Nos. 08-4003, 08-4456, 08-4689

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

MCBURNEY CORPORATION
Intervenor

MCBURNEY CORPORATION
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

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

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

BRIEF FOR

THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petitions of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO ("the Union") and McBurney Corporation ("McBurney") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Decision and Order of the Board that issued on September 29, 2007 and is reported at 351 NLRB 799. (A 71-90.)[1] The Union and McBurney have each intervened on behalf of the Board with respect to the other's petition. The Union filed its petition on August 15, 2008, McBurney filed its petition for review on September 10, and the Board filed its cross-application for enforcement on September 23. All filings were timely; the Act imposes no time limit on such filings. The Board had jurisdiction over the unfair labor practice proceeding below

[1] "A" references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

under Section 10(a) of the National Labor Relations Act, as amended (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 Order 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, the Board filed a motion to dismiss the Union's petition 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.

Assuming that jurisdiction is proper, the Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the Union directly represents employees in New York state.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested findings that McBurney violated Section 8(a)(1) of the Act by surveilling the union organizing activities of its employees and violated Section 8(a)(3) and (1) of the Act by changing the work assignment of employee Dan Barney because of his union organizing activity.

2. Whether substantial evidence supports the Board's finding that McBurney violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire thirty-seven union-affiliated applicants at four jobsites.

3. Whether the Board's new policy articulated in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007) ("*Oil Capitol*"), for determining make-whole relief due in cases involving antiunion discrimination against union "salts" is consistent with the Act and adequately explained.[2]

4. Whether the Board reasonably determined that *Oil Capitol* is to be applied in the future compliance proceeding in this case.

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[2] 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, in which argument was heard on February 17, 2009.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that McBurney violated Section 8(a)(3) and (1) of the Act by refusing to hire union applicants at certain jobsites because of their union affiliation and changing an employee's work assignment because of his union activity. The complaint further alleged that McBurney violated Section 8(a)(1) of the Act by, *inter alia*, engaging in surveillance of union organizing. Following a hearing, an administrative law judge found that McBurney unlawfully refused to hire the union applicants, gave an employee a more onerous work assignment because of his union activity, and engaged in surveillance of union organizing. McBurney filed exceptions, and the General Counsel and Union filed cross-exceptions.

The Board remanded the case to the judge for further consideration of the refusal-to-hire violation in light of the Board's decision in *FES, A Division of Thermo Power*, 331 NLRB 9 (2000), which issued while the parties' exceptions were pending before the Board. On remand, after inviting and receiving briefs from all parties, the judge issued a supplemental decision reaffirming his finding that McBurney violated Section 8(a)(3) and (1) of the Act by refusing to hire union applicants at four

jobsites. McBurney filed exceptions to the supplemental decision. The Board affirmed the judge's findings with respect to all violations of the Act.

The Board modified, in part, the judge's make whole remedy in accordance with its decision in *Oil Capitol*. The General Counsel and the Union each filed a motion for reconsideration arguing that *Oil Capitol* should not be applied to the compliance stage of the case. The Board denied both motions. *McBurney Corp.*, 352 NLRB 241 (2008). (A 177-78.) The General Counsel filed a motion for reconsideration of the Board's denial of his first motion. The Board denied that motion. *McBurney Corp.*, 352 NLRB 879 (2008). (A 195.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. McBurney's Operations and Hiring Policy; McBurney's Ebensburg Jobsite

McBurney designs and constructs industrial steam plants, power plants, and related heavy construction throughout the United States. (A 77; 285.) McBurney maintains a hiring policy that gives preference to certain applicants. The policy is not written and is communicated among supervisors by word of mouth. (A 71; 405, 453, 964, 1010.) The order of hiring priority is: (1) current employees transferring from another jobsite; (2) former McBurney employees; (3) applicants referred by a McBurney

employee; and (4) unknown applicants who walk in or call in for a job. (A 71-72; 281, 361, 408, 929, 996.)

Prior to the construction jobs in this case, McBurney had a project in Ebensburg, Pennsylvania, in 1990. (A 77; 450, 989.) On that job, supervisory personnel included James Austin, Jake Vanderlinden, Jim ("Jimbo") Clayton, and Freeman ("Rusty") Reid. (A 77; 989, 1418, 1465.) Ernest ("Skip") Patterson, Millard ("J.D.") Howell, and Michael ("John") Manculich were employed at the Ebensburg site doing rigging and welding work. (A 77; 482-83, 588-89, 698-99.)

B. McBurney's Towanda Jobsite: Union Members Apply in August and on October 25 and 26; Nonunion Applicants are Hired October 27 and 30 and in November; Union Members Apply on November 16 and December 13; Nonunion Welders are Hired in January

In 1995 and 1996, McBurney constructed a boiler in Towanda, Pennsylvania. (A 77; 286.) Vanderlinden, as site manager, was the highest-ranking McBurney official on the job. (A 77; 1447.) Directly beneath Vanderlinden were Austin as boiler superintendent, George Pittman as mechanical and piping superintendent, and Clayton and Reid as general foremen. (A 77; 1448.) Boilermakers were first hired at the site in late summer 1995. (A 77; 383, 1201.)

On August 28, Howell called McBurney's main office in Atlanta and was told to contact the Towanda site. (A 77; 490-91.) He called on August 30, left his name, qualifications, and telephone number, and was placed on McBurney's call-in list. (A 77; 294, 491-92.)

On October 25, James Bragan, organizer and initiator of "Fight Back" campaigns for the Union,[3] went with Local 13 business agent Greg Portz and four union members to a local job search service to find the location of the McBurney jobsite in Towanda. (A 77; 855-56, 871.) On their way, they stopped at a local diner and Bragan approached a man wearing a McBurney jacket. (A 77; 856.) After hearing Bragan's qualifications, that individual, superintendent Pittman, invited Bragan to apply for work at the jobsite. (A 77; 857, 1148.) Bragan was unable to meet Pittman at the jobsite that afternoon, so he called McBurney's local office and informed the secretary, Malissa Ball, that he would come out to apply. (A 77; 858.) When Bragan and four boilermakers went to the jobsite to apply, Ball took down their names. (A 77; 859.) Bragan identified himself as a union organizer and Portz as a Local 13 business manager. (A 77; 860.) The men emphasized their experience in welding, rigging, and pipefitting. (A 77; 860.)

[3] "Fight Back" is an ongoing union organizing campaign in which the Union targets specific employers and seeks to unionize them.

Organizer Bragan drafted a letter to superintendent Austin, dated October 26, in which the Union confirmed that the union applicants were interested in employment. (A 77; 282-84, 870.) The letter also listed the names of 30 other qualified individuals who were interested in working for McBurney. (A 77; 283-84.) On the same day, three groups of union members went to the Towanda jobsite and applied for work. (A 77; 298, 802, 816, 826, 837.) All were qualified journeymen and boilermakers who left their names and qualifications with the secretary. (A 77; 298, 803, 818, 827, 839.) They also informed the secretary that they were Local 13 members. (A 77; 803, 839.) McBurney did not hire any of these applicants. (A 78; 383-85, 819, 829.)

Superintendent Pittman hired three pipewelders and fitters to begin on October 27 and three additional men who had experience as pipefitters and millwrights to begin on October 30. (A 77; 383.) In total, for October and November 1995, McBurney hired 10 individuals with no union affiliation, several of whom were new hires. (A 78; 383-84.) McBurney did not contact or hire any of the union applicants. (A 77; 383-84, 819, 829, 864.)

On November 16, Durland Siglin, a boilermaker and member of Local 13, went to the Towanda jobsite to apply. (A 78; 882-83.) Siglin was asked to leave his name, phone number, and qualifications. (A 78; 884.) He also

revealed his union affiliation. (A 78; 886.) Siglin returned to the jobsite 2 weeks later, and again in December, but was never contacted about a job. (A 78; 884, 887-88.) McBurney continued to hire nonunion applicants in December. (A 78; 384.)

On December 13, Bragan went to the jobsite with four union members, including Howell. (A 78; 492, 618, 860.) Howell remained in the parking lot as the others went to the office. (A 78; 493, 860.) While there, Howell saw foreman Reid and reminded him that they had worked together previously at Ebensburg and told Reid that he was now a union organizer. (A 78; 493.) Reid told Howell that McBurney needed employees but Howell would have to consult Clayton about employment. (A 78; 495.)

In the meantime, Bragan and the others spoke to superintendent Austin, introducing themselves as union members. (A 78; 861.) Austin said McBurney did not need any welders then but he would be hiring soon. (A 78; 861.) In early January, McBurney hired 7 tube welders, none of whom had any union affiliation and at least 2 of whom had not worked for McBurney previously. (A 78; 384-85.)

C. Union Applicants at Towanda are Told in January that Hiring is Delayed due to Weather; Nonunion Applicants Barney and Kemp are Hired in January; Union Members Return Twice in February When They are Told Work Will be Available; They are Told on February 19 that Work is Ahead of Schedule

When they visited the jobsite on January 10, 1996, site manager Vanderlinden told Bragan and Portz that hiring was delayed because of cold weather. (A 78; 862.)

Dan Barney, who was not a member of the Union, was hired as a welder on January 16. (A 78; 632-33, 663.) When he first visited the jobsite on January 15, Clayton told him to return the next day. (A 78; 631.) At that time, Clayton asked Barney how he knew about the job and Barney replied that he had met employee Bill Parsons a few days earlier. (A 78; 631, 1020.) McBurney also hired an individual recommended by Barney, Bruce Kemp, who appeared at the jobsite on January 22 and was hired on January 24. (A 78; 635, 1037.)

Vanderlinden spoke with Howell and Patterson at McBurney's office on January 23. (A 78; 497-98, 1466.) He recognized them from their prior employment at the Ebensburg site and regarded them as good employees. (A 78; 499-500, 1470.) Vanderlinden stated he had no need for them but that he might contact them in a couple of weeks. (A 78; 532, 1466.)

On January 30, Allen Layaou and Kirk Babcock applied at the jobsite by leaving their contact information and disclosing their union membership. (A 78; 805.) The secretary told them that they would be notified if any jobs became available. (A 78; 806.) During January, McBurney hired 8 additional journeyman welders and pipefitters with no union affiliation. (A 78; 384-85.)

On February 5, Howell, Patterson, and Manculich returned to Towanda with four other union members. (A 78; 502, 590, 1470.) Dressed in work clothes that showed their union affiliation, they first encountered Clayton, who indicated that he remembered them as good employees at Ebensburg. (A 78; 504, 591, 593, 1033-34.) The union members informed Clayton that they had their tools with them and were ready to work. (A 78; 503.) When they entered the jobsite trailer and told Vanderlinden the same thing, he said it would be another couple weeks before work was available. (A 78; 504, 593, 1471.)

The four applicants returned 2 weeks later on February 19 with their tools ready to report for work. (A 78; 504, 594.) Vanderlinden was unavailable and they told Pittman that they were reporting for work. (A 78; 505.) Pittman said that the work was ahead of schedule and talked about layoffs. (A 78; 505, 1166-67.) The union members observed many

unassembled boiler parts at the building site. (A 78; 506, 596.) Pittman insisted, however, that McBurney was not hiring anyone and said they could leave their contact information with the secretary. (A 78; 505, 594.)

D. Barney's Job Duties; Barney and Kemp Deliver a Letter to Vanderlinden; Barney is Reassigned to Iron Work; Reid and Clayton Watch Barney and Kemp in the Breakroom

Barney was initially assigned to run a forklift under the supervision of Reid and Clayton; he then went to work as a welder under Darren King's supervision. (A 79; 1021-23, 1204-05.) On February 7, 3 weeks after he started work, Barney, along with Kemp, delivered a letter to Vanderlinden, signed by Bragan, notifying McBurney that the two employees were union organizers who would be engaging in organizing activities at the jobsite. (A 79; 310, 636.) The letter assured McBurney that the activities would not interfere with their work. (A 79; 310.) The day after this letter was delivered, Barney was transferred to the iron-worker crew to perform grating work, which involved heavy lifting of steel grating weighing more than 100 pounds and transporting it across narrow iron beams covered with ice and snow. (A 79; 639-41, 659.)

Barney and Kemp conducted their organizing activities in the breakrooms during breaks. (A 79; 638.) Clayton and Reid went to the

smoking breakroom and observed the employees' union activities, leading the employees to complain to Vanderlinden. (A 79; 642-43.)

E. Barney and Kemp Inquire About Transferring to Libby, Montana; Barney and Kemp are Laid Off at Towanda; Clayton Tells Barney that He Has No Need for Help at Libby; McBurney Hires Journeymen at Libby after Barney's Call to Clayton

When Barney first spoke with Clayton in January, Barney mentioned his intention to eventually transfer to McBurney's Libby, Montana, jobsite where a wood burning boiler was being built. (A 79; 641, 685.) Clayton transferred to Libby in April. (A 79; 1481.) On April 25, Barney spoke with superintendent Austin at Towanda about whether he and Kemp could transfer to Libby and Austin told him to check with Clayton. (A 79; 652-53.) After Barney and Kemp were laid off from Towanda on April 27, Barney called Clayton on April 29 or 30 and said that he and Kemp were ready to come to Libby and work. (A 79; 654-55, 1042.) Clayton said he did not need anybody. (A 79; 655, 1043.) When Barney reminded Clayton about Clayton's prior statement about needing help there, Clayton stated that he had no need for their work. (A 79; 655.) Barney called a week later and received the same message. (A 79; 655.) McBurney hired at least 19 journeymen on or after April 29, approximately 50 percent of whom were new hires. (A 79; 364, 386.)

F. McBurney Has Two Projects in Arkansas; Union Business Manager Branscum Applies at Prescott; A Week Later Branscum Takes 14 Union Members To Prescott to Apply; Superintendent Cooper Says McBurney Needs Help at Arkadelphia; Branscum Sends a Letter to McBurney; McBurney Responds with Details of Its Hiring Policy

McBurney had two projects in Arkansas in 1996, one at Prescott and one at Arkadelphia. (A 79; 387-88, 1237, 1308.) In Prescott, Tommy Cooper was the superintendent. (A 79; 1237.) On April 16, Dale Branscum, business manager for Local 69, visited the Prescott site to apply for work. (A 79; 753, 755, 1253.) Without identifying his union affiliation, Branscum spoke with Cooper, who told him that he needed six boilermakers and helpers. (A 79; 756-57, 762, 1253.) Branscum filled out an application and Cooper said the jobs might be available in 2 or 3 weeks. (A 79; 314, 757, 1254.)

Branscum called Cooper a week later and Cooper confirmed that he had a job for Branscum. (A 79; 760-61.) Branscum told Cooper that he had some friends who were also interested in jobs. (A 79; 761, 1255.) That day, April 23, Branscum went to the Prescott site with 14 members of Local 69. (A 79; 761, 914, 1256.) Branscum told Cooper that he was the Union's business manager and the applicants were Local 69 members. (A 79; 763, 1260.) Cooper passed out application forms and told the applicants that he would need boilermakers in about a week. (A 79; 340-44, 762-64, 914,

1257.) Cooper was ready to employ two connectors, or iron workers, but none of the applicants expressed an interest in those positions. (A 79; 1259.) Cooper also said that McBurney needed workers for its project in Arkadelphia. (A 79; 765, 1259.)

By letter dated April 25, Branscum informed Donald Usher, McBurney's Vice President of Projects, that he was interested in having 15 members of Local 69 employed at either of the two sites in Arkansas, and assured McBurney that any organizing activity would not interfere with their work. (A 79; 279-80.) Usher responded by letter on May 2, setting forth McBurney's priority hiring practices and stating that the union applicants would be considered "walk-ins" and considered for employment in accordance with McBurney policy. (A 79; 281.) None of the applicants were hired at Prescott or Arkadelphia. (A 79; 362-63, 387-88.)

G. Howell Applies at Prescott After Cooper Tells Howell's Wife that A Job is Available; Howell Writes a Letter to McBurney and Identifies Himself as a Former McBurney Employee

Howell was another union applicant in Arkansas. (A 79; 506.) On May 14, he called the Prescott site and left a message inquiring about employment. (A 79-80; 506-07, 1262.) Cooper returned the call to Howell's home and spoke to his wife, Marjorie, stating that he had a job for Howell at Prescott or another site. (A 80; 554, 1262.) Later that day,

Howell went to Prescott and introduced himself to Cooper as a union representative and organizer for Local 69. (A 80; 507, 550, 1263-64.) After speaking with him, Cooper did not offer Howell a job. (A 80; 511, 1267.)

Howell wrote a letter, dated May 31, to McBurney's home office in Georgia identifying himself as a former McBurney employee and recommending for employment the 15 applicants whose names had previously been submitted to the home office by Branscum. (A 80; 307-08, 511.) None of the 15 journeymen applicants, nor Branscum or Howell, were hired by McBurney at the two Arkansas jobsites. (A 80; 362-63, 387-88.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 29, 2007, the Board (Members Liebman and Walsh, Chairman Battista dissenting in part) issued its decision affirming the judge's findings that McBurney violated Section 8(a)(1) of the Act by surveilling the union organizing activities of its employees and violated Section 8(a)(3) and (1) of the Act by changing the work assignment of an employee because of his union organizing activity. (A 73.) The Board further affirmed the judge's finding that McBurney violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire 37 union applicants at four jobsites. (A 73.)

The Board's Order requires McBurney to cease and desist from engaging in surveillance of employees' union activities, changing work assignments of its employees because of their union activities, and failing and refusing to hire applicants because of their union affiliation. (A 74.) Affirmatively, the Board's Order directs McBurney to offer employment to 37 applicants in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions. (A 74.) The Order further requires McBurney to make the applicants whole for any loss of earnings and other benefits, as well as to remove from its files any reference to the unlawful refusals to hire. (A 74.) The Board's remedy is to be applied in

accordance with its decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), with respect to two applicants, James Bragan and Dale Branscum, who were union salts, and any other applicant whom McBurney shows in a compliance proceeding was a salt. (A 73-74.) The Board's Order further directs McBurney to post a remedial notice. (A 74.)

III. THE BOARD'S ORDERS DENYING MOTIONS FOR RECONSIDERATION

On February 29, 2008, the Board (Members Liebman and Schaumber)[4] denied the General Counsel and Union's motions for reconsideration. The Board found that neither motion, arguing that *Oil Capitol* should not be applied at the compliance stage of this case, presented "extraordinary circumstances" warranting reconsideration of the Board's decision. On July 23, 2008, the Board (Members Liebman and Schaumber)

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[4] 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*, __ F.3d __, 2009 WL 638248 (1st Cir. Mar. 13, 2009).

The issue has been briefed before this Court in *Snell Island SNF LLC v. NLRB* (2d Cir. Nos. 08-3822-ag and 08-4336-ag), which is scheduled for oral argument on April 15, 2009.

denied the General Counsel's second motion for reconsideration. The General Counsel asserted that the Board failed to adequately consider whether applying *Oil Capitol* would cause manifest injustice. The Board found that the issue was considered and rejected by the Board and, accordingly, the second motion did not establish extraordinary circumstances warranting reconsideration of the Board's decision.

SUMMARY OF ARGUMENT

Faced with mounting organizing activity by the Union, McBurney engaged in a widespread effort to avoid unionization. Before the Court, McBurney does not contest that it engaged in surveillance of its employees' organizing activities in breakrooms or that it reassigned an employee to more onerous working conditions after he began engaging in organizing activity.

McBurney also sought to avoid unionization by refusing to hire every single union applicant at four jobsites over the course of a year. McBurney was hiring at the jobsites in Pennsylvania, Montana, and Arkansas in 1995 and 1996. The union applicants were qualified boilermakers but, because of its union animus, McBurney manipulated its unwritten hiring policy to avoid hiring even those union applicants with the highest hiring priority. McBurney's union animus was further demonstrated by its

misrepresentations to applicants about when it would be hiring and its additional uncontested unfair labor practices.

McBurney failed to meet its burden of showing that it would not have hired all 37 union applicants even in the absence of their union affiliation. McBurney's hiring policy cannot constitute a complete defense to its unlawful refusals to hire where McBurney selectively followed the policy when it suited McBurney's ends. Furthermore, McBurney's belated argument that the Board should have determined whether the nonunion applicants were more qualified than the union applicants is not properly before this Court.

The Board entered a remedial order to make whole the 37 union-affiliated applicants whom McBurney unlawfully refused to hire. With respect to that remedy, the Union challenges the presumptions and burden of proof the Board has outlined in *Oil Capitol* for determining some of the discriminatees' backpay and instatement rights in a subsequent compliance proceeding. The Union's challenge fails because the Board's policy is reasonable and adequately explained in its *Oil Capitol* decision. The Union has not shown that it would be manifestly unjust to retroactively apply *Oil Capitol* here. Substantial evidence demonstrates that Bragan and Branscum were acting as salts and the Union's assertion that *Oil Capitol* should not be

applied to other discriminatees is premature. Neither Section 10(e) nor its remand order to the judge limited the Board's authority to conform its remedial order to *Oil Capitol*.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT McBURNEY VIOLATED SECTION 8(a)(1) OF THE ACT BY SURVEILLING THE UNION ORGANIZING ACTIVITIES OF ITS EMPLOYEES AND VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY CHANGING THE WORK ASSIGNMENT OF EMPLOYEE DAN BARNEY BECAUSE OF HIS UNION ORGANIZING ACTIVITY

Before this Court, McBurney does not contest the Board's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by engaging in surveillance of its employees' union activities when "supervisors beg[a]n to increasingly use the employees' breakroom to observe their union activity" (A 80) at the Towanda jobsite. McBurney also does not contest the Board's finding that it violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by transferring employee Barney to perform iron work after Barney began engaging in union organizing activity. (A 81.) Under well-settled law, McBurney's failure to contest these Board findings constitutes a waiver of any defense and "the Board is entitled to summary affirmance of those findings and conclusions." *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

Moreover, the uncontested violations do not disappear by not being mentioned in McBurney's brief. Rather, the "coercive antiunion actions"

stay in the case, and "[i]t is against this background that [the Court will] consider the Board's remaining findings." *NLRB v. Pace Motor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983). *Accord Torrington Extend-A-Care*, 17 F.3d at 590. In other words, the uncontested violations "remain, lending their aroma to the context in which the [contested] issues are considered.'" *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT McBURNEY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING AND REFUSING TO HIRE THIRTY-SEVEN UNION-AFFILIATED APPLICANTS AT FOUR JOBSITES

A. Standard of Review

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). The Court will not reject factual findings unless "no rational trier of fact could reach the conclusion drawn by the Board." *G&T Terminal*, 246 F.3d at 114. When the Board's findings are based on the judge's "assessment of the credibility of the witnesses, they will not be

overturned unless the testimony is 'hopelessly incredible' or the findings 'flatly contradict' either the 'law of nature' or 'undisputed documentary testimony.'" *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (quoting *NLRB v. J. Coty Messenger Serv.*, 763 F.2d 92, 96 (2d Cir. 1985)).

This Court has long held that "the Board's finding of discriminatory motivation . . . cannot lightly be overturned on review." *NLRB v. Gladding Keystone Corp.*, 435 F.2d 129, 132 (2d Cir. 1970). Rather, the question whether an employer discriminated against union activity is an inquiry that "the expertise of the Board is peculiarly suited to determine." *Perel v. NLRB*, 373 F.2d 736, 737 (4th Cir. 1967); *accord Gladding Keystone*, 435 F.2d at 131.

B. The Act Prohibits an Employer from Failing or Refusing to Hire Applicants Because of their Union Affiliation or Activity

It is well established that Section 8(a)(3)'s protection of employees against "discrimination in regard to hire" encompasses applicants for employment. *See NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 87-88 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941). As the Supreme Court explained long ago, "[d]iscrimination against union labor in the hiring of [employees] is a dam to self-organization at the source of supply," which "inevitably operates against the whole idea of the

legitimacy of organization." *Phelps Dodge*, 313 U.S. at 185; *accord NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435-36 (2d Cir. 2001). A discriminatory refusal to hire is unlawful even when the applicant is a paid union organizer, or "salt." *See Town & Country*, 516 U.S. at 96-97; *Ferguson Elec.*, 242 F.3d at 436.

In *FES, a Division of Thermo Power*, 331 NLRB 9, 12, 15 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002), the Board set forth the standards for determining whether an employer has violated Section 8(a)(3) by refusing to hire a union-affiliated applicant. In a refusal-to-hire case, the General Counsel must show that (1) the employer was hiring, or had concrete plans to hire, when it refused to hire the applicants at issue; (2) the applicants had experience or training relevant to the employer's announced or generally known requirements of the positions for which they applied, or that the employer had not uniformly adhered to such criteria, or that the criteria were pretextual or had been pretextually applied; and (3) union animus contributed to the decision not to hire the applicants. *Id.* Among the factors supporting an inference of unlawful motivation are the employer's expressions of hostility to employee rights, disparate treatment of discriminatees compared to others, the presence of other unfair labor practices, the timing of the adverse action, and the fallacious nature of the

employer's explanation. *See Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988); *J. Coty Messenger*, 763 F.2d at 98.

Once the General Counsel has made his showing, the burden shifts to the employer to show that it would not have hired the applicants, even in the absence of their union affiliation. *FES*, 331 NLRB at 12, 15. "[I]ntent is subjective and in many cases can be proved only by the use of circumstantial evidence. In analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference." *Pergament United States v. NLRB*, 920 F.2d 130, 139 (2d Cir. 1990) (citation and quotation marks omitted).

C. Substantial Evidence Supports the Board's Finding that McBurney Failed and Refused to Hire All 37 Union Applicants Because of Their Union Affiliation

McBurney failed to hire 37 applicants affiliated with the Union and, as the Board found (A 85-88), the General Counsel satisfied all elements of *FES* to show that McBurney's actions were unlawful. The applicants applied when McBurney was hiring and were qualified boilermakers. McBurney acted out of union animus, as demonstrated by its other unfair labor practices, which are uncontested, its misrepresentations to union applicants, and its failure to follow its own hiring policy.

McBurney does not deny that it was hiring skilled workers at each of the jobsites during the applicable periods of 1995 and 1996. The Board

found (A 85) that McBurney hired a total of more than 40 pipefitters, pipewelders, and journeyman welders at Towanda from November 1995 until February 1996. At Libby, that spring, McBurney hired 19 journeymen after Towanda employees Barney and Kemp unsuccessfully attempted to transfer there. (A 87.) At Prescott and Arkadelphia in Arkansas, McBurney hired at least 17 journeymen between the two jobsites after the union members filled out applications. (A 87, 392-93.)

All the union applicants had the experience and training relevant to the positions for which they applied. McBurney "never argued that the union applicants were unqualified for the available jobs." (A 87.) The Towanda applicants, for instance, had trade experience ranging from 6 to 28 years. (A 86.) As the Board found, the qualifications of the union applicants "clearly correspond[] to the line of work and the trades of the more than 40 nonunion employees who were hired at Towanda." (A 86.) Similarly, the "high level of skills of the [Arkansas] applicants was not disputed." (A 87.) When superintendent Cooper looked through the applications, he remarked that the union members were highly skilled. (A 88; 765.)

There is ample undisputed record evidence that union animus was a motivating factor in McBurney's failure to hire the union applicants. Before

the Court, McBurney does not deny that it violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of union organizing activities at Towanda and reassigning employee Barney to more onerous working conditions because of his union activities.

Additionally, McBurney was hiring through its unwritten hiring policy and did hire walk-ins at its jobsites, yet its management at the same time "frequently misrepresented and misled union applicants about [McBurney's] hiring plans and repeatedly lied to the applicants about [McBurney's] intentions to hire." Such deliberate misrepresentations to union applicants support a finding that an employer's actions were motivated by union animus. *Progressive Elec. Inc. v. NLRB*, 453 F.3d 538, 548 (D.C. Cir. 2006) (employer "lied" to union applicants, "assuring them" it would call when openings existed, "when in fact [it] had no such intention").

Furthermore, as discussed below, McBurney did not follow its own hiring policy in several instances involving the union applicants. Given McBurney's staunch reliance on its hiring policy as its defense throughout this case, its repeated failure to follow that policy is further evidence of its union animus.

The record evidence, much of it undisputed, shows that McBurney was hiring skilled workers, the union applicants had the experience and training required for the jobs, and McBurney harbored union animus that contributed to its decision not to hire the union applicants. Thus, the Board properly found that McBurney violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire 37 union applicants at four of its jobsites.

D. McBurney Did Not Meet Its Burden of Showing that It Would Not Have Hired the 37 Applicants if They Had No Union Affiliation

The Board reasonably found (A 72) that McBurney's position—that it would not have hired the union-affiliated applicants in any event—was without merit. McBurney's asserted (Br 30) affirmative defense is that adherence to its unwritten hiring policy is a complete defense to the refusal-to-hire unfair labor practice. However, as the Board found (A 72), McBurney's "reliance on its hiring policy is fatally undermined by the fact that . . . it used the priority hiring system selectively and systematically to avoid the hiring of union applicants."

Substantial evidence in the record establishes that McBurney hired a total of 58 employees after the first 20 union applicants signed the walk-in hiring list at Towanda. Thirty-seven of those hirees lacked any preferential status under McBurney's policy and came after qualified union applicants

had applied. (A 72.) In order to hire those 37 nonunion applicants, McBurney even passed over 3 union applicants with a preferential status as former employees. (A 72.) As McBurney acknowledges (Br 12-14), former McBurney employees Howell, Manculich, and Patterson should have been hired at Towanda under the preferential hiring category for former employees. (A 73; 482, 588, 698, 854.)

McBurney also manipulated its hiring policy when current employees Barney and Kemp tried to transfer to the Libby jobsite after their work at Towanda was finished.[5] (A 72.) As transfers from another McBurney jobsite, these men should have been hired at Libby ahead of any walk-ins or even former McBurney employees under McBurney's hiring policy.

At Prescott and Arkadelphia, after the first 16 union members had applied, McBurney hired 31 employees, 10 of whom were walk-ins with no hiring priority. (A 73.) As a former McBurney employee, applicant Howell

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[5] McBurney's assertion (Br 15) that the record contains only a single reference to Kemp transferring to Libby is erroneous. The judge credited Barney's recollection of a conversation with Clayton in which Clayton said he had jobs for both Barney and Kemp at Libby. (A 82 n.12; 651-52.) Barney also had a conversation, in Kemp's presence, with Austin at Towanda on April 25 about whether he and Kemp could transfer to Libby. (A 79; 652-54, 753.) After Barney called Clayton in Libby a few days later to say that he and Kemp were ready to come, Kemp did not make a separate call to Libby himself because he and Barney would split up the calls to save on phone charges. (A 79; 655, 751.)

should have had priority to be hired at Prescott; indeed, Howell even referred to the hiring policy when he applied. (A 88; 307, 508.)

In making its determination that McBurney's hiring policy was not a complete defense to its failures to hire, the Board relied on *Jesco, Inc.*, 347 NLRB 903 (2006), where the employer similarly failed to establish that its priority hiring policy was the non-discriminatory reason why it failed to hire union applicants. In *Jesco*, at least 40 percent of the nonunion applicant hires fell outside the employer's priority hiring system. 347 NLRB at 904-05. McBurney's track record is even worse. Thus, the Board concluded that out of a total of 105 employees hired at the 4 jobsites, McBurney bypassed its own asserted hiring priority system on 57 occasions when it hired walk-ins who applied *after* union applicants. As the Board stated (A 73), "more than 54 percent of [McBurney's] hiring decisions were either inconsistent with or not explained by its hiring policy."

McBurney incorrectly states (Br 32) that the only "true" deviations from its hiring policy were when it hired four walk-in applicants instead of four union applicants with hiring priority as former employees. McBurney thus asserts (Br 33) that, under *Zurn/N.E.P.C.O.*, 345 NLRB 12 (2005), *enforced*, 243 Fed. Appx. 898 (6th Cir. 2007), its hiring policy was a defense to the refusal-to-hire violation in at least some cases. The Board rejected

(A 72) this argument because, not only did McBurney hire nonunion applicants over *prior* qualified union applicants on 57 occasions, but also McBurney did not hire even a single union-affiliated applicant at the jobsites in question. *See id.* at 14. McBurney's manipulation of its hiring policy to avoid hiring union applicants "strongly implies antiunion animus" and, consequently, the policy "'necessarily fails as a defense to the Section 8(a)(3) allegations.'" (A 73, quoting *Jesco*, 347 NLRB at 905.)

Additionally, McBurney "frequently misrepresented and misled the union applicants about [its] hiring plans." (A 73.) The employer in *Jesco* similarly lied to union-affiliated applicants about whether it was hiring, supporting the Board's finding that its hiring policy was not a valid defense. 347 NLRB at 908-09. McBurney unconvincingly attempts (Br 34 n.3) to distinguish the false statements in *Jesco* from the subterfuge that its supervisors engaged in when union applicants came to the jobsites. The record shows that superintendent Cooper told union applicant Branscum a week after Branscum applied that a job was available for him at Prescott; however, after Branscum revealed his union affiliation, he was not hired. (A 79; 760-63.) Likewise, Cooper told applicant Howell's wife that he had a job for Howell but, when Howell appeared at the Prescott jobsite and introduced himself as a union organizer, there was no job for him. (A 80;

508, 554.) At Towanda, union applicants were told they would be contacted once McBurney started to hire, but, despite additional hiring that took place, they did not hear from McBurney. (A 77; 819, 829, 864.) On other occasions, union applicants were told that hiring at Towanda was delayed because of cold weather and it might be a couple of weeks before anyone was needed, but when they checked back 2 weeks later, the message was that layoffs were imminent because work was ahead of schedule. (A 77-78; 504-05, 532, 862, 1166-67, 1466, 1471.) This was despite the fact that the applicants could see unassembled boilerparts at the building site. (A 78; 506, 596.)

McBurney faults (Br 30) the Board for not showing that each union applicant was more qualified than each nonunion applicant in the walk-in hiring category. The General Counsel has the initial burden, in a failure-to-hire case, to show that the three prongs of *FES* are satisfied.[6] As discussed previously, the Board found, and the record supports, that the General Counsel had met this initial burden. McBurney points to no precedent indicating that the Board was required to impose that additional "more qualified" burden on the General Counsel.

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[6] To the extent that McBurney (Br 30) refers to "the Board" as having an initial burden of proof, McBurney is mistaken. *FES*, 331 NLRB at 12.

Moreover, before the Board, McBurney did not assert or present evidence in support of the notion it now raises for the first time to this Court that it hired nonunion applicants because they were more qualified than the union applicants. McBurney "never argued that the union applicants were unqualified for the available jobs" (A 87) or that other applicants were more qualified. McBurney is thus foreclosed from making its belated argument to the Court that the Board should have made some type of merit comparison for each applicant. 29 U.S.C. § 160(e) ("[n]o objection that has not been urged before the Board . . . shall be considered by the court"); *see also Elec. Contrs. v. NLRB*, 245 F.3d 109, 121-22 (2d Cir. 2001).

In any event, McBurney is simply ignoring the Board's finding that there were "*prior* qualified union applicants" when the nonunion walk-ins applied. (A 72 (emphasis added).) Once the General Counsel met his burden of showing that the prior union applicants had the experience or training that were the generally known requirements for the jobs, the onus was on McBurney to show that it would not have hired the union applicants anyway. Therefore, it was McBurney's burden to assert that it hired a nonunion applicant for a given position because the nonunion applicant, for example, had more experience or the union applicant was not the type of

welder that McBurney needed at the time.[7] McBurney clearly did not meet this burden and cannot point to evidence in the record showing that the nonunion applicants were more qualified, because it never presented such evidence.

In sum, with respect to the hiring of non-priority applicants, McBurney apparently believes (Br 32) that in this hiring category, it was free to discriminate against union applicants and selectively choose to hire only nonunion applicants. Had McBurney neutrally applied its hiring policy, it might have support for its claim. However, the Board found that, where union applicants walked in and applied for work, those applicants were discriminated against based on their union affiliation. Thus, McBurney hired nonunion walk-ins who applied after the union applicants, but were hired first rather the union applicants.

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[7] McBurney complains (Br 35) that it does not have employment applications for certain individuals, but that is a product of McBurney's own hiring practices. As pointed out in its brief (Br 11), McBurney does not typically use employment applications for hiring purposes.

III. THE BOARD'S REMEDIAL POLICY IN *OIL CAPITOL* IS CONSISTENT WITH THE ACT AND ADEQUATELY EXPLAINED IN THE BOARD'S ORDER

There is no dispute that the Board has appropriately enjoined McBurney from failing and refusing to hire union applicants in the future, as well as mandated the posting of a remedial notice informing employees both of McBurney's unlawful conduct and of their right to be free of such antiunion discrimination. The Union exclusively challenges the presumptions and burdens of proof the Board outlined in *Oil Capitol*, 349 NLRB 1348 (2007), for determining some discriminatees' backpay and instatement rights in a subsequent compliance proceeding. As explained more fully in the Board's brief in *IBB v. NLRB (Brown & Root)* (2d Cir. No. 08-4849, filed in tandem with the instant brief), 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.

In *Oil Capitol*, the Board announced a new policy for determining the relief 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 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 General 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. *Oil Capitol*, 349 NLRB at 1348-55. 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 the request for backpay and instatement with evidence establishing the period a 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 salt-discriminatee. *Id.* 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 for salting cases would be applied "in the present case and in all future cases where the issue arises." *Id.* at 1349.

The Union plainly disagrees with the wisdom of the Board's exercise of its policymaking authority here, 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, Int'l Bhd. of Teamsters v. NLRB*, 947 F.2d 1034, 1039-40 (2d Cir. 1991). The Union's position must be rejected because the Board's remedy here is rational and consistent with the Act. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 796 (1990) (the Board "has the primary responsibility for developing and applying national labor policy").

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 Ass'n. v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994). 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 (*Ferguson*

Electric, 242 F.3d at 431-32; *Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714, 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.

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 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).

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*, 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." 253 F.3d 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.[8] *Ferguson Electric*, 242 F.2d at 431. Indeed, the

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[8] 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 instatement with *evidence* establishing the period a salt would have remained on the job.

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.* 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.

B. The Board's New Policy Is Supported by a Reasoned Explanation Grounded in Well-Established Remedial Principles and 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 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 Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). 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*, 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).

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 that 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 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*, 331 NLRB at 691-92. The Fourth Circuit, however, found that the backpay award was punitive and refused to enforce it. *Aneco*, 285 F.3d at 332-33. 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. As fully discussed in the Board's brief in *IBB v. NLRB* (2d Cir. No. 08-4849), 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. *See Aneco*, 285 F.3d at 332-33 (application of the traditional presumption in a salting case resulted in a punitive backpay calculation); *Starcon, Inc. v. NLRB*, 450 F.3d 276, 278-79 (7th Cir. 2006) (expressing concern that applying the Board's traditional presumption of continued employment in salting cases could require the employer to produce difficult-to-obtain evidence, that it could result in punitive remedies, and that it could mandate instatement where none was warranted.)

In the end, the Board changed its policies based on legitimate concerns about 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.

C. 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 30-36) 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 Electric, 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."[9] *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 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

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[9] 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).

[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 McBurney from committing "like or related" violations of the Act, and requires McBurney to conspicuously post a notice to employees detailing the prior unfair labor practices and setting forth the employees' rights under the Act. (A 74.) If McBurney fails to comply with these requirements, it could be subject to contempt proceedings. *Hoffman Plastic Compounds 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*, 285 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.

D. The Board's Policy Does Not Conflict with Supreme Court Precedent

Additionally, as fully explained in the Board's brief in *IBB v. NLRB* (2d Cir. No. 08-4849), the Board's new policy does not conflict with Supreme Court precedent. The Union argues (Br 41) 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. (Br 33, 35, 42, 45.) The Union misreads *H.K. Porter* which, by its own terms, 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.

The Union also asserts (Br 42) 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." However, unlike the minimum backpay award struck down in *Sure-Tan*, 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." 467 U.S. at 901 n.11.

IV. THE BOARD REASONABLY DETERMINED THAT *OIL CAPITOL* IS TO BE APPLIED IN THE FUTURE COMPLIANCE PROCEEDING IN THIS CASE

The Union's myriad claims as to why *Oil Capitol* should not be applied in the compliance phase of this case are without merit. First, retroactive application of *Oil Capitol*—to a subseqent phase of the case—will not work a manifest injustice. Second, substantial evidence supports the

Board's finding that applicants Bragan and Branscum were salts. Finally, neither the lack of exceptions to the judge's remedy nor the Board's remand to the judge preclude the Board from entering its remedial Order.

A. 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 49) the Board's remedial determination to apply *Oil Capitol* in future compliance proceedings, claiming (Br 52) "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 (Br 55) that retroactive application will cause a "manifest injustice."

Ruling on the Union's motion for reconsideration in this case, the Board reasonably rejected the Union's "manifest injustice" claim. 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 this case, "were instituted well before *Oil Capitol* was decided." (A 178.) 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 Enters.*, 344 NLRB 673, 673 (1993); *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. *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983).[10] 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 608, 611-12 (2d Cir. 1990).

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 litigation. Indeed, no evidence would remotely support

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[10] 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 Semco Printing*, 721 F.2d at 892.

such an assertion. *See Local 900, Int'l Union of Elec., Radio & Machine 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).[11]

Moreover, contrary to the Union's contention (Br 54), 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 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*, 285 F.3d at 331-32; *Hartman Bros. Heating & Air Conditioning 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)

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[11] The Union nonetheless claims (Br 54), oddly, that in "this compliance proceeding, the General Counsel and [the Union] relied upon the existing Board precedent . . . ." It is unclear what the Union means by this. The compliance proceeding in the present case has *not yet occurred*.

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.

(Chairman Hurtgen dissenting); *Kamtech, Inc*., 333 NLRB 242, 243 n.7 (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); *Tualatin Elec., Inc*., 331 NLRB 36, 37-38 (2000) (Member Hurtgen dissenting). In short, the Union's claim (Br 54) 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 39) 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 54) 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 this case. 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 Electric*, 253 F.3d at 717-18.[12]

B. Substantial Evidence Supports the Board's Finding that Union Organizers Bragan and Branscum Are Salts

Substantial evidence supports the Board's finding that James Bragan and Dale Branscum are salts and thus the *Oil Capitol* remedy properly applies to them. Salts are "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign." *Oil Capitol*, 349 NLRB at 1348 n.5 (2007). Salting has been defined as "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." *Id.* (quoting *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), *enforced*, 84 F.3d 1202 (9th Cir. 1996)). Contrary to the Union's assertion (Br 56), record evidence shows that both Bragan and Branscum were seeking employment with McBurney as salts.

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[12] The Union's claimed reliance (Br 55) on *F.W. Woolworth Co*., 90 NLRB 289 (1950), when litigating this case is inapposite. As the Board explained in its Order Denying the Motion for Reconsideration, *F.W. Woolworth Co*. has 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. (A 177 n.4.)

Bragan is an international organizer for the Union and part of his job is to initiate "Fight Back" campaigns against nonunion employers, including initiating a campaign at Towanda. (A 77; 871-72.) On three occasions, Bragan applied for work at the Towanda jobsite and took other union members with him to apply. (A 77-78; 858-62.) Bragan drafted a letter to McBurney indicating that he and other union members were interested in working at the Towanda jobsite and that if they engaged in protected activities, the activities would not interfere with their work. (A 78; 282-84, 870.) Additionally, Bragan wrote and signed a letter to site manager Vanderlinden at Towanda informing him that Barney and Kemp were union organizers who would be engaging in organizing activities at the jobsite. (A 79; 310.) The Board reasonably found, based on Bragan's job as a union organizer initiating Fight Back salting campaigns, his leadership in taking other union members to apply at Towanda, and his letters to McBurney on behalf of other applicants and organizers, that Bragan was a "salt." In these circumstances, the Board reasonably found that Bragan applied at Towanda as part of a union salting campaign targeting McBurney.

Dale Branscum is the Union's Local 69 business manager and applied for work at the Prescott jobsite on April 16 and again on April 23. Branscum was a paid business manager and had not worked in the field

doing boilermaker work for almost 3 years prior to his application. (A 79; 779, 792-93.) The second time he applied, Branscum brought along to the jobsite 14 other union-affiliated applicants. (A 79; 755-61.) On April 25, Branscum wrote a letter to McBurney vice president Usher indicating that 15 union members had applied at the Prescott site and that they also wished to be considered for employment at Arkadelphia and any other Arkansas projects. (A 79; 279-80.) Branscum included in the letter an assurance that any protected activity on the part of the union members would not interfere with their work. (A 79; 279-80.) The Board reasonably found, based on Branscum's job as a union business manager, his willingness to work for lower wages at McBurney after being out of the field for some time, his leadership in taking other union members to apply at Prescott, and his letter to McBurney on behalf of the other applicants, that Branscum was a "salt." In these circumstances, the Board reasonably found that Branscum applied as part of a union salting campaign targeting McBurney.

With respect to the Union's argument (Br 55-57) that *Oil Capitol* should not be applied to the other union applicants, that argument is not properly before the Court. As the Union recognizes (Br 56), there is no "finding that the remaining discriminatees were salts." The Board indicated (A 74) that McBurney "will have the opportunity in compliance proceedings

to show that additional discriminatees were salts." Because compliance proceedings have not yet commenced, McBurney has not yet put on evidence to show that any additional discriminatees were salts and can do so, if it chooses, at a compliance hearing. The Board clearly stated that the burden of showing a discriminatee is a salt falls on McBurney and, until McBurney meets that burden, the Union's argument that the union applicants were not salts is "premature."[13] *See NLRB v. Katz's Delicatessen, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (finding appeal premature where Board had not yet determined how remedial pension and welfare fund payments would be structured).

C. The Union's Procedural Arguments About the Board's Entry of Its Remedial Order are Without Merit

The Union erroneously claims (Br 45-46) that Section 10(e) of the Act "clearly precluded" the Board from applying its *Oil Capitol* remedy in this case because no party requested that the Board take such action in exceptions to the decision of the administrative law judge. By its terms,

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[13] As the Union states (Br 48), the Board found (A 72) that Barney and Kemp were transfers when they attempted to secure work at the Libby jobsite. As with all other discriminatees besides Bragan and Branscum, the Board has not made a finding that the two were salts. The Board specifically found, in denying the Union's motion for reconsideration, that the Union's protest (Br 48-49) that *Oil Capitol* is inapplicable to Barney and Kemp was premature before the Board. (A 177 n.4.) It is likewise premature before this Court.

Section 10(e) only limits the issues that may be reviewed "by the court." 29 U.S.C. § 160(e). Thus, fully within the strictures of Section 10(e), the Board may reverse or amend a judge's conclusion regardless of whether a party to the proceeding has filed an exception challenging that conclusion. *See Local 1814, Intl. Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1404 n.26 (D.C. Cir. 1984); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980) (en banc); *see also NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959) ("Even absent an exception, the Board is not compelled to act as a mere rubber stamp for its [judge].").

The Union's reliance (Br 47) on the "law of the case" doctrine is also misplaced. The Board's remand order to the judge, to consider the factors raised in *FES*, in no way precluded the Board from modifying the judge's proposed remedial order. As this Court has found, "'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)); *see also 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").

The Board has modified the judge's remedy to conform to the change in the law in *Oil Capitol* regarding the burden of proof as to the reasonable backpay period for salts. *Oil Capitol* was decided on May 31, 2007, while this case was before the Board on exceptions to the judge's order on remand. Thus, *Oil Capitol* constituted an "intervening change in controlling law" and, to the extent that the "law of the case" was established by the Board's remand order, it was justified in departing from that prior ruling. *Coca-Cola Bottling*, 55 F.3d at 77.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying McBurney's and the Union's petitions for review and enforcing the Board's Order in full.

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May 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSNITHS, FORGERS & HELPERS, AFL-CIO	*	Nos. 08-4003, 08-4456, 08-4689
Petitioner	*	
v.	*	Board Case No. 26-CA-17564
NATIONAL LABOR RELATIONS BOARD	*	
Respondent	*	
and	*	
MCBURNEY CORPORATION	*	
Intervenor	*	
MCBURNEY CORPORATION	*	
Petitioner/Cross-Respondent	*	
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	
Respondent/Cross-Petitioner	*	
and	*	
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSNITHS, FORGERS & HELPERS, AFL-CIO	*	
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 13,727 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 21st day of May 2009

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: International Brotherhood of Boilermakers v. NLRB

DOCKET NUMBER: 08-4003

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

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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