simply “needed this money.” (PA 9; 59.) Bannenberg continued to picket for several months after he resigned, thereby showing that he, again like the strikers in *Augusta Bakery*, did not intend to permanently sever his employment relationship. *See id.* at 1476 (noting that continuing to picket showed that strikers who resigned solely to collect pensions did not intend to permanently sever employment). Additionally, after the strike, Bannenberg, on his own initiative, notified the Company that he wished to return to his former job. (PA 10; 53, 60.) His post-strike contact with the Company, expressing his interest in continued employment, “further undermines [the employer’s] claim of abandonment.” *Zimmerman Plumbing & Heating Co.*, 339 NLRB 1302, 1304 n.6 (2003).

⁵ The Board found that, in addition to the five strikers identified above, the Company had a reinstatement and backpay obligation to several other strikers who resigned in order to obtain 401(k) funds. As noted above p.10, the Company has waived any arguments with respect to those discriminatees, and the Board seeks summary enforcement of its Order in that regard.

- Alan Resch sought a hardship withdrawal from his 401(k) account because he needed to pay bills, including health insurance premiums for himself and his family. (PA 12; 145-46.) Resch resigned because his “obligations for bills were starting to overwhelm” him, and he “had to do something to take care of those bills.” (PA 14; 146.) According to Resch’s credited and uncontradicted account, Manager Oechsner informed him that insurance premiums were not a qualifying reason for a hardship withdrawal, and thus the only way to get the money was by quitting. (PA 12-13; 149.) *See Medite of New Mexico*, 316 NLRB at 629 (employee did not intend to quit when executing a letter of resignation after being told that it was the only way he could receive pension funds). Also, following his resignation, Resch continued to picket, although to a lesser extent. (PA 14; 147.) *See Augusta Bakery*, 957 F.2d at 1476. After the strike ended, he obtained from the Union and then completed the Company’s return-to-work questionnaire, on which his wife wrote simply that he “terminated employment due to financial hardships.” (PA 14; 52, 150.) Thus, Resch took initiative to be reinstated following the strike, “further undermin[ing] [the Company’s] claim of abandonment.” *See Zimmerman Plumbing*, 339 NLRB at 1304 n.6.
- Michael Bartelt sought a hardship withdrawal from his 401(k) account after the strike ended but before he was recalled to work because he had

outstanding bills to pay and his home was threatened with foreclosure (a fact that he did not disclose to Oechsner). (PA 16; 62.) The Board found that Bartelt resigned in order to obtain money for financial reasons, and would not have done so otherwise.⁶ (PA 17; 67.) Bartelt showed continued interest in employment with the Company after his resignation. After being told by Union Representative James Malson that Company Vice President Phil Davis wanted Bartelt back on the job, Bartelt returned to the facility to investigate the possibility of reinstatement. (PA 17; 68-69.) By taking the initiative to return to his employment at the Company, Bartelt further demonstrated that he did not intend to abandon his employment. *See Zimmerman Plumbing*, 339 NLRB at 1304 n.6.

- Robert Graf resigned three weeks after the strike ended. As his credited testimony shows, he told Manager Oechsner that he was resigning because the Company had not offered him reinstatement and he needed his 401(k) money to get his “debts straight.” (PA 19; 104.) Thus, as in *Meditate of New Mexico*, Graf submitted his resignation only after being told that it was the only way he could access his much-needed funds. 316 NLRB at 629. Graf

⁶ Bartelt ended up receiving a loan from his parents and therefore did not ultimately withdraw the money from his 401(k) account. However, he did not learn that they would be willing to lend him the money until after he had already signed the resignation letter. (PA 17; 66.)

was working at an interim employer for \$3.69 per hour less than his company wages. (PA 19; 101-02.) Graf picketed until the end of the strike. (PA 19; 104.) *See Augusta Bakery*, 957 F.2d at 1467.

- Douglas Wiedeman resigned in January 1998, a few months after the strike ended. At that point, the Company still had not recalled him, and he needed his 401(k) funds to pay bills because his interim job paid less than the one to which he should have been reinstated. (PA 20; 153-54.) The judge credited Wiedeman's undisputed testimony that he told Oechsner that he had to quit because he needed the money. (PA 21; 155.) When Wiedeman was eventually offered reinstatement in 2004, he returned to work at the Company, further suggesting that he had not intended to abandon his employment. (PA 21; 156.) *See Zimmerman Plumbing*, 339 NLRB at 1311 (an employee's return to work when offered reinstatement is "convincing" evidence of lack of intent to sever employment relationship).

Thus, as shown above, the strikers whose status the Company contests (Br 29-33) resigned only because they had an "existing economic need" for their 401(k) funds. *Rose Printing*, 289 NLRB at 276. Furthermore, as in *Meditate*, 316 NLRB at 629, the Company failed to present unequivocal evidence that these strikers intended to permanently sever their employment. On the contrary, a company representative said that resigning was the only way to obtain the 401(k)

funds they needed. As the Board reasonably found, the situation of the strikers here is no different from that of the strikers in *Augusta Bakery*, *Rose Printing*, and *Meditate*, who also resigned simply because they needed to obtain retirement funds, and who did not intend to sever their employment permanently.

2. The Company's attempts to show that the strikers who resigned to obtain their 401(k) funds are not entitled to backpay are without merit

The Board rightfully rejected (PA 23) the Company's assertion, which it repeats here (Br 14-15), that upon the strikers' resignations "equitable considerations" tolled its backpay liability. As the Board noted (PA 22), contrary to the Company (Br 15), "there is no issue . . . that the resignations were 'fictitious' or a 'sham' for any purpose." It is undisputed that the discriminatees resigned and were therefore able to withdraw the 401(k) funds. Nor can the Company seriously suggest (Br 15) that it was somehow tricked into thinking that the resignations would cut off its remedial obligations under the Act. As the Board noted (PA 23), "for many years the Board has made clear that in dealing with unrecalled strikers an employer may not presume that [they] . . . intended to abandon employment." Further, given the evidence that Manager Oechsner "encouraged, facilitated, and suggested the resignations," the Board properly concluded (*id.*) that "[e]quitable considerations do not weigh in favor of the [Company]."

In this regard, the Company errs in relying (Br 14) on *Mississippi Steel Corp.*, 169 NLRB 647, 663, *enforced sub nom. in part, United Steelworkers of America v. NLRB*, 405 F.2d 1373 (D.C. Cir. 1968). As the Board noted (PA 24), it has not applied *Mississippi Steel* subsequently, particularly in cases where the Board has found tolling inappropriate because an employer's unfair labor practices "contributed to the strikers' willingness to resign." *Alaska Pulp Corp.*, 326 NLRB 522, 525 n.17 (1998), *enforced in part and remanded in part sub nom. Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000). Here, as in *Augusta Bakery*, the Company's unlawful failure to recall the strikers contributed to their need to resign before being recalled in order to obtain much-needed funds.⁷ *See Alaska Pulp*, 326 NLRB at 525 n.17 (citing *Augusta Bakery*, 298 NLRB at 59). And, with respect to the strikers who resigned before the strike ended, the Board correctly found (PA 24) that the record "leaves no doubt" the Company "played an active role in encouraging and facilitating striker resignations."

The Board also reasonably rejected (PA 22-23) the Company's contention (Br 19-23) that its fiduciary obligations as an administrator of the 401(k) plan somehow absolved it of its duty under the Act to provide make whole relief. It should be

⁷ The Company compares (Br 17) four strikers who are not part of this proceeding with the discriminatees who were unlawfully denied timely reinstatement. The four strikers are not included in the Board's Order and did not testify at the hearing. Therefore, the Board made no factual findings or legal conclusions regarding those individuals, notwithstanding any representations the Company has made.

noted that the Company does not dispute its remedial obligation to reinstate the strikers who resigned. The Company could hardly do otherwise, given that the 401(k) plan specifically provides for reemployment and continued participation in the plan. (PA 23; RA 89.) It follows that the Company, by failing to make good on its admitted obligation to reinstate strikers who resigned to obtain 401(k) funds, began incurring backpay liability as of the date of that unfair labor practice.

In these circumstances, the Board appropriately determined (PA 22-23) that the Company's reliance on the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001-1461, and Treasury Regulations governing the tax status of 401(k) plans, does not provide a defense to its obligation to make the strikers whole. The Company's citations do not support its contention that an employer would violate its fiduciary duty by reinstating, pursuant to the remedial order of a federal agency, discriminatees who had previously resigned to take distributions. Indeed, precedent involving analogous issues undermines the Company's claim. *See, e.g., National Gas Distribution Corp.*, 308 NLRB 841, 844-45 (1992) (rejecting employer's reliance on tax code provisions as justification for its unlawful unilateral change, even if rescinding the change might impose significant tax liability); *Truck Drivers Union Local 164*, 274 NLRB 909, 919 (1985) (finding that Board order directing employer to provide pension service credits for backpay period in which no services were performed did not conflict with

employer's fiduciary obligations under ERISA), *enforced*, 835 F.2d 879 (6th Cir. 1987).

Furthermore, the Company has not identified a single case that supports its position. Instead, it cites (Br 23) *Kennedy v. Plan Adm'r for DuPont Savings & Inv. Plan*, 555 U.S. 285 (2009), an inapposite case that speaks generally of a plan administrator's obligations under ERISA. The Company, however, does not explain how this case absolves it of its responsibility under the Act to reinstate, with backpay, former unfair labor practice strikers who did not intend to abandon their employment.

The only other case cited by the Company in support of its contention that the Board's Order would cause it to violate ERISA is similarly inapplicable. In *Egelhoff v. Egelhoff*, 532 U.S. 141, 146-50 (2001), the Court found that a state law regarding life insurance and pension beneficiaries was pre-empted by ERISA. The Court relied on ERISA's own pre-emption section, which states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). Clearly, the National Labor Relations Act is not a state law and, thus, is not subject to ERISA's pre-emption provision.

The Company makes a further attempt (Br 24-25) to avoid responsibility for backpay to the discriminatees by claiming that the Board's Order directs it "to

unilaterally change the collectively bargained 401(k) plan.” The Company’s argument fails because the Board did not “add[] a substantive modification to the plan” (Br 25) by ordering the Company to pay backpay to former unfair labor practice strikers who were unlawfully denied reinstatement. The Board took no action that modified the 401(k) plan, nor did it order the Company to make a unilateral change to the plan. The Company’s reliance (Br 26) on *H.K. Porter v. NLRB*, 397 U.S. 99 (1970), is similarly misplaced. The Board’s Order does not compel the Company to agree to any substantive contract provision, nor does it mandate any change to the terms of the 401(k) plan.

In sum, as the discriminatees credibly testified, they sought to withdraw money from their 401(k) accounts because the unfair labor practice strike, and the Company’s delay in reinstating them, had created an economic hardship. Indeed, the Company played an active role in soliciting resignations from strikers seeking such withdrawals. The strikers who resigned did so only to obtain much-needed funds. As the Board reasonably found, although they took that action, they did not intend to permanently sever their employment relationship with the Company—as they demonstrated by continuing to picket as well as seeking and/or ultimately accepting reinstatement. Given all the circumstances, the Board reasonably rejected (PA 24) the Company’s contention that the discriminatees’ resignations absolved the Company of its backpay liability.

D. The Board Reasonably Found that the Company Failed To Demonstrate that Its Liability Should Be Reduced Based on When Discriminatees Were Entitled to Reinstatement

- 1. The Board reasonably accepted the General Counsel's method for determining when striking employees should have been recalled as the most accurate method for determining what would have happened in the absence of the Company's unfair labor practices**

The Board utilized a seniority-based formula to determine the order of reinstatement for former strikers whose recall the Company delayed. (PA 35-38.) The Company challenges (Br 34-37) this procedure, arguing that it erred in directing the recall of former strikers within their classifications based on their plant-wide seniority. Instead, the Company asserts (Br 34) that the Company should have been permitted, in certain situations, to recall former strikers based on whomever it believed to be the most qualified of eligible former strikers when an opening occurred. According to the Company (Br 34), its preferred method was more appropriate because it allegedly was "the collectively bargained method used in recalling individuals to work from layoff" (although not from a strike). For the reasons discussed below, the Board reasonably rejected (PA 38) the Company's highly subjective recall method, which it invoked only selectively in an effort to minimize its backpay liability.

In order to better understand the Board's reasons for rejecting the Company's preferred recall method, it is helpful to bear in mind that when the strike ended, the

Company was required, but failed, to reinstate strikers to available positions, including those positions held by replacement workers hired after the strike converted to an unfair labor practice strike. *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956) (unfair labor practice strikers have rights to their positions greater than any replacements hired during the unfair labor practice strike, and must be rehired on their unconditional offer to return to work). However, when the strike ended, not enough positions were available to reinstate all of the former strikers immediately, due in part to the presence of replacement workers hired before the strike converted to an unfair labor practice strike. (PA 5, 35.) *See Sunol Valley Golf & Recreation Co.*, 310 NLRB 357, 371 (1993) (after an economic strike converts to an unfair labor practice strike, the strikers are entitled to immediate reinstatement upon their unconditional offer to return to work, unless they were permanently replaced prior to the conversion, in which case they are entitled to reinstatement before any other persons are hired or on the departure of their preconversion replacements), *enforced*, 48 F.3d 444 (9th Cir. 1995).

The Company does not contest these matters, nor does it dispute that it failed to reinstate many former strikers when it should have. (PA 35.) Instead, the Company takes issue with the seniority-based formula adopted by the Board for directing the recall of those former strikers who were denied immediate reinstatement.

In considering the Company's challenge, one must also recognize, as the Board did here (PA 35), that the objective in compliance proceedings is to restore the status quo ante that would have existed but for the employer's unfair labor practices. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Additionally, although an employer can urge the Board to select a different formula than the one proposed by the General Counsel, the Board will employ the most accurate method. *See, e.g., Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001); *Woodline Motor Freight, Inc.*, 305 NLRB 6 & n.4 (1991), *enforced*, 972 F.2d 222 (8th Cir. 1992). However, when it is impossible to reconstruct with accuracy what would have happened but for the unfair labor practices, the Board resolves any uncertainty against the employer whose wrongdoing created the uncertainty. *See NLRB v. United Contractors, Inc.*, 713 F.2d 1322, 1329 (7th Cir. 1983).

In this instance, the Board reasonably determined (PA 35) that the General Counsel's proposed recall method, which required recalling former strikers based on their seniority within classification, constituted the "most accurate reconstruction of what would have happened in the absence of unfair labor practices." In so ruling, the Board relied on a number of factors. To begin, as the Board emphasized (PA 35), the Company was content to use the General Counsel's seniority-based method in recalling former strikers immediately at the strike's conclusion. Indeed, as the

Board stated (PA 35), the Company admitted the propriety of this recall method in its answer to the compliance specification and in its summary exhibit 39. It was only later, when recalling former strikers based on seniority would have adversely affected the Company's backpay liability, that it opportunistically opposed the General Counsel's method, and began using its own subjective procedure.⁸ As the Board noted (PA 35), the Company offered no explanation for its shifting positions. The Company never said why it believed that recalling former strikers by seniority within job classification was the most appropriate method to use at the end of the strike, but not when subsequent vacancies arose.

As the Board further emphasized (PA 36), the Company sought to employ its proposed method of recall "in a context where its decisions were hopelessly confounded with its admittedly unlawful conduct." Thus, as the Board noted (*id.*), the Company's unlawful refusal to reinstate former strikers by displacing replacement workers hired after the strike converted to an unfair labor practice strike "shaped" and "infected" its subsequent recall choices. Indeed, as the Board noted (PA 36), Manager Oechsner admitted that because the Company did not reinstate more strikers immediately, there is no way of knowing what its hiring needs would have been when it was ready to reinstate additional former strikers.

⁸ Contrary to the Company's assertion (Br 35-36), the Board's Regional Compliance Officer never agreed to the Company's backpay methodology. As the Board correctly noted (PA 38 n.77), the Company's statement "is without record support."

Furthermore, as the Board explained (PA 36), the Company's preferred recall procedure was highly subjective. It would have granted managers an "unfettered and unverifiable discretion" to determine strikers' recall rights based on nothing more than informal discussions about who was "most qualified" or "better than anyone else that was on the list," with seniority acting only as a type of tie-breaker. (PA 36-37; 141-43.) By contrast, as the Board found (PA 38), and contrary to the Company's protest (Br 36), the General Counsel's recall method—which, as noted above, the Company had no quarrel with using initially—incorporated an objective assurance that returning strikers were qualified for available positions, in that the method contemplated recalling employees to positions that they had previously held. In these circumstances, the Board reasonably concluded (PA 36) that "[t]he arbitrariness and incoherence" of the Company's preferred recall method "weigh[ed] against its adoption."

Finally, the Board reasonably rejected the Company's preferred recall method given its failure to produce any examples or documentary evidence to corroborate its claim that it had used such a recall policy in the past. (PA 37.) The Company mistakenly relies (Br 36) on the collective-bargaining agreement's procedure for recalling employees from layoff as precedent for its method. As the Board found (PA 37), however, this procedure was not intended to govern recall from an unfair labor practice strike. In any event, as the Board noted (*id.*), the contract provision

“does not, fairly read, anticipate the ad hoc discretion to choose the ‘most qualified’” that the Company claims for itself.

In sum, the Board reasonably rejected the Company’s preferred method for recalling strikers, which it sought to employ only after initially recalling many employees by seniority at the end of the strike in accordance with the General Counsel’s methodology. The Board adopted the General Counsel’s seniority-based recall method because it better approximated what would have happened absent the Company’s unfair labor practices. *See Performance Friction*, 335 NLRB at 1117; *Woodline Motor Freight*, 305 NLRB at 6 n.4.

**2. The Company failed to show that discriminatee
Douglas Wiedeman was not entitled to reinstatement and
backpay following the strike**

The Company unlawfully failed to offer Wiedeman reinstatement until 2004, over six years after the strike ended. The Board reasonably found (PA 29) that he was entitled to backpay from the time the strike ended until the time that the Company finally recalled him to his stockroom job. As the Board emphasized (PA 29), the record showed that stockroom work was available following the strike, and the Company bore the burden of showing otherwise. *See Radio Elec. Corp.*, 278 NLRB 531, 532 (1986). Simply put, the Board found (PA 29) that the Company failed to meet its burden, given the evidence that a significant amount of stocking and receiving work continued after the strike.

Furthermore, contrary to the Company's assertion (Br 49), the Board did not find that the Company assigned its "limited" stock work to previously recalled striker Norbert Jahn. Rather, the Board found (PA 29) that although Jahn did some stock work, the "majority" of such work was handled by supervisors. *See Super Glass Corp.*, 314 NLRB 596 n.1 (1994) (rejecting contention that work was not available when it was being performed by non-unit employees). In these circumstances, the Company errs in relying (Br 48-49) on *Randall, Burkhart/Randall*, 257 NLRB 1, 4 (1981), a distinguishable case where the Board stated that previously reinstated strikers could be assigned the work of strikers awaiting recall. As noted above, the record here shows that supervisors were doing the majority of Wiedeman's work. Accordingly, the Board reasonably found (A 29) that Wiedeman was entitled to be recalled to his stockroom job at the end of the strike.

E. The Board Reasonably Rejected the Company's Claims that Certain Discriminatees Incurred a Willful Loss of Earnings

The Board found that the Company did not meet its burden of showing that certain strikers incurred a willful loss of earnings based on their job searches and interim employment situations. The Board reasonably found that Laverne Jung, Hans Eusch, and James Malson engaged in adequate searches for interim employment; Thomas Cooper, Lawrence Wetzel, and Allen Curtis left interim jobs for justifiable reasons; and Douglas Wiedeman was not discharged from interim

employment for gross or deliberate misconduct. As shown below, the Company has not succeeded before this Court in providing any basis for denying enforcement of the Board's backpay Order with respect to the individuals discussed.

1. The standard for determining whether an employee has incurred a willful loss of earnings

In making an employee whole for loss of pay suffered as a result of the employer's unfair labor practices, deductions are made from gross backpay "for actual [interim] earnings by the worker, [and] also for losses which he willfully incurred" by "a clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp.*, 313 U.S. at 198, 199-200. A willful loss occurs when the employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 (2d Cir. 1965). *Accord NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976). The Company has the burden of proof on mitigation of its backpay obligation and must show that the discriminatees did not meet their duty to search for or retain interim work. *See NLRB v. Midwestern Pers. Servs.*, 508 F.3d 418, 423 (7th Cir. 2007).

The duty of employees to avoid such willful losses flows not so much from any duty to mitigate (though that term is often used), but rather from what the Supreme Court termed the "healthy policy of promoting production and

employment.” *Phelps Dodge*, 313 U.S. at 200. While backpay awards “somewhat resemble compensation for private injury. . . [they are designed] to vindicate public, not private, rights” and therefore it is “wrong to fetter the Board’s discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). With uniform court approval, the Board has long held that individuals wrongfully denied their employment need only make an “honest good faith effort” to seek other employment and “need only follow their customary method for obtaining work.” *Midwestern Pers. Servs.*, 508 F.3d at 423 (citing *Golay & Co. v. NLRB*, 447 F.2d 290, 295 (7th Cir. 1971)).

2. The Company failed to prove that discriminatees Laverne Jung, Hans Eusch, and James Malson engaged in inadequate searches for interim employment

As described above, an employee does not incur a willful loss of earnings if he makes a “reasonably diligent effort to obtain substantially equivalent employment.” *Moran Printing*, 330 NLRB 376 (1999). *Accord Midwestern Pers. Servs.*, 508 F.3d at 423. In evaluating the employee’s efforts, the Board does not undertake a “mechanical examination of the number or kind of applications,” but rather examines “the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment.” *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), *enforced*, 354 F.2d 170 (2d Cir. 1965).

Moreover, because the ultimate test of a discriminatee's efforts is whether those efforts are consistent with "an inclination to work and to be self-supporting," the Board has long held that those efforts must be viewed over the backpay period as a whole and not piecemeal. *Mastro Plastics Corp.*, 136 NLRB at 1359.

As we now show, the Board, applying the principles set forth above, reasonably found (PA 41-43) that the Company failed to meet its burden of proving that discriminatees Jung, Eusch, and Malson conducted inadequate job searches and thereby incurred a willful loss of earnings.

a. Laverne Jung

On October 16, 1997, eleven days after the strike ended, Jung received a letter from the Company inquiring about his desire to be recalled. (PA 42; 110-11.) On November 14, he received an actual letter of recall, which offered him reinstatement effective December 1. (PA 41; 109.) He returned to work on that date. (PA 41; 111.)

The Company asserts (Br 39) that the Board should have tolled Jung's backpay during the brief period between the end of the strike and his actual reinstatement because he did not seek interim employment during that time. As the Board appropriately found (PA 42), however, Jung reasonably concluded that reinstatement was imminent. After all, the Company contacted him about reinstatement just eleven days after the strike ended, and it sent him a letter offering

reinstatement shortly afterward. In these circumstances, the Board (PA 42) reasonably declined to toll Jung's backpay during the brief period when he was waiting for the Company to make good on its offer of reinstatement.

b. Hans Eusch

Although Eusch was entitled to recall on December 1, 1997, the Company did not actually reinstate him until February 8, 1999. (PA 42; 92.) The Board found (PA 3) that Eusch, who did not have interim employment during that time, was entitled to backpay with the exception of the last 6 months of 1998. During the backpay period, he applied for ten jobs, beginning in January 1998. Eusch credibly testified that he did not begin his job search until January 1998 because, until that point, he believed that he would be recalled soon. (PA 42; 93.) After not applying for any jobs in the last half of 1998, Eusch resumed his job search in January 1999 by submitting three applications. (PA 42; 92.)

Eusch's lack of success in securing interim employment does not demonstrate a lack of effort to obtain it. *Aneco, Inc.*, 333 NLRB 691, 692 & n.3 (2001) (discriminatee entitled to backpay even though he did not find interim work), *enforced in relevant part*, 285 F.3d 326 (4th Cir. 2002). During his job search, Eusch turned down an offer because it was for an unskilled position paying one-third less than he had been making and did not provide benefits. (PA 43; 88.) Eusch was not obligated to accept this position because it was not substantially

equivalent to his job at the Company. *See Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995) (“it is well established that a discriminatee’s obligation to mitigate an employer’s backpay liability requires only that the discriminatee accept substantially equivalent employment”). In another instance, Eusch was told by a prospective interim employer that he would have to resign from the Company to guarantee that he would not return there if he was recalled. (PA 43; 95.) The Board reasonably found (PA 43) that he was not required to accept such a conditional offer.

Furthermore, the Company did not present evidence showing that there was work available for tape operators such as Eusch in the relevant geographic area. (PA 42.) *See id.* (burden is on the employer to show facts that reduce backpay). Thus, as the Board found (PA 2 n.6), the Company’s reliance (Br 37-38) on *St. George Warehouse*, 351 NLRB 961 (2007), *enforced*, ___ F.3d ___, 2011 WL 2473948 (3d Cir. June 23, 2011), is misplaced. In *St. George Warehouse*, the Board stated that the burden of persuasion is on the employer to show that a discriminatee has not made a reasonable search for available work, and the burden of production is on the discriminatee and the General Counsel to present evidence of the steps taken to search for work. As the Board recognized (PA 2 n.6), *St. George Warehouse* applies “[w]hen a respondent raises a job search defense to its backpay liability and produces evidence that there were substantially equivalent jobs in the relevant geographic area during the backpay period.” *Id.* at 964. The Company did not, in

raising a job search defense, show evidence of substantially equivalent jobs in the relevant geographic area. As the Board stated (PA 2 n.6), the Company “adduced no such evidence here.”⁹ In any event, even if the Company had produced evidence regarding the availability of jobs in the area, the General Counsel satisfied any burden that would have arisen under *St. George Warehouse* by having the strikers whose efforts to mitigate are at issue appear at the hearing, where the General Counsel elicited testimony from them about their efforts to seek employment. *Id.* at 961.

c. James Malson

Before the Company belatedly recalled Malson on April 22, 1998, he applied for numerous skilled welding positions and other jobs, but did not succeed in securing interim employment. (PA 43; 120-23.) Contrary to the Company’s view (Br 42-43), Malson’s failure to obtain interim employment does not, standing alone, mean that his search for interim employment was unreasonable. *See Aneco*, 333 NLRB at 692 & n.3.

Malson began his job search immediately after the strike ended, but waited three months to look for highly skilled welding positions. (PA 43; 121-23.) As the

⁹ As evidence of available jobs, the Company relies (Br 41) on the General Counsel’s compliance specification showing that other companies in the area hired some of the strikers. However, the Board reasonably found (PA 2 n.6) that the Company failed to show whether substantially equivalent jobs in the same classifications as those of the strikers were available.

Board found (PA 43-44), however, given the uncertainty that the Company created about his recall date, his decision to wait a short time before seeking out a more skilled position does not warrant a finding that his job search was unreasonable. His job search showed an “inclination to work and to be self-supporting,” and his overall efforts to “relieve his unemployment” were reasonable. *Mastro Plastics*, 136 NLRB at 1359.

Moreover, the Company failed to produce evidence that there were substantially equivalent welding positions available to Malson. Accordingly, the Company’s reliance (Br 37-38) on *St. George Warehouse*, 351 NLRB at 961, is again misplaced. In any event, Malson testified at the hearing about his efforts to seek employment, thus satisfying any additional burden that he and the General Counsel could have incurred. *See id.*

As the Board also noted, during his backpay period, Malson received unemployment compensation from October 1997 until January 1998. (PA 43; 124.) His registration with the state unemployment agency constitutes prima facie evidence that his job search was reasonable. *Midwestern Pers. Servs.*, 508 F.3d at 424.

Malson had documentation of his job search during the period that he received unemployment, but not of the further efforts to find work that he engaged in from January to April 1998. (PA 43; 124.) As the Board reasonably found (PA

43 & n.86), however, the absence of such documentation does not diminish the credibility of his testimony that he looked for interim work during that time or that his search included skilled welding jobs similar to the one he held before the strike. *Ernst & Young*, 304 NLRB 178, 179 (1991); *see also Allegheny Graphics, Inc.*, 320 NLRB 1141, 1145 (1996) (discriminatees are not disqualified from backpay “because of their poor record-keeping”), *enforced sub nom. Package Serv. Co., Inc. v. NLRB*, 113 F.3d 845 (8th Cir. 1997).

3. The Board reasonably found that discriminatees Thomas Cooper, Lawrence Wetzel, and Allen Curtis left their interim employment for justifiable reasons

The Board (PA 44-45) reasonably rejected the Company’s claim that Cooper, Wetzel, and Curtis incurred a willful loss of earnings by quitting interim jobs during the period when the Company had unlawfully delayed their reinstatement. In so ruling, the Board relied on the settled principle that discriminatees who quit interim employment for a justifiable reason do not incur a willful loss of earnings. *See, e.g., First Transit Inc.*, 350 NLRB 825, 826 (2007). In determining whether a discriminatee has quit an interim job voluntarily without good justification, the Board will not lightly second-guess his judgment that circumstances were such that a decision to quit a job was reasonable. *See Firestone Synthetic Fibers*, 207 NLRB 810, 815 (1973) (discriminatee’s employment decision “should not lightly be treated

as a willful loss of earnings . . . even if he exercises what to the comfortably employed or affluent may seem a bad and hasty judgment”).

Furthermore, a discriminatee is not obligated to retain non-equivalent employment “regardless of the conditions under which the employee was required to work.” *Churchill’s Supermarkets*, 301 NLRB 722, 725 (1991). *Accord* *Midwestern Pers. Servs.*, 508 F.3d at 424. For example, the Board has long held that an employee need not “seek or retain a job more onerous than the job from which he or she was discharged.” *Id.* (internal quotation omitted). A discriminatee is also not required to accept or remain at a job “which is not consonant with his particular skills, background, and experience,” or “which is located an unreasonable distance from his home.” *Oil, Chem. & Atomic Wkrs. v. NLRB*, 547 F.2d 598, 603 (D.C. Cir. 1976).

The Board reasonably found, consistent with these principles, that Cooper, Wetzel and Curtis left their interim employers for justifiable reasons. They therefore did not incur a willful loss of earnings that would have curtailed the backpay that the Company owed them for unlawfully delaying their reinstatement.

a. Thomas Cooper

In September 1997, during the strike, Cooper began working at a foundry where his earnings were the same as his employment as a maintenance person at the Company. (PA 44; 72.) Cooper quit the interim job because it was, according to his

credited testimony, “an unhealthy and very dangerous place to work.” (PA 44; 72.) In response to a question about whether he had reason to believe at the time of his resignation from the foundry that his employment there would end before the Company recalled him, Cooper responded that, “Well, I kind of thought I’d probably die there.” (PA 44; 73.) Cooper specifically cited poor ventilation, electrical problems with equipment and lighting, industrial chemicals stored in the cafeteria refrigerator, and a compressor with no dryer on it as some of the causes of his safety concerns. (PA 44; 74-76.) Given these poor conditions, the Board reasonably found (PA 44) that Cooper’s resignation from the foundry was reasonable and not grounds for limiting his backpay period. *See Midwestern Pers. Servs.*, 508 F.3d at 424.

The Company (Br 43) mischaracterizes Cooper’s decision to leave the foundry—a dangerous workplace—as exercising a “personal preference.” The Company (Br 43) also mistakenly relies on a distinguishable case involving a discriminatee who quit an interim job, with no indication of any problematic working conditions, to open up his own business. *See Rainbow Tours, Inc.*, 280 NLRB 166, 192 (1986). While the employee in *Rainbow Tours* might have exercised a “personal preference,” surely the Company is not suggesting that leaving a hazardous workplace is a decision similar to starting ones own business.

Next, the Company (Br 44) incorrectly places the burden on Cooper to report the problems at the foundry, but cannot point to any Board or court precedent requiring a discriminatee to take such actions. On the contrary, it is settled that a discriminatee need not remain at a “more dangerous” interim job. *Midwestern Pers. Servs.*, 508 F.3d at 424. *Accord Parts Depot, Inc.*, 348 NLRB 152, 154 n.16 (2006) (rejecting contention that discriminatee’s resignation from interim job was unreasonable because he was not required to “accept jobs posing increased exposure to environmental hazards or more onerous conditions in the first place”). In sum, the Company errs in suggesting that Cooper was obligated to attempt to correct an interim employer’s dangerous working conditions. The Board therefore reasonably rejected the Company’s claim that he incurred a willful loss of earnings by leaving that interim job.

b. Lawrence Wetzel

In September 1998, during his backpay period, Wetzel quit an interim job at General Metalworks to work for a local school district, taking a \$4 per hour pay cut. He was still working there when his backpay period ended in February 1999, upon the Company’s offer of reinstatement. (PA 44; 161-62.) Wetzel took the new interim job despite the pay cut, in part, because he was preparing for retirement and the school district offered a plan that he could qualify for based on prior state employment. None of his prior interim jobs, including General Metalworks, offered

any of the pension benefits that he needed to make up for the 401(k) benefits that he began losing when the Company unlawfully refused to recall him at the end of the strike. (PA 44-45; 163-64.)

Given the circumstances, Wetzel needed the pension benefits that he could earn from the school district in order to prepare for retirement. His decision to change jobs was therefore, as the Board found (PA 45), “an entirely reasonable desire to increase this important form of compensation.” *See Midwestern Pers. Servs.*, 508 F.3d at 425 (employment is not substantially equivalent where insurance not provided by interim employer). The Board reasonably concluded (PA 45) that discouraging discriminatees from switching to new interim employers in order to provide for their long-term retirement needs would be “antithetical to the public policy concerns underlying the mitigation requirements.” After all, as the Board noted (PA 45), the Company’s “unlawful conduct was at the root of the dilemma faced by Wetzel. He was forced to consider his retirement situation without knowing when KSM intended to recall him,” or whether the Company would ever make him whole for lost pay and retirement benefits. *See Virginia Elec. & Power Co.*, 319 U.S. at 543-44. Thus, Wetzel acted reasonably and with justifiable cause when he left General Metalworks for a new interim job, and his backpay should not be limited.

c. Allen Curtis

The Board reasonably rejected the Company's claim, which it repeats on review (Br 45-46), that Curtis—who had worked for the Company as a painter—incurred a willful loss of earnings when he quit an interim job with Liftco, where he labored outside in the freezing weather and was paid a piece-rate wage that averaged \$18-22 per hour. (PA 45; 79.) In June 2000, Curtis left Liftco to take a new interim job as a painter. His new interim job was the same as the one that he had held with the Company before the strike and paid the same \$12 per hour guaranteed rate. (PA 45; 82-84.) In addition, his new interim job meant that he would no longer have to work outside in the freezing weather as he had done at Liftco. (PA 45; 84-85.)

The Board reasonably found (PA 45) that Curtis did not incur a willful loss of earning by quitting his interim job at Liftco because it was not substantially equivalent to the one that he had held at the Company. *See Domsey Trading Corp.*, 351 NLRB 824, 887 (2007) (piece-rate job not substantially equivalent to hourly-wage job because income less predictable), *remanded in part on other grounds*, 636 F.3d 33 (2d Cir. 2011). Accordingly, as the Board concluded (PA 45), Curtis could quit the non-substantially equivalent Liftco job for any reason without a detrimental effect on his backpay. *See Midwestern Pers. Serv.*, 508 F.3d at 423, 425 (discriminatee not required to accept or retain employment that is not substantially equivalent). Furthermore, Curtis had no obligation to remain at Liftco because his

interim job there was more onerous than the painting job to which the Company had unlawfully refused to reinstate him. *See Midwestern Pers. Serv.*, 508 F.3d at 424; *Parts Depot*, 348 NLRB at 154 n.16.

4. Given the evidence that discriminatee Douglas Wiedeman was not discharged from interim employment for deliberate and gross misconduct, the Board reasonably found that the Company failed to meet its burden of showing that he incurred a willful loss of earnings

The Board (PA 46) reasonably rejected the Company's claim, which it repeats here (Br 47-48), that Wiedeman incurred a willful loss of earnings when he was discharged from two interim jobs. It is settled that a discharge from interim employment, without more, is insufficient to show that a discriminatee has willfully sustained a loss of earnings. Rather, the employer has the burden of showing that the discriminatee's discharge was due to "deliberate and gross misconduct which is so outrageous that it suggests deliberate courting of discharge." *Cassis Mgmt. Corp.*, 336 NLRB 961, 967 (2001). *Accord P*I*E Nationwide*, 297 NLRB 454, 454 (1989), *enforced in relevant part*, 923 F.2d 506 (7th Cir. 1991). Contrary to the Company's view (Br 46-48), the Board reasonably found (PA 46) that the Company failed to meet its burden of showing that Wiedeman—whose reinstatement the Company unlawfully delayed from October 1997 to February 2004—engaged in such deliberate and gross misconduct as to incur a willful loss of earnings and forfeit his right to backpay.

Wiedeman worked at Troyk Printing from August 1999 to May 2001, when he was terminated. (PA 46; 157.) He indicated that he did not get along with a co-worker, and attributed his discharge to “bad work habits.” (PA 46; 157.) The Company, however, failed to establish that Wiedeman engaged in gross, deliberate or outrageous misconduct. As the judge found (PA 46), there is “not a hint of it” in the known facts of Wiedeman’s termination. *See Ernst & Young*, 304 NLRB at 180 (discharge based on poor work performance does not constitute a willful loss of earnings).

The Company likewise failed to establish that Wiedeman’s subsequent discharge from an interim job at a trucking company was caused by gross, deliberate, or outrageous misconduct. Instead, the record shows only his testimony that he was let go because his truck kept breaking down and he could not get to work. (PA 46; 159.) This hardly constitutes the sort of gross, deliberate or outrageous misconduct that would warrant the forfeiture of backpay. *See id.*; *Ryder Syst.*, 302 NLRB 608, 610 (1991) (no willful loss of earnings where an employee was discharged from interim employment for missing several scheduled deliveries).

F. The Court Lacks Jurisdiction To Consider the Company’s Belated and Meritless Due Process Claim

The Company contends (Br 11-13) that it was denied due process because the Board issued its Second Supplemental Decision and Order on September 30, 2010, the day after the D.C. Circuit issued a mandate returning this case to the Board for

further consideration in light of *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). (RA 3.) The Company asserts (Br 11) that in this circumstance “a valid quorum of the Board still has not conducted a full review of this matter,” and alternately argues (Br 11, 13) that the Board’s Second Supplemental Decision and Order should therefore “be afforded less deference” or remanded “with explicit instructions to actually review” the record.

These contentions suffer from fatal flaws. First, the Company failed to give the Board an opportunity to respond to its allegations; as a result, Section 10(e) of the Act (29 U.S.C. § 160(e)) bars the Court from considering its claims here. Second, in any event, it is well settled that courts grant administrative agencies like the Board a presumption of regularity in their decision-making processes, and will not delve into their deliberative methods based on speculation—all the Company offers here. Accordingly, the Court should reject the Company’s belated and meritless contentions.

1. The Court lacks jurisdiction to consider the Company’s due process claim because the Company failed to raise it below

After the Board issued its Second Supplemental Decision and Order, the Company could have raised its due process claim with the Board by filing a motion for reconsideration pursuant to Section 102.48(d)(1) of the Board’s Rules and Regulations (29 C.F.R. § 102.48(d)(1)). It had 28 days in which to do so. *See* 29

C.F.R. § 102.48(d)(2). Given the Company's failure to file such a motion, the Court lacks jurisdiction to consider the Company's belated claim here.

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides: “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Where, as here, the objection was not raised before the Board, the reviewing court lacks jurisdiction to consider it in a subsequent enforcement proceeding, absent extraordinary circumstances.¹⁰ *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party before the Board). *Accord L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 983 (7th Cir. 2002); *NLRB v. Alwin Mfg. Co.*, 78 F.3d 1159, 1162 (7th Cir. 1996).

Indeed, in *New York & Presbyterian Hosp. v. NLRB*, ___ F.3d ___, 2011 WL 2314955, at *8 (D.C. Cir. June 14, 2011), the court recently rejected a similar “rubber-stamping” contention based on the Hospital’s failure to raise it before the

¹⁰ *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

Board. As the court stated: “Whatever the merits of the Hospital’s claim, section 10(e) prevents us from considering the argument raised for the first time on appeal.”

Id.

Moreover, there are no extraordinary circumstances that would excuse the Company’s failure to move for reconsideration. An extraordinary circumstance exists “‘only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time.’” *NLRB v. Dominick’s Finer Foods*, 28 F.3d 678, 686 (7th Cir. 1994) (quoting *NLRB v. Allied Prods., Corp.*, 548 F.2d 644, 654 (6th Cir. 1977)). And the Supreme Court has made clear that there *is* a proper time to challenge aspects of a case that arise for the first time in a Board decision—namely, in a timely motion for reconsideration, which the Company did not file. *See Woelke & Romero*, 456 U.S. at 665; *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).¹¹

¹¹ The Company cannot claim that the Board’s October 4, 2010 application for enforcement precluded a motion for reconsideration because the statutory scheme would have permitted the Company to move for reconsideration even after the Board applied for enforcement. This is so because Section 10(e) of the Act vests the Court with exclusive jurisdiction over a case only *after* the record has been filed. *See* 29 U.S.C. § 160(e) (“[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive . . .”). *See also New York & Presbyterian Hosp.*, ___ F.3d ___, 2011 WL 2314955, at *8 (rejecting extraordinary circumstance argument in similar procedural posture).

Nor could the Company plausibly assert that moving for reconsideration would have been futile, and therefore an extraordinary circumstance that warranted bypassing the Board. Futility is a narrow exception to Section 10(e): “an objection would be futile only when the Board has unequivocally rejected a party’s position by expressly refusing to follow the authority or line of authorities relied upon by that party.” *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 358 n.13 (6th Cir. 1983). The Company cannot make such a showing here; “probable futility cannot be equated with extraordinary circumstances.” *Keystone Roofing Co. v. OSHA*, 539 F.2d 960, 964 (3d Cir. 1976) (rejecting employer’s argument that it was not required to raise its claim before OSHA because the agency had issued a prior ruling that was contrary to the outcome sought by the employer).

2. In any event, the Company’s attack on the Board’s process for deciding this case is meritless

In any event, there is no merit to the Company’s claim (Br 11-13) that it was denied due process. The Company offers nothing but conjecture in asserting (Br 11) that the Board “still has not conducted a full review of the matter.” It is settled that courts afford administrative agencies like the Board a “presumption of regularity” in their decision-making, and will presume that public officials have properly discharged their official duties absent “clear evidence to the contrary.” *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (“A strong

presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.”). The Company’s speculation cannot rebut the presumption of regularity afforded by these cases.

Thus, in *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court concluded that it was error to permit the Secretary of Agriculture to be deposed regarding the process by which he reached his decision, including the extent to which he studied the record and consulted with subordinates. As the Court explained, the courts may not “probe [the Secretary’s] mental processes” because, “[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.” Following this logic, the Supreme Court has held that it will accept at face value the Board’s assurances that it adequately considered the record before issuing a decision. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947) (rejecting argument that Board failed to consider additional evidence upon remand where the Board assigned case to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time).

The Company cannot overcome the presumption that Board members properly discharged their duties by noting (Br 11-12) that the Board issued its

Second Supplemental Decision and Order the day after the D.C. Circuit issued its mandate. Courts have consistently rejected attempts to delve into administrative agencies' decision-making processes based on how quickly they carried out their duties. *See, e.g., National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejects claims that it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) (“bare allegation” that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process).

Nor can the Company overcome the presumption of regularity by remarking (Br 12) on the brevity of the Second Supplemental Decision and Order. The Board specifically stated in its Second Supplemental Decision and Order that it had “considered the judge’s decision and the record in light of the exceptions and briefs,” and “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 1124,” which the Board incorporated by reference. (PA 1.) The Company offers no factual support, much less any “clear evidence to the contrary,” as the Supreme Court requires, *Chem. Found.*, 272 U.S. at 14-15, that

would warrant disregarding this explanation or delving into the mental processes the Board followed in issuing its decision.

In sum, the Court lacks jurisdiction to consider the Company's belated procedural challenge. In any event, the Company utterly fails to establish any basis for its assertion (Br 11) that the Board's Second Supplemental Decision and Order "is a mere 'rubber-stamping'" of its earlier order. For these reasons, the Court should reject the Company's attempt to avoid enforcement of the backpay order issued against it.

The Company had the burden before the Board to prove any factors that would mitigate its backpay obligation to the strikers who were unlawfully denied timely reinstatement, as it now has the burden before this Court of demonstrating that the Board was unreasonable in applying its expert judgment. As shown above, with respect to numerous Board findings supported by substantial evidence, the Company has not met that burden.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

/s/ Julie B. Broido

JULIE B. BROIDO

Supervisory Attorney

/s/ Amy H. Ginn

AMY H. GINN

Attorney

National Labor Relations Board

1099 14th Street NW

Washington DC 20570

(202) 273-2996

(202) 273-2942

LAFE E. SOLOMON

Acting General Counsel

CELESTE MATTINA

Acting Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

July 2011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	* No. 10-3300
	*
and	*
	* Board Case No.
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	* 30-CA-13762
	*
Intervenor	*
	*
v.	*
	*
KSM INDUSTRIES, INC.	*
	*
Respondent	*

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I hereby certify the Board has served two copies of its brief by first-class mail upon the following counsel:

Kevin J. Kinney
Krukowski & Costello, S.C.
7111 West Edgerton Avenue
Milwaukee, WI 53220

Joseph P. Stuligross
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial
& Service Workers International Union
Five Gateway Center, Room 807
Pittsburgh, PA 15222-1214

/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 5th day of July, 2011