

Nos. 16-1328, 16-1396

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

**PENNSYLVANIA STATE CORRECTIONS
OFFICERS ASSOCIATION,**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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NATIONAL LABOR RELATIONS BOARD)	
)	
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, and Amici: Pennsylvania State Corrections Officers Association (“the Association”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Business Agents Representing State Union Employees Association (“the Union”) was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

B. Ruling Under Review: This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of a Supplemental Decision and Order issued by the Board on August 26, 2016, and reported at 364 NLRB No. 108.

C. Related Cases: This case has not previously been before this or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

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Dated at Washington, DC
this 11th day of April 2017

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GLOSSARY

2012 Order	358 NLRB 108 (2012)
Act	National Labor Relations Act
Association.....	Pennsylvania State Corrections Officers Association
Board.....	National Labor Relations Board
Br.....	Opening brief of the Pennsylvania State Corrections Officers Association
Commonwealth	Commonwealth of Pennsylvania
JA	Joint Appendix
Supplemental Order	364 NLRB No. 108 (Aug. 26, 2016)
Union.....	Business Agents Representing State Union Employees Association

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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of the Pennsylvania State Corrections Officers Association (“the Association”) to review, and on the cross-application of the National Labor Relations Board to enforce, a Supplemental Decision and Order (“the Supplemental Order”) the Board issued against the

Association. (JA.198-310.)¹ The Supplemental Order, which is reported at 364 NLRB No. 108 (Aug. 26, 2016), determines the amount of backpay the Association owes under a prior, unchallenged Board order, reported at 358 NLRB 108 (2012) (“the 2012 Order”), in which the Board required the Association to bargain with Business Agents Representing State Union Employees Association (“the Union”) over the effects of the Association’s decision to discharge five employees and to pay backpay to employees pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). (JA.21-28.)

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”). The Board’s Supplemental Order is final and the Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Association’s petition for review and the Board’s cross-application for enforcement are timely; the Act places no time limit on such filings.

¹ “JA” refers to the joint appendix. References preceding a semicolon are to the Board’s findings. References following a semicolon are to supporting evidence or to the Board’s uncontested 2012 Order.

STATEMENT OF THE ISSUES

1. Under the Board's 2012 Order, the Association's backpay obligation continued to accrue from March 28 to September 28, 2012, unless the parties reached a bona fide impasse sooner. A bona fide impasse cannot arise in *Transmarine* bargaining while an employer insists on paying less backpay than Board law requires. And Board law does not permit an employer to reduce its backpay obligation by withholding money owed to it by employees. Did the Board reasonably find that backpay continued to accrue until September 2012 because the Association could not lawfully declare impasse while it insisted on reducing its minimum backpay obligation by money it claimed that employees owed it?

2. It is well established that a backpay claimant who declines or quits interim employment remains entitled to ongoing backpay if that interim employment was not substantially equivalent to the claimant's previous job. Following his discharge, claimant Bill Parke turned down a position as a corrections officer for the Commonwealth of Pennsylvania that undisputedly differed substantially in pay, duties, and working conditions from his position as an assistant grievance manager with the Association. Did the Board reasonably apply settled law in finding that Parke was entitled to full backpay?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the attached addendum.

STATEMENT OF THE CASE

At issue in this case is the amount of backpay the Association owes five former employees pursuant to the Board's 2012 Order. In the earlier proceedings, the Board found that the Association violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), by failing to bargain with the Union over the effects of its decision to discharge the five employees. The Board imposed its standard remedy for an effects-bargaining violation, ordering the Association to bargain with the Union and pay the employees limited backpay calculated pursuant to a formula set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

In the Supplemental Decision and Order now before the Court, the Board found that the Association failed to satisfy any of the conditions for stopping the accrual of backpay under *Transmarine*. Accordingly, the Board found that employees' backpay continued to accumulate until the Union became unavailable for bargaining in September 2012. The Board also rejected the Association's request to deny backpay to one employee who found a new job following his discharge instead of returning to a non-substantially equivalent position he had once held as a corrections officer.

The Association seeks review, and Board seeks enforcement, of the Board's Supplemental Order. Below are summaries of the underlying unfair-labor-practice proceeding, the parties' effects bargaining, the compliance proceeding, and the Supplemental Order currently under review.

I. THE BOARD'S FINDINGS OF FACT

A. The Underlying Unfair-Labor-Practice Proceeding

The Association represents corrections officers employed by the Commonwealth of Pennsylvania. (JA.299, 308; JA.23.) It employs business agents drawn from the ranks of those corrections officers to carry out its representational functions. (JA.299, 308; JA.24 & n.2, 251.) In July 2010, those business agents and the Association's support staff selected the Union to represent them. (JA.299; JA.24.)

On August 20, 2010, the Association discharged business agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke. (JA.299; JA.24-25, 251.) It did not bargain with the Union about whether to discharge those employees or about the effects of the discharges, such as whether the employees would receive severance pay. (JA.299; JA.27.) Dyches, Hood, Hurd, and Miller immediately returned to their former positions as corrections officers; Parke did not. (JA.299, 301, 308; JA.35-36, 71, 78-79.)

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging, among other things, that the Association had failed to give the Union notice and an opportunity to bargain over the discharges and their effects. (JA.299; JA.23.) After a hearing, on March 17, 2011, an administrative law judge issued a decision finding that the Association had not unlawfully failed to bargain about the decision to discharge the employees, but that it had violated the Act by failing to bargain with the Union over the effects of that decision. (JA.299; JA.21, 27-28.) The judge noted that timely effects bargaining could have addressed such matters as "severance pay and other accrued, but unpaid, benefits, such as vacation or sick pay." (JA.28.)

The judge issued a recommended order including, in pertinent part, remedial provisions drawn from *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). (JA.299, 307; JA.28.) The recommended order required the Association to bargain with the Union over the effects of the five discharges and to pay the discharged employees backpay for a limited period. Specifically, it required that the Association:

[P]ay those employees backpay at their normal wages from 5 days after the date of this order until the earliest of the following conditions:

- (1) the date [the Association] bargains to agreement as to the effects of the discharges;
- (2) a bona fide impasse in bargaining;

- (3) the Union's failure to request bargaining within 5 business days after receipt of this order or to commence negotiations within 5 days after receipt of [the Association]'s notice of its desire to bargain with the Union; or
- (4) the Union's subsequent failure to bargain in good faith.

(JA.28.)

The recommended order also placed both a ceiling and a floor on the Association's backpay obligation. First, it limited the Association's liability by providing that "[i]n no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date they were discharged to the time they secured equivalent employment elsewhere, or the date on which the [Association] shall have offered to bargain in good faith, whichever occurs sooner." (JA.28.) Second, it established a minimum backpay obligation, mandating that "in no event, shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in [the Association]'s employ." (JA.28.)

The Association did not file exceptions to the judge's findings and recommended order. (JA.298; JA.21.) On March 23, 2012, the Board issued a decision and order affirming the judge's finding that the Association had violated the Act by failing to engage in effects bargaining, and ordering the Association to "bargain with [the Union] with respect to the effects of its decision to discharge

[the 5] Business Agents” and to pay them “their normal wages for the period set forth in the remedy section of the judge’s decision.” (JA.21.)

B. The Parties’ Effects Bargaining

The Association and the Union met on April 4, 2012, to engage in effects bargaining pursuant to the Board’s 2012 Order. (JA.299-300, 308; JA.48, 90, 222, 252.) At that meeting, the Association took the position that the parties would bargain over “the two week backpay remedy the Administrative Law Judge suggested in this matter.” (JA.90, 213.) The Association made an offer it characterized as “establishing what the backpay amount would be for the five removed business agents for a two week period immediately following their removal.” (JA.213. *Accord* JA.53.) The Association then proposed that “the amount of the two week backpay period would be reduced by the one week[’s] pay received by the removed business agents.” (JA.214. *Accord* JA.97-98.) It further proposed that the remaining week of “backpay that we were offering would only act as a credit,” which it would apply to offset damages it anticipated recovering in lawsuits against Dyches, Hood, Hurd, and Miller alleging fraudulent mileage reimbursement claims. (JA.214. *Accord* JA.97-98.) The Association reiterated in writing that it was offering “backpay . . . for a 2-week period,” with one week already paid and the other week treated as a credit toward future potential liabilities. (JA.91-92, 222-23, 252.)

After attempting to confer with the former business agents, the Union made a counteroffer on April 10, seeking two weeks' severance pay for each of them, as well as compensation for unused leave and, for Hood, reimbursement for phone bills and mileage. (JA.300, 308; JA.62, 112, 224, 252.) The Union objected to the Association withholding any backpay as an offset against a potential recovery in litigation over mileage reimbursements. (JA.300, 308; JA.224.)

The next day, the Association rejected the Union's counteroffer and declared that the parties were at impasse. (JA.300, 308; JA.65, 69, 225-26.) As a result, the Association stated, it would implement the offer it had conveyed on April 4. (JA.300, 308; JA.225-26.) The parties engaged in no further bargaining, and the Union subsequently became defunct on approximately September 28, 2012. (JA.300, 308; JA.57-58, 65-66, 69.) The Association ultimately sued only Dyches, Hurd, and Miller over their mileage reimbursements. (JA.300, 308; JA.227-50, 252-53.) It never paid any backpay to any of the five former employees pursuant to the 2012 Order. (JA.300; JA.130-38, 168-73.)

C. The Compliance Proceeding

The Board's Regional Director issued a compliance specification alleging that the *Transmarine* backpay period had commenced on March 28, 2012, five days after the Board's 2012 Order issued, and that none of the conditions that order specified for ending the backpay period had been met. (JA.300, 307; JA.131.)

Accordingly, the specification alleged that backpay had continued to accrue until September 28, 2012, the approximate date when the Union ceased to function and thus become unavailable for bargaining. (JA.300, 307; JA.131.) The specification calculated the net backpay due to each of the employees by totaling the earnings they would have received from the Association during that time, then deducting their interim earnings in that period. (JA.163-67.)

In its amended answer to the compliance specification, the Association denied that it owed the claimants anything. (JA.168-73.) It asserted that it had reached impasse in bargaining with the Union on April 11, 2012, thereby cutting off the accrual of backpay. (JA.169-73.) It stated that it had “identified the sum which it intended to pay as a *Transmarine* remedy and offset that against previously improperly paid benefits already received by the individuals named in the Board’s previous order.” (JA.168-69.) And it took the position that “the impasse reached as well as its implementation by [the Association] satisfied the provisions of the [2012] Decision and Order.” (JA.169-73.)

The Association also asserted that backpay should be “cut off” for Parke because he chose not to return to work as a corrections officer upon his discharge from the Association. (JA.171.) At hearing, the Association confirmed its position that Parke should receive no backpay. (JA.37.)

II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On the foregoing facts, the Board (then-Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting in part) found, in agreement with the administrative law judge, that the parties had not reached a bona fide impasse in negotiations because the Association had improperly insisted on reducing its backpay obligation below the two-week minimum the Board's 2012 Order had established. (JA.300-01.) Because there had been no lawful impasse, the Board found, in agreement with the judge, that backpay continued to accrue for a 26-week period, from March 28, 2012, until the Union became defunct around September 28, 2012. (JA.300-01.) Dissenting in part, Member Miscimarra would have found that the Association's backpay obligation accrued for only two weeks. (JA.307.)

Contrary to the judge, the Board (then-Chairman Pearce and Member Hirozawa; Member Miscimarra, not reaching the issue) further found that Parke was entitled to his full backpay award notwithstanding his decision not to return to employment as a corrections officer because the corrections officer position was not substantially equivalent to the position from which he had been discharged. The Board ordered the Association to pay \$9,646.25, \$3,235.89, \$11,755.23, \$8,243.08, and \$24,332.27 to Dyches, Hood, Hurd, Miller, and Parke, respectively.

SUMMARY OF ARGUMENT

1. The Board reasonably found that the backpay period in this case ran for 26 weeks, from March 28 to September 28, 2012. The Board's 2012 Order required the Association to take two actions. First, it required the Association to bargain with the Union over the effects of its decision to discharge five employees in August 2010. Second, in order to foster the conditions necessary to make that bargaining meaningful more than a year and a half after the employees had been discharged, it required the Association to pay them a minimum of two weeks' backpay and specified that backpay would continue to accrue until one of certain listed conditions was met.

Substantial evidence supports the Board's finding that, instead of engaging in the effects bargaining that the 2012 Order required, the Association sought to bargain down the amount of backpay it owed. But the calculation of backpay was already fixed by the 2012 Order, and under settled Board law, the Association was not entitled to reduce that backpay by money it hoped to recover from some of the employees in future litigation. The Board reasonably determined that the parties could not reach a lawful impasse while the Association was insisting on paying employees less than the minimum they were due.

Drawing on the partial dissent of one Board Member in this case, the Association raises several objections in its opening brief that it never urged before

the Board. Because the Association did not make those arguments to the Board, Section 10(e) of the Act provides that the Court lacks jurisdiction to consider them. In any event, the Association's jurisdictionally barred contentions are meritless.

2. The Board reasonably determined that Parke was entitled to his full 26-week backpay award. Although a backpay claimant must avoid willfully incurring losses, it is well settled that the claimant's obligation is only to seek interim employment that is substantially equivalent to the job the claimant lost. The Association does not dispute that Parke earned significantly more working for the Association than for the Commonwealth, or that his office job as an assistant grievance manager involved fundamentally different duties and working conditions than his hands-on work with convicted felons as a corrections officer. Nor does the Association contest the Board's finding that, under its longstanding precedent, those facts rendered the two jobs not substantially equivalent. Instead, the Association argues that, because Parke had the right to go back to work for the Commonwealth when the Association discharged him, he had to take that job even though it was not substantially equivalent employment. Under well-established Board law, however, he had no such duty. Because the positions were not substantially equivalent, Parke was free to decline or quit employment with the Commonwealth and pursue other work.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference; the Court upholds them "so long as they are neither arbitrary nor inconsistent with established law." *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). 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); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). In addition, the Court "owes substantial deference to inferences drawn from the facts and, overall, to the reasoned exercise of the Board's expert judgment." *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1004 (D.C. Cir. 2016) (quotation, brackets, and ellipses omitted).

"This deference extends to the Board's interpretation of its precedent." *Id.* at 1004. "Likewise, policy arguments are for the Board—not this [C]ourt—to resolve." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015). That is particularly so where remedial matters are concerned, for "[i]n fashioning its remedies under the broad provisions of [Section] 10(c) of the Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n.32 (1969). As the Supreme Court has recognized, "the relation of remedy to policy is peculiarly a matter for administrative competence," and the "courts must not enter the allowable area of the Board's discretion." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE PARTIES DID NOT REACH A LAWFUL IMPASSE IN EFFECTS BARGAINING BECAUSE THE ASSOCIATION INSISTED ON PAYING LESS BACKPAY THAN THE BOARD'S ORDER REQUIRED

In the underlying unfair-labor-practice case, the Board found that the Association violated the Act by failing to bargain with the Union over the effects of its decision to discharge five employees. (JA.21, 27-28.) Accordingly, the Board issued a *Transmarine* order, imposing its “typical remedy” in cases involving an unlawful failure to bargain about the effects of a management decision. (JA.28.) *See Smurfit-Stone Container Enters.*, 357 NLRB 1732, 1736 (2011) (noting that where an employer violates its duty to engage in effects bargaining, “the board typically orders a *Transmarine* remedy to restore some measure of economic strength to the union” (footnote omitted)), *enforced sub nom. Rock-Tenn Servs., Inc. v. NLRB*, 594 F. App'x 897 (9th Cir. 2014). The Association did not contest the imposition of that remedy, either before the Board or now before the Court. Rather, it contends (Br.16) that it complied with its remedial obligations by, it claims, bargaining to impasse and then unilaterally implementing its proposal.

As we show below, the Board reasonably rejected that position (JA.299-301), as should the Court. In line with precedent and the record evidence, the Board determined that, by improperly insisting on paying employees less than the

2012 Order required as a minimum, the Association deprived the Union of the bargaining leverage to which it was entitled and precluded the meaningful bargaining that the *Transmarine* remedy is intended to foster. Under those circumstances, the impasse that the Association declared was not a valid one. It therefore was not relieved of its duty to bargain, and the backpay period continued to run until the Union ceased to function.

A. An Employer Cannot Lawfully Insist to Impasse on a Position Inconsistent with *Transmarine*'s Backpay Requirements

The Supreme Court has recognized that bargaining over the effects of an employer's decisions on union-represented employees "must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). When a decision involves discharges, the failure to bargain in a timely manner "is significant because effects bargaining can result in such additional benefits as pension fund payments, health insurance coverage and conversion rights, preferential hiring at other employer plants, and reference letters for jobs with other employers." *Times Herald Printing Co.*, 315 NLRB 700, 702 (1994). *See also Fallbrook Hosp.*, 360 NLRB No. 73, 2014 WL 1458265, at *18 (2014) (employer was required to bargain over effects of discharges, which could include "things like severance packages, neutral recommendation letters, or benefits payouts"), *enforced*, 785 F.3d 729 (D.C. Cir. 2015). Nearly fifty years ago, in

Transmarine Navigation Corp., 170 NLRB 389 (1968), the Board crafted a remedy to ensure that even long after an employer has already discharged them, employees who were deprived of timely effects bargaining will nonetheless receive the benefit of meaningful bargaining.

The employer in *Transmarine* closed a facility without bargaining over how that decision would affect its union-represented employees. 170 NLRB at 389. The Board recognized that the employer's unlawful failure to bargain had "denied [the employees] an opportunity to bargain through their contractual representative at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs were being terminated." *Id.* And the Board further determined that a simple order to bargain would be inadequate to cure the violation, as that bargaining would occur "after [the employer] closed its terminal and when the collective strength of the employees' bargaining unit had been dissipated." *Id.* The Board therefore deemed it necessary to fashion a remedy that would create conditions similar to those that would have existed had good-faith bargaining occurred at the appropriate time. *Id.* at 390.

To that end, the Board in *Transmarine* imposed "a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic

consequences for [the employer].” *Id.* Specifically, the Board ordered the employer to pay unit employees backpay for a period beginning 5 days after receipt of the Board’s decision and ending if and when: (1) the parties reach agreement in effects bargaining; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to timely request or commence bargaining; or (4) the union ceases to bargain in good faith. *Id.* The Board further required “the amounts to be paid to be not less than the amounts the [employees] would have earned during a 2-week period of employment.” *Id.*

As the Board noted in this case, “[t]he purpose of *Transmarine* backpay is ‘to restore at least some economic inducement for an employer to bargain as the law requires.’” (JA.300 (quoting *O.L. Willis, Inc.*, 278 NLRB 203, 205 (1986).) The parameters of the employer’s backpay obligation under *Transmarine* are critical to that objective. The mandate that the employer pay at least two weeks of backpay removes an incentive for the employer to minimize its liability by rushing the bargaining process. *See Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983) (“[T]he minimum pay period may well discourage premature impasse in the bargaining that is to ensue.”). Conversely, the prospect of steadily mounting backpay following the initial two-week period discourages undue delay on the employer’s part and provides the union “some measure of bargaining strength which it would have had if [the employer] had engaged in effects bargaining at the

appropriate time.” *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1307 (8th Cir. 1988). *Accord Sawyer of Napa, Inc.*, 321 NLRB 1120, 1120 (1996) (“[I]f there are delays in the bargaining process . . . the consequences to the [employer] are progressively greater” and there is “a corresponding enhancement of the union’s bargaining strength.”).

Thus, as the Board explained here (JA.300), *Transmarine* backpay is distinct from the substantive terms of any severance agreement the parties may reach.² *See Sea-Jet Trucking Corp.*, 327 NLRB 540, 540 (1999) (stating that moving expenses and transportation costs “are issues over which the parties may bargain pursuant to the *Transmarine* remedy,” but “they are not germane to backpay computations”), *enforced mem.*, 221 F.3d 196 (D.C. Cir. 2000) (table) (per curiam). The former is necessary, where the Board has imposed a *Transmarine* remedy, to make bargaining over the latter meaningful. Logically, then, as the Board observed, “[p]ermitting a party to bargain to impasse about *Transmarine* backpay would defeat the purpose of the remedy.” (JA.300.)

In particular, because *Transmarine* backpay is an indispensable prerequisite to meaningful effects bargaining, the Board has held that in the course of that

² The Board provided an illustration of the practical distinction between backpay under *Transmarine* and the severance pay parties may agree to in bargaining. If, “[a]t the end of 3 weeks of effects bargaining pursuant to *Transmarine*, a union and a[n] [employer] agree to 1 week’s severance pay,” the claimants “will receive 1 week’s severance pay and 3 weeks’ *Transmarine* backpay.” (JA.300 n.7.)

bargaining, an employer cannot insist to the point of impasse that its backpay obligation be reduced. In *Sawyer of Napa*, 321 NLRB at 1125-26, following a plant closure, the employer agreed to compensate laid-off employees in accordance with *Transmarine*. But in the ensuing effects bargaining, the employer “incorrectly took the position that the *Transmarine* remedy is limited to 2 weeks’ backpay” and insisted that its backpay liability would not continue to increase during bargaining. *Id.* at 1120. After a period of months, the parties agreed that their negotiations had reached an impasse. *Id.* at 1126-27; *id.* at 1122 (Member Cohen, dissenting in part).

The Board concluded that the impasse was “no[t] legally cognizable.” *Sawyer of Napa*, 321 NLRB at 1120. By erroneously insisting that *Transmarine* required no more than two weeks’ backpay, the employer had “refused to acknowledge or accept its full responsibilities under the *Transmarine* remedy.” *Id.* As a result, the Board found, the employer “did not suffer the full consequence of the *Transmarine* remedy and the Union was not accorded the full bargaining strength that the *Transmarine* backpay provisions were designed to generate.” *Id.*

B. Throughout Bargaining, the Association Improperly Insisted On Reducing Its *Transmarine* Backpay by Withholding Money Some Employees Allegedly Owed

Applying the foregoing principles, the Board reasonably determined (JA.300-01) that the Association did not reach a legally cognizable impasse in

effects bargaining with the Union. As an initial matter, substantial evidence supports the Board's finding (JA.300-01) that the Association never made any kind of proposal for severance pay and instead insisted on bargaining over the amount and form of *Transmarine* backpay. As the Board noted, the Association informed the Union at the bargaining table that its offer addressed the “*two week backpay remedy the Administrative Law Judge suggested*” and established “what the *backpay amount* would be.” (JA.399 (quoting JA.213) (emphasis in Board's decision).) And the Association confirmed in writing that its offer was ““backpay . . . for a 2-week period,”” with certain modifications. (JA.300 (quoting JA.222).) Thus, as the Board found, the Association conflated its effects-bargaining and backpay-payment obligations “by proposing during effects bargaining that the parties bargain about the *Transmarine* backpay remedy.” (JA.300.)

Further, settled law supports the Board's finding that the Association demanded an impermissible deduction. It is undisputed that, as the Board found, the Association insisted to impasse on withholding one week's backpay from some of the claimants, to be applied “as a credit in future lawsuits.” (JA.300, 308 n.6; JA.45-46.) When an employer asserts that a backpay claimant owes it money, however, the Board has consistently “refused to permit [the] employer to reduce the amount of backpay by the amount of its private claims.” *The State Journal*, 238 NLRB at 388. *See also Cont'l Ins. Co.*, 289 NLRB 579, 584 (employer was

not entitled to offset erroneously paid vacation pay from a backpay award); *Teamsters Local 705 (Randolph Paper Co.)*, 227 NLRB 694, 694-95 (1977) (union ordered to pay backpay to employee could not offset from that sum dues the employee allegedly owed).

The Board's rule against allowing an employer to deduct from backpay awards any debts that it claims employees owe it follows from the foundational principle that a Board order requiring backpay does not "confer private rights but exists to enforce the public interest in preventing and deterring unfair labor practices." *The State Journal*, 238 NLRB 388, 388 (1978). And it is consistent with the Board's broader policy of shielding employees' backpay awards from deductions that would not effectuate the purposes of the Act. *See, e.g., NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951) (holding that Board did not abuse its discretion in "refusing to deduct . . . unemployment compensation payments from back pay"); *Times Herald*, 315 NLRB at 702 (barring employer from offsetting payments made pursuant to the WARN Act from *Transmarine* backpay).³

³ The Board has recognized a narrow exception to its no-offset rule for severance payments, which the Board considers to be interim earnings and permits the employer to deduct from a *Transmarine* backpay award. *W.R. Grace & Co.*, 247 NLRB 698, 699 n.5 (1980). Here, the General Counsel characterized one week of pay the Association had already provided the employees after their discharges as severance pay. (JA.131.) Accordingly, the Board did not find the Association's proposed deduction of that severance pay to be inconsistent with the minimum two-week backpay award. (JA.301 n.8.)

It is also well established that a party cannot declare a lawful impasse if it insists “that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act.” *Nat’l Mar. Union (Texas Co.)*, 78 NLRB 971, 981-82 (1948). As the Board found, the Association “in effect demanded a modification of the *Transmarine* remedy” by seeking to reduce its backpay obligation through an impermissible deduction. (JA.301.) Because that demand was inconsistent with the basic purposes of *Transmarine*, the Board reasonably found that the Association was not entitled to press it to the point of impasse. (JA.301.) And in the absence of a lawful impasse, the Board properly found that the Association’s backpay obligation continued to accrue until the Union became defunct. (JA.301.)

C. The Court Lacks Jurisdiction To Consider the Association’s Arguments, Which Are Meritless in Any Event

The Association does not seriously dispute the Board’s findings of fact or the essential legal tenets underlying its decision. Indeed, it acknowledges “that the parties cannot modify the *Transmarine* award by agreement.” (Br.28.) And although it attempts, in passing, to distinguish several cases the Board cited (Br.30-31 n.5), it does not appear to dispute the principles those cases stand for—that a lawful impasse cannot arise when an employer’s bargaining position undermines the integrity of the *Transmarine* bargaining process, *Sawyer of Napa*, 321 NLRB at 1120-21, and that Board law precludes an employer from deducting from its

backpay obligations any debts that it claims employees owe it, *The State Journal*, 238 NLRB at 388. The Association instead spends the bulk of its opening brief (Br.16-18, 19-36) advancing the arguments that one Board Member set forth in a partial dissent in this case (JA.302-07 (Member Miscimarra, dissenting in part)). As we show below, however, those arguments are not properly before the Court because the Association never urged them before the Board.

Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Thus, absent extraordinary circumstances not present here, the Court is jurisdictionally barred from considering arguments the Association raises for the first time on appeal. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550 (D.C. Cir. 2016).

Before the Board, the Association argued, in relevant part, that it permissibly sought to offset mileage reimbursement from the “minimum of two weeks of backpay,” and that its proposal in that regard addressed “a mandatory subject about which the other party must bargain.” (Cross-Exceptions at 1, ¶¶ 2, 6.) That argument confirms the Board’s finding that the Association improperly insisted to impasse on reducing its minimum backpay obligation.

Before the Court, however, the Association changes tack and advances wholly new and distinct theories. It first argues (Br.21-26) that the Board impermissibly considered the substantive content of its proposals in finding that they undermined the Board's *Transmarine* remedy. It then asserts (Br.27-32, 35-36) that it was the Board—and not the Association itself—that misunderstood the difference between *Transmarine* backpay and severance, and that it sought to negotiate only as to the latter. Finally, the Association claims (Br.32-35) that the Board's Supplemental Order is somehow punitive. Those contentions did not appear in the Association's filings with the Board. Accordingly, the Court cannot consider them. *See N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) (language in employer's exceptions must be specific enough to put the Board on notice as to particular issues); *U-Haul Co. of Nev. v. NLRB*, 490 F.3d 957, 963 (D.C. Cir. 2007) (employer could not advance new argument on appeal for applying distinct legal framework).

It is immaterial, for Section 10(e) purposes, that the Association's new arguments were outlined in one Board Member's partial dissent and that the Board explained its rejection of his views. "[S]ection 10(e) bars review of any issue not *presented* to the Board, even where the Board has discussed and decided the issue." *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 167-68 (D.C. Cir. 2016) (quoting *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015))

(internal quotation marks omitted). *See also, e.g., Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 60 (D.C. Cir. 2016) (employer forfeited theory advanced by dissenting Board Member and rejected by Board majority by failing to raise it in exceptions); *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 33 (D.C. Cir. 2007) (the Court lacked jurisdiction to consider issue that “the Board on its own considered”).

In any event, even if the Association’s arguments were not jurisdictionally barred, they are all meritless. First, contrary to the Association’s claims (Br.21-32), it is well settled that the Board can—and often must—examine the content of parties’ bargaining proposals in fulfilling its congressionally mandated task of overseeing the bargaining process.⁴ The Supreme Court recognized in *H.K. Porter*

⁴ The Board routinely does so, for example, in evaluating whether a party has engaged in unlawful surface bargaining. *See, e.g., NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1188 (D.C. Cir. 1981) (“In determining whether the company fulfilled [its bargaining] obligation, the terms of its bargaining proposals may be examined.”); *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979) (“Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to.”); *Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1221 (2001) (finding violation because employer’s “final offer was extreme in nature, [and] was made without any corresponding incentives to secure the Union’s assent”), *enforced*, 50 F. App’x 444 (D.C. Cir. 2002). And naturally, the Board must look to the content of a proposal to determine whether a party has improperly insisted to impasse on permissive or illegal subjects. *See, e.g., Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (“We agree with the Board’s determination that [the employer’s] insistence to the point of impasse on a waiver of the Union’s access to the Board constituted an unfair labor practice.”); *NLRB v. Cent. Mach. & Tool Co.*, 429 F.2d 1127, 1129-30 (10th Cir. 1970) (“[T]he *H.K. Porter* case does not appear to withdraw the Board’s

Co. v. NLRB that although the Act bars “official compulsion over the actual terms of the contract,” it fully anticipates that the Board will “oversee and referee the process of collective bargaining.” 397 U.S. 99, 108 (1970). And as the Board explained in *Sawyer of Napa*, that is precisely what the Board accomplishes by ensuring that an employer not diminish the bargaining strength to which a union is entitled under *Transmarine*. 321 NLRB at 1120-21. The Board’s requirement that the Association comply with *Transmarine*’s minimum backpay period does not “compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements,” *H.K. Porter*, 397 U.S. at 106, but rather enforces a remedy that “[e]nsur[es] meaningful bargaining,” consistent with “the primary objective of the Act.” *Yorke*, 709 F.2d at 1145.

The Association’s cursory effort (Br.30 n.5) to distinguish *Sawyer of Napa* misses the mark. The Association argues that in that case “the employer’s misconception affected *the bargaining itself*.” (Br.30 n.5 (quoting JA.307 n.13 (Member Miscimarra, dissenting in part).) But the Board reasonably determined that the Association’s demand to modify its backpay obligation did just that. As the Board recognized, “[p]ermitting a party to bargain to impasse about *Transmarine* backpay would defeat the purpose of the remedy” (JA.300), which is

authority to determine whether a section 8(a)(5) violation has occurred by a company’s insistence upon including a nonmandatory bargaining subject to a point of impasse.”).

to create conditions that will make belated effects bargaining meaningful. *See Times Herald*, 315 NLRB at 702 (“Unless an effective *Transmarine* remedy is imposed, the status quo ante with respect to bargaining power will not be restored and the employees’ chance to negotiate for these significant benefits will be unlawfully minimized.”).

The Association goes on to argue—again, for the first time before the Court—that “its offer exceeded the minimum requirement of *Transmarine*” (Br.27), so that it did not actually “attempt[] to negotiate downward the Board-ordered backpay remedy” (Br.36). In that regard, the Association notes (Br.35) that its offer did not include a deduction that *Transmarine* would have permitted for employees’ interim earnings during the initial two-week period. But the Association has never attempted to dispute as a matter of basic arithmetic the Board’s finding that, by subtracting the debts that it claimed employees owed it, the Association’s offer “proposed reducing the *Transmarine* amount.” (JA.300.)

On the contrary, as shown above (pp.7-8), the Association’s communications to the Union left no room for doubt that it intended to pay nothing to the employees from whom it hoped to recover mileage reimbursements. Moreover, as the Board noted (JA.300), the Association never did make any payment to the employees. And although the Association, in its opening brief to the Court, adopts for the first time the view of the partially dissenting Board

Member that it in fact “owes the affected employees 14 days’ backpay” (Br.26. (quoting JA.304 (Member Miscimarra, dissenting in part))), the position it took in its answer to the General Counsel’s Compliance Specification was that it owed nothing (JA.169-73 (arguing that “the impasse reached as well as its implementation by [the Association] satisfied the provisions of the Decision and Order”)). That position confirms that the Association believed at that time that it had successfully insisted to impasse on reducing its *Transmarine* backpay obligation to zero.

The Association also belatedly attempts (Br.35-36) to rely on a stipulation regarding impasse that it never referenced in its filings with the Board. It cannot raise that stipulation for the first time in its appellate brief, but even if it could, its arguments would fail. Contrary to the Association’s claim, the General Counsel did not “stipulate[] that a lawful impasse was reached.” (Br.35.) As the Board explained, although the parties stipulated that the Association and the Union reached impasse (JA.252), “the legal question whether that impasse was lawful” is “separate and distinct” (JA.300 n.5). *See Sawyer of Napa*, 321 NLRB at 1121 (finding “no legally cognizable impasse”); *id.* at 1122 (Member Cohen, dissenting in part, noting that “[t]he General Counsel and the Union concede that [effects] bargaining reached an impasse.”). Were that not so, the principle that it is unlawful to insist on certain proposals “to the point of impasse,” *Teamsters Local*

Union No. 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990), would be a contradiction in terms.

The Association's characterization (Br.32-35) of the Board's calculation of backpay under the 2012 Order as somehow punitive is likewise both belated and illogical. Like the Association's other contentions, "[t]his argument was not made to the Board and so comes too late." *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008). "Board Member Miscimarra's dissent, which viewed the Board's [backpay award] to be impermissibly punitive, does not excuse [the Association]'s failure to raise the objection." *Enter. Leasing*, 831 F.3d at 551. *Cf. Sea Jet Trucking Corp. v. NLRB*, 221 F.3d 196, 2000 WL 293222, at *1 (D.C. Cir. 2000) (table) (per curiam) (noting, in dicta, "concern[]" that *Transmarine* "may in some respects be punitive rather than remedial," but enforcing Board's order because the issue was not properly presented). Moreover, contrary to the Association's characterization, the Board did not fix the backpay period at 26 weeks "*sua sponte*." (Br.32.) The General Counsel alleged that backpay ran for that period; the judge so found; and the Board upheld the judge's finding. (JA.300, 309.) But even if the Board had acted *sua sponte*, the Association's failure to raise its argument to the Board by a motion for reconsideration would deprive the Court of jurisdiction to consider it. *W&M Props.*, 514 F.3d at 1345-46.

In any event, even if the Court could consider it, the Association provides no authority for its novel claim that its own failure to bargain to a lawful impasse or agreement transformed the Board's unchallenged 2012 Order into an impermissibly punitive remedy. Indeed, if the amount of backpay alone could render the *Transmarine* remedy invalid, any employer could evade its obligations by simply allowing backpay to pile up until it reached punitive levels. Nor does the Association bolster its punitive-remedy argument by referencing (Br.34) a decertification petition filed in January 2012. The Association makes no effort to contest the Board's findings that "the Region properly refused to process the petition" and "the employees never requested that the Region reinstate [it]." (JA.301 & n.9.)

Finally, the Association simply misreads the 2012 Order when it asserts that backpay "could have continued through at least the date of the Board's Supplemental Decision and Order." (Br.34.) In fact, the 2012 Order limited the backpay period by providing that it could not exceed the period "from the date [the employees] were discharged to the time they secured equivalent employment elsewhere, or the date on which the [Association] shall have offered to bargain in good faith, whichever occurs sooner." (JA.28.) *See W.R. Grace & Co.*, 247 NLRB 698, 699 (1980) (explaining calculation of the backpay period).

II. THE BOARD REASONABLY FOUND THAT PARKE WAS ENTITLED TO A FULL BACKPAY AWARD

The Board reasonably found (JA.302) that backpay claimant Bill Parke, like the other 4 discharged employees, was entitled to the full 26-week backpay award. Settled Board precedent supports its finding (JA.302) that Parke did not willfully incur losses by declining a position that was not substantially equivalent to the job he had held with the Association. The Association's contrary argument finds no support in the law, and the Board reasonably rejected it.

A. Board Law Permits a Backpay Claimant To Decline or Quit Interim Employment that Is Not Substantially Equivalent to the Claimant's Previous Job

The Board's method of computing backpay is well settled. After calculating the gross backpay a claimant would have received during the backpay period, the Board deducts any "actual [interim] earnings of the worker" as well as "losses which he willfully incurred" during that time. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198, 199-200 (1941). The Supreme Court has explained that the deduction of willfully incurred losses is not for the employer's benefit; rather, it is intended to further "the healthy policy of promoting production and employment." *Id.* at 200.

Whether a backpay claimant has willfully incurred losses turns on a comparison between the job the claimant lost and the interim jobs available to that individual. A claimant willfully incurs losses if he or she fails to make reasonable

efforts to obtain, or obtains and then unjustifiably abandons, interim employment that is substantially equivalent to the job from which the claimant was discharged. *See NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976).

It is well established, however, that “traditional mitigation rules do not require claimants to accept offers to positions that are not substantially equivalent to their former positions.” *Alamo Cement Co.*, 298 NLRB 638, 638 n.2 (1990). *See Madison Courier*, 472 F.2d at 1321 (recognizing that a claimant “is not obliged to seek work which involves conditions that are substantially more onerous than his previous position”). Likewise, the Board has long held, with court approval, that a claimant “is under no obligation to retain nonequivalent employment, once secured.” *Churchill's Supermarkets*, 301 NLRB 722, 725 (1991), *enforced mem.*, No. 91-1101, 1991 WL 285300, (D.C. Cir. 1991) (per curiam). *Accord NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 716 (6th Cir.1993) (employees “did not have a duty to continue their employment at [an interim employer] because it was not equivalent to their former position with [the prior employer] in either pay or working conditions”); *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629-30 (4th Cir. 1988) (“A failure to retain interim employment that is substantially less remunerative than [the] previous job does not provide a basis for reducing a

worker's back pay award."); *Kawasaki Motors Mfg. Corp., U.S.A. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988) ("The employee is not required to seek or retain a job more onerous than the job from which he or she was discharged."). If an interim job is not substantially equivalent to the one that was lost, a claimant's subjective reasons for declining or quitting it are irrelevant. *See Lundy Packing Co.*, 286 NLRB 141, 145 (1987) (because interim position was not substantially equivalent, "it is unnecessary to make a separate determination on whether [employee's] quitting his job . . . was justified"), *enforced*, 856 F.2d 627 (4th Cir. 1988).

As the Board recognized in this case, whether two jobs are substantially equivalent depends on "various criteria, such as pay, working conditions, job duties, commutes, and work locations." (JA.302.) *See NLRB v. Oregon Steel Mills, Inc.*, 47 F.3d 1536, 1539 (9th Cir. 1995) ("The words 'substantially equivalent' cover many things, including rate of pay, hours, working conditions, location of the work, kind of work, and seniority rights." (ellipses and quotation omitted)); *L.B. & B. Assocs., Inc.*, 346 NLRB 1025, 1027 (2006).

"The burden of proving [a] willful loss of earnings is always upon the employer," *Oil, Chem. & Atomic Workers*, 547 F.2d at 603, "and *not* upon the General Counsel of the Board who represents the interests of the discriminatee," *Madison Courier*, 472 F.2d at 1318. Further, in evaluating whether a willful loss has occurred, the Board resolves any doubts in favor of the innocent employee and

against the party who committed the unfair labor practice. *See Madison Courier*, 472 F.2d at 1321; *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966).

B. The Board Reasonably Applied Established Law in Finding that Parke Did Not Willfully Incur Losses by Declining a Job that Was Not Substantially Equivalent to His Position with the Association

Applying the foregoing principles, the Board reasonably found that “the Commonwealth corrections officer position Parke declined was not substantially equivalent to his assistant grievance manager position with the [Association].” (JA.302.) As the Board found (JA.302), because the jobs were not equivalent, Parke’s decision not to return to his former job as a corrections officer had no impact on his backpay entitlement.

The facts underlying the Board’s finding are uncontested. From 1996 to 2002, Parke earned \$2630 biweekly as a corrections officer for the Commonwealth of Pennsylvania. (JA.301; JA.73, 75.) His duties involved the care, custody, and control of inmates at a medium-security corrections facility. (JA.301; JA.74.) In May 2002, the Commonwealth granted him an indefinite leave of absence to work for the Association. (JA.299, 301; JA.71, 77-78.) For more than eight years, the Association employed Parke as an assistant grievance manager. (JA.299, 301; JA.71, 77-78.) In that capacity, he earned \$3580 biweekly and his job was to enforce the collective-bargaining agreement between the Association and the

Commonwealth. (JA.301; JA.72-73, 75-77.) When the Association discharged him in August 2010, Parke had “an automatic right of reinstatement to [his] former job[] as [a] corrections officer[] with the Commonwealth.” (JA.299.) He did not return to his former corrections officer job, however, and instead retired from the Commonwealth. (JA.301; JA.78-79, 81, 83-86.)

The Board found—and the Association does not dispute—that the assistant grievance manager position from which Parke was discharged and the corrections officer position to which he declined to return were not substantially equivalent because they dramatically “differed in pay, working conditions, and job duties.” (JA.302.) The pay differential of over 25 percent, standing alone, rendered the two positions legally nonequivalent. *See Arlington Hotel Co., Inc.*, 287 NLRB 851, 854 (1987) (employee did not fail to mitigate by declining interim job that paid 25-percent less than his prior position), *enforced in pertinent part*, 876 F.2d 678 (8th Cir. 1989). *Accord NLRB v. Thalbo Corp.*, 171 F.3d 102, 114-15 (2d Cir. 1999) (employee had no obligation to accept position that paid \$6.00 per hour instead of the \$7.38 she had previously received); *The Lorge School*, 355 NLRB 558, 561-62 (2010) (employee who had earned \$75,000 a year as an instructional supervisor was not obligated to seek teacher positions paying \$55,000 to \$65,000).

In addition, Parke’s working conditions and duties as a business agent were fundamentally different from those he would have confronted as a corrections

officer. As the Board noted (JA.302), his position with the Association “was wholly an office job,” involving interactions with corrections officers and management, while his position with the Commonwealth “was an active job that involved the care, custody, and control of prison inmates.” (JA.302; JA.76-77.) “Without question,” as the Board found (JA.302), those working conditions and job duties were not comparable. *See NLRB v. Midwestern Pers. Servs., Inc.*, 508 F.3d 418, 424 (7th Cir. 2007) (former truck driver’s backpay was not reduced because he voluntarily quit interim employment that “required him to cut timber, which was more dangerous than the position he [previously] held”); *Oregon Steel*, 47 F.3d at 1540 (position that was “all indoors” at a factory was not substantially equivalent to position working “outdoors in rain gear, removing mud and waste from car bodies”); *Lord Jim’s*, 277 NLRB 1514, 1516 (1986) (backpay was not affected by employee’s decision to quit interim employment as a “busboy and bathroom cleaner” that was more “difficult, strenuous, and dirty” than her prior job as a cocktail waitress).

Because the two positions differed starkly in pay, duties, and working conditions, the Board properly concluded that “Parke did not fail to mitigate by declining to return to his corrections officer job.” (JA.302.)⁵

⁵ The Association erroneously asserts (Br.40-41) that the Board also relied on Parke’s adoption of special-needs children or the Commonwealth’s denial of his

C. The Association's Contrary Arguments Are Unsupported

There is no merit to the Association's argument (Br.39-42) that the Board should have departed from its precedent and reduced Parke's backpay because he declined nonequivalent employment as a corrections officer. The Association makes a series of claims about the relationship between that job and the assistant grievance manager position, but it fails to show that the facts it asserts have legal significance, much less that they required the Board to disregard the settled principles it applied.

Before addressing the Association's claims, we emphasize what the Association has not argued here. The Association has never raised—and has therefore waived—any argument that Parke's backpay should be reduced for any reason other than his decision not to return to work as a corrections officer. *See* above pp.23-24 (discussing Section 10(e)); *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not raised in opening brief are waived). In particular, it has not argued that Parke's search for equivalent employment was inadequate or that he "lower[ed] his sights" too soon when he took a job in the healthcare industry. *See Madison Courier*, 472 F.2d at 1320-21 (discussing the principle that employees, after unsuccessfully searching for

request for an eight-week leave of absence. Although the Board noted those facts (JA.301), they did not enter into its legal analysis (JA.302).

equivalent positions for a reasonable time, may be required to settle for lower-paying work).⁶

Yet, in making the argument that Parke should have taken the corrections officer job, the Association does not actually maintain what the law requires it to maintain—that the corrections officer job was a substantially equivalent position. Indeed, if the Association believed that to be the case, it also would have challenged the Board’s award of backpay to the four other employees—Dyches, Hood, Hurd, and Miller—based on the 2012 Order’s specific direction that backpay would end for all of the employees at “the time they secured equivalent employment elsewhere.” (JA.28.) Conspicuously, however, the Association has never argued that they lost their entitlement to further backpay by returning to corrections officer positions when the Association discharged them from their grievance-handling jobs.

Turning to the assertions the Association does make, they fail to advance its case. The Association first notes that Parke’s assistant grievance manager position “was not a tenured appointment.” (Br.39.) But that merely means that Parke’s

⁶ In any event, the record in this case would not support either argument. *See Ryder Sys.*, 983 F.2d at 713 (“A backpay claimant is under no duty to remain in the same industry as that from which he was discharged”); *Woodline Motor Freight, Inc.*, 305 NLRB 6, 9 (1991) (“The acceptance of a lesser paying position by a discriminatee standing alone and with no proof that he has failed to engage in a reasonably diligent search for interim employment does not toll backpay.”); JA.79, 85 (discussing Parke’s job search).

job—like most jobs in the United States—was at will. That fact has no bearing on what kind of job he was required to take when he was discharged from it.

Equally irrelevant is the Association’s observation (Br.40) that Parke continued to accrue certain benefits from the Commonwealth of Pennsylvania throughout his eight-year career with the Association. It is undisputed that, pursuant to an unusual contractual arrangement, the Commonwealth effectively subsidized the Association by allowing employees of the latter to accumulate benefits during their leaves of absence from the former. But the Association concedes that the two entities “are *not* the same employer.” (Br.41 (emphasis in original).) And it does not—and cannot—dispute the Board’s finding (JA.302) that corrections officer and assistant grievance manager are not the same job. Contrary to the Association’s erroneous claim that Parke remained a corrections officer at all times and merely took on “additional duties” (Br.40), the record is clear that when he became an employee of the Association his job changed completely. Regardless of what benefits the Association had negotiated for Parke to receive from the Commonwealth, the Association employed Parke to do a job with different pay, duties, and working conditions than the one he had previously performed. Therefore, when it discharged him, Board law did not require him to resume a distinct, nonequivalent job he had done nearly a decade earlier.

It does not matter that the Commonwealth guaranteed Parke his former job if he wanted it back. If that right of reinstatement is viewed as an unconditional offer of nonequivalent employment, he was entitled to refuse it. *See G&T Terminal Packaging Co., Inc.*, 356 NLRB 181, 190 (2010) (“[T]he fact that a discriminatee rejects a job offer is not, by itself, sufficient to toll backpay if the job offered is not substantially equivalent to the job lost.”), *enforced*, 459 F. App’x 19 (2d Cir. 2012). The fact that he had performed the job in the past makes no difference to this analysis. *See Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 624-25, 632 (2006) (employee was not required to respond to offer of recall to prior job on nonequivalent terms), *enforced*, 508 F.3d 418 (7th Cir. 2007); *Madison Courier*, 472 F.2d at 1314 (employee did not willfully incur losses by declining to return to position distant from her home, even though she had worked that very job in the past); *The Lorge School*, 355 NLRB at 559, 561-62 (employee was not required to seek teaching positions that were not substantially equivalent to the supervisory position from which she was discharged, even though she had previously worked as a teacher).

Alternatively, if the arrangement between the Association and the Commonwealth is construed to mean that Parke, in some sense, automatically became a corrections officer again when the Association discharged him and then “he quit” (Br.41), he was fully entitled to do so. As shown above, Board law

permitted him to resign from the nonequivalent position as a corrections officer at any time. *See Churchill's Supermarkets*, 301 NLRB at 725 (“where interim employment positions are not substantially equivalent to the position from which the discriminatee was discharged, the discriminatee-claimant may quit the nonequivalent employment without loss of pay”), and other cases cited above, pp.32-33.

The Association also observes (Br.42 n.7) that the other employees it discharged along with Parke went back to work for the Commonwealth. But the fact that others chose to return to jobs that were not substantially equivalent does not mean that Parke was required to do so as well. *See Madison Courier*, 472 F.2d at 1314 n.18 (noting that “[t]he fact that [some employees] were willing to undertake the excessive commuting burden associated with a [distant] position does not negate the propriety of the Board’s conclusion” that employees were not required to do so).

In sum, the Board properly applied settled law to the undisputed facts in finding that Parke did not willfully incur losses by declining a job that was not substantially equivalent to the one he had lost. That finding, “being neither unreasonable nor contrary to precedent, commands the deference of the [C]ourt.” *Tualatin Elec.*, 253 F.3d at 720.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Association's petition for review and enforcing the Board's Supplemental Order in full.

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April 2017

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

PENNSYLVANIA STATE CORRECTIONS)	
OFFICERS ASSOCIATION,)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1328, 16-1396
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	ii
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	ii
Section 10(a) (29 U.S.C. § 160(a))	ii
Section 10(c) (29 U.S.C. § 160(c))	ii
Section 10(e) (29 U.S.C. § 160(e))	iii
Section 10(f) (29 U.S.C. § 160(f)).....	iv

NATIONAL LABOR RELATIONS ACT

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a

labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such

additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

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

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Respondent/Cross-Petitioner)	04-CA-037652

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), its brief contains 9,717 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben

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Dated at Washington, DC
this 11th day of April 2017

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 11th day of April 2017