Oral Argument Not Yet Scheduled

No. 15-72878

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; CULINARY WORKERS UNION LOCAL 226; BARTENDERS UNION LOCAL 165

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

ARCHON CORPORATION

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

TABLE OF AUTHORITIES

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

TABLE OF AUTHORITIES

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

TABLE OF AUTHORITIES

Statutes: **Page(s)**

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

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union

Local 165 ("the Union") to review a Board Decision and Order issued against Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corp. d/b/a Sahara Hotel and Casino ("the Companies"), on September 10, 2015, and reported at 363 NLRB No. 7. (ER 3-8.)[1] The order is final under Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(f) ("the Act"). Archon Corporation, which identifies itself as the respondent below, has intervened in support of the Board.[2] The Board had subject matter jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the Act, 29 U.S.C. §160(a), which authorizes the Board to prevent unfair labor practices. The Court has jurisdiction pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), and venue is proper because the Union conducts business in Las Vegas, Nevada. The Union's petition for review, which was filed on September 17, 2015, is timely because the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its broad remedial discretion, and complied with the Court's remand order, in fashioning a remedy that includes cease-and-desist, rescission, bargaining, notice-posting, and notice-mailing directives, but not

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[1] "ER" references are to the Excerpts of Record the Union filed with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] *See* Archon's October 9, 2015, Motion to Intervene at 1.

dues reimbursement, which is not necessary to effectuate the purposes of the Act in the unique circumstances of this case.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. The Prior Decisions of the Board and the Court

The Companies, operators of hotels and gambling casinos, were owned by Sahara Gaming, Inc., until they were sold in the fall of 1995. The Union and the Companies or their predecessors had collective-bargaining agreements by which they agreed to deduct union dues from the paychecks of employees who had signed forms authorizing such deductions, and to remit those dues to the Union.[3] After these agreements expired on May 31, 1994, the parties negotiated unsuccessfully for successor agreements through the end of that year. The Companies abided by the agreements' checkoff provisions until June 1995, when they ceased checking off dues after notifying the Union that they intended to do so. The Companies thereafter redirected amounts, which had previously been deducted and remitted to the Union, to the employees as part of their regular wages. (ER 113, 120-21.)

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[3] The state of Nevada, where the casinos are located, is a "right-to-work" state. As a result, under Section 14(b) of the Act (29 U.S.C. § 164(b)), the agreements legally could not include a union-security provision requiring union membership as a condition of employment.

After investigation of charges filed by the Union, the Board's General Counsel issued an unfair-labor-practice complaint alleging that the Companies violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally ceasing deductions for union-membership dues from its employees' paychecks after the expiration of the agreements covering those employees. After a hearing, an administrative law judge issued a recommended decision and order dismissing the complaint. The General Counsel and the Union filed exceptions. (ER 3.)

On July 7, 2000, the Board issued its first decision and order, affirming the judge's dismissal of the complaint, and finding that the Companies acted lawfully by unilaterally ceasing union dues checkoff after the agreements expired. *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) ("*Hacienda I*") (ER 3, 113-23.) In so ruling, the Board relied on settled law that a dues-checkoff obligation expires with the agreement that created it, even absent a contractual union-security clause. (ER 3, 114-15 (citing *Bethlehem Steel Co*., 136 NLRB 1500, 1502 (1962), *aff'd in relevant part sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir. 1963); *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1988)).)

On the Union's petition for review, this Court held that it could not discern the Board's rationale for excluding dues checkoff from the usual rule against unilateral

changes in the absence of a union-security clause. *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 580, 586 (9th Cir. 2002). Accordingly, the Court remanded the case to the Board so that it could "articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it." *Id.*

Subsequently, the Board issued a Supplemental Decision and Order in *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) ("*Hacienda II*") (ER 3-4, 109-12), reaffirming the complaint dismissal based on language in the dues-checkoff clauses of the parties' agreements explicitly limiting the checkoff obligation to the duration of those agreements. On review, the Court rejected the Board's finding that this contractual language amounted to a clear and unmistakable waiver of the Union's right to bargain over the cessation of dues checkoff, and again remanded the case for further proceedings. *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1082 (9th Cir. 2008).

Thereafter, the Board issued a Second Supplemental Decision and Order. *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) ("*Hacienda III*") (ER 4, 103-08). The four participating Board members were equally divided on the remanded issue, which required the Board to offer a new explanation for its existing rule or overrule that precedent. Lacking a three-member majority to do either, the Board unanimously agreed that its decision-making practices required it to apply

existing precedent, namely, *Bethlehem Steel* and *Tampa Sheet Metal*. On that basis, the Board again dismissed the complaint. (ER 4, 103, 106.)

Upon the Union's petition for review of *Hacienda III*, the Court again remanded the case to the Board. *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9th Cir. 2011). The Court first found that while the Board's traditions may require three votes to reverse or establish precedent, the Board had not provided a reasoned explanation for its rule excluding dues checkoff from the unilateral-change doctrine in right-to-work states. *Id.* at 872. Turning to the merits, the Court held that "in a right-to-work state, where dues checkoff does not exist to implement union security, dues checkoff is akin to any other term of employment that is a mandatory subject of bargaining" and may not be unilaterally terminated after contract expiration. *Id.* at 876. The Court thus found that the Companies violated Section 8(a)(5) and (1) of the Act by ceasing dues deduction without bargaining to impasse. *Id.*

To the remedy this violation, the Court remanded the case to the Board "to determine what relief is warranted." *Id.* The Court did not instruct the Board as to the type of relief that was warranted. *Id.*

II. The Board's Decision and Order

On remand, the Board (then-Member Miscimarra and Members Hirozawa and McFerran) accepted as the law of the case the Court's finding that the

Companies violated the Act by unilaterally ceasing dues checkoff. (ER 3.) The Board then turned to the Court's instructions to determine "what relief is warranted," and fashioned the remedy it believed "best effectuates the policies of the Act under the unique circumstances of this case." (ER 3.) In so doing, the Board ordered the Companies to cease and desist from unilaterally terminating dues checkoff upon the expiration of their agreements with the Union, and from in any like or related manner interfering with employees' rights under the Act; to bargain with the Union before making unilateral changes to employees' terms and conditions of employment; to rescind the unlawful cessation of dues checkoff; and to post a remedial notice, and mail it to employees if the Companies have gone out of business or closed their facilities. (ER 4, 5-6.)

The Board (Member Hirozawa dissenting) found, however, that make-whole relief, namely, reimbursement to the Union of dues the Companies had failed to check off, was not warranted in the unusual circumstances in this case. (ER 4-5.) As the Board explained, properly rationalized or not, the rule in *Bethlehem Steel* had been in place for decades, and the Companies had relied on it in ceasing dues checkoff following contract expiration in 1995. At that time, the Companies could not have foreseen that the protracted litigation in this case would culminate in a contrary ruling by this Court some 16 years later. The Board concluded that in these circumstances, it "would not be appropriate to order make-whole relief,

which would carry with it a requirement that compound interest be paid on all amounts due." (ER 5.) In addition, the Board found such relief was not necessary to effectuate the Act's purposes because the Companies "correctly believed they were following settled Board law" when they acted in 1995, and there was "no reason to believe that they w[ould] not continue to abide by Board law." *Id.*

Thereafter, the Union filed a motion for reconsideration with the Board, seeking make-whole relief and arguing that the cease-and-desist and notice-posting remedies were ineffective. On July 26, 2016, the Board (then-Member Miscimarra and Member McFerran; Member Hirozawa concurring) denied the motion, finding that it did not identify "any material error" or demonstrate "extraordinary circumstances warranting reconsideration." (ER 1-2.) The Board also rejected the Union's claim that the Board's remedial order was "meaningless and moot." *Id.* As the Board explained, even assuming, as the Union asserted, that the Companies had ceased operations, the order "accounts for such a situation" by requiring them to mail the notice to all affected employees—a remedy that the Board has long considered appropriate because it directly "informs employees of their rights under the Act and the violations that have occurred." (ER 1-2 n.2.)

SUMMARY OF ARGUMENT

On remand, the Board adopted as the law of the case the Court's finding that the Companies violated the Act by ceasing dues checkoff upon contract expiration

without bargaining to impasse. Moreover, the Board fully complied with the Court's instruction to determine "what relief is warranted." Specifically, the Board issued a remedial order that redresses the violation by ordering the Companies, as well as their successors and assigns, to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with employees' rights under the Act; to rescind the unlawful cessation of dues checkoff; to bargain on request with the Union before making any changes in terms and conditions of employment; and to post, and if necessary mail, remedial notices to all current and former employees.

The Board also properly exercised its broad discretionary authority over remedial matters in determining that make-whole relief—ordering the Company to reimburse the Union for the dues it failed to deduct—was not necessary to effectuate the purposes of the Act in the unusual circumstances of this case. As the Board explained in making this determination, when the Companies ceased deducting dues upon contract expiration in 1995, they correctly believed their conduct was lawful under the decades-old *Bethlehem Steel* rule in effect at the time. As the Board also found, the Companies had relied on that then-settled rule, and could not anticipate that protracted litigation in this case would culminate in the Court modifying the rule some 16 years later. The Board also correctly noted that there was no reason to believe the Companies would not continue to abide by

Board law. In so ruling, the Board acted squarely within its discretion to tailor the remedy to the particular facts of the case.

The Union fails to meet its heavy burden of showing that the Board's remedial order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act. The Union observes that the Board has in the past awarded dues reimbursement for the violation found here, but the Board is not required to mechanically award the same remedy in the unusual circumstances of this case. The dues-reimbursement cases cited by the Union do not address those circumstances, much less require such relief here. The Union also errs in positing that the Companies were notified the law might change in 2002, when this Court remanded the case to the Board to explain how *Bethlehem Steel* applies in the context of a right-to-work state. That remand order did not tell the parties how the rule might change, and it came seven years after the Companies ceased dues deductions in 1995.

The Union gains no more ground in arguing that the cease-and-desist and notice-posting remedies ordered by the Board are useless or moot. The Supreme Court has long recognized the salutary effect of those remedies. Moreover, the Board's order adequately addresses the Union's concern that the Companies might not be able to post remedial notices if they have ceased or sold their operations. In that event, the order—which also runs against the Companies' successors and

assigns—specifically requires them to mail the notices to all employees. The Union's claims that the Companies are incapable of effectuating the Board's chosen remedies, and that there may be no successor available to do so, are premature. The record at present contains so such findings. Instead, it is settled that those are matters to be addressed at the compliance stage of these proceedings. Moreover, the Court is jurisdictionally barred from considering the Union's attacks on the viability of the bargaining and checkoff-restoration orders because the Union never raised them to the Board.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION, AND COMPLIED WITH THE COURT'S REMAND, IN FASHIONING A REMEDY THAT SEEKS TO EFFECTUATE THE POLICIES OF THE ACT IN THE UNIQUE CIRCUMSTANCES OF THIS CASE

A. The Board Has Broad Discretion In Fashioning Remedies

Section 10(c) of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator to cease and desist from the unlawful conduct "and to take such affirmative action . . . as will effectuate the policies of [the] Act . . . ." 29 U.S.C. §160(c). The Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *see also California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir.

1996) (Board's remedial order is reviewed only for "clear abuse of discretion"). Because of its special expertise, the Board is afforded broad discretion in formulating remedies that will further the purposes of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Accordingly, the Board's choice of remedy must be enforced unless the Union shows "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord California Pac. Med.*, 87 F.3d at 308.

Moreover, in determining the appropriate remedy, the Board has a duty and broad discretionary authority under Section 10(c) to "tailor its remedies to varying circumstances on a case by case basis, in order to ensure that its remedies are congruent with the facts of each case." *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1132 (2003). *Accord Sure-Tan, Inc.*, 467 U.S. at 900 (the Board has "broad discretion" to tailor the remedy to the unfair labor practice found); *NLRB v. Mackay Radio & Telegraph, Co.*, 304 U.S. 333, 348 (1938) ("[T]he relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress."); *Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 840 (9th Cir. 1981) (the "question the Board must answer in each case" is "whether in the particular circumstances [the remedy] will effectuate the policies of the Act"); *Excel Case Ready*, 334 NLRB 4, 5 (2001) (Board has broad discretion to "fashion

a just remedy to fit the circumstances of each case it confronts") (internal quotations and citations omitted).

Accordingly, the Board is not required to provide the same relief, make whole or otherwise, in every case involving a certain violation, because the remedy that best effectuates the Act's purposes may vary with the particular circumstances. *See generally Shepard v. NLRB*, 459 U.S. 665, 670 (1983) (nothing in the Act "requires the Board to reflexively order that which a complaining party may regard as 'complete relief,'" and "the Board acted within its authority in deciding that a [dues] reimbursement order in this case would not effectuate the policies of the Act"); *NLRB v. Flite Chief, Inc.*, 640 F.2d 989, 992 (9th Cir. 1981) (make-whole relief "is not mechanically compelled by the Act"). Thus, the Supreme Court has cautioned that the Board should not habitually apply a remedy "without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 349 (1953). Likewise, as this Court has explained, even regarding the "normal" remedy for a violation, the Board must determine whether it will effectuate the Act's policies in the particular circumstances of the case. *Golden Day Schools, Inc.*, 644 F.2d at 840.

B. The Board Fully Complied with the Court's Remand, Which Appropriately Recognizes the Board's Discretion To Fashion an Appropriate Remedy

The Union errs in arguing that the Board's Order conflicts with the terms of the Court's remand. (Br. 31-35.) The Board did exactly what the Court directed it to do. To begin, the Board accepted as the law of the case the Court's finding that the Companies violated the Act by unilaterally ceasing to deduct union dues upon contract expiration. (ER 3.) Thus, contrary to the Union's claim, this is not a case where the Board "refused to apply the law announced" by the Court. (Br. 34.)

As to the remedy for that violation, the Court—consistent with the Board's broad remedial discretion under Section 10(c)—left it to the Board to determine "what relief is warranted." *Local Joint Executive Board of Las Vegas*, 657 F.3d at 876. Consistent with the Court's directive, the Board fashioned a remedy that it believed best effectuated the purposes of the Act given the particular circumstances of this case. (ER 5-6.) Thus, the Board redressed the violation by ordering the Companies, as well as its successors and assigns, to cease unilaterally terminating dues checkoff upon contract expiration, and from in any like or related manner violating employees' rights; to rescind the unilateral change; to bargain before making changes to employees' terms and conditions of employment; and to post (and, if applicable, mail) a remedial notice. (ER 5-6.)

Moreover, as further discussed below, the Board fully explained why dues reimbursement was not necessary to effectuate the Act's purposes in the particular circumstances of this case, where the Companies' conduct in ceasing to deduct dues was lawful under decades-old Board precedent, and they had no reason to anticipate that the law would be changed 16 years later. Nothing in the terms of the Court's remand impinges on the Board's discretion to tailor the remedy to those particular circumstances.[4] As shown below, the Board appropriately exercised that discretion, and therefore its choice of remedy should be affirmed.

C. The Board Properly Exercised Its Remedial Discretion by Issuing Cease-and-Desist, Bargaining, and Notice-Posting Orders, but Not Dues Reimbursement, in the Unusual Circumstances of this Case

Consistent with the Court's remand "to determine what relief is warranted," the Board fashioned a set of remedies that it believed would "best effectuate the policies of the Act under the unique circumstances of this case." (ER 3.) Thus, the Board directed the Companies, and their successors and assigns, to remedy the

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[4] It follows that, contrary to the Union's claim (Br. 34-35), this case is nothing like *Silverman v. NLRB*, where the Second Circuit specifically ordered back pay, the Board failed for over 5 years to effectuate that order by determining the amounts owed, and the court issued a writ of mandamus requiring the Board to determine each claimant's back pay award within 60 days. 543 F.2d 428, 429-31 (2d Cir. 1976) (per curiam). Here, in contrast, the Court did not mandate back pay or any specific remedy, and the Board has already complied with the Court's remand by issuing an appropriate remedial order.

unlawful cessation of dues checkoff by ceasing and desisting from the unfair labor practices found, and from in any like or related manner interfering with employees' rights under the Act; by bargaining with the Union and rescinding the unilateral change that eliminated dues checkoff; and by posting (and, if necessary, mailing to all affected employees) an appropriate notice. (ER 5-6.) This relief is indisputably appropriate to remedy the unlawful unilateral change that occurred here. *See* cases cited at ER 5 & n.23.

The Board also reasonably exercised its discretion to tailor the remedy to the particular circumstances of this case by determining that the additional remedy of dues-reimbursement was not warranted. In so doing, the Board acknowledged that in other cases involving an employer's unlawful failure to honor a dues-checkoff arrangement, it has ordered the employer to reimburse the union for those dues. *See* ER 5 & n.23, and cases cited therein. In the present case, however, the Board found that such relief was not necessary to effectuate the purposes of the Act. As the Board noted, when the Companies decided to cease honoring dues checkoff arrangements in 1995 after contract expiration, decades-old Board law held they could lawfully do exactly that, including in a right-to-work state like Nevada. *See Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962) (employer lawfully discontinued dues checkoff after the parties' contract expired), *aff'd in relevant part sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir.

1963); *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1988) (applying same rule in a right-to-work state where the contract could not lawfully contain a union-security clause). *See generally Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (noting the Board's long-held view that a dues-checkoff obligation does not survive contract expiration); *Xidex v. NLRB*, 924 F.2d 245, 254-255 (D.C. Cir. 1991) (same).

Thus, as the Board observed, employers, including the Companies here, relied on that longtime rule in deciding to cease honoring dues-checkoff arrangements following contract expiration. As the Board further noted, when the Companies acted in 1995, they could not have known that the rule they relied on would be overturned by this Court 16 years later (or by the Board another four years after that). (ER 5.) *See Lincoln Lutheran of Racine*, 362 NLRB No. 188, 2015 WL 5047778, *1, *11 (2015) (overturning the *Bethlehem Steel* rule, and applying that change prospectively only given, among other considerations, employers' longstanding reliance on the rule). In these unusual circumstances, the Board found that it would not be appropriate to order make-whole relief in the form of dues reimbursement, which would also have required the Companies to pay over 20 years of compound interest on all amounts due. (ER 5.) In so doing, the Board properly exercised its discretion, and followed the Supreme Court's guidance to consider "circumstances which may make" the remedy in a "particular

situation oppressive and therefore not calculated to effectuate a policy of the Act." *Seven-Up Bottling Co.*, 344 U.S. at 349. In addition, the Board found dues reimbursement was not necessary to effectuate the Act's purposes because the Companies "correctly believed they were following settled Board law" when they acted, and there was "no reason to believe" that they would not "continue to abide by Board law." *Id.*[5] *See NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 614 (1969) (in exercising its discretion to fashion an appropriate remedy, the Board may consider the extensiveness of the violations and the likelihood of their recurrence); *accord NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1350 (9th Cir. 1994) (deterrence is a relevant consideration in the Board's fashioning of a remedy).

The Board also observed (ER 5) that its reason for not requiring dues-reimbursement here—the Companies' detrimental reliance on the longstanding *Bethlehem Steel rule*—can be harmonized with its decision in *Lincoln Lutheran*, based on similar considerations, to apply its overturning of that rule prospectively only. *See Lincoln Lutheran of Racine*, 2015 WL 5047778, *1, *11, discussed at p. 17. Contrary to the Union's claim (Br. 32-34), there is nothing inappropriate in the Board fashioning the remedy based on a consideration—that the Companies'

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[5] Even if, as the Union claims (Br. 26), Archon and its predecessor violated the Act in two unrelated cases over 15 years ago, that would not undermine the Board's finding that there is no reason to doubt that they will abide by current dues-checkoff rules.

conduct was lawful under Board law in effect when they acted—that also bears on whether a new rule should be applied retroactively. The Union therefore gains no ground in asserting (Br. 29-30) that the logic of applying the newly announced rule in *Lincoln Lutheran* prospectively only "does not support . . . barring a [dues-reimbursement] remedy where a violation occurred."

D. The Union Fails To Show the Board Abused Its Remedial Discretion

In response, the Union fails to show, as it must, that the Board abused its broad discretion by tailoring the remedy to the particular facts of this case, and that its remedy is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). Accordingly, the Court should deny the Union's petition for review, and affirm the Board's choice of remedy.

The Union does not (and cannot) dispute that the Board has broad discretion to tailor the remedy to fit the particular case. It cites no case requiring the Board to award dues reimbursement against a party that correctly believed it was following the precedent in effect at the time it ceased deducting dues, and where that precedent remained in effect for many more years to come.

In particular, the Union gains no ground in citing cases where the Board ordered dues reimbursement but did not address the unusual circumstances present here. (Br. 9, 12-15.) Rather than "ignore" or "defy" that precedent, as the Union

incorrectly suggests (Br. 10-15), the Board acknowledged those cases but explained why a different result was warranted here. As noted, pp. 16-18, the Board found that dues reimbursement was not necessary to effectuate the Act's purposes because the Companies correctly believed they were following Board law when they ceased dues deduction. (ER 5.) The cited dues-reimbursement cases do not address this consideration, much less require the Board to award make-whole relief in the circumstances of this case. Accordingly, those cases do not undermine the Board's discretion to tailor the remedy to the particular circumstances present here. *See Diamond Walnut Growers, Inc.*, 340 NLRB at 1132 (Board has discretion to tailor remedy to particular facts), and cases cited at pp. 12-13. Nor was the Board obligated to award due reimbursement in the unusual circumstances here merely because it has awarded that remedy in other, more typical cases, such as where the employer failed to abide by a dues-checkoff provision in an existing agreement and the governing legal principle—that employers must abide by the terms of existing agreements—was not in dispute and has not changed.[6]

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[6] Other cases cited by the Union (Br. 9-15) are likewise distinguishable. For instance, in *Gadsden Tool, Inc.*, 340 NLRB 29, 30 (2003), the Board ordered dues reimbursement against an employer that had unlawfully refused to execute an agreement that included a dues-checkoff provision; the governing legal principle that such a refusal is unlawful was not in dispute and has not changed. The same was true in *West Coast Cintas Corp.*, 291 NLRB 152, 156 (1988), where the Board ordered dues reimbursement to remedy an employer's failure to adhere to a dues-checkoff provision in an unexpired agreement; such failure was and continues to

Undaunted, the Union goes so far as to insist that the Court order the Board "to issue the standard remedy in this case." (Br. 34.) However, this wrongly ignores the Board's statutory discretion and duty to tailor the relief to the particular facts of the case. To be sure, as the Union notes (Br. 11), one traditional consideration in fashioning a remedy is to place the parties in the position that they would have occupied absent the violation. The Union, however, cites nothing that would warrant stripping the Board of its discretion to rely on other appropriate considerations in fashioning a remedy better tailored to the circumstances of this case. *See generally NTEU v. FLRA*, 731 F.2d 703, 706 (9th Cir. 1984) (agency may, in its discretion, find that *status quo ante* remedies are unwarranted in the particular circumstances of the case, even if they are "usually" appropriate).

The Union also misses the mark—and relies on hindsight—in claiming (Br. 21-24) that the Companies knew or should have known that the decades-old Board rule they relied on in 1995 would be overturned by this Court in 2011. Its claims about the delays stemming from the protracted nature of this litigation are equally misguided. (Br. 24.) As shown, pp. 16-18, when the Companies acted in 1995, longstanding precedent permitted employers to discontinue dues checkoff upon contract expiration. Thus, the Board found that, regardless of whether that

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be unlawful. *See also Sommerville Constr. Co.*, 327 NLRB 514, 514 n.2 (1999) (same remedy for employer's unlawful repudiation of unexpired agreement containing a dues-checkoff provision), *enforced* 206 F.3d 752 (7th Cir. 2000).

precedent was well "rationalized or not," the Companies correctly believed it was the law when they acted. (ER 5.)[7] The litigation delays that ensued as the Union repeatedly challenged the Board's efforts to comply with the Court's remand orders do not alter that fact.

In an attempt to avoid these plain facts, the Union wrongly relies on subsequent events that arguably placed the validity of the rule in question years after the fact. It claims, for example, that the Court put the Companies on notice in 2002, when it remanded *Hacienda I* to the Board to explain or change the *Bethelem Steel* rule that the Companies had relied on 7 years earlier. (Br. 21, 24.) This exercise in hindsight does not, however, change the relevant fact that the Companies correctly believed they were following Board law as it stood when they acted back in 1995.

Nor is there any merit to the Union's claim that certain remedies awarded by the Board—the cease-and-desist and notice-posting orders—are moot, meaningless, or leave the Union without an effective remedy absent dues reimbursement. (Br. 15-19.) The Supreme Court has rejected a similar argument, stating that traditional cease-and-desist and notice-posting orders are "significant

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[7] The Union erroneously suggests (Br. 23) that *Hacienda I*, which issued in 2000, was the first case to apply the *Bethlehem Steel* rule to dues-checkoff agreements arising in a right-to-work state. As shown, pp. 16-17, the Board did that in *Tampa Steel*, a 1988 case.

sanctions" even absent make-whole relief, as an employer who violates them may be subject to contempt proceedings. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

As the Board explained, moreover, even if, as the Union asserts (Br. 16), the Companies have sold or ceased their operations, the Board's order accounts for that situation by requiring them (or their successors and assigns) to mail a copy of the notice to all employees. *See* ER 1-2, 6. As the Board observed (ER 1-2 & n.2), and the Union otherwise appears to concede (Br. 19), notice-mailing is an appropriate remedy because it informs employees of their rights under the Act and the violations that occurred. *Indian Hills Care Ctr.*, 321 NLRB 144, 144 (1996); *see also Parkview Hosp., Inc.*, 343 NLRB 76, 76 n.3 (2004).[8]

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[8] There is no merit to the Union's belated claims that the other affirmative requirements of the Board's order—to rescind the unlawful cessation of dues checkoff and bargain before changing terms and conditions of employment—are inappropriate. (Br. 17.) The Union never raised these claims to the Board in its motion for reconsideration, which instead addressed only the cease-and-desist and notice-posting remedies. Judicial review of those claims is therefore jurisdictionally barred by Section 10(e) of the Act, which provides: "No objection that has not been urged before the Board . . . shall be considered by the Court." 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008). In any event, the Board properly ordered these traditional remedies, which, unlike dues reimbursement, are appropriate in the circumstances of this case.

There is no more merit to the Union's claim that absent an order directing the Companies to reimburse the Union for dues that were not remitted under the checkoff provisions starting in 1995, the employees are left without a meaningful remedy. (Br. 28.) The Union's error is in suggesting that those employees have suffered significant losses as a result of the unilateral cessation of dues checkoff. (Br. 28.) As shown, when the Companies ceased dues checkoff, they redirected the amounts that would have been deducted back into the employees' paychecks. Doing so did not take money from employees, alter the dues they may have owed the Union, or prevent them from directly paying those dues to the Union.

The Union's remaining attacks on the Board's chosen remedies are premature because they raise issues to be addressed in a subsequent compliance proceeding. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984); *NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996). For example, the Union asserts that no party can carry out the remedies ordered by the Board because the Companies have been sold or ceased operations. (Br. 15-18.) The Board, however, has not yet made findings on those matters, which involve issues for a compliance proceeding. Moreover, the Board's order also runs against the Companies' officers, agents, successors, and assigns (ER 5), and despite the Union's claim (Br. 18), a determination has not yet been made as to whether there

is a successor that can implement the Board's remedies.[9] That issue, as well as the specific contours of bargaining, rescinding the unlawful cessation of dues checkoff, and posting or mailing notices, involves matters to be determined at the compliance phase. *See Sure-Tan, Inc.*, 467 U.S. at 902 (noting the Board's judicially-approved policy of using compliance proceedings to tailor the remedy to suit the individual circumstances of each case); *Katz's Delicatessen*, 80 F.3d at 771 (noting that compliance proceedings are particularly necessary where there is insufficient evidence in the record to determine how to best effectuate the remedial order).

[9] For example, there has been no finding whether Archon Corp., the intervenor before this Court, is a successor which can effectuate the remedial order.

CONCLUSION

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

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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May 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; CULINARY WORKERS UNION LOCAL 226; BARTENDERS UNION LOCAL 165	)	
Petitioners	)	No. 15-72878
v.	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	28-CA-013274
Respondent	)	
and	)	
ARCHON CORPORATION	)	
Intervenor	)	

STATUTORY ADDENDUM

TABLE OF CONTENTS

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

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) . . . .

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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 7;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) [Powers of Board generally] The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(c) [Reduction of testimony to writing; findings and orders of Board] . . . . 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 [subchapter] . . . .

* * *

(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 proceeding, as provided in section 2112 of title 28, United States Code [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 question 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 court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner 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; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 14 of the Act (29 U.S.C. § 164) provides in relevant part:

(b) [Agreements requiring union membership in violation of State law] Nothing in this Act [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

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Respondent	)	
and	)	
ARCHON CORPORATION	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 6,057 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
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UNITED STATES COURT OF APPEALS
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ARCHON CORPORATION	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth 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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