

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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PRESSROOM CLEANERS, INC.,

Respondent,

and

Case No. 34-CA-071823

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ,

Charging Party.

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CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL
32BJ'S REPLY BRIEF IN SUPPORT OF ITS CROSS-EXCEPTION
TO THE ALJ's DECISION

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In its answering brief, Respondent Pressroom Cleaners, Inc. (“Pressroom”) largely ignores the arguments put forth by Charging Party Service Employees International Union, Local 32BJ (“Local 32BJ”) in support of Local 32BJ’s cross-exception. But, Pressroom makes several points that require a quick response.

First, Pressroom asserts that in *W&M Properties of Conn. Inc. v. NLRB*, 514 F.3d 1341 (D.C. Cir. 2008), the D.C. Circuit already “heard and rejected” the argument that the Board’s ruling in *Planned Building Services*, 347 NLRB 670 (2006) should be overruled. In making this argument, Pressroom completely misrepresents the D.C. Circuit’s decision in *W&M Properties*. In fact, the D.C. Circuit found that “W&M waived its challenge to the Board’s remedy and deprived us of jurisdiction to consider it.” *W&M Properties*, 514 F.3d at 1345.

Next, Pressroom argues that it would be punitive for the Board to deny Pressroom an opportunity to reduce its liability by providing counterfactual evidence about what might have happened if Pressroom had not unlawfully refused to hire the former Capitol employees. But, there is nothing punitive about refusing to let a lawbreaker reduce its liability by trying to establish that it could have accomplished the same goal lawfully. As the Supreme Court held in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964), where the employer unlawfully refused to bargain over the contracting out of maintenance work, “the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay.” In *Fibreboard*, the Court did not require the Board

to allow the employer to offer evidence that it could have reached impasse and implemented its contracting out proposal if it had bargained with the union.

Moreover, precisely because it is impossible to turn back the clock, the Board and the courts have long recognized the appropriateness of requiring a wrongdoer to bear the risk of uncertainty that it has created. For instance, in *Lapeer Foundry and Machine, Inc.*, 289 NLRB 952 (1988), the Board held that where an employer lays off workers without first negotiating with the union, the laid off workers are entitled to full backpay relief even though bargaining may not have prevented the layoffs. In *Lapeer*, the Board concluded that a “post-hoc determination of the economic situation” would “unnecessarily inject[] the Government into an area in which the collective-bargaining process should be permitted to function.” *Id.* at 955. Likewise, in *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943), the Supreme Court upheld a Board order requiring an employer to reimburse employees’ union dues payments where the employer provided unlawful assistance to the union. The employer had argued that the remedy was penal because the employees had received benefits for the dues payments, including substantial wage increases. The Court held that it would be wrong “to fetter the Board’s discretion by ... forc[ing] it to inquire into the amount of damages actually sustained.” *Id.* at 543. Instead, since it was “manifestly impossible to say” what benefits might have been secured by workers “if the freedom of choice of a bargaining agent had not been interfered with,” the Board was empowered to utilize its “administrative experience and knowledge” to craft an appropriate remedy. *Id.* at 544.

Finally, Pressroom relies upon *Sheet Metal Workers Int'l. Ass'n., Local 270 v. NLRB*, 561 F.3d 497 (D.C. Cir. 2009) to argue that Local 32BJ's challenge to the remedy is not ripe yet. But, *Sheet Metal Workers* concerned the proper time to seek circuit court review of a remedial rule established by the Board, not the proper time for the Board to consider a challenge to its own remedial rule. Moreover, even in *Sheet Metal Workers*, the court held that a party must object to a remedial rule at the merits stage "when the remedial rule is objectionable on its face." *Id.* at 502. Here, Local 32BJ is arguing that the remedial rule announced by the Board in *Planned Building Services* is objectionable on its face.

For the reasons set forth above, and in Local 32BJ's cross-exception, the Board should overrule its decision in *Planned Building Services*, and it should not allow Pressroom an opportunity to try to reduce its liability by presenting counterfactual evidence about what might have happened if Pressroom had not unlawfully refused to hire its predecessor's employees.

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Certificate of Service

I hereby certify that a copy of the foregoing document, entitled **Charging Party SEIU Local 32BJ's Reply Brief in Support of its Cross-Exception to the ALJ's Decision**, was served on this this 6th day of September 2013, via electronic mail, on the following parties:

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