

No. 08-4754-ag

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

**INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS & HELPERS, AFL-CIO**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

FLUOR DANIEL, INC.

Intervenor

**ON PETITION FOR REVIEW OF TWO ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

These cases are before the Court on a petition filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (“the Union”) for review of two Orders of the National Labor Relations Board (“the Board”), *Fluor Daniel, Inc.*, 350 NLRB No. 66, 2007 WL

2330902 (2007), and *Fluor Daniel, Inc.*, 351 NLRB No. 14, 2007 WL 2858939 (2007), which the Board issued against Fluor Daniel, Inc. (“the Company”). (A 193-232, A 422-32.)¹ The Company has intervened in the Union’s review proceeding in support of the Board.² The Orders are final with respect to all parties.³ The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”).

The Board respectfully renews its argument, advanced in its previous motion to dismiss, that this Court is without appellate jurisdiction to entertain the Union’s petition because the Union is not “aggrieved” by the Board’s Orders within the meaning of Section 10(f) of the Act (29 U.S.C. § 160(f)), any claim of injury is pure conjecture, and the case is otherwise premature for review. On November 17, 2008,

¹ “A” references are to the parties’ joint appendix. References preceding a semicolon are to the Board’s findings; those following a semicolon are to supporting evidence.

² In a separate case pending before the Court, the Board has applied for enforcement of its Order issued against the Company in *Fluor Daniel, Inc.*, 350 NLRB No. 66. *See NLRB v. Fluor Daniel, Inc.*, Case No. 09-0368-ag. In that case, briefs for the Company and the Board, respectively, are due April 10 and May 11, 2009.

³ The Union was the charging party before the Board, and has at all stages of these cases acted in the interest of the discriminatees, many of whom, however, are members of Pipefitters Local 633, Iron Workers Local 103, or Laborers Local 1392. (A 202-03.)

the Board filed a motion to dismiss the Union's petition for review for lack of appellate jurisdiction. In an order issued on January 5, 2009, a three-judge motions panel of this Court denied the Board's motion.

It is settled, however, that "[a] ruling by a motions panel of this Court indicating that the Court has appellate jurisdiction does not bar reconsideration of that issue by the merits panel." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999). *See also, United States v. Ecker*, 232 F.3d 348, 349 (2d Cir. 2000) (jurisdiction question may be revisited by merits panel). The Board respectfully renews its argument to the merits panel that jurisdiction is improper and relies on its previously-filed motion to dismiss. (Motion of the National Labor Relations Board to Dismiss the Union's Petition for Lack of Appellate Jurisdiction.)

Assuming that jurisdiction is proper, the Court has jurisdiction over these cases under Section 10(f) of the Act (29 U.S.C. § 160(f)); venue is proper because the Union transacts business in this Circuit. The Union's petition for review, which was filed on September 26, 2008, was timely because the Act imposes no time limit on the initiation of review proceedings.

STATEMENT OF THE ISSUES

1. Whether the Board's new policy articulated in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), for determining make-whole relief due in cases involving antiunion discrimination against union "salts"—that is, union

organizers who apply for work with a nonunion employer in furtherance of a campaign to organize the employees—is consistent with the Act and adequately explained.⁴

2. Whether the Board reasonably determined that *Oil Capitol* is to be applied in the future compliance proceedings in these cases.

STATEMENT OF THE CASE

The two Supplemental Decisions and Orders currently under review share common procedural roots. In 1993, the Board issued a Decision and Order finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily refusing to hire 53 voluntary union organizers, or “salts,” and by unlawfully discharging an employee for refusing to cross a union picket line. *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993). In the subsequent enforcement proceeding, the United States Court of Appeals for the Sixth Circuit enforced those portions of the Board’s Order regarding the Company’s unlawful discharge and its failure to hire 2 of the 53 salt-applicants. *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 971-75 (6th Cir. 1998). The Sixth Circuit, however, remanded the issue of whether the Board’s General Counsel, as a

⁴ The Board’s *Oil Capitol* decision is currently on review before the D.C. Circuit in *Sheet Metal Workers Int’l Assn., Local 270 v. NLRB*, Case No. 07-1479, and oral argument was heard on February 17, 2009.

matter of proof, had sufficiently matched the remaining 51 salt-applicants with vacant positions for which they were qualified. *Id.* at 964-71.

Adopting the Sixth Circuit’s decision as law of the case, the Board remanded the issue of matching the remaining 51 salt-applicants to vacant positions to an administrative law judge with instructions to reopen the record and accept additional evidence. (A 136-38.) On a separate procedural track, those portions of the Board’s Order that the Sixth Circuit had enforced proceeded to a compliance hearing before a second administrative law judge. After the judges issued their respective decisions, and while exceptions to those decisions were pending before the Board, the Board issued its decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007) (“*Oil Capitol*”), which articulated a new policy for determining remedial relief in compliance proceedings in union “salting” cases.

The Board subsequently issued the two Supplemental Decisions and Orders currently under review. In each case, the Board instructed (A 193 n.5, A 422, 425) that *Oil Capitol* was to be applied in the future compliance proceedings held to determine the exact amounts of backpay. Now before this Court, the Union challenges the Board’s *Oil Capitol* decision, as well as the Board’s determination that the standards of proof established in *Oil Capitol* are to be applied in the future compliance proceedings in each of these cases. The underlying facts, which serve

as background, are detailed below, followed by summaries of the procedural history and the Supplemental Decisions and Orders.

I. STATEMENT OF FACTS

A. **Background; the Company Contracts To Work Several Outage Jobs for Big Rivers; the Union Renews Its Campaign To Organize the Company's Nonunion Employees, and Assists Some of Its Members Who Are Willing To Be Voluntary Union Organizers in Applying for Jobs; None of the Union Salt-Applicants Are Hired**

The relevant underlying facts were affirmed by the Sixth Circuit in its decision, *Fluor Daniel, Inc.*, 161 F.3d 953, and are repeated here for the Court's convenience. The Company is a nationwide enterprise engaged in an engineering, construction, and maintenance business. *Id.* at 956. Since about 1983, the Union has conducted an ongoing campaign to organize the Company's nonunion employees called "Fight Back" or "Strike Back." *Id.* at 959. In 1990, the Company signed a contract for work at various electric power generating facilities for the Big Rivers Electric Corporation ("Big Rivers"). *Id.* at 956. The work was to be performed during "outages," that is, times when generating stations are completely shut down for maintenance purposes during off-peak months in the spring and fall. *Id.* In 1990, the Company performed work for Big Rivers during eight outages. *Id.* at 955-56.

For the outage scheduled for April at the Wilson plant in Centertown, Kentucky, the Company implemented a staffing plan which included accepting

applications through the Kentucky Employment Service (“the Service”). *Id.* at 956. The Union obtained job applications from the Service and distributed them to union members who had indicated that they would be willing to work as voluntary union organizers. *Id.* The Union returned a package of 43 applications to the Service which the Company received on March 26. *Id.* at 956-57.

All of the 43 applications that the Union submitted to the Service, except for one,⁵ identified the applicants as voluntary union organizers. *Id.* None of the 43 applicants was hired. *Id.* Instead, the Company hired 52 workers who had no connection to organized labor, as well as a few workers whose only connection to a union was simply having participated in a union apprenticeship program or worked at a union shop. *Id.*

B. The Coons Brothers Are Offered Jobs Contingent on Passing Welding Tests; They Fail and Are Not Hired; Four Applicants Who Are Not Salts Are Allowed To Retest or Are Given Easier Tests, and Are Hired; Employee Bolin Honors the Union Picket Line, and the Company Discharges Him

When the start of the Wilson outage was delayed, some workers whom the Company had hired took other jobs, leaving the Company with a need to hire more boiler tube welders. *Id.* at 956-97. At that time, the Company offered jobs to the Coons brothers, who had identified themselves as volunteer union organizers on

⁵ Richard Bowlds’ application did not state that he was a voluntary union organizer, but did list as references two union representatives. (*See* A 195.)

their applications, but the Company made the job offers contingent on their passing a welding test. *Id.* Both Coons brothers failed the test, neither was given an opportunity to retest, and neither was hired. *Id.* at 957. That day, another applicant who failed the test was retested, passed, and was hired. *Id.* Three other applicants were given easier welding tests than the test the Company administered to the Coons brothers, passed, and were hired. *Id.* None of those four workers was a voluntary union organizer. *Id.*

On April 13, the Union established a picket line at the Wilson plant to protest the Company's failure to hire the salt-applicants. *Id.* at 958. Over the next 9 days, the Company hired 36 more workers, but none of the salt-applicants. *Id.* Soon after the picketing began, employee David Scott Bolen asked a company manager what would happen if he refused to cross the picket line. *Id.* Bolen was told that "the first time we give you an excused absence, the second time will be a written warning and the third time, we will terminate you." *Id.* Subsequently, Bolen honored the union picket line. *Id.* A few days later, that same manager told a time clerk to write up Bolen as a voluntary discharge. *Id.*

C. At Another Spring Outage, the Union Assists 11 Workers, Who Identify Themselves as Voluntary Union Organizers on Their Applications, in Applying for Company Jobs; None Are Hired; in the Fall, the Company Again Fails To Hire the Salt-Applicants

In May, the Union established a picket line during the spring outage at the Big Rivers' Green plant in Sebree, Kentucky. *Id.* After a clerk at the plant stopped

and asked the pickets what they wanted and they replied “jobs,” the clerk returned and handed out job applications. *Id.* Subsequently, the Union mailed a package to the Company containing 11 of those applications, all of which identified the applicants as volunteer union organizers. *Id.* at 959. The Company received that batch of applications on May 17. *Id.* None of the 11 salt-applicants was hired. *Id.*

At the end of the spring outages, the Company terminated all employees hired for those outages. *Id.* For the fall outages, the Company did not hire any of the salt-applicants, despite the fact that their applications were still on file with the Company, and despite the Company’s staffing plan directive that stated: “All applications will be retained for use in future staffing.” *Id.*

II. PROCEDURAL HISTORY

A. The Board’s Initial Decision

On February 6, 1991, the Board’s General Counsel issued an unfair labor practice complaint against the Company after investigating a charge filed by the Union. *Fluor Daniel, Inc.*, 311 NLRB 498, 500 (1993). The complaint alleged that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(3))

and (1))⁶ by discriminatorily refusing to hire 54 voluntary union organizers and by discharging employee Bolen for refusing to cross a union picket line. *Id.* After a hearing, Administrative Law Judge Martin J. Linsky issued a decision finding that the Company violated the Act, as alleged. *See id.* at 500-08.

On May 28, 1993, the Board issued a Decision and Order finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire 53 voluntary union organizers, including brothers Steven and John Coons, and by unlawfully discharging employee Bolen. *Id.* at 498-500. The Board, however, dismissed the complaint allegation regarding one employee, Edward DeWitt, finding that he submitted an inadequate job application. *Id.* at 498.

B. The Sixth Circuit's Opinion

After the Company refused to comply with the Board's Order, the Board applied for enforcement in the Sixth Circuit. On November 16, 1998, the court issued a decision enforcing the Board's Order in part and remanding in part. *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953. Specifically, the court enforced the Board's

⁶ Section 8(a)(3) of the Act makes it an unfair labor practice for an employer, "by discrimination in regard to hire . . . , to . . . discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act (29 U.S.C. § 157), which include the rights "to self-organization" and "to form, join, or assist labor organizations." A Section 8(a)(1) violation is derivative of a Section 8(a)(3) violation. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1984).

Order insofar as it found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Bolen and failing to hire the Coons brothers, but it remanded to the Board the issue of whether the Board's General Counsel, as a matter of proof, had sufficiently matched the remaining 51 salt-applicants with vacant positions for which they were qualified. *Id.* at 964-71.

C. The Hearings After Remand

On remand, the Board's response to the Sixth Circuit's decision was two-fold. First, in accordance with the court's remand instructions, the Board directed Administrative Law Judge Linsky to reopen the record and accept additional evidence on the question of whether the remaining 51 salt-applicants could be matched to vacant positions for which they were qualified. (A 136-38.) On May 11, 2001, Judge Linsky issued a decision finding that all 51 salt-applicants were sufficiently matched with available positions for which they were qualified, and that therefore they were entitled to make-whole relief for losses suffered as a result of the Company's discriminatory refusals to hire them. (A 201-32.) The Company filed exceptions with the Board for review of the judge's recommended decision. (A 193.)

Second, on those portions of the Board's Order enforced by the court—that is, the Company's unlawful discharge of employee Bolen and its failure to hire the Coons brothers—the Board's General Counsel initiated a compliance proceeding

to determine the exact amount of backpay due to each discriminatee, and a hearing was held. (A 426-27.) On June 7, 2004, Administrative Law Judge Jane Vandenventer issued a supplemental decision recommending that backpay be awarded as follows: Bolen, \$18,442.05, plus interest; John Coons, \$32,566.54, plus interest; and Steven Coons, \$43,579.84, plus interest. (A 426-32.) The Company and the Union both filed exceptions with the Board for review of that recommended decision. (A 422.)

D. The Intervening *Oil Capitol* Decision

While exceptions to both recommended decisions were pending, the Board issued its decision in *Oil Capitol*, 349 NLRB 1348 (2007), which announced a new policy for determining the make-whole relief due in cases involving discrimination against union “salts”—that is, union organizers, paid or unpaid, who apply for work with a nonunion employer in furtherance of a campaign to organize employees. Prior to *Oil Capitol*, the Board applied in all construction industry cases calculating the make-whole relief due to victims of discrimination—including those who were union salts—a rebuttable presumption that those individuals would have remained in the job indefinitely. *See Dean Gen. Contractors*, 285 NLRB 573, 574-75 (1987); *see also NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 431-32 (2d Cir. 2001) (approving the Board’s presumption of continued employment in cases involving union salts).

In *Oil Capitol*, however, the Board concluded that, in cases involving discrimination against union salts, a rebuttable presumption of continued employment was no longer warranted. 349 NLRB at 1353. Instead, the Board determined that the General Counsel, in compliance proceedings involving the calculation of make-whole relief for discrimination against union salts, will be required to affirmatively support backpay allegations with evidence establishing the period of time the salt would have remained on the job. *Id.* at 1353-54.

In short, the Board's rationale for crafting the new policy was that, because a salt's duration of employment is largely dictated by the union's objectives, the most probative evidence of the duration of employment would be more readily available to the union or salt-discriminatee. 349 NLRB at 1352. The Board also concluded that applying the traditional presumption of continued employment could, and often did, result in awards that were more punitive than remedial. *Id.* (citing *Aneco, Inc. v. NLRB*, 285 F.3d 326, 332-33 (4th Cir. 2002)). The Board declared that these new standards of proof in salting cases would be applied "in the present case and in all future cases where the issue arises." *Id.* at 1349.

III. THE BOARD'S SUPPLEMENTAL DECISIONS AND ORDERS

A. *Fluor Daniel, Inc.*, 350 NLRB No. 66

On August 13, 2007, the Board (Members Liebman, Schaumber, and Kirsanow) issued its Supplemental Decision and Order (A 193-201) finding, in

agreement with Administrative Law Judge Linsky, that 49 of the salt-applicants were sufficiently matched to available positions for which they were qualified, and that they were therefore entitled to a make-whole remedy. However, in disagreement with the judge, the Board found that 10 of those applicants, although adequately matched to fall outage positions, were not sufficiently matched to spring outage positions. (A 193-94.) The Board, however, dismissed the complaint allegations regarding two applicants, George Saltsman and Richard Bowlds.⁷ (A 193.)

Further, the Board noted that, “[i]n *Oil Capitol Sheet Metal, Inc.*, 349 NLRB [1348] (2007), the Board recently modified the evidentiary requirements to be applied in determining instatement and backpay-period duration issues where, as here, the discriminatees are union salts.” (A 193 n.5.) Accordingly, the Board directed that, when litigating the backpay awards in the future compliance proceeding, “the General Counsel will bear the burden of proof as set forth in *Oil Capitol.*” (A 193 n.5.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with,

⁷ The Board dismissed (A 197) regarding Saltsman because he failed to submit an adequate job application. Regarding Bowlds, the Board dismissed (A 195) because it found that the Company would not have known that he was a salt from his application because the application did not state “voluntary union organizer.”

restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to pay backpay to the 49 discriminatees, to offer reinstatement to 44 of them (4 had retired and 1 had died while the case was pending), and to make them whole for losses suffered as the result of the Company's discriminatory refusals to hire them. (A 199.) The Order also requires the Company to remove from its files any reference to its unlawful refusals to hire, and to post a remedial notice to employees at all jobsites within a 75-mile radius of Owensboro, Kentucky. (A 199-200.)

B. *Fluor Daniel, Inc.*, 351 NLRB No. 14

On September 28, 2007, the Board (Members Liebman, Schaumber, and Kirsanow) issued its Supplemental Decision and Order (A 422-26) finding that employee Bolen was due the amount of backpay recommended by Administrative Law Judge Vandenventer, but determined that the backpay owed to the Coons brothers, both of whom were salt-applicants, should instead be calculated in accordance with the standards of proof established in *Oil Capitol*. Accordingly, the Board severed that portion of the case involving the Coons brothers and remanded it for further proceedings. (A 422.) The Board, however, noted that the Coons brothers' rights to reinstatement had already been conclusively determined by the Sixth Circuit's enforcement order, and that therefore the Board lacked

jurisdiction to revisit that issue. (A 425-26.) The Board' Order also requires the Company to pay employee Bolen backpay in the amount of \$18,442.05, plus interest. (A 426.)

B. Motions for Reconsideration

The Union filed two separate, but substantially similar, motions with the Board for reconsideration of the Supplemental Decisions and Orders. Specifically, the Union contended that *Oil Capitol* was wrongly decided, that the Board's instruction to apply *Oil Capitol* in the future compliance proceedings would cause manifest injustice, and that, in any event, the Sixth Circuit's decision precluded the application of *Oil Capitol* in either compliance proceeding. As a factual matter, the Union also claimed that none of the discriminatees were "salts," and therefore *Oil Capitol* had no application to these cases. The Board denied the motions in two unpublished orders issued on August 29, 2008.⁸ (A 433-41.)

⁸ The Board's Supplemental Decisions and Orders were issued by a three-member panel of the Board. Its subsequently-issued Orders denying the motions for reconsideration were issued by a two-member Board quorum. In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See Quorum Requirements, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB* 560 F.3d 36 (1st Cir. 2009). The issue has been briefed before this

SUMMARY OF ARGUMENT

The Act's protections against antiunion discrimination extend to union salts who apply for jobs with the objective of inducing unionization. When the Board finds that discrimination has occurred, it issues a general remedial order and defers more specific calculations of the actual relief due. In the compliance proceeding, the Board assesses a discriminatee's entitlement to backpay and a job offer by determining the amount of time the victim of the discrimination would have continued to work for the employer absent the unlawful discrimination. Prior to its decision in *Oil Capitol*, the Board applied in all construction industry cases calculating the relief due to victims of discrimination—including union salts—a rebuttable presumption that those individuals would have remained in the job indefinitely. In *Oil Capitol*, the Board announced a new policy under which the General Counsel, in salting cases, will be required to affirmatively support his request for backpay and reinstatement with evidence establishing the period a salt would have remained on the job. In the present cases, the Board instructed that the evidentiary standards of *Oil Capitol* be applied in determining backpay duration issues at the compliance stage of the proceedings.

Before this Court, the Union challenges the Board's *Oil Capitol* decision, as well as the Board's determination that the standards of proof established in *Oil Capitol* are to be applied in future compliance proceedings in these cases. The Union's arguments are without merit.

At the outset, the Board renews its argument, advanced in its motion to dismiss the Union's petition for lack of appellate jurisdiction, that the Court is without jurisdiction to entertain the Union's petition. Even assuming that jurisdiction is established, however, the Union's petition must fail on the merits, because the Board's new policy is consistent with the Act and adequately explained in the Board's *Oil Capitol* decision. The Board's new policy is solidly grounded in Section 10(c) of the Act, which gives the Board broad discretion to devise remedies for violations of the Act. In crafting the new policy, the Board reasonably determined that, because a salt's duration of employment is largely dictated by the union's objectives, the most probative evidence of the duration of employment would be more readily available to the union. In addition, the Board reasonably concluded that applying the traditional presumption of continued employment could result in backpay awards that are more punitive than remedial. Thus, the Board's ultimate conclusion—not to apply the presumption of continued employment in compliance proceedings involving discrimination against union salts—is a permissible means of ensuring the proper administration of the Act's remedies.

The Union's challenges to the Board's new policy are all unavailing. First, the Board's new policy makes permissible distinctions between union salts and ordinary job applicants, and does not place unwarranted burdens on employees' protected activities. Second, the Board's new policy does not allow employers to freely violate the Act by discriminating against union salts. Third, because the Board's new policy requires that a salt's entitlement to relief be based on evidence adduced in a compliance proceeding, it will not yield results that are unduly speculative; and, contrary to the Union's suggestion, the Board is not forbidden from inquiring into the parties' conduct in a labor dispute to devise a backpay and reinstatement remedy that restores the status quo ante. Fourth, there is no merit to the Union's argument that applying *Oil Capitol* to the subsequent compliance proceedings in the present cases would result in "manifest injustice." The Board's decision to apply its new policy to all cases where the discriminatees are union salts was entirely justified under settled precedent. Fifth, the Union's contention that the Board was jurisdictionally barred from making the remedial determination to apply *Oil Capitol* at the compliance stage is contrary to the settled principles of the law-of-the-case doctrine. Finally, there is no merit to the Union's claim that the discriminatees in the present case are not salts. In advancing this argument, the Union ignores the Board's finding that the discriminatees fit squarely within the definition of salts described in *Oil Capitol*.

ARGUMENT

An employer violates Section 8(a)(3) and (1) of the Act by engaging in antiunion discrimination against its employees. The protections afforded by Section 8(a)(3) and (1) extend to union salts who are job applicants sent in “ostensibly to obtain employment but with the objective of inducing union organization.”

Progressive Elec., Inc. v. NLRB, 453 F.3d 538, 547 (D.C. Cir. 2006) (citations and quotation marks omitted); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995).

The instant appeal does not challenge the Board’s well-supported conclusion that the Company unlawfully discriminated against numerous union salts by refusing to hire or consider them for hire because of their union or other protected concerted activities. Nor is there any dispute that the Board has appropriately enjoined the Company from committing similar unfair labor practices in the future and mandated the posting of a remedial notice informing employees both of the unlawful conduct and of their right to be free of such antiunion discrimination. Rather, the Union exclusively challenges the presumptions and burdens of proof the Board has outlined for determining the discriminatees’ backpay and reinstatement rights in a subsequent compliance proceeding. The Union’s petition must fail. Even if the Union can overcome the jurisdictional hurdle to the Court’s entertaining

its petition, its petition fails on the merits because the Board's new policy is reasonable and adequately explained in the Board's *Oil Capitol* decision.

I. THE BOARD'S NEW POLICY ARTICULATED IN *OIL CAPITOL* FOR DETERMINING MAKE-WHOLE RELIEF DUE IN CASES INVOLVING ANTIUNION DISCRIMINATION AGAINST UNION "SALTS" IS CONSISTENT WITH THE ACT AND ADEQUATELY EXPLAINED

Even assuming the Union satisfies this Court that it has standing now to challenge the Board's new policy (see pp. 2-3), its petition fails on the merits. The Union plainly disagrees with the wisdom of the Board's exercise of its policymaking authority, but it cannot demonstrate that the new policy is anything other than "a reasonable choice within a gap left open by Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). *Accord Local 812 v. NLRB*, 947 F.2d 1034, 1039-40 (2d Cir. 1991).

It is settled that the Board "has the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). That principle holds especially true where the Board exercises its remedial authority under the Act, for which it "draws on a fund of knowledge and expertise all its own." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Deference to the Board's policy judgments remains in force even where the Board decides to overrule its prior decisions. The Board's precedent, like any agency's initial interpretation of a statute it is authorized to administer, "is not instantly

carved in stone.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations and quotation marks omitted); *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975); *WPIX, Inc. v. NLRB*, 870 F.2d 858, 866 (2d Cir. 1989). On the contrary, the Board can reconsider the wisdom of its policies on a continuing basis. *Brand X Internet Servs.*, 545 U.S. at 981.

In harmony with these core principles, this Court will uphold a change in the Board’s policies if the new policy is consistent with the statute; supported by a reasoned analysis; and applies to all litigants. *Torrington Extend-a-Care Employee Assoc. v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994). At bottom, the Board’s new policy “must be upheld” if the Board “arrived at [a] reasonable resolution of the problem in a meaningful manner,” regardless “of how [the courts] might have decided the matter in the first instance[.]” *Id.*; *see also United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240, 245 (D.C. Cir. 1993) (a change in Board policy will be upheld so long as it rests on a permissible reading of the Act, and the Board gives a reasoned analysis for changing its course); *Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095, 1099-1102 (D.C. Cir 2001) (a challenge to an agency’s reasonable choice within a gap left open by Congress must fail). Here, there is no question that the Board has crafted a new policy that overrules its prior precedent. And, although the now-overruled policy previously received judicial approval (*see NLRB v. Ferguson Electric*, 242 F.3d 426 (2d Cir. 2001); *Tualatin*

Elec., Inc. v. NLRB, 253 F.3d 714, at 717-18 (D.C. Cir. 2001)), the new policy is equally permissible because it is consistent with the Act, fully explicated by the Board in *Oil Capitol*, and applies to all litigants within the category covered by the rule.⁹

A. The Board’s New Policy Is Authorized by the Provisions of the Act Granting the Board Broad Discretion To Fashion Remedies for Unfair Labor Practices

The Board has, as part of its responsibility for developing and applying national labor policy, “the authority to formulate rules to fill the interstices of the [Act’s] broad statutory provisions.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). Its new policy in *Oil Capitol* is a permissible exercise of that authority that is consistent with both the language and purpose of the Act. At the outset, the Board’s new policy certainly does not “conflict with the statute” (*United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993)), for there is nothing in the Act that expressly dictates what presumptions, if any, should be applied when determining the extent of make-whole relief awarded to

⁹ In *Oil Capitol*, the Board stated that the new standards for salting cases would be applied “in the present case and in all future cases where the issue arises.” 349 NLRB at 1349. Thus, the new policy enunciated in that case applies equally to all litigants within the category covered by the policy. See *NLRB v. Niagara Mach. & Tool Works*, 746 F.2d 143, 148 (2d Cir. 1984) (citing Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup.Ct.Rev. 53, 63-64). The Union does not claim—nor could it claim—that the Board’s enunciation of its new policy in *Oil Capitol* was an exercise in “ad hoc” decision-making. See Winter, at 63.

salts in discrimination cases. Further, the new policy is solidly grounded in Section 10(c) of the Act, which provides that the Board may remedy unfair labor practices by ordering the violator “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). The Supreme Court “has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and *broad discretion* to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (emphasis added); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (“Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board’s discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.”).

Indeed, when the D.C. Circuit earlier approved the Board’s decision to apply the traditional presumption of continued employment to union salts in *Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714 (2001), it did so, not on the ground that the Board’s then-existing policy was *required* by the Act, but because the policy was not “arbitrary or contrary to law.” *Id.* at 717-18. Similarly, in approving the Board’s traditional presumption of continued employment in cases of union salts, this Court did not suggest that the Board’s then-existing policy was *required* by the

Act.¹⁰ *NLRB v. Ferguson Elec.*, 242 F.2d 426 (2001). Indeed, the *Ferguson* Court recognized that “[t]he Board has broad discretionary powers to fashion remedies for violations of the Act, and is entitled to deference in its choice of remedy as a result of its unique expertise in labor disputes.” *Id.* at 431. Similarly, when the Supreme Court reviewed the Board’s decision to treat salts as statutory employees in *Town & Country*, it “put the question in terms of the Board’s lawful authority” because the Board “possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act’s application.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995). Thus, the Board’s decision to remove the presumption of continued employment in the context of salting is consistent with its authority under the provisions of the Act granting it broad discretion to devise and administer remedies for unfair labor practices.

¹⁰ The *Ferguson* Court observed that there was an absence of record evidence regarding whether the discriminatee would have stayed at the job, and that “the mere possibility that an employee *might* have left [his job at the employer] sooner is insufficient to shorten the [backpay] period” 242 F.3d at 432. (Emphasis in original.) However, the *Ferguson* Court also recognized that “[a] backpay award must be sufficiently tailored to remedy only the actual consequences of an unfair labor practice, and should not address purely speculative damages.” *Id.* at 431. *Oil Capitol* does just that by requiring the General Counsel to affirmatively support his request for backpay and reinstatement with *evidence* establishing the period a salt would have remained on the job.

B. The Board’s New Policy Is Supported by a Reasoned Explanation Grounded in Well-Established Remedial Principles, As Well As Basic Distinctions Between Ordinary Job Applicants and Union Salts

The Board’s extensive discussion detailing the reasons for its new policy more than satisfies the obligation to provide a reasoned explanation for its action. The Board’s analysis flowed from first principles guiding the exercise of its remedial authority, as well as from its assessment of the fundamental differences between salting and the ordinary employment relationship. The Board’s explanation demonstrates that its resulting policy decision—which requires only that salts’ instatement rights and backpay period be proven by evidence—is a permissible exercise of its remedial authority under the Act.

Thus, the Board declared that its approach to fashioning its new policy would be “guided by well-established remedial principles.” *Oil Capitol*, 349 NLRB at 1351. To that end, the Board acknowledged that the primary purposes of its make-whole remedies are to compensate employees for “losses suffered on account of an unfair labor practice” (*id.* (quoting *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952))), and to restore “the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination” (*id.* (quoting *Phelps Dodge*, 313 U.S. at 194)). The Board also observed that fulfilling those remedial objectives requires an approach that is “adapted to the [specific] situation which calls for redress” (*id.* (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938))), thus

ensuring that the remedy is “tailored to expunge only the actual, and not merely speculative consequences of the unfair labor practices.” *Id.* (quoting *Sure-Tan*, 467 U.S. at 900). The Board approached its resolution of this issue mindful of the Supreme Court’s admonition that “[t]he Act is essentially remedial.” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). In sum, the *Oil Capitol* remedy, by its terms, is aimed at restoring the status quo that would have obtained but for the unfair labor practices. It clearly “vindicate[s] the public policy” of the Act to compensate salts for their actual losses “suffered on account of [the] unfair labor practice[s].” *Nathanson v. NLRB*, 344 U.S. at 27.

The Board also acknowledged that its remedial decisions should be guided by well-established principles concerning the allocation of burdens of proof in its proceedings. Specifically, the Board noted (*Oil Capitol*, 349 NLRB at 1351) that, although the General Counsel may sometimes enjoy the benefit of a favorable presumption, he bears the ultimate burden of proof in establishing the backpay period. *See Nordstrom v. NLRB*, 984 F.2d 479, 481 (D.C. Cir. 1993). The Board also observed that, as a general matter, fairness and efficiency are served when the party with superior access to evidence bears the burden of going forward on a particular issue. *Oil Capitol*, 349 NLRB at 1351. *See NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) (“the burden of going forward normally falls on the party having knowledge of the facts involved”); *Canadian Commercial*

Corp. v. Dep't of Air Force, 514 F.3d 37, 42 (D.C. Cir. 2008); McCormick on Evidence 237 p.564 (6th ed. 2006) (“A doctrine often repeated by the courts is that where the facts with respect to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.”).

The Board reaffirmed that, in the context of ordinary applicants for employment, all of these considerations continue to support the general presumption of continued employment. As the Board noted, “most job applicants seek employment of an indefinite duration.” *Oil Capitol*, 349 NLRB at 1348. And, “because the employer controls the job and is in the best position to establish how long it would have retained the discriminatee . . . , it is appropriate, as an evidentiary matter, to place the burden on the employer to produce evidence showing whether or when the discriminatee’s employment would have terminated for nondiscriminatory reasons.” *Id.*

The Board reasonably concluded, however, that the relative valence of these considerations changes when the discriminatee at issue is a union salt. In contrast to ordinary job applicants, salts often do not seek indefinite employment for an indefinite period. Rather, the Board stated, experience demonstrates that many “salts remain or intend to remain with the targeted employer only until the union’s defined objectives are achieved or abandoned.” *Id.* at 1348-49.

The Board concluded for a number of reasons that the traditional presumption of continued employment is not warranted in salting cases. First, the Board reasonably determined that adherence to the traditional presumption would require employers to adduce evidence that is difficult for them to obtain. *Id.* at 1349-55. Because the salt's duration of employment is largely dictated by the union's objectives, much of the pertinent evidence of the duration of employment would include "information relating to the union's organizing objectives, plans, anticipated deployment of personnel, and employment histories of its salts in similar salting campaigns." *Id.* at 1352. Such evidence would not be readily available to the employer; instead, it is likely to be "in the possession of the union, as the campaign's progenitor and director, and of the salt participant in th[at] campaign." *Id.*

Second, the Board reasonably concluded that applying the traditional presumption of continued employment could—and, in some instances, did—result "in backpay awards that are more punitive than remedial." *Id.* To illustrate that concern, the Board pointed to *Aneco, Inc.*, 333 NLRB 691 (2001), *enforcement denied in relevant part*, 285 F.3d 326 (4th Cir. 2002). There, the Board utilized its traditional presumption of continued employment and found that a union salt who was denied employment should receive a backpay award covering a period of 5 years. *Aneco, Inc.* at 691-92. The Fourth Circuit, however, found that the backpay

award was punitive and refused to enforce it. *Aneco, Inc. v. NLRB*, 285 F.3d 326, 332-33 (4th Cir. 2002). The court deemed “indefensible” the Board’s assumption that the salt would have worked for Aneco for 5 years—particularly in light of the salt’s status as a paid union organizer, the absence of any evidence that other salts had worked for target employers for such prolonged periods, and the fact that the salt worked for only 5 weeks after accepting a later remedial job offer. *Id.* at 332. The court therefore remanded the case to the Board “to fashion a remedy that will restore [the salt], as nearly as possible, to the circumstances that he would have enjoyed but for [the employer’s] illegal discrimination.” *Id.* at 333.

In light of the foregoing considerations, the Board concluded that the traditional presumption of continued employment “is suspect in the case of a union salt.” *Oil Capitol*, 349 NLRB at 1352-53. It determined that the better policy in such cases is to require the General Counsel to “present affirmative evidence to meet his burden of proving the reasonableness of the claimed backpay period.” *Id.* at 1353. As a corollary to its new policy, the Board further determined that a salt’s entitlement to an offer of employment is subject to defeasance if, at the compliance stage, the General Counsel cannot prove that the salt would still be working for the employer but for the unlawful discrimination. *Id.* at 1355.

The Board's new policy, in addition to being adequately explained, is eminently reasonable.¹¹ Many of the concerns that motivated the Board's adoption of the new policy had already become an obstacle to the enforcement of the Board's orders in court. As already noted, the Fourth Circuit denied enforcement of the Board's order in *Aneco* because it found that application of the traditional presumption in a salting case resulted in a punitive backpay calculation. Similarly, in *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999) ("*Starcon I*"), the Seventh Circuit denied enforcement of the Board's remedial order in a salting case and remanded the case to the Board for the General Counsel to prove how many of the salts the employer "would have hired had it not been actuated by hostility to unionization." *Id.* at 951-52. After the Board awarded relief to the only two salts (out of the more than a hundred) who testified they would have accepted a job offer, the case returned to the Seventh Circuit. *See Starcon, Inc. v. NLRB*, 450 F.3d 276 (7th Cir. 2006) ("*Starcon II*"). Once there, the union argued that the General Counsel should not have to prove that salts who were qualified would have

¹¹ Admittedly, the Board's new policy does not adhere to the general principle that "the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages." *Tualatin Elec.*, 253 F.3d at 718; *see also NLRB v. Ferguson Elec. Co.*, 242 F.3d at 432. But that is just "one of several" considerations the Board takes into account. *Tualatin Elec.*, 253 F.3d at 718; *see also Phelps Dodge*, 313 U.S. at 198 (noting that the Board, in crafting its remedial policies, must strike a balance "taking fair account . . . of every socially desirable factor"). In formulating its new policy, the Board permissibly concluded that other factors simply weighed more heavily in the balance.

accepted a job offer. *Id.* at 278. The court, however, reaffirmed its earlier conclusion that the burden of establishing the backpay period in salting cases was properly placed on the General Counsel. *Id.* In particular, the court expressed concern that applying the Board’s traditional presumption of continued employment in salting cases could require the employer to produce difficult-to-obtain evidence,¹² that it could result in punitive remedies,¹³ and that it could mandate instatement where none was warranted.¹⁴

In the end, the Board changed its policies based on legitimate concerns about the proper administration of the Act’s remedies. The mechanism it chose to address those concerns—the removal of a single rebuttable presumption in a small class of compliance proceedings—was a minor but well-calibrated shift in existing precedent. Further, the Board’s decision announcing the new policy gave the parties, the public, and the courts a transparent and cogent explanation for its actions. The Board’s decision is therefore entitled to respect as an exercise of its considerable discretion in administering remedies under the Act.

¹² *Starcon II*, 450 F.3d at 279 (“It is easier for each employee to produce evidence of what he would have done had he been offered a job than for the employer to produce evidence of what each of the employees would not have done.”).

¹³ *Id.* at 278 (“The National Labor Relations Act is not a penal statute, and windfall remedies—remedies that give the victim of the defendant’s wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal.”).

¹⁴ *Id.* (“[A] worker cannot get relief predicated on his being denied a job if he would have spurned the job had it been offered to him.”).

C. The Union’s Challenges to the Board’s New Policy Are All Without Merit

The Union advances a farrago of arguments claiming the Board lacks the authority to establish its new policy. Common to all is a series of basic misconceptions about the effect of the Board’s new policy, the application of the now-overruled policy that preceded it, and the meaning of key Supreme Court precedent. Cumulatively, the Union’s misconceptions lead it to request a form of relief for salts that was never permitted by previous decisions and, indeed, could not be authorized by the Act. As a result, the Union fails to cast any doubt on the permissibility of the Board’s new policy.

1. The Board’s new policy does not impermissibly “discriminate” against salts, or against certain forms of protected activity

At the outset, there is no merit to the Union’s contention (Br 20-27) that the Board’s new policy must be struck down because it impermissibly discriminates against salting as a form of protected activity, and treats salts as a “subclass” of disfavored employees. Much of the Union’s argument in this regard rests on its claim that the Board’s new policy conflicts with the Supreme Court’s decision in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995). No such conflict exists.

The question before the Supreme Court in *Town & Country* was whether “the Board may lawfully interpret [the Act’s definition of ‘employee’] to include . . . workers who are also paid union organizers.” *Id.* at 89. The Court agreed that such

a construction of the Act was within the “degree of legal leeway” the Board enjoys “when it interprets its governing statute.” *Id.* But, contrary to the Union’s suggestion, the *Town & Country* Court did *not* hold that the Board must treat salts identically for all purposes of the Act’s administration. Indeed, the opposite is true: the Court expressly stated that the Board need not treat “paid union organizers like other company employees in every labor law context.” *Id.* at 97. By way of example, the Court approvingly noted that the Board has held that “a paid organizer may not share a sufficient ‘community of interest’ with other employees . . . to warrant inclusion in the same bargaining unit.”¹⁵ *Id.* Thus, the Board’s new policy—which continues to treat salts as statutory “employees” and does nothing more than eliminate the presumption of continued employment in compliance proceedings involving salts—remains consistent with *Town & Country*.

The Union’s claim that application of *Oil Capitol* discriminates against salts or creates a “second-class status” for salts is premised on the mistaken notion that the Board’s new policy withholds the Act’s remedies from salts. The Board’s authority to remedy antiunion discrimination under Section 10(c) is constrained by

¹⁵ Thus, the Board has excluded salts from a bargaining unit because their employment was solely for the purpose of union organizing and was therefore temporary in nature. *299 Lincoln Street*, 292 NLRB 172, 180 (1988). To take another example, the Board’s rule that an employer may lawfully refuse to hire a union salt during a strike has been approvingly cited. *See Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1198 (D.C. Cir. 2003).

the requirements that its remedies “be tailored to the unfair labor practice [they are] intended to redress” (*Sure-Tan*, 467 U.S. at 900), and that they be designed to “restor[e] the economic status quo that would have obtained but for the company’s wrongful [action].” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Remedies that are punitive or based on pure speculation are impermissible. *Capitol Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009-10 (D.C. Cir. 1998).

Separate and apart from the instatement and backpay remedies, the Board’s Order contains other remedial relief. The Order has a cease-and-desist provision that enjoins the Company from committing “like or related” violations of the Act, and requires the Company to conspicuously post a notice to employees detailing the prior unfair labor practices and setting forth the employees’ rights under the Act. If the Company fails to comply with these requirements, it could be subject to contempt proceedings. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (citing *NLRB v. Warren Co.*, 350 U.S. 107, 112-13 (1955)). The Supreme Court has recognized that “[t]his threat of contempt sanctions . . . provides a significant deterrent against future violations of the Act.” *Sure-Tan*, 467 U.S. at 904 n.13. In other words, those remedies are “sufficient to effectuate national labor policy regardless of whether the spur and catalyst of backpay accompanies them.” *Hoffman Plastic*, 535 U.S. at 152 (citations and quotation marks omitted).

Moreover, the Board's new policy does not withhold from salts any remedy to which other employees are entitled. Indeed, the Union's argument highlights the conjectural nature of its claim here. The Board's "standard" instatement order would not guarantee an offer of employment to the discriminatees, nor does the Board's new policy deprive them of one. At this stage of the proceeding, the Union can only speculate that the Board's change in policy would affect the discriminatees' instatement rights. Even where the Board has applied its traditional presumption of continued employment, it has long recognized that a discriminatee's ultimate right to a job offer is a factual question resolved during the compliance proceeding. *See Dean Gen. Contractors*, 295 NLRB 573, 573-74 (1987). And, if the evidence in that proceeding establishes that the discriminatee would no longer be employed, the employer is relieved of the obligation to make a job offer. *See id.* at 575; *see also Tualatin Elec.*, 253 F.3d at 718 (recognizing employer's "right to seek out and to present evidence that the salt would not have" continued working for the employer "whether by reason of the union's policies or its own").

Likewise, in terms of the backpay owed, depending on the evidence adduced at a compliance proceeding, a salt-applicant may receive the maximum amount of backpay covering the entire period from the date of the violation, while another non-salt applicant may be denied any monetary relief when the presumption of continued employment has been rebutted. Thus, it is simply wrong to posit that the

salts' rights have been—and highly conjectural to state that they will be—adversely affected by the Board's Order. *See Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995). All that the Board's new policy requires is that make-whole relief for a salt be based on actual evidence that the salt would have remained in the job for the claimed period of backpay.

Further, there is no merit to the Union's related complaint (Br 22-23) that the Board's new policy imposes a "burden" on the exercise of activities protected by Section 7 of the Act or discourages participation in concerted union activities. The Union offers no support whatsoever for this assertion. Moreover, on its face, the Board's Order does not enjoin the discriminatees from doing anything, thus leaving them free from official restraint to engage in whatever protected activities they choose.

2. The Board's new policy does not conflict with the Supreme Court's decision in *H.K. Porter*

The Union argues (Br 31-34) that the Board's new policy violates a rule—supposedly set forth in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)—broadly forbidding the Board from speculating about, or reconstructing, events that would have occurred in a labor dispute. According to the Union, the Board's new policy

runs afoul of that rule by mandating an inquiry into the amount of time a salt would have remained on the job but for the employer's unlawful discrimination.¹⁶

The Union misreads *H.K. Porter* and, in so doing, ignores Supreme Court precedent that thoroughly undermines its argument. In *H.K. Porter*, the Board found that the employer's failure to agree to a union proposal for union dues check-off was not in good faith, and it ordered the employer to grant the union's request. 397 U.S. at 100-01. The Supreme Court, however, held that while the Board has the power "to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." *Id.* at 102. Instrumental to the Court's conclusion was its reading of Section 8(d) of the Act, which provides that an employer's statutory obligation to bargain in good faith with a union representing its employees "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). As the Court reasoned, "it would be

¹⁶ It is worth noting that the Union does not even acknowledge that, under the former rule, backpay and reinstatement could be limited if an employer adduced evidence sufficient to rebut the presumption of continued employment. In *Tualatin Electric*, the D.C. Circuit expressly recognized an employer's "right to seek out and to present evidence that the salt would not have" continued working for the employer "by reason of the union's policies or of its own." 253 F.3d at 718. Thus, the *Tualatin Electric* Court permitted the Board to conduct the inquiry the Union now claims is forbidden. Similarly, in *Ferguson Electric Co.*, 242 F.3d at 432, the Court explicitly recognized that evidence showing that the salt would have left his or her job would shorten the backpay period.

anomalous indeed to hold that while [Section] 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute.” 397 U.S. at 108.

By its own terms, then, *H.K. Porter* only prevents the Board from compelling an employer “to agree to any substantive contractual provision” in a collective-bargaining agreement. 397 U.S. at 102. That decision says nothing about how the Board should reach an evidence-based conclusion on the degree of make-whole relief due to a salt discriminatee. And, unlike *H.K. Porter*, where the Court determined that the Board’s remedial authority was expressly limited by a provision of the Act, the Board’s new policy requiring the General Counsel to support his claim for make-whole relief with affirmative evidence is consistent with Section 10(c), which allows the Board to award backpay and reinstatement in a manner that “will effectuate the policies of [the Act].” 29 U.S.C. § 160(c).¹⁷

¹⁷ Much the same can be said of the Union’s reliance on *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), where the D.C. Circuit held that the Board lacks the authority to issue a bargaining order in the absence of a concrete manifestation of a majority of employees’ assent to union representation. 721 F.2d at 1383-84. The *Conair* Court concluded that such a remedy would conflict directly with the provisions of the Act ensuring employees a right to a majority-chosen bargaining representative, *id.* at 1381-82 (discussing 29 U.S.C. §§ 157, 159(a)), and would conflict implicitly with the Act’s limitation of non-majority bargaining representatives to certain industries and circumstances, *id.* at 1382-83 (discussing 29 U.S.C. § 158(f)). In contrast, there is nothing in the Act that conflicts—either explicitly or implicitly—with the Board’s decision here to apply no presumption of continued employment in cases involving discrimination against union salts. Instead, Section 10(c) expressly authorizes the Board to award backpay and

The Union’s arguments on the meaning of *H.K. Porter* reveal that it “misconceive[s] the role of the Board.” *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). It simply does not follow from cases holding that the Board may *not* award particular remedies that, in other cases, the Board *must* award a particular remedy. The Board’s power to order make-whole relief “is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices.” *Automobile Workers v. Russell*, 356 U.S. 634, 642-43 (1958). There is “nothing in the language or structure of the Act that *requires* the Board to reflexively order that which a complaining party may regard as ‘complete relief’ for every unfair labor practice.” *Shepard*, 459 U.S. at 351 (emphasis added).

In any event, the Union’s expansive reading of *H.K. Porter* is impracticable. If the Board is to award any relief at all, there is *no* calculation of make-whole relief that would avoid “reconstructing” the labor dispute in the sense the Union opposes. The Union’s own proposed solution—to mandate an indefeasible right to reinstatement and a backpay period spanning more than 19 years for about 50 discriminatees—simply reconstructs the labor dispute by deeming that the discriminatees would have remained in the Company’s employ for the entire period, regardless of the Union’s objectives or organizing plans. The only difference

instatement in a manner that “will effectuate the policies of [the Act].” 29 U.S.C. § 160(c).

between the Board's policy and the outcome sought by the Union is that the former will ultimately be based on evidence concerning the discriminatees' actual losses, while the latter will not.

Indeed, under the Union's reasoning, it is difficult to discern how the Board could adjudicate unfair labor practices, much less devise remedies for such practices, without examining the effect of the parties' actions on a labor dispute. Fortunately, the Supreme Court has repeatedly affirmed that the touchstone of the Board's remedial authority is the restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice. *See, e.g., Sure-Tan*, 467 U.S. at 900; *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188-89 (1973); *J.H. Rutter-Rex*, 396 U.S. at 263; *Phelps Dodge*, 313 U.S. at 194. Thus, there is nothing in *H.K. Porter*, *Conair*, or any other case relied upon by the Union that prevents the Board from conducting remedial inquiries simply because the relevant events necessarily involve an ongoing labor dispute.

3. The Board's new policy does not conflict with the Supreme Court's decision in *Sure-Tan*

The Union also asserts (Br 33-34), in a related argument, that the Board's new policy conflicts with the Supreme Court's decision in *Sure-Tan* because any backpay award determined pursuant to the new policy would be impermissibly based on "the Board's views as to what 'probably' would have happened but for the

employer's unfair labor practice." The Union's argument represents a complete inversion of *Sure-Tan*'s central premise.

In *Sure-Tan*, the Board found that the employer violated the Act by reporting its employees to immigration authorities in retaliation for their union activities, which resulted in the employees fleeing the country. 467 U.S. at 889. The Board ordered its conventional remedy of reinstatement with backpay and left for subsequent compliance proceedings the determination whether the employees were available for work so as not to toll the employer's backpay liability. *Id.* On appeal, the Seventh Circuit enforced the Board's finding of a violation, but modified its remedial order by setting a minimum backpay period of 6 months. *Id.* at 890. The lower court reasoned that "it would better effectuate the policies of the Act to set a minimum amount of backpay which the employer must pay in any event." *Id.* (citation and quotation marks omitted).

The Supreme Court reversed the lower court's modifications to the Board's order, holding that the 6-month minimum backpay period was unduly speculative. *Id.* at 899-900. The Court concluded that the "main deficiency" in the lower court's modification of the remedy was that it was developed "in the total absence of any record evidence as to the circumstances of the individual employees." *Id.* at 899 n.9. Drawing a contrast with the Board's permissible practice of "appl[ying] to particular facts a reasonable formula for determining the probable length of

employment,” the Court found that the lower court’s estimate of a backpay period was faulty because it was made “without any evidence whatsoever as to the period of time these particular employees might have continued working . . . and without affording [the employer] any opportunity to provide mitigating evidence.” *Id.* at 901 n.11. That being so, the lower court’s order impermissibly resulted in a backpay award made “without regard to the employees’ actual economic losses.” *Id.* at 904.

Sure-Tan clearly poses no obstacle to the Board’s new policy. Unlike the minimum backpay award struck down there, the Board’s new policy requires that a salt’s entitlement to relief be based on evidence adduced in a compliance proceeding. Indeed, the *Sure-Tan* Court specifically approved of remedial approaches that, like the Board’s new policy, “appl[y] to particular facts a reasonable formula for determining the probable length of employment.” *Id.* at 901 n.11.

To be sure, the Board cannot know for certain how events would have unfolded in the absence of an unfair labor practice, but that is not what *Sure-Tan* requires. All that *Sure-Tan* forbids is the establishment of a backpay award “in the total absence of any record evidence as to the circumstances of the individual employees” and that bears no relation to “the employees’ actual economic losses.” 467 U.S. at 899 n.9, 904. Because the Board’s new policy specifically requires

supporting evidence for a remedial award in salting cases, it fully comports with the holding of *Sure-Tan*.

II. THE BOARD REASONABLY DETERMINED THAT *OIL CAPITOL* IS TO BE APPLIED IN THE FUTURE COMPLIANCE PROCEEDINGS IN THESE CASES

A. Contrary to the Union’s Claim, Retroactive Application of *Oil Capitol* Is Not Manifestly Unjust

In *Oil Capitol*, the Board stated that it would apply the new evidentiary requirement “in all cases where the discriminatee is a union salt.” 349 NLRB at 1353. The Union challenges (Br 47-53) the Board’s remedial determination to apply *Oil Capitol* in future compliance proceedings in these cases, claiming (Br 50) “the inequity of applying the Oil Capitol rule to the facts of this case far outweigh[s] the interest that might be furthered if it was applied.” In particular, the Union contends that retroactive application will cause a “manifest injustice.” (Br 53.)

Ruling on the Union’s motions for reconsideration in these cases, the Board reasonably rejected the Union’s “manifest injustice” claim for the same reasons it was rejected in *McBurney Corp.*, 352 NLRB 241 (2008). (A 433-41.) As the Board explained, its determination is consistent with existing precedent, under which “the Board has routinely applied *Oil Capitol* in appropriate pending cases, all of which,” like these cases, “were instituted well before *Oil Capitol* was decided.”

McBurney Corp., 352 NLRB at 242. The Board's conclusion is both reasonable and consistent with law.

A decision that changes existing law is generally given retroactive effect unless retroactive application would cause manifest injustice. *See, e.g., SNE Enterprises*, 344 NLRB 673, 673-74 (2005); *NLRB v. Bufco Corp.*, 899 F.2d 608, 611 (7th Cir. 1990). "Absent some manifest injustice," the Court will defer to the Board's retroactive application determination. *See, e.g., NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983).¹⁸ By definition, retroactive application is not manifestly unjust if the complaining party fails to show that it relied on the prior rule and that the new rule severely penalizes it. *See NLRB v. Bufco Corp.*, 899 F.2d at 611-12.

The Union fails to show that retroactive application of the *Oil Capitol* policy constitutes a manifest injustice. Significantly, the Union does not claim that it relied on the pre-*Oil Capitol* presumption in taking the actions which led to this

¹⁸ This Court has stated that, in determining whether to give retroactive effect to an agency decision, it will weigh the following five factors: "(1) whether the particular case is one of first impression, (2) whether the new rule presents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *WPIX, Inc. v. NLRB*, 870 F.2d 858, 866 (2d Cir. 1989). The touchstone of this analysis, though, is whether retroactive application would result in manifest injustice. *See NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d at 892.

litigation. Indeed, no evidence would remotely support such an assertion. *See Local 900, International Union of Electrical, Radio & Mach. Workers v. NLRB*, 727 F.2d 1184, 1195 (D.C. Cir. 1984) (rejecting union’s retroactivity challenge where union failed to show that it relied on prior law in fashioning challenged clause).¹⁹ Further, the Union cannot claim that the Board’s Orders impose a penalty on it, because the Union is not required to pay any damages under the Board’s Orders. *See SNE Enterprises, Inc.*, 344 NLRB at 673-74 (retroactive application not manifestly unjust because Board’s order does not require complaining party to pay any damages); *cf. Local 900*, 727 F.2d at 1195 (retroactive application would not cause great hardship because of limited backpay liability under Board’s order).

Moreover, contrary to the Union’s contention (Br 37), there have been numerous “warnings” that the remedial policies related to salts were undergoing analysis by the courts and the Board itself. The Union surely has been on notice that there was some growing dissatisfaction with evidentiary presumptions in compliance cases. Indeed, concerns about the Board’s previous evidentiary

¹⁹ The Union nonetheless claims (Br 39), oddly, that “in the compliance proceeding, the General Counsel and [the Union] relied upon existing Board precedent” It is unclear what the Union means by this. The compliance proceeding in the present case has *not yet occurred*. Further, the Union does not advance its cause by citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). In that case, the Board decided not to apply its new objective test announced in the case because of the employer’s clear reliance on the subjective test. The Union cannot make the same argument here.

presumption had percolated for years. As described above, the Board's then-existing evidentiary presumption came under judicial scrutiny and criticism. *See, e.g., Aneco, Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002); *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1111 (7th Cir. 2002). The issue was also the subject of repeated dissents in Board decisions. *See, e.g., Wolfe Elec. Co.*, 336 NLRB 684, 684 n.4 (2001) (Chairman Hurtgen dissenting); *Kamtech, Inc.*, 333 NLRB 242, 243 n.7 (2001) (Member Hurtgen dissenting); *3D Enters. Contracting Corp.*, 334 NLRB 57, 58-59 (2001) (Chairman Hurtgen dissenting); *Ferguson Elec. Co.*, 330 NLRB 514, 519-20 (2000) (Member Hurtgen dissenting), *enforced* 242 F.3d 426 (2d Cir. 2001); *Tualatin Elec., Inc.*, 331 NLRB 36, 37-38 (2000) (Member Hurtgen dissenting), *enforced* 253 F.3d 714 (D.C. Cir. 2001). In short, the Union's claim (Br 38) that the Board did not sound an "adequate warning" heralding the arrival of the policy enunciated in *Oil Capitol* rings hollow.

Nor is there merit to the Union's argument (Br 52-53) that retroactive application of the Board's new *Oil Capitol* rule—which requires the General Counsel to present affirmative evidence that the salt would have worked for the employer throughout the claimed backpay period—is manifestly unjust because it imposes on the General Counsel and the Union the "impossible burden" (Br 52) of reconstructing its salting plans and the personal histories of the discriminatees. Once again, the Union's argument demonstrates the speculative nature of the claim

presented to this Court. At this stage of the case, it is unclear whether the General Counsel will seek to satisfy his *Oil Capitol* burden by reliance on salting plans or even the precise evidence that may be required in these cases. Moreover, the Union has cited no evidence that such salting plans are unavailable, and simply suggests that such evidence may be unavailable. In any event, the Union has been on notice for the past 8 years that such records could be relevant at the compliance stage. *See Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714 (D.C. Cir. 2001).²⁰

B. The Board Reasonably Rejected the Union’s Jurisdictional Challenges to the Board’s Remedial Finding that *Oil Capitol* Is To Be Applied in Determining Backpay

The Union contends (Br 36-47) that the Board was jurisdictionally barred from making the remedial determination to apply *Oil Capitol* at the compliance stage in these cases, because the Board was bound, by the law of the case, to apply its prior precedent, *Dean General Contractors*, 285 NLRB 573 (1987).²¹ Missing

²⁰ The Union’s claimed reliance (Br 39) on *F.W. Woolworth Co.*, 90 NLRB 289 (1950), when litigating these cases is inapposite. As the Board explained in *McBurney Corp.*, *F.W. Woolworth Co.* has no application to the issue of the duration of the backpay period because that case only “holds that backpay must be calculated quarterly,” and therefore no inconsistency would result from applying both *F.W. Woolworth Co.* and *Oil Capitol* in the same compliance proceeding. *McBurney Corp.*, 352 NLRB at 241 n.4.

²¹ As explained at pp. 46-47, prior to *Oil Capitol*, the Board applied in all compliance proceedings in which make-whole relief was due to victims of discrimination, including salts, a rebuttable presumption that those individuals would have remained in the job indefinitely. *See Dean General Contractors*, 285 NLRB at 574-75, and cases cited at p. 46.

the mark, however, the Union’s contention fails to recognize the fundamental principle that “‘law of the case’ doctrine . . . authorizes departure from a prior ruling in the event of ‘an intervening change in the controlling law.’” *NLRB v. Coca-Cola Bottling Co.*, 55 F.3d 74, 77 (2d Cir. 1995) (quoting *United States v. Adegbite*, 877 F.2d 174, 178 (2d Cir. 1989)).²² Here, *Oil Capitol*—which was decided on May 31, 2007, while these cases were before the Board on exceptions—constituted such an “intervening change in controlling law.” *Coca-Cola Bottling*, 55 F.3d at 77. The Board therefore reasonably determined that it was appropriate to apply *Oil Capitol* at the compliance stage in these cases.

Moreover, the Board previously rejected the Union’s jurisdictional claims raised in each of these cases, and the Board’s conclusions are fully consistent with the limits of its jurisdiction following a court remand. It is well settled that the Board has no jurisdiction to modify a court-enforced order. *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997-98 (2004), *enforced* 448 F.3d 388 (D.C. Cir. 2006) (citing cases). And, in turn, when a court has remanded an issue to the Board, the Board has jurisdiction to render a new finding, as long as it does so in a manner consistent with the court’s decision, and to determine the corresponding

²² See, e.g., *Norton Health Care, Inc.*, 350 NLRB 648, 650 n.10 (2007) (prior Board finding on supervisory status not binding as “law of the case” where “[s]everal years have passed since the underlying hearing, and Board law on supervisory status has changed in the interim”).

appropriate remedy. *See International Bhd. of Elec. Workers, Local 494*, 341 NLRB 537, 537 (2004) (the Board, reversing on remand, found the union violated the Act and issued a remedial order), *enforced mem.*, 161 Fed.Appx. 16 (D.C. Cir. 2005).

Accordingly, with regard to applying *Oil Capitol* to the calculation of backpay due the 49 discriminatees (excluding the Coons brothers), the Board explained that, because the Sixth Circuit did not enforce that portion of the Board's Order, but instead remanded it for further proceedings, "there is no jurisdictional bar to the application of *Oil Capitol* at compliance." (A 435 n.3.) And, in contrast, the Board also reasonably determined (A 425-26) that, with regard to the reinstatement remedy for the Coons brothers, there was a jurisdictional bar because the Sixth Circuit enforced that portion of the Board's Order. *See Fluor Daniel, Inc.*, 161 F.3d 953, 971-75. *See, e.g., Cobb Mech. Contractors, Inc.*, 333 NLRB 1168, 1170 (2001) (on partial remand, employer could not relitigate the duty to offer employment because the court-enforced order required reinstatement), *enforced in relevant part*, 295 F.3d 1370 (D.C. Cir. 2002).

Referring to the Board's finding that the Company's duty to offer employment to the Coons brothers could not properly be revisited because it was enforced by the Sixth Circuit, the Union argues (Br 36-42) that the Board should have reached the same conclusion regarding the duration of the backpay periods,

given that Administrative Law Judge Linsky in his remedy section cited *Dean General Contractors*, 285 NLRB 573. The Board reasonably rejected that contention, explaining (A 426) that “[t]he judge cited *Dean General [Contractors]* in the remedy section of his decision, but neither paragraph 2(b) [ordering backpay] nor any other provision of the Order incorporates that section by reference.” *See Fluor Daniel, Inc.*, 311 NLRB at 506-07. The Board noted (A 426 n.11), however, that “it is unsurprising that the Order did not incorporate the remedy section by reference, as that section failed to state any remedial principles to be subsequently applied.” Rather, the judge’s citation to *Dean General Contractors* in his remedy section was simply that—a citation, with no articulated remedial principle or proposition.

Therefore, as the Board explained, because “[a] court of appeals enforces only the Board’s *Order*,” and not the specifics of a remedy section unless incorporated by reference, “nothing in the underlying court-enforced [O]rder would be modified if, on remand, the duration of the backpay period were altered.” (A 425-26, emphasis in original.) The Board’s parsing of the exact provisions of the court-enforced Order to determine what issues were open on remand is fully consistent with the typical reading of orders in such partial remand cases. *See, e.g., Cobb Mech. Contractors, Inc.*, 333 NLRB at 1170 (parsing what portions of the remedy section were incorporated by reference into the court-enforced order).

Finally, there is no merit to the Union's contention (Br 42-47) that the court-enforced Order's reference to *F.W. Woolworth Co.*, 90 NLRB 289 (1950), requires that the backpay periods be calculated through the date that the Company makes the requisite offers of employment to the discriminatees. The Board previously rejected this argument when the Union raised it in *McBurney Corp.*, 352 NLRB 241 (2008). In that case, the Board explained that the reference to *F.W. Woolworth Co.* had no application to the issue of the duration of the backpay periods because that case only "holds that backpay must be calculated quarterly," and therefore no inconsistency would result from applying both *F.W. Woolworth Co.* and *Oil Capitol* in the same compliance proceeding. *McBurney Corp.*, 352 NLRB at 241 n.4. Indeed, the Board's analysis of the developing problem of under calculating backpay in *F. W. Woolworth Co.*, and its articulated new methods for how to calculate backpay on a quarterly basis, contains *no* discussion of issues pertaining to backpay periods. *See F. W. Woolworth Co.*, 90 NLRB at 291-94. Accordingly, the Union has presented the Court with no viable jurisdictional argument.

C. There Is No Merit to the Union's Claim that the Discriminatees Are Not Salts

The Union's argument (Br 53-58) that the discriminatees at issue in these cases are not union "salts" is founded on a misunderstanding of the Board's definitions of "salting" and "salts." As the Board specified in *Oil Capitol*, "salting" is "the act of a trade union in sending in a union member or members to

an unorganized jobsite to obtain employment and then organize the employees.”
Oil Capitol, 349 NLRB at 1348 n.5 (quoting *Tualatin Elec.*, 312 NLRB 129, 130 n.3, *enforced* 84 F.3d 1202, 1203 n.1 (9th Cir. 1996)). It defined “salts,” in turn, as “those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign.” *Id.*

Against those clear definitions, the Union unsuccessfully attempts (Br 53-58) to alter the Board’s definitions of “salting” and “salts.” Specifically, the Union rephrases (Br 54) the Board’s statement that the “immediate objective” of a salting campaign “*may* not always be organizational” (*Oil Capitol*, 349 NLRB at 1348 n.5, emphasis added), into a requirement that a salt *must*, by definition, be part of a union campaign that has a *non*-organizational goal. As shown, there is no such requirement, and the Union’s misinterpretation must be rejected.

Here, the Union concedes (Br 55) that the purpose of its salting campaign was organizational. Indeed, the Sixth Circuit noted the Union’s express concession that it had been conducting an ongoing “Fight Back” or “Strike Back” campaign to organize the Company’s nonunion employees since about 1983. *See Fluor Daniel, Inc.*, 161 F.3d at 959. Further, as shown, for the April outage, the Union solicited those members who had expressed an interest in serving as volunteer union organizers, provided them with job applications, and returned that batch of 43 applications to the Kentucky Employment Service. And for the May outage, the

Union similarly collected another batch of 11 job applications, all of which again identified the applicants as volunteer union organizers, and submitted them in a single package directly to the Company. *See* pp. 5-8. It is hard to imagine stronger facts—particularly given that the Sixth Circuit affirmed them on review—demonstrating that the discriminatees were workers “who appl[ied] for work with a nonunion employer in furtherance of a salting campaign.” *Oil Capitol*, 349 NLRB at 1348 n.5.

The Union also misrepresents this Court’s decision in *NLRB v. Ferguson Electric Co.*, 242 F.3d 426 (2001), by citing it for its claim that the Court “has previously limited the term ‘salts’ to paid union organizers.” (Br 54 n.12.) In that case, the Court undertook no such analysis. Rather, in *Ferguson Electric*, the Court discussed the issue in terms of the facts of that case which involved only a single paid organizer. *Id.* at 428-29. Just as often, as here, union “salts” are *unpaid* union members acting in furtherance of the union’s organizing campaign. *See, e.g., Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 540-41, 552 (D.C. Cir. 2006) (group of eight union members went en mass as “batch applicants” to apply at nonunion employer as unpaid voluntary union organizers). In any event, the Union never raised the issue of the discriminatees’ status as unpaid union organizers to the Board, and is therefore barred from raising it now. *See Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 115, 121-22 (2d Cir. 2001) (reviewing court is barred by

Section 10(e) of the Act, 29 U.S.C. § 160(e), to consider objection not raised before the Board). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Accordingly, the Union’s challenge to the Board’s Supplemental Decisions and Orders fails in all respects.²³

²³ As a final stab at undermining the Board’s Supplemental Decisions and Orders, the Union oddly asserts (Br 57) that the issue of whether the discriminatees were salts was “not properly before the Board.” To the contrary, the Union *itself* raised that issue directly to the Board in its motions for reconsideration, and the Board summarily rejected it. (A 433-41.)

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

May 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF	*	
BOILERMAKERS, IRON SHIP BUILDERS,	*	
BLACKSMITHS, FORGERS & HELPERS,	*	
AFL-CIO	*	No. 08-4754-ag
	*	
Petitioner	*	Board Case No.
	*	26-CA-13842
v.	*	
	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Respondent	*	
	*	
and	*	
	*	
FLUOR DANIEL, INC.	*	
	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 13,712 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
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Dated at Washington, DC
This 20th day of May 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by e-mail and first-class mail upon the following counsel at the addresses listed below:

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