

No. 11-11561-E

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

GIMROCK CONSTRUCTION, INC.

Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)
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 Petitioner)
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 v.) **No. 11-11561-E**
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 GIMROCK CONSTRUCTION, INC.)
)
 Respondent)
 _____)

Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to FED. R. APP. R. 26.1 and Local Rule 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case and were omitted from the certificate contained in the brief filed by Gimrock Construction, Inc.:

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Dated at Washington, D.C.
this 22nd day of August, 2011

STATEMENT REGARDING ORAL ARGUMENT

Board counsel believe that this case involves the application of well-settled principles to undisputed facts, and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board asks to be permitted to participate and assist the Court in its resolution and understanding of this case.

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

STATEMENT OF JURISDICTION

This case is before this Court on the application of the National Labor Relations Board for enforcement of its Supplemental Decision and Order issued against Gimrock Construction, Inc. (“Gimrock”), in *Gimrock Construction, Inc.*, 356 NLRB No. 83, 2011 WL 288785 (Jan. 28, 2011). (D&O 1-13.)¹ The Board

¹ “D&O” refers to the consecutively paginated decisions of the Board and the administrative law judge, which can be found in Volume III (Doc. No. 12) of the

had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices.

The Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices were committed in Florida. The Board’s Order is final with respect to all parties. The Board filed its application to enforce the Board’s Order on April 8, 2011. There is no time limit in the Act for seeking enforcement or review of Board orders.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order.
2. Whether the Board acted within its broad remedial discretion in selecting an appropriate methodology for calculating Gimrock’s backpay liability.
3. Whether the administrative law judge acted within his discretion in ruling on three procedural matters at the hearing.

record. “Tr.” refers to the transcript of the unfair labor practice hearing, contained in Volume I of the record. “GCX” refers to the General Counsel’s exhibits, “RX” refers to Gimrock’s exhibits, and “JX” refers to the parties’ joint exhibits admitted at hearing, all of which are contained in Volume II of the record. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Gimrock’s opening brief.

4. Whether the Board acted within its broad remedial discretion by ordering Gimrock to bargain with the Union at least 16 hours each week and to file monthly progress reports with the Board's Regional Director.

STATEMENT OF THE CASE

Despite the lengthy history of this case, the remaining disputes now before the Court are both straightforward and unremarkable. In two Orders issued in June 2005, the Board found that Gimrock violated the Act in a number of ways, including by refusing to reinstate striking employees after they made an unconditional offer to return to work, by refusing to bargain with the Union since October 1999, and by refusing to furnish the Union with certain information relevant to the Union's bargaining duties. Consequently, the Board ordered Gimrock to reinstate the strikers and make them whole, to bargain with the Union, and to furnish the Union with the requested information. On review, this Court enforced those Orders in December 2006 in a consolidated proceeding.

Subsequently, Gimrock failed to comply with those court-enforced Orders and disputed various aspects of its backpay liability which prompted the Board's Regional Director to initiate a compliance proceeding to resolve those controversies. After a compliance hearing, an administrative law judge issued a recommended decision establishing the backpay owed to each discriminatee, and ordering Gimrock to furnish the Union with certain information. The judge also

recommended ordering Gimrock to abide by certain time and reporting conditions in bargaining with the Union, namely, to bargain for a minimum of 16 hours each week during contract negotiations and to file monthly progress reports with the Board's Regional Director. On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended Order. Below are summaries of the prior proceedings and the Board's Supplemental Decision and Order.

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDINGS

A. The Board Finds that Gimrock Violated the Act by Refusing To Reinstatement the Striking Employees

Gimrock is a heavy civil contractor specializing in harbor and marine construction in South Florida and the Caribbean. *Gimrock Constr., Inc.*, 326 NLRB 401, 402 (1998). On March 20, 1995, after the Board conducted an election, the Board certified the International Union of Operating Engineers, Local Union 487, AFL-CIO ("the Union"), as the exclusive bargaining representative of a unit of construction employees working in Miami-Dade and Monroe counties in Florida. *Id.* at 401. After unsuccessful negotiations for a collective-bargaining agreement, the Union went on strike on May 31. *Id.* Although the strikers made

an unconditional offer to return to work on June 6, Gimrock refused to reinstate them.² *Id.* at 401-02.

After a hearing, on May 31, 1996, an administrative law judge issued a recommended decision, which the Board adopted with modifications, finding that Gimrock violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) & (1)) by failing to reinstate the strikers upon their unconditional offer to return to work. 326 NLRB at 409. The Board also found, in disagreement with the judge, that the Union's bargaining position—in support of which the strike was conducted—did not evidence an unlawful jurisdictional objective in violation of Section 8(b)(4)(i) and (ii)(D) of the Act (29 U.S.C. § 158(b)(4)(i) & (ii)(D)).³ *Id.* at 401. To remedy these violations, the Board ordered Gimrock to reinstate the strikers, explaining however, that because Gimrock had hired an indeterminate number of permanent strike replacement workers who were entitled to remain employed, those strikers for whom positions were not immediately available were to be placed on a preferential hiring list. *Id.* at 409-10. The Board also ordered Gimrock to make the strikers whole for any loss of earnings and other benefits they suffered, and deferred to a later compliance proceeding the exact determination of which strikers

² The strikers were Ronnie Chinnors, Al Duey, Joseph MacNeil, Joseph Robinson, Barney Sims, James Wilkerson, and James Wolf. 326 NLRB at 402.

³ This jurisdictional dispute is no longer at issue, but it is relevant to understanding the procedural history of this case, as will be discussed below.

were entitled to reinstatement under the specifics of a preferential hiring list that would need to be established. *Id.* at 409.

B. On Review, this Court Remands the Case to the Board for Further Proceedings; the Board Issues a Supplemental Decision

On the Board's application for enforcement of its August 1998 Order, this Court (Circuit Judges Birch and Black, and District Judge Nesbitt) concluded that the Board had not adequately explained its conclusion that the Union's bargaining position did not evidence an unlawful jurisdictional objective. *NLRB v. Gimrock Constr., Inc.*, 247 F.3d 1307, 1312 (11th Cir. 2001). Accordingly, the Court remanded the case to the Board "for a thorough discussion of the evidence supporting the Board's determination of the Union's bargaining position and for a thorough explanation of the Board's reasons for discounting the conflicting evidence on this issue." *Id.* at 1312-13.

On remand, the Board fully addressed the Court's instruction for further explanation on its finding with regard to the jurisdictional dispute and issued a Supplemental Decision and Order on June 30, 2005, reaffirming its original decision that the employees did not engage in an unlawful jurisdictional strike. *Gimrock Constr., Inc.*, 344 NLRB 1033 (2005). The Board also affirmed its original finding that Gimrock violated Section 8(a)(3) and (1) of the Act by failing to reinstate the striking employees after they made an unconditional offer to return

to work. *Id.* The Board ordered Gimrock to comply with the Order set forth in the Board's original 1998 Order. *Id.* at 1039.

C. In a Separate Case, the Board Issues Another Decision Against Gimrock on June 30, 2005; on Review, this Court Consolidates the Cases and Enforces both Board Orders

On December 1, 1999, the Board's General Counsel issued a second complaint against Gimrock, alleging that Gimrock violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union since October 27, 1999, and refusing to furnish certain information requested by the Union in May and July 1999. *Gimrock Constr., Inc.*, 344 NLRB 934 (2005). On June 30, 2005, the same day it issued its Supplemental Decision and Order described above, the Board issued a Decision and Order finding that Gimrock violated the Act as the General Counsel had alleged. *Id.* On review, the Court consolidated the cases and issued an opinion upholding the Board's unfair labor practice findings and enforcing both Orders in full. *NLRB v. Gimrock Constr., Inc.*, 213 F. App'x 781, 782 (11th Cir. 2006) (per curiam).

II. THE COMPLIANCE PROCEEDING

On January 24, 2007, the Board's General Counsel sent Gimrock letters advising Gimrock of the specific remedial actions that must be undertaken to comply with the two court-enforced Orders. (D&O 1 n.4, 5-6; GCX 2, 3, 9, 10.) Gimrock did not respond to those letters or otherwise take any steps necessary to

comply with the Board's Orders. That non-compliance was similar to Gimrock's earlier refusals to comply with the Board's Orders before enforcement. (D&O 5-6; JX1 Attachments A-K).)

On February 27, 2009, the General Counsel issued a compliance specification and notice of hearing pursuant to Board Rule 102.52, (29 C.F.R. § 102.52), which it later amended, addressing both Gimrock's obligations to reinstate and make whole the discriminatees and to meet and bargain with the Union and furnish the Union the information it had requested.⁴ (D&O 2; (GCX 1(g) & (r).) In the specification, the Regional Director took a two-pronged approach to calculating Gimrock's backpay liability. The Regional Director found that from June 6, 1995, when the discriminatees' made an unconditional offer to return to work, through June 30, 1998, an appropriate measure of backpay was each discriminatee's average weekly gross wages earned in calendar year 1995. (D&O 7, 11; Tr. 207, GCX 1(dd) ¶ 6(a).) From July 1, 1998 forward, the Regional Director relied on the average gross earnings of currently employed comparator employees as an appropriate measure of backpay, which takes into account

⁴ During the hearing, the General Counsel agreed to combine the compliance specification and the amended compliance specification into a single document for ease of reference. (GCX 1(dd).) The General Counsel explained during the hearing, however, that the Regional Director did not reissue this combined document so it is unsigned. (D&O 2 n.1; Tr. 186, GCX 1(dd)).

intervening changes in pay rates, hours, or other conditions. (D&O 7-8, 11; Tr. 207, 228, GCX 1(dd) ¶ 6(b).) The Regional Director was unable to use this method prior to July 1, 1998, because the Company had failed to produce the necessary payroll data. For periods of time after July 1, 1998, during which the Regional Director lacked contemporaneous payroll records of comparator employees, the Regional Director continued to use the comparator-employee method, and projected the average gross earnings paid to comparator employees during the previous calendar quarter to determine the discriminatees' backpay for that period. (D&O 7, 11; Tr. 207, GCX 1(dd) ¶ 6(c).)

The compliance specification also alleged that although the backpay period had tolled for six of the seven discriminatees, it had not tolled for discriminatee Al Duey. Thus, the specification sought to require Gimrock to reinstate Duey to his former position or to a substantially equivalent position, or to place him on a preferential hiring list. (D&O 13.) Moreover, because of its continuing refusal since December 2006 to comply with the court-enforced bargaining order, the Regional Director sought to require Gimrock to adhere to minimum time and reporting requirements. (D&O 1, 12; GCX 1(dd).)

Gimrock filed an answer to the compliance specification, and in response to the Regional Director's later assertions that the Answer lacked the specificity

required by the Board's Rules, amended that answer. (GCX 1(m) & (n).) The General Counsel then filed a combined motion for summary judgment, motion to strike portions of Gimrock's answer, and motion to preclude the presentation of certain evidence on issues previously decided during the unfair labor practice proceedings.

The administrative law judge denied the motion for summary judgment, finding that the General Counsel was required to file that motion directly with the Board, and denied the other motions, without prejudice, finding it was impossible to sever them. (GCX 1(w).) He explained, however, that he was expressing no opinion on the merits of the General Counsel's contentions. *Id.*

On the first day of the hearing, the General Counsel renewed the motions to strike and to exclude certain evidence, which the judge granted in part, after hearing the parties' arguments. (D&O 3; Tr. 15.) The next day, Gimrock sought leave to amend its answer for a third time by raising several alternative theories. (D&O 1 n.1; Tr. 173-74, GCX 1(cc).) The judge denied the motion, finding that under the circumstances it was not appropriate to allow such an amendment at that late stage of the case. (Tr. 181.) After the compliance hearing, the judge issued his recommended Supplemental Decision and Order on November 16, 2009.

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On January 28, 2011, the Board (Chairman Liebman and Members Pearce and Hayes (dissenting in part, D&O 1 n.6)) issued its Supplemental Decision and Order affirming the administrative law judge's ruling, findings, and conclusions. (D&O 1-13.) Among the conclusions adopted by the Board were the judge's findings that the method for calculating each discriminatee's backpay, as well as the backpay calculations themselves, were reasonable and not arbitrary, and that Gimrock had failed to meet its burden of showing that any of the discriminatees had not properly mitigated Gimrock's backpay liability. (D&O 1, 11.)

The Board's Order requires Gimrock to pay specific amounts of backpay to the discriminatees, plus interest accrued to the date of payment, and to offer employee Al Duey reinstatement to his former position or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing if necessary employees hired after June 6, 1995. (D&O 1, 13.) The Board's Order also requires Gimrock to bargain with the Union, and additionally to (1) meet and bargain with the Union for a minimum of 16 hours each week until either an agreement is reached, the parties agree to a hiatus in bargaining, or they arrive at a lawful impasse, and (2) prepare written bargaining progress reports every 30 days and submit those reports to the Regional Director, with copies to the Union to provide it with an opportunity to reply. (D&O 1, 13.) Finally, the Order

requires Gimrock to furnish the Union with all information it had requested between May 7, 1999, and March 10, 2008.

The specific amounts due to the discriminatees follows:

Murray Chinnery	\$74,583.12
Alfred Duey	\$125,057.47
Joseph MacNeil	\$10,367.77
Estate of Joseph Robinson	\$580.83
Barney Sims	\$92,243.40
James Wilkerson	\$37,208.66
James Wolf	\$14,311.31
<hr/>	
Total Backpay:	\$354,352.56

(D&O 2, 13.)

IV. STANDARDS OF REVIEW

As discussed in the relevant sections of the Argument below, the Board's exercise of its broad remedial discretion in determining how to calculate Gimrock's backpay liability and requiring Gimrock to bargain with the Union according to time and reporting requirements are to be affirmed unless this Court finds that either determination was arbitrary. *See NLRB v. Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (5th Cir. 1966); *NLRB v. East Texas Steel Castings Co.*, 255 F.2d 284 (5th Cir. 1958), *decree clarified*, 281 F.2d 686 (5th Cir. 1960).

Moreover, the Board's choice of remedy is afforded "significant deference."

NLRB v. Goya Foods of Florida, 525 F.3d 1117, 1126 (11th Cir. 2008).⁵

The Board's procedural rulings, including its decision to deny Gimrock leave to amend its answer and to exclude certain evidence, are reviewed under the abuse of discretion standard. *See NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978); *accord Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999).

Finally, the Board's factual findings underlying the remedy, including a finding that an employer failed to carry its burden of establishing facts that would mitigate its backpay liability, are conclusive, as in other contexts, if supported by substantial evidence. 29 U.S.C. § 160(e); *see also NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 431 (2d Cir. 2001); *NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1993).

SUMMARY OF THE ARGUMENT

The Board is entitled to summary enforcement of the uncontested portion of its Order requiring Gimrock to furnish the Union with the information it requested. Gimrock waived any challenge to this finding by not raising it in its opening brief. Further, although Gimrock challenges the Board's choice of methodology used to

⁵ Gimrock's assertion (Br. 20, 21) that these remedial determinations are to be reviewed de novo is incorrect.

calculate its backpay liability, it does not challenge the Board's calculations or its finding that Gimrock failed to meet its burden of showing that the discriminatees did not properly mitigate Gimrock's backpay liability. Thus, Gimrock has also waived any challenge to those determinations.

The Board acted well within its broad remedial discretion in selecting the methodology used to calculate Gimrock's backpay liability. The Board found that an appropriate measure of backpay was based on the earnings of comparator employees, which take into account fluctuations in wage rates and hours. Because, however, the Company had failed to provide payroll records before July 1, 1998, for that earlier period, an appropriate measure of backpay was based on each discriminatee's pre-discharge earnings. These methods of calculating backpay are commonly used by the Board and broadly accepted by the courts. Gimrock argues that the Board should have relied exclusively on the discriminatees' pre-discharge earnings and that by later relying on comparator employees' earnings, the Board's method was punitive and constituted a "windfall" because it resulted in increased amounts. But Gimrock's claim is meritless; the Board's objective is not to arrive at the lowest backpay figure, but rather to approximate backpay as closely as possible to make the discriminatees whole, and the Board did exactly that.

Also contrary to Gimrock's contentions, the administrative law judge acted well within his discretion in issuing several routine procedural rulings. It is well

settled that administrative law judges are afforded wide discretion in making such rulings, which are reviewed under the abuse of discretion standard. Gimrock challenges the judge's decisions (1) to strike several portions of Gimrock's amended answer to the compliance specification, (2) to deny Gimrock leave to amend its answer to the compliance specification for the third time, and (3) to exclude certain evidence that was relevant only to determinations that were previously litigated in the underlying unfair labor practice proceedings. Each of these rulings was reasonable and procedurally sound.

Finally, the Board reasonably required Gimrock to bargain with the Union for a minimum of 16 hours each week and to report on its progress to the Board's Regional Director. The Board reasonably explained that these measures were warranted based on its determination that Gimrock otherwise was not likely to satisfy its bargaining obligations in a timely and meaningful manner under a standard bargaining order. Establishing such requirements falls within the Board's broad remedial discretion.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTION OF ITS ORDER

In its opening brief, Gimrock does not challenge that portion of the Board's Order (D&O 2, 13) requiring it to furnish the Union with all of the information it requested from May 7, 1999, through March 10, 2008. By failing to contest this finding, Gimrock has waived any such challenge. *See United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000) (arguments not raised in opening brief are waived); *Herring v. Sec'y, Dept. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (“[a]rguments raised for the first time in a reply brief are not properly before a reviewing court”); *see also* Fed. R. App. P. 28(a)(9)(A) (argument must contain party's contentions with citation to authorities and record). The Board is therefore entitled to summary enforcement of that portion of its Order. *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999); *Puralator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1427-28 (11th Cir. 1985).

II. THE BOARD ACTED WELL WITHIN ITS BROAD REMEDIAL DISCRETION IN SELECTING AN APPROPRIATE METHOD FOR CALCULATING GIMROCK'S BACKPAY LIABILITY

Although Gimrock challenges the Board's method for calculating its backpay liability, it does not challenge the calculations themselves. (D&O 2, 13.) Nor does it challenge the Board's determination (D&O 12) that Gimrock did not meet its burden of showing that any of the discriminatees failed in their duty to

mitigate Gimrock’s backpay liability. Gimrock has therefore waived any such arguments. *See Nealy*, 232 F.3d at 830-31. Accordingly, provided that this Court agrees that the Board acted within its broad remedial discretion in selecting an appropriate method of calculating backpay, and rejects Gimrock’s specious challenges to three routine procedural rulings made by the administrative law judge during the compliance hearing, discussed below in Section III, the Board’s backpay findings are to be upheld.

A. The Board’s Choice of Method for Calculating Backpay Is To Be Upheld Unless It Was an Arbitrary Abuse of Discretion

The Board’s remedial authority “is a broad discretionary one, subject to limited judicial review.” *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). It derives from Section 10(c) of the Act, which provides that upon finding that an unfair labor practice has been committed, the Board shall order the violator “to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of the Act.” 29 U.S.C. § 160(c); *accord NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1126 (11th Cir. 2008).

Because the Board “draws on a fund of knowledge” in fashioning remedies, its chosen remedy is entitled to “significant deference.” *Goya Foods of Florida*, 525 F.3d at 1126 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n.32 (1969)). The Board’s backpay award “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.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). In reviewing the Board’s chosen method of calculating backpay, a reviewing court asks only whether the chosen method was arbitrary; if not, the choice may not be rejected. *See NLRB v. Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (5th Cir. 1966); *NLRB v. East Texas Steel Castings Co.*, 255 F.2d 284 (5th Cir. 1958), *decree clarified*, 281 F.2d 686 (5th Cir. 1960).

Moreover, the Board’s factual findings underlying the remedy, including a finding that an employer failed to carry its burden of establishing facts that would mitigate its backpay liability, are conclusive, as in other contexts, if supported by substantial evidence. 29 U.S.C. § 160(e); *see also NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 431 (2d Cir. 2001); *NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1993).

B. The Board Reasonably Chose an Appropriate Method of Calculating the Backpay Owed to the Discriminatees

In calculating a backpay award, the Board “is only required to employ a formula reasonably designed to produce approximate awards due.” *NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375, 378-79 (5th Cir. 1979) (quoting *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1177 n.28 (5th Cir. 1969)).

“[T]here may be several equally valid methods of computation, each yielding a somewhat different result. . . . The fact that the Board necessarily chose to proceed

by one method rather than another hardly makes out a case of abuse of discretion.” *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977) (per curiam); *see also NLRB v. Laborers’ Int’l Union of N. Am., AFL-CIO*, 748 F.2d 1001, 1004 (5th Cir. 1984) (explaining that the fact that the Board might have chosen a different method for computing backpay is irrelevant).

Here, the Board affirmed (D&O 1, 11) the General Counsel’s two-pronged approach for computing Gimrock’s backpay liability that reasonably drew from two of the most common methods of calculating backpay. As a preliminary matter, it is important to note that the reason that the General Counsel was required to use more than one backpay method arose because Gimrock turned over only a small portion of the payroll records that the General Counsel had repeatedly requested. Rather than complying with those requests asking for records beginning for the pay period immediately prior to the start of the backpay period running from June 6, 1995, the day the striking employees made an unconditional offer to return to work, Gimrock instead provided payroll records only forward from July 1, 1998. (D&O 8, 11.) Lacking those earlier records, the General Counsel reasonably relied on each discriminatee’s average weekly earnings before June 6, 1995, projecting those earnings forward to July 1, 1998. Then, from July 1, 1998, forward, the General Counsel computed backpay based on the earnings of comparator employees that were obtained from the payroll records that Gimrock

had provided. (D&O 7, 11; Tr. 207, 228, 426.) Accordingly, the Board found (D&O 1, 11) that the General Counsel’s calculations were “reasonable and not arbitrary.”

Indeed, courts have widely approved the Board’s use of a discriminatee’s pre-discharge earnings and the earnings of comparator employees as reasonable, alternative methods for calculating backpay. *See NLRB v. Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (5th Cir. 1966) (“representative employee earnings’ formula commonly applied”) (citation omitted); *Bagel Bakers*, 555 F.2d at 305 (noting that projected earnings formula “has previously received judicial approval”). Moreover, the courts have recognized that the Board’s use of more than one backpay formula in a given case may be appropriate, depending on the circumstances. *Laborers Local 38*, 748 F.2d at 1004 (explaining that the Board had a rational basis to use four distinct formulas to calculate the backpay of four discriminatees). Likewise, the Board’s Casehandling Manual lists these two methods among its three enumerated methods of calculating backpay, with the third method being the wages of replacement employees. *See NLRB Casehandling Manual (Part Three) Compliance Section, 10540.1*. In other words, the two methods used by the General Counsel are two of the three most common and broadly accepted approaches for the Board to calculate backpay.

The comparable employee earnings formula is particularly appropriate where, as here, “the backpay period is lengthy,” because with the passage of time it becomes “difficult to determine the probable path of a particular discriminatee.” *Midwest Hanger Co.*, 221 NLRB 911, 915 (1975), *enforced in relevant part*, 550 F.2d 1101 (8th Cir. 1977). By contrast, as the Board’s Casehandling Manual makes clear, projecting forward a discriminatee’s actual pre-discharge earnings “is most applicable to a short backpay period.” Casehandling Manual, § 10532.2; *see also Woodline Motor Freight*, 305 NLRB 6, 6 n.4 (1991), *enforced*, 972 F.2d 222, 225 (8th Cir. 1992). This distinction is eminently reasonable because “[a]s the backpay period becomes longer, it becomes more likely that significant changes in conditions will occur” (Casehandling Manual § 10532.2), rendering pre-discharge earnings less and less accurate.

In sum, it was reasonable for the Board to use the discriminatees’ pre-discharge earnings to calculate backpay through June 30, 1998, given that the Company failed to provide payroll data that would allow the Board to consider the earnings of comparator employees. Once that information became available, it was reasonable for the Board then to rely on payroll data of current employees to account for fluctuations in employees’ wages and work hours.

Gimrock incorrectly argues (Br. 32-37) that because the General Counsel’s backpay calculations set forth in the backpay specification increased from some

preliminary calculations that the General Counsel had earlier made available to Gimrock, the backpay award provided a “punitive windfall” (Br. 32) to the claimants. As the Regional Director cautioned Gimrock, those preliminary calculations were provided with the caveat that they would be “subject to revision by the Region.” (D&O 7; RX 1.) And as the credited testimony of the Regional Director’s Compliance Officer established, although the Regional Director’s preliminary calculations were based only on the discriminatees’ pre-discharge earnings, because the backpay periods of three discriminatees were substantial, the Regional Director reconsidered and decided that relying on comparator earnings, when such information was available, provided a more accurate measure of backpay. (D&O 11; Tr. 426.) This change was therefore not made “to award the claimants more backpay” (Br. 33), or “to punish Gimrock for failing to agree to the prior [preliminary] calculation” (Br. 36), as Gimrock alleges without any record support. The mere fact that the final calculations were higher than the preliminary estimates does not lead to the conclusion that the award was a windfall, but rather supports the fact that changes in wages occurred after July 1, 1998, which would have inured to the benefit of the discriminatees had they not been unlawfully discharged.

Finally, although Gimrock objects to the Regional Director’s decision to utilize comparator earnings for part of the backpay period, nowhere does it suggest

that the ultimate backpay figures were inaccurate or that they overestimated the amount of backpay that the discriminatees would have earned had they not been discharged. In short, the Board's choice of methodology was "reasonably designed to produce approximate" backpay calculations. *NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375, 378-79 (5th Cir. 1979). This choice was reasonable and therefore entitled to affirmance by the Court.

III. THE ADMINISTRATIVE LAW JUDGE'S RULINGS ON SEVERAL ROUTINE PROCEDURAL MATTERS DURING THE HEARING WERE WELL WITHIN HIS DISCRETION

The Board's rulings on procedural issues are reviewable under the abuse of discretion standard. *See NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978); *accord Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). Here, Gimrock challenges three of the administrative law judge's rulings made during the hearing. Each of those rulings was reasonable and within the judge's discretion.

A. The Judge Did Not Abuse His Discretion By Striking Portions of Gimrock's Amended Answer and Deeming Admitted the Related Allegations in the Compliance Specification

Gimrock argues (Br. 27-28) that it was denied due process when the administrative law judge granted portions of the General Counsel's motion to strike several of its answers and affirmative defenses to the allegations in the compliance specification. It claims (Br. 27) that it was "blindsided" by this

motion, which it “had no reason to expect.” Gimrock, however, fails to explain the significance, if any, of a party being surprised by the filing of a motion. Insofar as this may be its weak attempt to raise a due process claim, Gimrock has failed to allege any resulting prejudice and therefore such a claim would be deficient on its face. In any event, Gimrock’s feigned surprise by the motion is disingenuous given that the General Counsel had steadfastly maintained, through various stages of the proceeding, that Gimrock’s answer to the compliance specification was deficient because it did not comply with the Board’s rule governing such answers, which requires a respondent to set forth any disagreement with a backpay computation in detail and to furnish appropriate figures in support of its position. *See* Board Rule 102.56(b).

The General Counsel first alerted Gimrock to the deficiencies of its answer in an April 15, 2009 letter. (GCX 1(o) Ex. 3.) As is relevant here, the General Counsel asserted that Gimrock sought to impermissibly relitigate issues previously decided by the Board and enforced by this Court, and that although Gimrock contested the Regional Director’s method of calculating backpay, it failed to state its position on how backpay should have been calculated or to furnish any alternative backpay figures. In response, Gimrock filed an amended answer on April 22, but its answer remained deficient, prompting the General Counsel, on April 29, to file a combined motion for partial summary judgment, motion to strike

portions of Gimrock's amended answer, and motion to preclude Gimrock's presentation of certain evidence. (GCX 1(n) & (o).)

The administrative law judge denied the motions on May 27, 2009, finding that the General Counsel was required to file its motion for partial summary judgment with the Board, rather than the judge. He also found that severing the motion for partial summary judgment from the General Counsel's motions to strike portions of the amended answer and to preclude the presentation of certain evidence was impossible. (GCX 1(w).) Importantly, however, the judge denied the motions "without prejudice" and explained that he was expressing no opinion on the merits of the General Counsel's contentions. (GCX 1(w).) Thereafter, Gimrock amended its answer for a second time on May 31, after the Regional Director issued an amendment to the compliance specification. (GCX 1(aa).) Moreover, Gimrock was given every opportunity to address the merits of the motion. At hearing, the judge painstakingly went through the portions of Gimrock's answer that the General Counsel asserted were deficient. After considering arguments on each point, he was persuaded by the General Counsel to strike several answers, and was persuaded by Gimrock not to strike others. (Tr. 19-65.)

Gimrock now challenges the Board's adoption of the judge's decision to strike that portion of Gimrock's answer in which Gimrock denied that "an

appropriate measure of backpay” from June 6, 1995, through June 30, 1998, was the discriminatees’ pre-discharge earnings. The judge explained (D&O 3; Tr. 42-49) that Gimrock had failed to deny the allegation with the specificity required by Board Rule 102.56 because it did not set forth any alternative method of calculating backpay for that period. In challenging this finding, Gimrock’s only complaint is that the judge considered the motion after having denied similar motions several days before the hearing. It does not argue, much less establish, that it had set forth sufficient details about why the Regional Director could not rely on the discriminatees’ pre-discharge earnings to calculate backpay from 1995 through 1998, nor does it suggest that its answer “furnish[ed] the appropriate supporting figures” as required by Board Rule 102.56(b). Further, the fact that the judge considered the motion after previously denying it “without prejudice” does not make out a violation of due process but rather constituted the valid exercise of his discretion. Importantly, again, Gimrock has failed to show any resulting prejudice.

This was far different from the cases relied on by Gimrock (Br. 24-25) in which a violation of due process was found because a party did not obtain sufficient notice and an opportunity to be heard. *See NLRB v. Complas Indus., Inc.*, 714 F.2d 729, 734 (7th Cir. 1983) (finding due process violation where General Counsel amended complaint during hearing to allege a new violation

wholly unrelated to complaint); *Alaska Roughnecks & Drillers Ass'n v. NLRB*, 555 F.2d 732, 735 (9th Cir. 1977) (Br. 24-25) (finding due process violation where employer was not given any notice that union alleged it was a successor or joint employer, nor the opportunity to participate in certification proceedings). Here, the administrative law judge afforded Gimrock every measure of due process that is required in Board proceedings, including notice and the opportunity to be heard. His decision thereafter to strike portions of Gimrock's answer simply cannot be described as an abuse of discretion.⁶

B. The Judge Did Not Abuse His Discretion By Denying Gimrock Leave To Amend Its Answer

Gimrock incorrectly argues (Br. 28-31) that the administrative law judge abused his discretion by denying it leave to amend its answer to the compliance

⁶ Gimrock also broadly attacked the Board's discovery rules without addressing the myriad decisions upholding those rules. *See, e.g., P.S.C. Res., Inc. v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978) (citing *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-860 (2d Cir. 1970); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402 (7th Cir. 1961)). It also challenges the administrative law judge's decision to allow the General Counsel to determine which documents produced by the discriminatees pursuant to a subpoena should be given to Gimrock, although Gimrock fails to acknowledge that the judge only allowed the General Counsel to cull relevant information from the documents after the judge precisely defined (Tr. 96) what documents were indeed relevant. Regardless, Gimrock did not raise either of these issues in its exceptions before the Board or assert that special circumstances prevented it from doing so. Accordingly, under Section 10(e) of the Act, this Court has no jurisdiction to entertain these contentions. 29 U.S.C. § 160(e); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1431 (11th Cir. 1985).

specification at the hearing and for a third time. The judge acted well within his discretion in doing so, explaining (Tr. 181) that given the circumstances of the case, it was not appropriate to permit Gimrock to amend its answer so late in the case.

On the second day of the hearing, Gimrock sought to amend its answer to assert that the Board should apply the pre-discharge earnings methodology for the entire backpay period and to make several alternative arguments.⁷ (GCX 1(cc)). The judge denied the motion (Tr. 176.), explaining that under the Board's Rules, Gimrock could not put forth a series of alternative arguments, but must rather opt for a specific theory on how backpay should be calculated, and furnish appropriate supporting figures. The judge then stated (Tr. 182) that he would reconsider his ruling if Gimrock chose to rely on one amended theory, but explained that he would not allow Gimrock to proceed along alternative theories. Gimrock never chose to do so, thus the judge only considered the defense that Gimrock had stated in its amended answer filed prior to the hearing.

⁷ In arguing the motion at hearing, Gimrock explained that it sought to alternatively argue that (1) the discriminatees' were not entitled to any backpay; (2) if the discriminatees' were entitled to backpay, the pre-discharge earnings methodology should be applied throughout the entire backpay period; (3) if the accepted the Board's reliance on comparator earnings after July 1, 1998, the General Counsel used inappropriate comparators; and (4) the General Counsel should reduce the comparators' earnings by the fringe benefits they earned. (Tr. 173-74.)

The judge's straightforward ruling was not an abuse of discretion. Gimrock had amended its answer twice before the hearing, as was its right under Board Rule 102.23 (29 C.F.R. § 102.23). Once the hearing began, however, it was within the judge's discretion to permit or deny the amendment. *See* 29 C.F.R. § 102.23.

Gimrock argues (Br. 30) that the judge imposed “a nonexistent ‘timeliness’ requirement,” which was an error of law, and thus failed to exercise his discretion. This is not true. The judge found (Tr. 181) that “in these circumstances it's [not] appropriate to allow an amendment at this late point” (emphasis added), implicitly acknowledging that in other circumstances, an amendment may be warranted. Thus this case is unlike those relied on by Gimrock (Br. 30-31), in which a tribunal failed to follow its own regulations or simply failed to exercise its discretion. *See Simmons v. Block*, 782 F.2d 1545, 1549-50 (11th Cir. 1986) (finding that the Secretary of the Farmers Home Administration, in selling surplus property, engaged in arbitrary conduct by preferring cash bids to credit bids when the pertinent regulation required the Secretary to accept the highest qualified bidder); *United States v. Spilotro*, 786 F.2d 808, 816 (8th Cir. 1986) (finding magistrate judge failed to exercise his discretion by not considering a defendant's individual circumstances when imposing conditions of pretrial release); *United States v. Brantley*, 342 F. App'x 762, 768-69 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1106 (U.S. 2010) (finding district judge abdicated discretion by deferring to U.S.

Marshals Service on question of whether defendant should remain shackled throughout trial).

Here, the administrative law judge provided Gimrock every opportunity to argue in support of its motion before ruling, based on the circumstances at hand, that it was not appropriate to allow the answer to be amended. Even then, the judge offered to reconsider his ruling if Gimrock would comply with the Board's rules by opting for a specific theory of how backpay should have been calculated.

The judge acted well within its discretion in doing so.⁸

C. The Judge Did Not Abuse His Discretion When He Excluded Evidence Related to the Company's Failure To Reinstate the Discriminatees

Gimrock also incorrectly argues (Br. 37) that the administrative law judge should have excluded certain evidence. Again, such rulings are to be upheld unless they constitute an abuse of discretion. *See Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1268 (11th Cir. 1999), and cases cited at p. 14-15. Here, the judge (D&O 3) provided Gimrock "considerable latitude in presenting evidence," but in accord with well-settled Board law, properly prevented Gimrock from relitigating

⁸ Gimrock's argument, even if viable, would only implicate the backpay of three discriminatees—Chinners, Duey, and Sims—because only they had backpay periods that extended beyond July 1, 1998. The backpay periods of the remaining four discriminatees—MacNeil, Robinson, Wilkerson, and Wolf—ended before July 1, 1998, and thus the Regional Director calculated their backpay using only their pre-discharge earnings. (D&O 9.)

issues that were, or should have been, addressed in the underlying unfair labor practice proceeding. *See, e.g., Sceptor Ingot Castings, Inc.*, 341 NLRB 997, 998 (2004); *Paolicelli*, 335 NLRB 881, 883 (2001).

Specifically, Gimrock argues that the judge abused his discretion by precluding testimony on two issues after receiving offers of proof from Gimrock's counsel. First, he excluded proffered testimony from a union representative that a discriminatee was fined for returning to work after the strike. Gimrock argues (Br. 23) that this testimony would show that other discriminatees would have refused offers of reinstatement out of fear of being fined. The judge, however, found (Tr. 689) that Gimrock failed to previously assert this as a defense in the unfair labor practice proceeding. Furthermore, the judge reasonably explained (Tr. 691-93) that even if the proffered evidence were assumed true, the inference that other discriminatees would have turned down offers of reinstatement was simply too speculative, explaining that the Board cannot "necessarily draw any inferences on what would have happened had any of the claimants been offered reinstatement." (Tr. 691.)

Second, Gimrock challenges (Br. 41-42) the judge's decision to preclude testimony that, shortly after the June 1995 strike, Gimrock officials offered to reinstate several discriminatees. But again, in the underlying unfair labor practice proceeding, the Board found that Gimrock violated the Act by not reinstating the

discriminatees after they made an unconditional offer to return to work. 326 NLRB at 409. The time for Gimrock to have argued that it offered to reinstate several employees was in that earlier proceeding.

The Board did not, as Gimrock suggests (Br. 41), defer this issue to the compliance proceeding. Rather, it merely deferred the issue of how many discriminatees, and which ones, were entitled to immediate reinstatement, and how many had been replaced by permanent replacements who were hired before the discriminatees' made the unconditional offer to return to work and were therefore entitled to remain on the job. This allowance does not, as Gimrock now suggests (Br. 41-42), permit it to relitigate the Board's finding that Gimrock unlawfully refused to reinstate the discriminatees.

In short, the administrative law judge acted well within his discretion in issuing each of the three procedural rulings that Gimrock now challenges, and thus those rulings should not be disturbed.

IV. THE BOARD ACTED WELL WITHIN ITS BROAD REMEDIAL DISCRETION IN REQUIRING GIMROCK TO BARGAIN WITH THE UNION ACCORDING TO CERTAIN TIME AND REPORTING REQUIREMENTS

To remedy Gimrock's refusal, since December 2006, to comply with its court-enforced bargaining order, the Board (Br. 1, 12-13) ordered Gimrock to bargain with the Union for at least 16 hours each week until an agreement is reached, the parties agree to a hiatus in bargaining, or they arrive at a lawful

impasse, and to file monthly progress reports with the Regional Director with copies to the Union to provide it with an opportunity to reply. This remedy is entitled to “an unusually high degree of respect” because such affirmative orders are “peculiarly a matter of administrative competence.” *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 537 (5th Cir. 1969) (citing *Fibreboard Paper Prod. Corp. v. NLRB*, 1964, 379 U.S. 203, 216 (1964)).

The administrative law judge concluded (D&O 12) that these requirements, which were requested by the General Counsel, were appropriate because Gimrock otherwise was unlikely to “satisfy its bargaining obligations to the Union in a timely and meaningful fashion” under an order lacking such conditions. He based this on Gimrock’s refusal to bargain for years, the fact that Gimrock’s principals were “not fully forthright in their testimony,” and the totality of the circumstances. (D&O 12.) The Board agreed, explaining (D&O 1) that these bargaining requirements were “necessary to ensure that (and gauge whether) [Gimrock] meaningfully complies with its bargaining obligations as set forth under the terms of the court-enforced Order.”⁹

⁹ Board Member Hayes dissented from this portion of the Board’s Order (D&O 1 n.6), asserting that because the underlying Order was enforced by this Court, the General Counsel instead should have sought modification of the Court’s enforcement order.

Moreover, ordering these requirements comports with the purpose of a compliance proceeding, which is to “ensur[e] a respondent’s compliance with the requirements of a Board order or a court judgment that enforces a Board order.” Casehandling Manual, § 10504.1. It is also consistent with prior decisions in which the Board has placed similar conditions on a bargaining order. For example, in *Harowe Servo Controls, Inc.*, 250 NLRB 958, 1125 (1980), the Board required the employer, upon the Union’s request, to bargain within 15 days of the order, to have a mediator from the Federal Mediation and Conciliation Service attend bargaining sessions, to meet reasonably often and for reasonably long periods, and to furnish progress reports to the Regional Director upon request. Further, these requirements accord with several recent cases involving significantly less egregious facts than are at issue here, in which the Board declined to impose similar affirmative bargaining orders but stated that such a remedy may be appropriate in a future case. *See Monmouth Care Ctr.*, 356 NLRB No. 29 (2010), *incorporating by reference* 354 NLRB No. 2, 2009 WL 1311482, at *4 n.3 (2009) (reversing administrative law judge’s decision to require minimum bargaining schedule because General Counsel did not request such relief); *Myers Investigative & Security Servs.*, 354 NLRB No. 51, 2009 WL 2208569, at *2 n.2 (2009) (declining to establish a minimum bargaining schedule where employer refused to bargain for just 9 months and there was no prior refusal-to-bargain allegations).

The Board's decision to establish these time and reporting requirements is also consistent with the Board's practice, in a variety of contexts, of setting forth requirements beyond the Board's normal remedial measures when warranted by the circumstances. For example, although the Board typically orders offending parties to comply with notice-posting requirements, in limited cases it will order a party to read a Board notice to assembled employees. *See, e.g., J. P. Stevens & Co.*, 171 NLRB 1202 (1968), *enforced*, 417 F.2d 533, 540 (5th Cir. 1969); *Federated Logistics*, 340 NLRB 255, 258 & n.11 (2005), *enforced*, 400 F.3d 920 (D.C. Cir. 2005). And although an employer is required to presume that a newly certified union maintains majority support for 1 year following certification, to dispel the effects of bad faith bargaining during that period, the Board will, depending on the circumstances, extend that period by a minimum of 6 months. *See, e.g., Beverly Health & Rehab. Servs.*, 325 NLRB 897, 902-03 (1998), *enforced*, 187 F.3d 769 (8th Cir.1999); *Dominguez Valley Hosp.*, 287 NLRB 149, 151 (1987), *enforced*, 907 F.2d 905 (9th Cir. 1990).

Gimrock incorrectly argues (Br. 44) that the Board's own precedent requires, as a precondition to imposing such remedies as it did here, a finding that Gimrock's actions were both taken in bad faith and egregious. The cases cited by Gimrock in support of this notion, *Crystal Springs Shirt Corp.*, 229 NLRB 4, 4 n.1 (1977), and *Leavenworth Times*, 234 NLRB 649, 649 n.2 (1978), do not establish

such a standard, but merely explain, in declining to impose a bargaining schedule, that the employers' conduct in each case could not fairly be characterized as egregious, nor its defenses so frivolous as to warrant more than the Board's usual remedies.

The Board's finding (D&O 1) that these time and reporting requirements are necessary to ensure Gimrock's compliance with its bargaining order was reasonable and should be afforded "significant deference." *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1126 (11th Cir. 2008). As the Second Circuit recently explained, "[t]he problem of how drastic to mold the remedy in a particular proceeding concerned with the latest in a series of violations calls for the sensitive exercise of administrative judgment, and we cannot substitute our own opinion for the Board's reasoned explication." *Service Employees Int'l Union v. NLRB*, ___ F.3d ___ (2d Cir. Aug. 1, 2011) (2011 WL 3250549, at *11) (quoting *Amalgamated Local Union 355 v. NLRB*, 481 F.2d 996, 1007 (2d Cir. 1973)).

Finally, Gimrock contends (Br. 45-48) that the Board exceeded its jurisdiction by ordering a bargaining schedule during the compliance stage of the proceedings. But the Supreme Court has explained that the courts "have long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge."

Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 902 (1984) (citing *NLRB v. J. H. Rutter–Rex Mfg. Co.*, 396 U.S. 258, 260 (1969); *Nathanson v. NLRB*, 344 U.S. 25, 29–30 (1952); *Trico Prods. Corp. v. NLRB*, 489 F.2d 347, 353-54 (2d Cir. 1973)). This is precisely what the Board did here.

Indeed, the compliance stage of Board proceedings is the very point in the proceedings when the Board should determine whether the circumstances warrant requirements in addition to a standard bargaining order. Here, for instance, the Board found that the time and reporting requirements were warranted because Gimrock had refused to bargain since this Court, in December 2006, enforced the Board’s bargaining order. *See NLRB v. Gimrock Constr., Inc.*, 213 F. App’x 781, 782 (11th Cir. 2006). This case is therefore more aptly analogized to cases in which courts have held employers in contempt for refusing to bargain in violation of a court-enforced Board Order, and have ordered employers to comply with a bargaining schedule. *See NLRB v. Schill Steel Prods.*, 480 F.2d 586, 598 (5th Cir. 1973) (per curiam) (ordering employer to bargain with the union for at least 15 hours a week unless the Union agreed to less in writing); *NLRB v. Johnson Mfg. Co. of Lubbock*, 511 F.2d 153, 156 (5th Cir. 1975) (ordering bargaining to proceed in “reasonably consecutive sessions”); *see also Straight Creek Mining, Inc. v. NLRB*, No. 97-5677, 2001 WL 1262218, at *1 (6th Cir. May 11, 2001) (per curiam); *NLRB v. H & H Pretzel Co.*, 936 F.2d 573, 1991 WL 111249, at *2 (6th

Cir. 1991) (per curiam); *NLRB v. Metlox Mfg. Co.*, No. 20,299, 1973 WL 3146, at *1 (9th Cir. Apr. 18, 1973) (per curiam). Although the standard for holding a party in contempt is admittedly higher than that required to simply find that a party violated the Act by refusing to bargain, Gimrock's longstanding refusal to bargain was in the face of a court-enforced Board Order.

By contrast, the cases relied on by Gimrock (Br. 47-48) involve situations in which a party, during a compliance proceeding, sought to change some aspect of a court-enforced Board Order, rather than to merely ensure that the offending party complied. *See Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006) (rejecting employer's attempt during compliance proceeding to challenge make whole relief from court-enforced Board Order); *D.L. Baker, Inc.*, 351 NLRB 515 (2007) (explaining Board could not, consistent with due process, extend backpay period beyond that determined in court-enforced Board order); *Willis Roof Consulting, Inc.*, 355 NLRB No. 48, 2010 WL 2471346, at *1 n.1 (2010) (rejecting employer's argument during compliance proceeding that no collective-bargaining agreement existed where court had enforced Board order finding otherwise); *Haddon House Food Prods., Inc.*, 260 NLRB 1060, 1060 (1982) (denying employer's motion for reconsideration and modification of an order that had previously been enforced by the court).

Certainly, the Board's decision to require that Gimrock abide by these time and reporting requirements is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 537 (5th Cir. 1969). The Board acted well within its broad remedial discretion in tailoring its remedy to ensure that Gimrock finally complies with its statutory duty to bargain with the Union.

CONCLUSION

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

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August 2011

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD)
)
)
Petitioner)
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)
v.) No. 11-11561-C
)
GIMROCK CONSTRUCTION, INC.)
) Board Case No.
) 12-CA-17385
Respondent)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,914 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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this 22nd day of August 2011

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2011, the Board electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit and submitted to the Clerk the required number of paper copies by first-class mail. Two true and correct copies of the brief were also served by first-class mail upon the counsel at the address listed below:

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