No. 12-1115

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ALTON H. PIESTER, LLC

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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TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a final Board order issued against Alton H. Piester, LLC ("the Company") on November 28, 2011, and reported at 357

NLRB No. 116. (JA 1-4.)[1] This case involves the Company's liability for the backpay that it owes to discriminatee Darrell Chapman for unlawfully discharging him in April 2007.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the underlying unfair labor practice occurred in Newberry, South Carolina, where the Company maintains a trucking facility from which it hauls goods and materials. The Board's application for enforcement, filed on January 24, 2012, was timely; the Act places no time limit on the institution of proceedings to enforce Board orders. The Board's Supplemental Order is final under Section 10(e) of the Act.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its broad remedial discretion in determining the amount of backpay that the Company owes to discriminatee Darrell Chapman as a result of his unlawful discharge.

[1] "JA" refers to the pages of the joint appendix that was filed with the Company's brief. References preceding a semicolon are to the Board's findings in its Supplemental Decision and Order ("D&O") appearing at JA 1-4; those following are to the supporting evidence. "Br." refers to the Company's opening brief.

STATEMENT OF THE CASE

This case is the last step in making Chapman whole for the Company's unlawful discharge of him for engaging in protected concerted activity. In *Alton H. Piester, LLC v. NLRB*, 591 F.3d 332 (4th Cir. 2010), this Court upheld a Board finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Chapman for engaging in protected concerted activity and enforced the Board's order that the Company make Chapman whole. In the Supplemental Decision and Order now before the Court, the Board directed the Company to pay Chapman $72,538.47 in backpay, plus interest.

STATEMENT OF FACTS

I. The Underlying Unfair Labor Practice Proceeding

On January 13, 2007, the Company announced a proposed change to its billing and bookkeeping practices regarding fuel surcharges that would decrease drivers' net pay. *Alton H. Piester, LLC*, 353 NLRB No. 33 (2008), *reprinted at* JA 18-24.3. The drivers protested the change, but Company Owner Alton Piester responded that if they didn't like it, they could "clean out their truck and move to another job." (JA 18.) Thereafter, employees frequently complained among themselves, and to Piester and his secretaries, about the fuel surcharge change. (*Id*.) On April 2, 2007, Chapman reiterated the complaint and asked that the

surcharge change be reflected on his paycheck stub. (*Id*.) In response, Piester discharged Chapman. (JA 18-18.2.)

On September 30, 2008, the Board's only two sitting members (Chairman Schaumber and Member Liebman) issued a Decision and Order finding that the Company violated Section 8(a)(1) of the Act by discharging Chapman for engaging in protected concerted activity. (JA 20.2.) In so ruling, they rejected the Company's contention that incidents predating Chapman's protected concerted activity contributed to his termination, including two non-fault accidents in company vehicles that occurred in January and February 2007. (JA 18.2 & n.8, 19.2-20.) The Board found that the Company failed to show that it would have discharged Chapman for those incidents absent his protected concerted activity, and thus, the discharge was unlawful. (JA 20.) To remedy this unfair labor practice, the Board ordered the Company to offer Chapman reinstatement and make him whole for any loss of earnings and other benefits. (JA 20.2-21.) On January 15, 2010, this Court enforced the Board's order. *Alton H. Piester, LLC v. NLRB*, 591 F.3d 332 (4th Cir. 2010).[2]

[2] The Court's enforcement order and mandate predated the Supreme Court's June 17, 2010 decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that under Section 3(b) of the Act (29 U.S.C. § 153(b)), a delegee group may not exercise delegated authority when the group's membership falls below three. Therefore, although the two Board members lacked authority to issue the underlying unfair labor practice decision, the matters resolved by this Court in

II. The Instant Compliance Proceeding

To resolve the amount of backpay owed by the Company to Chapman, the Board's Regional Director for Region 11 issued a compliance specification calculating Chapman's gross backpay based on the period from April 2, 2007 (the date of his unlawful discharge) to June 14, 2010 (the deadline for his response to the Company's unconditional offer of reinstatement). (D&O 1-2; JA 31-32, 86-99.) Pursuant to the Board's usual practice, the Region's Compliance Officer subtracted Chapman's interim earnings from his gross backpay. (D&O 2; JA 97.)

In its answer to the compliance specification (JA 107-09), the Company did not dispute the accuracy of the figures used to calculate backpay. Instead, the Company asserted in relevant part that its backpay obligation should have ended around June 2007. (JA 108.) That is when the Company, in connection with its attempt to curtail its backpay liability by exploring the possibility of reinstating Chapman, told its insurance carrier about his January and February 2007 driving accidents. In response, the carrier stated, via the insurance agency, that re-hiring him would cause an increase in the Company's insurance premiums or a loss of coverage. (JA 44-45, 62-65, 82, 180-90, 204.)

2010 are *res judicata*. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-78 (1940); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (cited with approval in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1377 (2010)).

Thereafter, an administrative law judge conducted a compliance hearing on the disputed issues. (D&O 2.) After rejecting the Company's defenses, the judge issued a supplemental decision and order recommending that the Company pay Chapman $72,538.47 with interest. (D&O 4.) The Company filed exceptions to the judge's recommended order, challenging, in relevant part, her finding that Chapman's backpay continued past June 2007. (D&O 1 & n.2; JA 110-11.)

III. The Board's Supplemental Decision and Order

On November 28, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued the Supplemental Decision and Order now before this Court for enforcement. 357 NLRB No. 116 (2011) (JA 1-4). The Board affirmed the judge's rulings, findings, and conclusions and adopted her recommended order, thus directing the Company to pay Chapman $72,538.47 plus interest, minus tax and withholdings. (D&O 1.)

SUMMARY OF ARGUMENT

The Board acted well within its remedial discretion in directing the Company to make discriminatee Darrell Chapman whole by paying him backpay from the date of his unlawful discharge on April 2, 2007, through June 14, 2010, when the Company offered him reinstatement. This backpay award appropriately restores Chapman to the position he would have been in but for the Company's unfair labor practice.

The Company contends that its backpay liability should have ended in June 2007, when, in an effort to curtail its backpay obligation, it told its insurance carrier about two driving accidents that Chapman had in January and February 2007. Upon receiving this information, the carrier opined that rehiring him would result in an insurance surcharge or loss of coverage. The Company, however, never informed its carrier that it was facing the prospect of a Board order directing it to remedy a labor law violation by reinstating Chapman. Nor did the Company attempt to appeal the provider's opinion or seek coverage from an alternate source. In these circumstances, the Board appropriately rejected the Company's claim that Chapman was uninsurable, and therefore that its backpay liability should have ended in June 2007.

Furthermore, the Board reasonably found that Chapman would have remained employed, and thus insured, throughout the backpay period had the Company not unlawfully discharged him in April 2007. As the Board explained, prior to Chapman's discharge, the Company was fully aware of his accidents but tolerated those blemishes on his driving record without discipline and did not report them to its insurance carrier. Indeed, as the Company admitted in its brief in support of exceptions, it initially concealed the accidents from the carrier in order to keep its insurance rates low. It was not until after Chapman's unlawful discharge that the Company informed its carrier of the accidents, as part of its

attempt to reduce its backpay liability. Moreover, the record does not support the Company's assertion that even if it had not unlawfully discharged Chapman, it would have disclosed the incidents because the carrier supposedly tightened its rules. Accordingly, the Board reasonably rejected the Company's attempt to curtail its backpay liability based on the two accidents.

STANDARD OF REVIEW

The Board's remedial power is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). As the Supreme Court has explained, "[i]n fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969) (quoted in *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 258 F.3d 305, 310 (4th Cir. 2001)). As this Court has explained, judicial deference is premised on the courts' appreciation that the Board has brought to bear its careful consideration and special competence in fashioning relief. *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 798 (4th Cir. 1998). And tolling of backpay is an issue "comfortably within the sphere of expertise delegated by Congress to the Board." *Id.* at 799. Thus, courts should not disturb a backpay order unless it represents a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. *J.H. Rutter-Rex Mfg.*

Co., 396 U.S. 258, 263 (1969); *Fibreboard*, 379 U.S. at 216. Thus, judicial review with respect to remedial issues is limited to whether the Board abused its discretion in fashioning its remedial order. *Coronet Foods*, 158 F.3d at 798; *accord Pepsi Cola*, 258 F.3d at 310.

The findings of fact underlying the Board's decision are conclusive if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Pepsi Cola*, 258 F.3d at 310. Thus, a reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Id*. (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF BACKPAY THE COMPANY OWES TO DISCRIMINATEE CHAPMAN AS A RESULT OF HIS UNLAWFUL DISCHARGE

A. The Board's Backpay Order Restores Chapman To the Position He Would Have Been in But for the Company's Unfair Labor Practice

Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that the Board, upon finding that an unfair labor practice has been committed, "shall order the violator to 'take such affirmative action including reinstatement of employees with or

without back pay, as [will] effectuate the policies' of the Act." *J.H. Rutter-Rex*, 396 U.S. at 262 (quoting Section 10(c)). Accordingly, Section 10(c) authorizes the Board to fashion appropriate orders to undo the effects of unfair labor practices. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Under the Act, an award of reinstatement with backpay is the conventional remedy in cases of unlawful discharge. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

A backpay award is a make-whole remedy designed to restore, as nearly as possible, the economic status quo the employee would have obtained but for the employer's wrongful act. *See Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 798 (4th Cir. 1998) (citing *Phelps Dodge*, 313 U.S. at 194); *NLRB v. Consol. Bus Transit*, 577 F.3d 467, 477-78 (2d Cir. 2009). 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; *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

To restore the economic status quo, the unlawfully discharged employee is normally entitled to backpay during the period that runs from the date of the unlawful discharge to the date the employer offers the discharged employee valid, unconditional reinstatement. *See, e.g., NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 603 (4th Cir. 1977). During that period, the employee 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 NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 712 n.2 (6th Cir. 1993).

The burdens of proof in a backpay proceeding are matters of settled law. The General Counsel's burden is to establish only that the gross backpay amounts contained in a compliance specification are reasonable. *See, e.g.*, *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir. 1988). The burden then shifts to the employer to establish affirmative defenses mitigating liability, such as tolling. *See NLRB v. Mining Specialists, Inc.*, 326 F.3d 602, 605 (4th Cir. 2003); *Coronet Foods*, 158 F.3d at 798. Any doubts are to be resolved against the employer. *Id*.

In this case, the issue before the Court is a narrow one. The Company does not contest the reasonableness of the backpay figures. Instead, it argues only that the Board erred in rejecting its affirmative defense that its backpay liability should have ended in June 2007, when it reported Chapman's accidents from January and February 2007 to its insurance carrier. Accordingly, as shown below, the backpay remedy ordered by the Board in this case appropriately restores Chapman to the position he would have been in but for his unlawful discharge.

B. The Board Reasonably Rejected the Company's Affirmative Defense that Its Backpay Liability Should Have Ended in June 2007

The Company contends (Br. 3-4, 9-10) that the Board should have tolled its backpay liability because the insurance carrier's June 2007 statement about Chapman's accidents made him "ineligible" for rehire. In a related vein, the

Company suggests (Br. 12-13) that its backpay obligation should have ended in the spring of 2007 because that is when it assertedly would have disclosed Chapman's accidents to the carrier in the normal course of business, even if it had not unlawfully discharged him. Although the obligation of a wrongdoing employer to make a discriminatee whole with backpay may be curtailed in certain circumstances, the Company failed to satisfy this heavy burden.

1. The June 2007 insurance statement did not render Chapman uninsurable

The Company argues (Br. 4, 10-11) that its backpay obligation should have ended in June 2007, when its insurance carrier opined that reinstating Chapman would result in a surcharge or loss of coverage. On this basis, the Company asserts (Br. 3-4, 11), without foundation in the record, that he was "ineligible" for reinstatement. In order to meet this high bar, an employer must show that it had no options to re-insure the discriminatee under its current carrier or other possible carriers. Thus, in *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 408 (5th Cir. 1984), the Court upheld the Board's reinstatement order where the employer did not "question or attempt to appeal" its insurance carrier's stated intention to exclude the drivers from coverage, and did not show that an appeal of the decision would have failed. Similarly, in *Golden Beverage of San Antonio, Inc.*, 256 NLRB 469, 472-73 (1981), the Board rejected the employer's defense that the discriminatee

was uninsurable and therefore not entitled to reinstatement, because the employer had failed to explore insurance options among alternative carriers.

Applying this precedent, the Board (D&O 1 n.2) properly rejected the Company's attempt to curtail its backpay obligation by pointing to the June 2007 insurance statement. As the Board reasonably found, the record failed to show that Chapman was uninsurable. At no time did the insurance carrier declare that Chapman could not be added to the policy. Rather, the carrier stated only that adding Chapman to the policy would cause an increase in rates or a loss of coverage. (D&O 3-4; JA 44-45, 65, 204.)

Moreover, as the Board noted, the Company did not attempt to reconcile these insurance concerns with its duty to reinstate Chapman. (D&O 1 n.2; JA 62-63, 68.) To begin, payment of a surcharge was within the Company's control. (JA 68.3-68.4.) Furthermore, there were other actions that the Company could have taken but did not. Notably, the Company did not even inform its carrier that it had a legal obligation to reinstate Chapman, let alone contest the carrier's opinion regarding the effect of reinstatement on the Company's policy. (D&O 1 n.2, JA 62-63.) Nor did the Company seek alternative coverage.[3] (D&O 1 n.2; JA 67-68.) In short, the Company failed to prove it was without options to curtail its liability.

[3] The Company's suggestion (Br. 14) that it could not change insurance carriers mid-stream is not supported by the record. The insurance agent testified that a

In sum, the Board reasonably found that the insurance carrier's statement in June 2007 did not toll the Company's backpay liability because the Company failed to prove he was uninsurable.

2. The record does not support the Company's related suggestion that, absent Chapman's unlawful discharge, his employment would have ended prematurely based on his driving record

There is no more merit to the Company's related suggestion (Br. 12-13) that its backpay obligation should have ended in June 2007, when it assertedly would have discharged Chapman for a non-discriminatory reason, namely, his driving record and its effect on the Company's insurance policy. As shown below, the record simply does not support this reconstruction of events in the absence of Chapman's unlawful discharge.

To prevail on such a claim, the Company would have had to show that it would have disclosed Chapman's accidents to its insurance carrier in the normal course of business in June 2007, and that such disclosure would have caused Chapman's discharge. In essence, the wrongdoing employer must reconstruct the events that would have transpired if there had been no unfair labor practice.[4] *See*

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policy could not be cancelled within 45 days. (JA 68.5.) But the policy took effect February 28, 2007 (JA 39, 44, 56, 61, 143), and the Company's inquiry about re-hiring Chapman occurred on June 13, 2007 (JA 180), more than 90 days later.

[4] In this regard, the Company errs in relying on the cases cited at p. 10 of its brief. Thus, *John Cuneo, Inc.*, 298 NLRB 856 (1990), and *First Transit, Inc.*, 350 NLRB

NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc., 258 F.3d 305, 313 (4th Cir. 2001) (backpay liability ends when employer shows it would have discharged discriminatee in a legally permissible manner); *accord Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 798 (4th Cir. 1998). Under this framework, the Company cannot rely on the insurance carrier's June 2007 review of Chapman's record because, as shown below p. 17, the Company only sought the review in order to reduce its liability, and the review would not have occurred but for the unfair labor practice. (D&O 3-4; JA 40-41, 61, 67, 82, 177-79.)[5]

The Company utterly failed to make such a showing. The Board reasonably concluded that Chapman would have remained employed throughout the backpay period. (D&O 1 n.2.) Thus, as the Board explained, the Company was aware of and tolerated his driving infractions prior to his unlawful discharge in April 2007.

825, 828-29 (2007), involve the rule that if a discriminatee engages in misconduct for which the employer would have discharged any employee, then reinstatement is denied and backpay terminated on the date the employer first acquired knowledge of the misconduct. Such a rule is inapplicable here because, as shown above, Chapman did not engage in misconduct, and in any event the Company was well aware of and tolerated his non-fault accidents prior to his unlawful discharge. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252, 256 (1939), where the employees were discharged for engaging in an unlawful sit-down strike, is also distinguishable.

[5] *See NLRB v. Consol. Bus Transit*, 577 F.3d 467, 473, 476-79 (2d Cir. 2009) (upholding backpay until date of next regularly scheduled driving test where discriminatee was disqualified prematurely because employer singled him out for testing); *Blue Square II, Inc.*, 293 NLRB 29, 29 n.2 (1989) (approving backpay until the employer would have requested driver safety records).

(D&O 1 n.2; JA 43, 75, 78, 83, 167-68.) Furthermore, it failed to prove in the underlying unfair labor practice proceeding that it would have discharged Chapman at that time for the accidents (together with alleged acts of misconduct) in the absence of his protected, concerted activities. (JA 18.2 & n.8, 20.) Accordingly, the Board, consistent with precedent, reasonably concluded that Chapman's driving record could not excuse the Company from complying with the reinstatement order and honoring its backpay obligation. (D&O 1, n.2.) *See Blue Circle Cement Co.*, 311 NLRB 623, 625 n.10 (1993) (reinstatement with backpay appropriate where employer knew about unauthorized postage meter use prior to discharge but did not discharge discriminatee on that basis), *enforced*, 41 F.3d 203 (5th Cir. 1994).

The Board's determination that Chapman would have remained employed but for his unlawful discharge is also buttressed by the fact that the Company willingly concealed his accidents from the insurance carrier prior to the discharge. (D&O 3-4; JA 44, 61.) As the record shows, Chapman was working as a driver when the Company obtained a new insurance policy with a different carrier, effective February 28, 2007. (D&O 3-4; JA 43, 61, 144-45.) At that time, the Company decided not to report Chapman's accidents to the carrier specifically because it wanted "to keep his insurance rates from going up," as the Company expressly admitted in its brief in support of exceptions. (D&O 4; JA 44, 61, 118.)

Based on the selective information supplied by the Company, which omitted any reference to the 2007 accidents, the insurance carrier deemed Chapman an acceptable driver on the new policy. (JA 43-44, 61, 167-68.) It was not until June 2007, that the Company—facing the prospect of a reinstatement order, and hoping to curtail its backpay liability—revealed the two accidents to its carrier.[6] (D&O 4; JA 44-45, 62-64, 82, 180-90.) Indeed, as the Board noted, the Company went to "great lengths" to disclose the accidents at this critical point, even sending copies of receipts for the damage to its carrier. (D&O 4; JA 180-90.) Given that the Company was "perfectly willing" to let Chapman's accidents go unreported during his employment, the Board reasonably found that he would have remained employed, and thus insured, throughout the backpay period, but for the unfair labor practice. (D&O 1 n.2, 3.) *See Overseas Motors*, 277 NLRB 552, 556-58 (1985) (rejecting tolling where employer concealed discriminatee's driving record from insurance carrier prior to unlawful discharge), *enforcement denied on other grounds*, 818 F.2d 517 (6th Cir. 1987).

In addition, the Board reasonably rejected the Company's claim, which it repeats on review (Br. 3), that even if it had not tolerated Chapman's accidents, concealed them from the insurance carrier, and committed the unfair labor practice,

[6] As explained below, pp. 20-21, the record fails to support the Company's claim (Br. 12) that the disclosure of Chapman's accidents at this critical juncture was merely due to the insurance carrier's tightening its rules.

it still would have discharged Chapman based on a purported "uniform practice" of not retaining employees who are "unacceptable" to the carrier. As the Board noted, Chapman's situation differed significantly from the three other drivers who were allegedly discharged due to adverse insurance assessments. (D&O 1, n.2.) Both drivers Griffin and Hasty were removed from insurance coverage by the Company's prior carrier, apparently without any option of paying a surcharge.[7] And with respect to driver Siebert, the Company did not present any evidence at the hearing that it terminated him for the effect of his driving record on insurance (JA 71). Thus, the Company errs in relying on the other drivers' records as a basis for tolling its backpay obligation.

Moreover, the Company was unable to prove that but for the unfair labor practice, the insurance carrier would have reviewed Chapman's driving record in the normal course of business during the backpay period. The Company suggests (Br. 13) that Chapman's record would have come to light before June 2007, when, as the insurance agent testified (JA 44, 51), the carrier sent an inspector to review some driving records after receiving a number of claims from the Company soon after the new insurance policy took effect on February 28, 2007 (JA 39, 44, 56,

[7] In March 2006, the prior insurance carrier sent the Company paperwork removing Griffin from coverage immediately. (JA 48-49, 69, 229-30.) Piester testified that Hasty was in the "same situation." (JA 69.) Although the Company's new insurance carrier deemed Hasty unacceptable in March 2007 (JA 221-23), he was not employed at the time (JA 94-95, 107, 145, 201-02).

61). But her testimony fails to establish that the inspector would have reviewed Chapman's record in particular. And it is settled that any uncertainty as to whether, or exactly when, the Company would have turned over Chapman's accident information to the carrier absent its unfair labor practice must be resolved against the Company as the wrongdoer. (D&O 3.) *See, e.g.*, *NLRB v. Mining Specialists, Inc.*, 326 F.3d 602, 605 (4th Cir. 2003) (doubts about affirmative defenses are resolved against employer).

Furthermore, even assuming the carrier would have reviewed Chapman's driving record in the normal course of business during the backpay period, the record does not support the Company's suggestion that it would have disclosed Chapman's January and February 2007 accidents at that time even absent the unfair labor practice. There is no merit to the Company's claim (Br. 6, 12) that it initially did not disclose the accidents because at the time the insurance carrier did not care about such non-fault incidents. The Company's claim cannot be squared with its admission, noted above p. 16, that it initially decided against reporting the accidents in order to keep its insurance rates low. (JA 118.)

Nor is there any merit to the Company's assertion (Br. 3) that the insurance carrier initially accepted Chapman's driving record but "became stricter" after his discharge. To support its speculation that at first the carrier was unconcerned about non-fault incidents, the Company relies (Br. 6, 12) solely on the policy

application package that it submitted in late February 2007. But the application actually requested "details for any accidents or violations" (JA 144) (emphasis added). Consistent with this language, the insurance agent testified (JA 57) that a prospective insured must disclose losses and accidents on the application, and she did not suggest that only certain types of incidents had to be disclosed. Thus, the record does not support the Company's claim that it refrained from reporting Chapman's accidents before his unlawful discharge simply because the insurance carrier was not interested in such information.

There is no more merit to the Company's claim (Br. 7, 12-13) that even if it had not unlawfully discharged Chapman in April 2007, it still would have disclosed his accidents later on that spring because the insurance carrier purportedly "tightened the rules." This claim is in direct conflict with the further admission that the Company made in its brief in support of exceptions that the carrier "would not have known of [Chapman's accidents] until renewal of the insurance" in February 2008, and that "notification of an adverse impact…would obviously not occur during [Chapman's] employment." (JA 118, 143.)

Moreover, the Company does not offer any specific support for its allegation (Br. 12-13) that following Chapman's unlawful discharge, it was required to disclose all accidents. The record merely reflects that the underwriter became concerned about the number of claims filed by the Company between February 28,

2007, when the policy took effect, and May 2007, and asked the Company to adopt a safe driving policy statement in May 2007.[8] (JA 44, 61, 63, 247-49.) But there is simply no evidence that the insurance carrier changed its policies regarding the types of accidents that had to be reported. Thus, the record fails to support the Company's contention (Br. 12-13) that even if it had not unlawfully discharged Chapman in April 2007, it still would have had to disclose the January and February 2007 accidents that it had previously tolerated and concealed.

In sum, the Board reasonably found that the Company did not meet its burden of proving its affirmative defense that its backpay obligation should have been tolled as of June 2007. The Company failed to show that Chapman's two non-fault accidents rendered him uninsurable or ineligible for reinstatement. The Company likewise failed to show that even if it had not initially tolerated Chapman's accidents and concealed them from the insurance carrier, and even if it had not committed an unfair labor practice against him, it still would have discharged him before the backpay period ended based on the accidents. Accordingly, the Court should enforce the Board's order directing the Company to pay Chapman $72,538.47 in backpay.

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[8] Notably, the policy merely served to put drivers with three violations on notice that they were "on their last limb, so to speak" (JA 242), and Company Owner Piester admitted that no employees were terminated based on the new policy when it was allegedly adopted in May 2007 (JA 84).

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment enforcing the Board's order in full.

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August 2012
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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves well-settled principles that are fully presented in the briefs, and therefore that argument would not be of material assistance to the Court. If, however, the Court believes that argument is necessary, the Board is fully prepared to participate, and to assist the Court in its understanding and resolution of this case.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1115 **Caption:** NLRB v. Alton H. Piester, LLC

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[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]

☑ this brief contains 5,101 [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: August 6, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	No. 12-1115
	)	
ALTON H. PIESTER, LLC	)	
	)	Board Case No.
Respondent	)	11-CA-21531

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2012, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF.

s/ *Linda Dreeben*
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Dated at Washington, DC
this 6th day of August, 2012