

Nos. 11-1137 & 11-1204

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STAGEHANDS REFERRAL SERVICE, LLC

and

**INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE EMPLOYEES AND MOTION
PICTURE TECHNICIANS OF THE
UNITED STATES AND CANADA, LOCAL 84**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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)	11-1204
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THEATRICAL & STAGE EMPLOYEES AND)	
MOTION PICTURE TECHNICIANS OF)	
UNITED STATES AND CANADA, LOCAL 84)	
)	
)	Board Case No.
Petitioners/Cross-Respondents)	34-CA-10971
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

**THE BOARD’S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: Stagehands Referral Service, LLC and the International Alliance of Theatrical & Stage Employees and Motion Picture Technicians of the United States and Canada, Local 84, petitioners/cross-respondents herein, were respondents in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Decision and Order in Case Nos. 34-CB-10971 and 34-CB-2774, issued on May 3, 2011, and reported at 356 NLRB No. 152.

(C) Related Cases: This case was previously before the Court in *IATSE, Local 84 v. NLRB*, Nos. 09-1158, 09-1197 (D.C. Cir. filed June 1, 2009), which was remanded to the Board. Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

/s/ Linda Dreeben
Linda Dreeben
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National Labor Relations Board
1099 14th Street, NW
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Dated at Washington, DC
this 29th day of November, 2011

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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 petition of Stagehands Referral Service, LLC (“SRS”) and International Alliance of Theatrical & Stage Employees and Motion Picture Technicians of the United States and Canada, Local 84 (“the

Union”) to review,¹ and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Union on May 3, 2011, and reported at 356 NLRB No. 152. (A 42-43.)²

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) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Union filed its petition for review on May 12, 2011. The Board filed its cross-application for enforcement on June 3. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

¹ For brevity, the Board will use “the Union” throughout its brief when referring to SRS and the Union collectively.

² Citations are to the deferred appendix filed on November 22, 2011.

STATEMENT OF THE ISSUE

Whether the Board is entitled to summary enforcement of its uncontested findings as to backpay owed to Stephen Foti because the Union has not challenged those findings in its opening brief and the Union's procedural arguments are without merit.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

The Board previously found that the Union discriminatorily failed to refer stagehand Stephen Foti for jobs with various employers after Foti's application for union membership was denied, in violation of Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)). *See Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1170 (2006), *enforced*, 315 F. App'x 318 (2d Cir. 2009). The Board further found that SRS, a statutory employer, violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discrimination in hiring in order to encourage membership in the Union. *Id.* at 1171. The Board found SRS and the Union to be jointly and severally liable for Foti's backpay remedy. *Id.*

Following a compliance hearing, an administrative law judge determined the backpay amount the Union owes to Foti. The Union filed exceptions to the judge's

decision with the Board. In its Supplemental Decision and Order, which it now seeks to enforce, the Board ordered the Union to pay \$77,455 in backpay, plus interest, to discriminatee Foti. The procedural history of the case is set forth in more detail below.

I. THE UNFAIR LABOR PRACTICE PROCEEDING

Acting on unfair labor practice charges filed by Stephen Foti, the Board's General Counsel issued a complaint (A 1-4) alleging that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by failing to refer Foti to various employers, and violated Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) by attempting to cause or causing employers to violate Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). The complaint also alleged that SRS, a statutory employer controlled and operated by the Union to supply stagehands to Mohegan Sun Casino, violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discrimination in hiring in order to encourage membership in the Union. Following a hearing, an administrative law judge issued a decision recommending that the complaint be dismissed. The General Counsel filed exceptions.

On August 31, 2006, the Board (Chairman Battista and Members Liebman and Schaumber) issued a decision reversing the judge's dismissal of the complaint. *Stagehands Referral Serv.*, 347 NLRB at 1167. The Board found that the evidence established that the Union refused to refer Foti for jobs for arbitrary, invidious, or

capricious reasons unrelated to any objective standards of referral in violation of Section 8(b)(1)(A) and (2) of the Act. *Id.* at 1170. The Board also found that SRS violated Section 8(a)(3) and (1) of the Act by maintaining with the Union an exclusive hiring hall system under which Foti was denied referrals for arbitrary, invidious, or capricious reasons. *Id.* at 1171. The Board ordered the Union to make Foti whole for any loss of wages and other benefits he may have suffered by reason of the Union's discriminatory failure to refer him for employment after May 24, 2004. *Id.* at 1172. On March 12, 2009, the Board's Order was enforced by the United States Court of Appeals for the Second Circuit. *See Stagehands Referral Serv., LLC v. NLRB*, 315 F. App'x 318 (2d Cir. 2009).

II. THE COMPLIANCE PROCEEDING

After enforcement of the Board's Order, a controversy arose concerning the amount of backpay that the Union must pay to Foti. As a result, on September 12, 2007, the Board's Regional Director issued a compliance specification alleging the gross backpay amount owed to Foti under the make-whole provision of the Board's Order, plus interest accruing to the date of payment. The Union submitted an Answer, disputing the amount owed. In April 2008, the Regional Director issued an amended compliance specification, to which the Union also filed an answer.

An administrative law judge held a hearing on the 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 the selection of the backpay formula, calculation of Foti's base period earnings, and the length of the backpay period. (A 28-36.) The judge entered a recommended order requiring the Union to pay \$77,455 in backpay, plus interest, to Foti for its discriminatory failure to refer him for employment. (A 36.)

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

On April 29, 2009, the Board's only two sitting members (Chairman Liebman and Member Schaumber) issued a Supplemental Decision and Order affirming the administrative law judge's findings, and adopting his proposed order. *Stagehands Referral Serv., LLC*, 354 NLRB No. 7, slip op. at 1 (2009). (A 28.) The Board ordered the Union to pay a total of \$77,455 in backpay plus interest. *Id.* Thereafter, the Union filed a petition to review the Board's Order in this Court, and the Board filed a cross-application for enforcement. *See IATSE, Local 84 v. NLRB*, Nos. 09-1158, 09-1197 (D.C. Cir. filed June 1, 2009). On October 20, 2009, the D.C. Circuit ordered the consolidated case held in abeyance.

On July 12, 2010, the Board filed a motion to remand the case to the Board 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 Union's petition for review, denying the Board's cross-application for enforcement, and remanding the case for further proceedings before the Board.

IV. THE BOARD'S CONCLUSIONS AND ORDER

On May 3, 2011, the Board (Chairman Liebman and Members Becker and Hayes) issued its Supplemental Decision and Order affirming the administrative law judge's findings, and adopting his proposed order. (A 42.) The Board ordered the Union to pay total backpay in the amount of \$77,455, plus interest, to Stephen Foti. (A 43.)

SUMMARY OF ARGUMENT

The Union has failed to contest in its opening brief numerous Board findings supporting the Board's determination of the Union's overall backpay liability to discriminatee Foti. As such, the Union has waived any challenges to backpay owed based on those findings. Accordingly, if the Court rejects the Union's procedural contentions described below, the Court should summarily enforce the Board's Order.

The Union presents only nonmeritorious procedural challenges to the Board's Order. The Union did not file with the Board a brief in support of its exceptions to the judge's decision. In attempting to fill this void, the Union

incorrectly argues, relying on a deceptively truncated reading of the Board's rules, that its posthearing brief to the judge in this case is part of the record before the Board. Section 102.45(b) of the Board's regulations (29 C.F.R. § 102.45(b)) defines the contents of the record before the Board, and does not include briefs prepared for and filed with an administrative law judge. The Union's mistaken contention that Section 102.45(b) includes posthearing briefs as part of the record before the Board cannot be squared with Board and court precedent consistently rejecting this claim. Additionally, the Board's regulations set forth specific requirements for a brief in support of a party's exceptions to a judge's decision, requirements that a posthearing brief cannot meet.

In a last-minute effort to cure its failure to file a brief with the Board, the Union filed, two years and one month after its exceptions to the judge's decision and any brief in support were due, a motion to supplement the record with its posthearing brief. The Board reasonably rejected the Union's untimely motion.

The Board further reasonably found, following precedent, that the Union's exceptions 2, 3, and 4 were not stated with sufficient particularity to give fair notice or to permit review by the Board. Upon considering the Union's exceptions as filed, the Board found no basis for overturning the judge's findings as to the backpay the Union owes discriminatee Foti to make him whole for the Union's unfair labor practices.

ARGUMENT

THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS AS TO BACKPAY OWED BECAUSE THE UNION HAS NOT CHALLENGED THOSE FINDINGS IN ITS OPENING BRIEF AND THE UNION'S PROCEDURAL ARGUMENTS ARE WITHOUT MERIT

A. The Board Is Entitled to Summary Enforcement of Its Uncontested Findings as to the Union's Backpay Obligation to Discriminatee Foti

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 UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006). 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 Mfg. Co.*, 396 U.S. 258, 262 (1969).

A backpay award is a make-whole remedy designed to restore "the economic status quo that [the discriminatee] would have obtained but for the . . . wrongful [act]." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). Indeed, a finding of discriminatory employment action "is presumptive proof that some back pay is owed." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972). 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 Oil, Chemical & Atomic Workers Int’l Union v. NLRB*, 547 F.2d 598, 602 (D.C. Cir. 1976).

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 Madison Courier*, 472 F.2d at 1318.³ Once that has been done, the burden is on the wrongdoer “to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.” *Id.* (quoting *Brown & Root*, 311 F.2d at 454). Uncertainties or ambiguities in determining a backpay remedy are resolved in favor of the discriminatee. *See Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717-18 (D.C. Cir. 2001).

³ The General Counsel ordinarily will also include in the backpay specification any mitigating amounts that he has discovered during his backpay investigation. *See* 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).

The Union has failed before this Court to contest any substantive aspect of the Board's backpay order. Specifically, the Union has failed to present any challenge to the Board's findings as to the appropriate backpay formula, the calculation of base pay, or when the Union's backpay liability ended. By failing to contest these and other Board findings in its opening brief, the Union has waived any defense concerning the backpay owed to discriminatee Foti. It is well-settled that "arguments not raised in [an] opening brief are waived." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 128 n.10 (D.C. Cir. 2008) (citation omitted). *Accord Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (argument noted before the Board but not raised in opening brief to the court is waived).

Accordingly, if the Court finds that the Board reasonably rejected the Union's procedural claims, then the Board is entitled, pursuant to this Court's "longstanding rule," to summary enforcement of its Order with respect to all backpay owed that the Union has not challenged in its opening brief. *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 358 (D.C. Cir. 2009) (granting summary enforcement of portion of Board order with respect to uncontested findings). *Accord Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) (same).

B. The Union's Procedural Claims are Without Merit

The Union raises only procedural arguments before this Court, which are not a barrier to enforcement of the Board's otherwise unchallenged order. The Union submitted no brief in support of its exceptions to the Board and, despite the Union's repeated protestations, its posthearing brief to the judge is not a part of the record before the Board. More than two years after the Union's exceptions were due, the Board reasonably rejected the Union's untimely attempt to lodge its posthearing brief with the Board. Finally, the Board reasonably rejected the Union's exceptions 2, 3, and 4 because the Union failed to state them with sufficient particularity to permit review.

1. Standard of Review

“The Board is vested with authority to promulgate rules and regulations which ‘may be necessary to carry out the provisions of [the Act].’” *NLRB v. Local 264, Laborers' Int'l Union of N. America*, 529 F.2d 778, 782 (8th Cir. 1976) (quoting 29 U.S.C. § 156). This broad discretion is not to be disturbed unless a rule is shown to be “without justification in law or reason.” *Id.* (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 332 (1946)).

The Board's interpretation of its rules is entitled to deference and must be upheld so long as it is reasonable. *Leach Corp. v. NLRB*, 54 F.3d 802, 806 (D.C. Cir. 1995). As this Court has stated, it “‘must defer to the Board's interpretation of

its own regulations” when “that interpretation is neither plainly erroneous nor inconsistent with the regulations.”” *Spectrum Health Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 n.7 (D.C. Cir. 2011) (quoting *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008)). *Accord Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996) (citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945)). Furthermore, an agency’s refusal to grant an exception to its rules “will not be overturned unless the agency’s reasons are ‘so insubstantial as to render that denial an abuse of discretion.’” *Green County Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985) (quoting *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983)).

2. The Union’s posthearing brief is not part of the record before the Board under Section 102.45 of the Board’s Rules and Regulations

The Union did not submit a supporting brief with its exceptions to the judge’s supplemental decision. While the Union cited to its posthearing brief to the judge in its exceptions (A 7-12), the posthearing brief is not a part of the record before the Board. (A 42.) *See* 29 CFR §102.45(b). The Board cited (A 42) Section 102.45(b) of its rules and regulations in support of its determination that the Union’s posthearing brief was not before it. In pertinent part, Section 102.45(b) sets forth what constitutes the record, in its entirety, before the Board:

The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing,

answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in [Section] 102.46, shall constitute the record in the case.

29 CFR § 102.45(b) (emphasis added). Posthearing briefs are not included in this exhaustive list.

The Union's misleading truncation of the above-quoted language is reprehensible. The Union misquotes (Br 12) the regulation as follows: "the administrative law judge's decision and exceptions . . . or briefs as provided in section 102.46 shall constitute the record in the case." The Union's omission of the word "answering," which directly modifies the noun "briefs," is a blatant attempt to make the regulation say something that it does not. Despite the Union's disingenuous quotation (Br 12) of the regulatory language, the only briefs included in the record are "answering briefs" as provided in Section 102.46, which states that a party may file an answering brief to another party's exceptions or cross-exceptions within 14 days of the filing of the exceptions or cross-exceptions. *See* 29 CFR § 102.46(d)(1) and (f)(1).⁴

⁴ Answering briefs are part of the record because they are the functional equivalent of a responsive pleading. For example, a party supporting the Board's findings cannot file exceptions; it is only by means of an answering brief that such a party can make known its opposition to exceptions.

The Board relied on (A 42) both the language of its own regulation and its precedent in *CPS Chemical Company*, 324 NLRB 1018 (1997), to find that the Union's posthearing brief was not before it. In *CPS Chemical*, the Board refused to consider the General Counsel's posthearing brief to the judge because posthearing briefs are not part of the record before the Board.⁵ *Id.* at 1018 n.2, *enforced*, 160 F.3d 150 (3d Cir. 1998). *Accord Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 801 n.20 (7th Cir. 1976) (briefs to administrative law judge are not part of record before the Board).

Based on the foregoing language of the Board's rule as well as court and Board precedent, the Union is simply wrong (Br 12) in stating that its posthearing brief was already part of the record.⁶ The Union's error in misreading Section 102.45(b) pervades its brief. For example, the Union incorrectly states at least 8 times (Br 12, 13, 15, 17, 21, 22, 23, 26) that its posthearing brief was "already" in the record before the Board. The Union similarly errs in claiming (Br 15) that the

⁵ The Board's reliance on *CPS Chemical*, 324 NLRB at 1018 n.2, which decided the same question presented here—that a posthearing brief to a judge is not part of the record before the Board under the Board's rules—demonstrates the falsity of the Union's claim (Br 16) that the Board "chose to abrogate established precedent."

⁶ The Union's reliance (Br 13) on various definitions of "judicial record" to support its argument ignores the fact that this case involves an administrative record and that the Board has set forth in its regulations what constitutes the administrative record before it. *See* 29 CFR § 102.45(b).

Board “claim[ed]” that the posthearing brief was in the record before it. The Union did not, as the Board noted (A 42) and as it admits (Br 13), refile its posthearing brief as a supporting document with its exceptions. Thus, the Board did not have the posthearing brief before it—in any form—to consider when reviewing the Union’s exceptions.

The Union’s attempt (Br 13-14) to bring its posthearing brief into the record through the “doctrine of incorporation by reference” is not properly before this Court because the Union never made that argument to the Board. 29 U.S.C. §160(e). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). Even after the Board issued its Supplemental Decision and Order, the Union had the opportunity to present its argument to the Board, and thereby preserve it, in the form of a motion for reconsideration. *See* 29 C.F.R. § 102.48(d)(1). *Accord W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008). In any event, the Union’s posthearing brief could not have been “integral” (Br 13) to the Board’s consideration of the Union’s exceptions to the judge’s supplemental decision in this case. The posthearing brief was written, not in support of the Union’s exceptions, but before the judge issued any decision that the Union could even except to before the Board.

Contrary to the Union’s (Br 12) false characterization, there is no “procedural contortion” or “trap for the unwary.” The Board’s Rules and

Regulations clearly set forth the requirements for briefs in support of exceptions. Section 102.46(c) of the Board's Rules and Regulations states that a brief in support of exceptions "shall contain no matter not included within the scope of the exceptions" and shall contain "in the order indicated" these components: a "clear and concise statement of the case"; a "specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate"; and an "argument, presenting clearly the point of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on." 29 CFR § 102.46(c). The Union did not, as it contends (Br 16), "follow[] the rules precisely" by assuming its posthearing brief somehow fit the specific requirements delineated above for a brief in support of exceptions.

While the Union correctly notes (Br 4) that the judge referred to its posthearing brief in his analysis and decision, that does not excuse the Union's obligation to file a brief in support of exceptions if the Union wanted to rely on such a document before the Board. The Union erroneously attempted to rely on its posthearing brief to the judge, but such a desire did not turn its posthearing brief into a brief "supporting" its exceptions. Thus, contrary to the Union's assertion (Br 7), the Board never refused to consider the Union's "supporting brief" because the Union never filed such a document with the Board.

Furthermore, while the General Counsel may have referred to the Union's posthearing brief in his response to the Union's exceptions (Br 6), the General Counsel is not the Board and does not bind the Board by referring to a document that is outside the record.⁷ *See CPS Chem.*, 324 NLRB at 1018 n.2 (where General Counsel referred to posthearing brief that was not part of the record before the Board, the Board refused to consider the brief); *see generally United Food & Commercial Workers Int'l Union v. NLRB*, 675 F.2d 346, 352 (D.C. Cir. 1982) (explaining bifurcated nature of authority of the Board and General Counsel).

3. The Board reasonably denied the Union's untimely motion to supplement the record

The Board properly rejected (A 42) as untimely the Union's March 7, 2011, motion to supplement the record with its posthearing brief (A 37-41), which the Union filed 2 years and 1 month after its exceptions to the judge's decision were due. Section 102.46(a) of the Board's Rules and Regulations provides that exceptions "together with a brief in support of said exceptions" must be filed "[w]ithin 28 days" of the judge's decision. 29 CFR § 102.46(a). The judge's supplemental decision in this case issued on January 7, 2009, thus the exceptions and any brief in support were due on February 4. Therefore, the Board did not

⁷ The Union's argument (Br 8) that it should be excused from following the Board's rules because the General Counsel did not assert either that the Union's posthearing brief was not in the record, or that the Board's consideration of it would violate the Board's Rules and Regulations, is similarly misplaced.

abuse its discretion in finding (A 42) that the Union's failure to file its posthearing brief with the Board by February 4, 2009, could not be cured with a motion to supplement the record on March 7, 2011. *See Green Cty. Mobilephone*, 765 F.2d at 238 (agency denial of a waiver of its rules upheld unless agency's reason so insubstantial as to be abuse of discretion).⁸

Additionally, the Board found that the Union waited to attempt to supplement the record almost 2 years after the decision of the two-member Board in this case, on April 29, 2009, which further put the Union on notice that the posthearing brief was not a part of the record before the Board. *Stagehands*, 354 NLRB No. 7, slip op at 1. This lengthy delay in attempting to rectify its failure to file a brief in support of exceptions undermines the Union's claim (Br 17) of a "good faith, even if mistaken, effort to comply with the rules of filing." Finally, the Board noted (A 42) that the Union waited to file its motion until 10 months after the Supreme Court's decision in *New Process*, the holding of which indicated that this case, like all decisions issued by the two-member Board, would be remanded to the Board.

⁸ The Union incorrectly states (Br 9) that the Board *sua sponte* refused to allow the Union to file its posthearing brief with the Board. To the contrary, the Board acted in response to the Union's motion to supplement the record.

4. The Board properly considered the exceptions that the Union stated with sufficient particularity to permit review

The Union correctly states (Br 20) that its exceptions (A 7-12) are in the record before the Board. However, the Union incorrectly states (Br 7) that the Board “ignore[d] the substance” of the Union’s exceptions. Rather, the Board reviewed (A 42) “the exceptions document and any citation of authorities and supporting argument contained therein.” Upon such a review, the Board found (A 42) that the “exceptions fail to demonstrate a basis for overturning the judge’s findings.”

Additionally, the Board properly found (A 42) that the Union failed to state the grounds for exceptions 2, 3, and 4 “with sufficient particularity to give fair notice to the General Counsel and the Charging Party, or to permit review by the Board.” As the Board has previously stated, “[i]t is the excepting party’s duty to frame the issues and present its case to the Board.” *James Troutman & Assoc.*, 299 NLRB 120, 121 (1990) (Board did not consider respondent’s deficient exceptions), *enforced mem.*, 935 F.2d 275 (9th Cir. 1991). Where a party “merely recites” an exception and “cites to the judge’s decision without stating, either in exceptions or its supporting brief, on what ground the purportedly erroneous finding should be

overturned,” the Board will disregard the exception. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005), *enforced*, 456 F.3d 265 (1st Cir. 2006).⁹

As shown, the Union’s procedural challenges are premised on a misreading of the Board’s Rules and Regulations and are without merit. The Union has raised no arguments in opening brief as to the Board’s findings with respect to the Union’s backpay liability to discriminatee Foti. Thus, if the Court agrees that the Board reasonably rejected the Union’s procedural claims, the Court should summarily enforce the Board’s Order.

⁹ The Union errs in relying (Br 17) on *NLRB v. Southwest Security Equipment Corporation*, 736 F.2d 1332, 1336 (9th Cir. 1984), where an employer stated an exception with sufficient particularity to preserve the court’s jurisdiction to review the employer’s argument under Section 10(e) of the Act (29 U.S.C. § 160(e)). In the cited case, the employer excepted to the judge’s finding and also clarified its argument in a brief opposing another party’s exceptions. By contrast, in the instant case, the Union failed to clarify its exceptions in a timely, appropriately filed brief to the Board. In addition, the Union, unlike the employer in *Southwest Security*, failed to contest the merits of the Board’s findings on review. Accordingly, *Southwest Security* is distinguishable.

CONCLUSION

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

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National Labor Relations Board

November 2011

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 6 (29 U.S.C. § 156):

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(3) (29 U.S.C. § 158(a)(3)):

It shall be an unfair labor practice for an employer –
(3) by discrimination 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(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)):

It shall be an unfair labor practice for a labor organization or its agents –
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7

Section 8(b)(2) (29 U.S.C. § 158(b)(2)):

It shall be an unfair labor practice for a labor organization or its agents –
(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 10(c) (29 U.S.C. § 160(c)):

[The Board] shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No 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. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .

Relevant provisions of the Board's Rules and Regulations:

29 C.F.R. § 102.45(b):

The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, shall constitute the record in the case.

29 C.F.R. § 102.46(a):

Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with section 10(c) of the Act and §§ 102.111 and 102.112 of these rules) file with the Board in Washington, DC, exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. . . .

29 C.F.R. § 102.46(c):

Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

- (1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
- (2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.
- (3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

29 C.F.R. § 102.46(d)(1):

Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions. . . .

29 C.F.R. § 102.46(f)(1):

Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions.

29 C.F.R. § 102.48(d)(1):

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. . . .

29 C.F.R. § 102.53:

Review by the General Counsel of compliance determination; appeal to the Board of the General Counsel's decision.

(a) The charging party may appeal such determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination. . . .

(b) The General Counsel may affirm or modify the determination of the Regional Director, or may take such other action deemed appropriate, stating the grounds for the decision.

(c) Within 14 days after service of the General Counsel's decision, the charging party may file a request for review of that decision with the Board. . . .

(d) The Board may affirm or modify the decision of the General Counsel, or make such other disposition of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the decision of the General Counsel.

UNITED STATES COURT OF APPEALS
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STAGEHANDS REFERRAL SERVICE, LLC)
)
and) Nos. 11-1137
) 11-1204
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THEATRICAL & STAGE EMPLOYEES AND)
MOTION PICTURE TECHNICIANS OF)
UNITED STATES AND CANADA, LOCAL 84)
)
) Board Case No.
Petitioners/Cross-Respondents) 34-CA-10971
)
v.)
)
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,001 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 29th day of November 2011

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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:

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Dated at Washington, DC
this 29th day of November 2011