

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,
v. NO. 16-3415
EYM KING OF MISSOURI, LLC,
Respondent.

RESPONDENT’S RESPONSE TO THE ORDER TO SHOW CAUSE
REGARDING PETITION OF THE NATIONAL LABOR RELATIONS
BOARD FOR ADJUDICATION IN CIVIL CONTEMPT AND
FOR OTHER CIVIL RELIEF

Respectfully submitted,

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Dated March 22, 2018.

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Respondent EYM King of Missouri, LLC (“Respondent”) files this response to the Court’s Order dated February 28, 2018 to show cause why it should not be adjudged in civil contempt for failing to comply with the Court’s June 21, 2017 judgment, and respectfully shows the Court as follows:

I. BACKGROUND¹

1. On February 28, 2018, the National Labor Relations Board (“NLRB” or “Petitioner”)² filed its Petition for Adjudication in Civil Contempt and for Other Civil Relief (“Petition”). Respondent denies that it is in civil contempt.

A. RESPONDENT HAS ATTEMPTED TO MAKE TERRENCE WISE WHOLE PURSUANT TO THE COURT’S MANDATE, BUT THE UNDERLYING PARTIES HAVE FAILED TO COOPERATE.

2. The Court’s mandate issued on August 14, 2017³ granted enforcement of the NLRB’s prior order against Respondent⁴ to post a notice, submit a letter of expungement, pay backpay and offer to hire Terrence Wise unconditionally.⁵

¹Emails cited by date; time (if multiple emails on same date); exhibit number; and pin cite.

² Workers’ Organizing Committee – Kansas City (“**Union**”) and its counsel are referred to as the “**Underlying Parties**.”

³Mandate at 1, *EYM King of Missouri, LLC v. N.L.R.B.*, No. 16-3415 (8th Cir. Aug. 14, 2017).

⁴*EYM King of Mo., LLC v. N.L.R.B.*, 696 Fed. Appx. 759, 762 (8th Cir. 2017) (per curiam) (unpublished) (enforcing order).

⁵*EYM King of Mo., LLC*, 364 N.L.R.B. 33, at *3 (2016).

3. On August 30th, Compliance Officer Brett Huckell advised that the expungement letter should be sent to Wise’s attorney, Fred Wickham,⁶ who was also primary counsel for the Workers’ Organizing Committee – Kansas City (the “**Union**”).⁷

4. On September 5th, legal assistant for Respondent’s counsel forwarded the expungement letter to Wise through Wickham.⁸

5. On September 6th, Respondent’s counsel forwarded to Huckell a copy of the expungement letter, with a copy of the required posting.⁹ Respondent’s counsel also inquired about reinstatement because Huckell had been unable to contact Wise.¹⁰

⁶Email, August 30th Ex. 1-A, at 1. True and correct copies of the foregoing email and all of the documents contained in the Index are attached hereto and incorporated herein by reference for all purposes.

⁷See Official Reporters Record, Workers’ Organizing Committee –Kansas City’s Original Charge Against Employer Ex. 1-A, at ¶ 6, *EYM King of Mo., LLC v. Workers Org. Comm.—Kan. City*, Nos. 14-CA-148915, 14-CA-150321, 14-CA-150794 (N.L.R.B. Mar. 26, 2015) (signed by Wickham as “Attorney for WOC-KC”).

⁸Email, September 5th Ex. 1-B, at 1.

⁹Email, September 6th 10:04 A.M. Ex. 1-C, at 1.

¹⁰*Id.*

6. Also on September 6th, Huckell stated Wise was still interested in working for Respondent and that any offer of reinstatement should be sent directly to Wickham as Wise's attorney.¹¹

7. On September 11th, Respondent's counsel forwarded a new Certification of Posting to replace one found insufficient by the NLRB as the wrong color.¹² The NLRB gave Respondent credit back to the original posting date.¹³

8. The next day, Respondent's counsel spoke with Huckell about backpay and reinstatement.¹⁴ Huckell reluctantly estimated the amount of backpay at around \$14,000, equating to less than a year Wise's pay, while further conceding Wise had been working elsewhere.¹⁵ Given how little time Wise was out of work, the backpay estimate seemed high, especially since Wise's application to Respondent had limited his hours.¹⁶ Respondent considered disputing backpay, but also wanted to avoid additional adversarial proceedings.¹⁷

¹¹Email, September 6th 3:07 P.M. Ex. 1-D, at 1.

¹²Email, September 11th Ex. 1-E, at 1.

¹³*See id.* at 2, 3-4.

¹⁴Bracken Decl. Ex. 1, ¶ 9, at 3.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

9. Respondent's counsel also raised with Huckell front pay in lieu of reinstatement.¹⁸ Huckell conceded it had not been offered.¹⁹ Respondent's counsel meanwhile confirmed front pay in lieu of reinstatement in addition to any backpay was consistent with the Office of the General Counsel's Memorandum GC 13-02 issued January 13, 2013, allowing inclusion of front pay in NLRB settlements.²⁰ Moreover, the memo required the NLRB to communicate any front pay offers to the aggrieved individual.²¹ The NLRB's Casehandling Manual also requires: "[i]f the charged party wishes to know whether alleged discriminatees desire reinstatement and the amount of backpay due, every effort should be made to ascertain and convey this information."²²

10. Respondent knew all parties would benefit from avoiding any contest of backpay by offering to make Wise whole through both backpay and front pay in

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.* (citing N.L.R.B. Memorandum GC 13-02 (Jan. 9, 2013)).

²¹*Id.*

²²NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL, PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS § 10130.9 (Feb. 2017); *cf. id.* at § 10130.9 ("The Board agent should also obtain the position of any alleged discriminatees and any other individuals or entities . . .").

lieu of reinstatement. Pursuant to the NLRB's direction,²³ Respondent's counsel attempted to contact Wise's attorney, Wickham.²⁴

11. On September 22nd, Wickham finally spoke with Respondent's counsel.²⁵ Wickham stated he did not know if there was a specific amount that Wise would accept for backpay and front pay to make Wise whole and avoid any contest.²⁶ Over the phone, Respondent's counsel offered \$16,000 to resolve the disputed backpay and pay additional front pay in lieu of reinstatement.²⁷ Wickham responded he would convey the offer to Wise, but did not provide any immediate response.²⁸

12. On September 26th, Respondent's counsel followed up the oral offer with the same offer in writing.²⁹ On September 27th, Wickham responded he

²³See Email, August 30th Ex. 1-A, at 1.

²⁴See Email, September 27th Ex. 1-F, at 2.

²⁵Bracken Decl. Ex. 1, ¶ 11, at 3.

²⁶*Id.*

²⁷*Id.* at ¶ 11, at 3-4.

²⁸*Id.* at ¶ 11, at 4.

²⁹Email, September 27th Ex. 1-F, at 2.

would present the offer to his client and respond.³⁰ On October 5th, Wickham responded that his client was not interested in an offer without instatement.³¹

13. Respondent still felt such offers would be more desirable than continuing to litigate, so it increased the offer.³² On October 10th, Wickham responded Wise was not interested in an offer without instatement.³³

14. On October 16th, Wickham spoke with Respondent's counsel again.³⁴ Although Wickham was unable to provide any parameters for Wise to be instated Respondent's counsel relayed Respondent would check its schedules for instatement.³⁵ Wickham also admitted Wise was currently and had been working for another employer.³⁶ Wickham conceded most people would accept Respondent's offer. He further admitted he still did not know if there was a specific amount Wise would accept, while further indicating any such amount would be substantially higher than the current offer.³⁷ Such correspondence

³⁰*Id.* at 1.

³¹Email, October 5th Ex. 1-G, at 1.

³²*See* Email, October 10th Ex. 1-H, at 2.

³³*Id.* at 1.

³⁴Bracken Decl. Ex. 1, ¶ 15, at 4.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

reasonably indicated at the time Wise was taking a hard-bargaining position for more money and instatement would not necessarily make Wise whole.³⁸

15. As a result, on the afternoon of October 18th, Respondent again conveyed to Wickham a higher offer for backpay and front pay for Wise.³⁹ The next morning, Wickham responded Wise was still not interested in such an offer without instatement.⁴⁰

16. Finally, on October 26th, Respondent made another offer to Wickham for Wise.⁴¹ Wickham did not immediately respond.⁴² The same day, Pia Winston from the NLRB left a message for Respondent's counsel,⁴³ but Respondent's counsel was out of the office.⁴⁴

17. After Respondent's counsel returned to the office the next day, he sent an email in response to Ms. Winston's message explaining Respondent was still negotiating with Wise.⁴⁵ On October 30th, Ms. Winston responded Wise was not

³⁸*Id.*

³⁹*See* Email, October 18th Ex. 1-I, at 1.

⁴⁰*See* Email, October 19th Ex. 1-J, at 1.

⁴¹*See* Email, October 26th Ex. 1-K, at 1.

⁴²*See* Email, October 30th 11:12 A.M. Ex. 1-M, at 1.

⁴³*See* Email, October 30th 8:15 A.M. Ex. 1-L, at 1.

⁴⁴*Id.*; Bracken Decl. Ex. 1, ¶ 19, at 5.

⁴⁵Email, October 30th 8:15 A.M. Ex. 1-L, at 1.

interested in front pay.⁴⁶ She also stated, “the NLRB is now initiating contempt proceedings against [Respondent] EYM for its repeated failure to offer instatement.”⁴⁷ Then, three hours later, Wickham responded to the October 26th offer stating “[his] client’s position has not changed on this matter.”⁴⁸

18. However, later the same day, Respondent’s counsel again spoke with Wickham on the phone.⁴⁹ Wickham reiterated that his “**clients**” were not interested in an offer without instatement.⁵⁰ Because Wickham represented both the Union and Wise, Wickham’s response was ambiguous as to whose interests he actually represented and which client wanted instatement.⁵¹

19. To resolve these ambiguities, Respondent’s counsel followed up with an email to Wickham requesting clarification that Wise, individually, had indeed refused the final offer and not the Union.⁵² To clearly establish Wise’s interests, Respondent merely requested that Wise sign a letter documenting whether he

⁴⁶*Id.*; see Pet’r’s Pet. Adjudication Civil Contempt Ex. D., at 1-2.

⁴⁷Email, October 30th 8:15 A.M. Ex. 1-L, at 1.

⁴⁸Email, October 30th 11:12 A.M. Ex. 1-M, at 1.

⁴⁹Bracken Decl. Ex. 1, ¶ 21, at 6.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

rejected or accepted the offer.⁵³ Despite this simple request, Wickham chose not to respond, permitting these ambiguities to remain and bolstering the concern that Wise, individually, was not the one rejecting the offers.⁵⁴

20. On November 2nd, Respondent's counsel again emailed Wickham in an effort to resolve the ambiguities and concerns with Wickham.⁵⁵ Again, Wickham chose not to respond.⁵⁶

21. On November 3rd, Respondent's counsel responded to a prior email from Huckell⁵⁷ that Respondent did not intend to dispute the backpay at that time, and further informed Huckell about the ongoing attempts to confer with Wickham about settlement.⁵⁸

22. On November 13th, Respondent's counsel again attempted to resolve the continuing ambiguities and concerns.⁵⁹ Yet again, Wickham chose not to respond.⁶⁰

⁵³*Id.* at 1, 4.

⁵⁴Bracken Decl. Ex. 1, ¶ 22, at 6.

⁵⁵Email, November 2nd Ex. 1-P, at 1.

⁵⁶Bracken Decl. Ex. 1, ¶ 24, at 6.

⁵⁷Email, November 1st Ex. 1-O, at 1.

⁵⁸Email, November 3rd Ex. 1-Q, at 1.

⁵⁹Email, November 13th Ex. 1-R, at 1.

⁶⁰Bracken Decl. Ex. 1, ¶ 26, at 7.

23. Meanwhile, the NLRB chose not to follow up or initiate any contempt proceeding after Ms. Winston's email on October 30th.⁶¹

B. THE NLRB IS USING CONTEMPT IN THIS CASE FOR GAIN IN ANOTHER PROCEEDING.

24. Despite the prior equivocation on how to make Wise whole, the NLRB filed the Petition on February 28, 2018.⁶² The Court then issued the Order requiring Respondent to show cause within 21 days why it should not be held in contempt.⁶³

25. Meanwhile, the same parties in this case have a pending appeal set for submission on March 14, 2018 ("Pending Appeal") to determine whether several other employees had engaged in improper intermittent strikes.⁶⁴ The timing of the Petition is highly coincidental.

⁶¹*Id.* at ¶ 27, at 7.

⁶²*See generally* Pet'r's Pet. Adjudication Civil Contempt.

⁶³*See* FED. R. APP. P. 15(b)(2).

⁶⁴Respondent respectfully requests the Court take Judicial Notice of the Court's docket for the pending appeal styled *N.L.R.B. v. EYM King of Missouri, LLC*, number 17-1944, for documents filed in that proceeding, and facts capable of accurate and ready determination, including, for example, filing dates for pleadings referenced herein. FED. R. EVID. 201(c)(2); *see also Gustafson v. Cornelius Co.*, 724 F.2d 75, 79 (8th Cir. 1983) ("An appellate court may take judicial notice of a fact for the first time on appeal." (citing 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5110, at 524-25 (1977 & Supp. 1982))).

26. In the Pending Appeal, Wickham and his law firm, Wickham & Wood, LLC, represented the Union,⁶⁵ filed a brief on behalf of the Union,⁶⁶ and further sought to participate in oral argument on February 15, 2018.⁶⁷ Meanwhile, the NLRB specifically referenced Wise numerous times in its brief in the Pending Appeal.⁶⁸

27. On March 8, 2018, Respondent's counsel again attempted to contact Wickham via telephone.⁶⁹ Wickham chose not to return the call yet again.⁷⁰ Respondent's counsel followed up with an email again requesting that Wickham dispel the conflict of interest between his clients, the Union and Wise, by simply having Wise provide documentation rejecting Respondent's offer.⁷¹

⁶⁵See Appearance Intervenor Workers Organizing Committee Kan. City, *N.L.R.B. v. EYM King of Mo., LLC*, No. 17-1944 (8th Cir. June 19, 2017) (filed by Brian T. Noland for Wickham & Wood, LLC).

⁶⁶See Brief of Intervenor, *N.L.R.B. v. EYM King of Mo., LLC*, No. 17-1944 (8th Cir. Aug. 21, 2017).

⁶⁷See Argument Response Form, *N.L.R.B. v. EYM King of Mo., LLC*, No. 17-1944 (8th Cir. Feb. 15, 2018).

⁶⁸See Brief of Petitioner *N.L.R.B.* at 3. n.2, 5, 16, 22 n.4, *N.L.R.B. v. EYM King of Mo., LLC*, No. 17-1944 (8th Cir. June 19, 2017).

⁶⁹Bracken Decl. Ex. 1, ¶ 28, at 7.

⁷⁰*Id.*

⁷¹Email, March 8, 2018 6:48 P.M. Ex. 1-S, at 1.

28. Despite not responding for months, Wickham quickly responded within 30 minutes.⁷² He stated his clients were in agreement and there was no conflict.⁷³ Nevertheless, Wickham still sent nothing evidencing Wise's position to distinguish it from the Union's as requested to dispel any conflict.⁷⁴

29. As a result, Respondent's counsel again requested from Wickham confirmation **directly** from Wise that he would prefer to leave his current employment elsewhere to be instated with Respondent, rather than accept the offered backpay and front pay in lieu of instatement.⁷⁵ Again, Wickham did not respond.⁷⁶

30. Respondent stands ready to pay backpay and unconditionally offer instatement to Wise.⁷⁷ However, Wise has never directly accepted or rejected Respondent's final offer sent to Wickham for backpay and front pay in lieu of

⁷²See Email, March 8, 2018 7:15 P.M. Ex. 1-T, at 1.

⁷³*Id.*

⁷⁴*See id.*

⁷⁵Email, March 9, 2018 Ex. 1-U, at 1.

⁷⁶Bracken Decl. Ex. 1, ¶ 30, at 7.

⁷⁷*Id.* at ¶ 31, at 7.

instatement to make Wise whole.⁷⁸ As a result, no final backpay determination has ever been made.⁷⁹

31. Oddly, the NLRB took no action after October 30th until now,⁸⁰ coincidentally just before arguments in the Pending Appeal between the NLRB and the same Respondent, in which the Union has intervened represented by the same counsel that has been representing Wise.

II. ARGUMENTS & AUTHORITIES

A. THE LEGAL STANDARD GOVERNING SANCTIONS FOR CIVIL CONTEMPT.

32. “[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt.”⁸¹ As stated in *Shillitani v. United States*, a federal court addressing contempt must exercise “the least possible power adequate to the end proposed.”⁸² “The contempt power is a most potent weapon, and therefore it must be carefully and precisely employed.”⁸³ Further, “[c]ivil contempt is

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*See id.* at ¶¶ 27, 31, at 7.

⁸¹*Spallone v. United States*, 493 U.S. 265, 276 (1990); *accord Taylor v. Finch*, 423 F.2d 1277, 1279 (8th Cir. 1970) (citing 18 U.S.C. § 401; FED. R. CIV. P. 70; *United States v. United Mine Workers*, 330 U.S. 258, 302-03 (1947)).

⁸²384 U.S. 364, 371 (1966) (quoting *Anderson v. Dunn*, 19 U.S. 204, 203-31 (1821)) (citing *In re Michael*, 326 U.S. 224, 227 (1945)).

⁸³*Mahers v. Hedgepeth*, 32 F.3d 1273, 1275 (8th Cir. 1994), *quoted in Indep. Fed’n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998).

‘remedial in nature and designed both to coerce obedience and to compensate the complainant for losses sustained’⁸⁴ One of the goals of contempt power is “to ensure that litigants do not anoint themselves with the power to adjudge the validity of order to which they are subject.”⁸⁵

33. A party seeking civil contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order.⁸⁶ The moving party must establish: (1) the court order was violated; (2) the order allegedly violated was valid and lawful; (3) the order was clear, definite, and unambiguous; and (4) the alleged contemnor was able to comply.⁸⁷ As the Supreme Court has held, “[a] court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.’”⁸⁸

34. Where it is undisputed that the alleged contemnor has violated a court order, the burden of production shifts to the alleged contemnor to show compliance

⁸⁴*Chao v. McDowell*, 198 F. Supp. 2d 1093, 1098 (E.D. Mo. 2002) (quoting JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 65.80 (3d ed. 1999)).

⁸⁵*Chi. Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 504 (8th Cir. 2000) (citing *United Mine Workers*, 330 U.S. at 290 n.56).

⁸⁶*Id.* at 505 (citing *Cooper*, 134 F.3d at 920).

⁸⁷*See, e.g., Am. Airlines, Inc. v. Allied Pilots Ass’n*, 228 F.3d 574, 581 (5th Cir. 2000); *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1241 (9th Cir. 1999).

⁸⁸*Turner v. Rogers*, 564 U.S. 431, 442 (2011) (quoting *Hicks v. Feiock*, 485 U.S. 624, 638 & n.9 (1988)).

is presently impossible.⁸⁹ The alleged contemnor must demonstrate: “(1) that they are unable to comply, explaining why ‘categorically and in detail,’”⁹⁰ (2) that their inability to comply was not “self-induced,”⁹¹ and (3) that they made “in good faith all reasonable efforts to comply.”⁹² Once the alleged contemnor makes this demonstration, the burden of production shifts back to the initiating party to prove the alleged contemnor has the ability to comply; “[a]nd once a civil contemnor complies with the underlying order, he is purged of the contempt and is free.”⁹³

35. The Court should not hold Respondent in civil contempt for its alleged violation of this Court’s judgment. Even assuming that the NLRB were able to satisfy its initial evidentiary showing by clear and convincing evidence, Respondent can show that it was unable to comply owing to Wise’s counsel.

B. COMPLIANCE WITH THE COURT’S JUDGMENT IS PRESENTLY IMPOSSIBLE.

36. The NLRB is seeking contempt for Respondent allegedly failing to comply with the Court’s judgment to instate Wise for employment. As set forth in

⁸⁹See *id.* (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)).

⁹⁰*Chi. Truck Drivers*, 207 F.3d at 506.

⁹¹*In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803-04 (1st Cir. 1991), *quoted in Chi. Truck Drivers*, 207 F.3d at 506.

⁹²*Commodity Futures Trading Comm’n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992), *quoted in Chi. Truck Drivers*, 207 F.3d at 506.

⁹³*Rogers*, 564 U.S. at 442 (citing *Feiock*, 485 U.S. at 633); *accord Wellington Precious Metals, Inc.*, 950 F.2d at 1529 (citing *Combs v. Ryan’s Coal Co.*, 785 F.2d 970, 984 (11th Cir. 1986) (“The party seeking the contempt citation retains the ultimate burden of proof . . .”); *In re Battaglia*, 653 F.2d 419, 423 (9th Cir. 1981)).

the accompanying declaration, Respondent has produced sufficient evidence to show that compliance with the judgment is presently impossible for reasons beyond its control. The evidence shows that Respondent was (1) unable to comply, (2) the inability was not self-induced, and (3) Respondent made all reasonable efforts to comply.

37. First, Respondent is categorically unable to comply with the judgment as Petitioner has failed to demonstrate Wise, individually, seeks reinstatement rather than retaining his current employment.⁹⁴ In the labor context, it is unlawful for either an employer or a labor organization to threaten, coerce, or restrain an employee, engaged in commerce, to cease doing business with another employer.⁹⁵ This obligation is separate from and in addition to the employer's obligation to offer reinstatement for unlawfully discriminating against an employee.⁹⁶

38. It is undisputed Wise has been employed elsewhere. He testified at the original hearing he had another job. His counsel, Fred Wickham, confirmed this. As courts have recognized, the NLRB's compliance provisions would have

⁹⁴See *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1240-41 (9th Cir. 1999), cited in *Chi. Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 506 (8th Cir. 2000).

⁹⁵29 U.S.C. § 158(b)(4)(i)-(ii)(B), (D).

⁹⁶See *N.L.R.B. v. Int'l Van Lines.*, 409 U.S. 48, 50-51 (1972).

the effect of coercing Wise to cease doing business with his current employer and start doing business with Respondent.⁹⁷

39. Significantly, it does not appear from the underlying ALJ hearing that either the NLRB or Wise was even seeking the remedy of reinstatement. Nonetheless, without considering Wise's private interest in his current employment, the ALJ unilaterally ordered Respondent to reinstate Wise.

40. In fact, during opening statement at the ALJ hearing, the General Counsel stated:

In order to remedy the refusal to hire Terrence Wise, the General Counsel is seeking a remedy as set forth in *paragraph 12 of the Consolidated Complaint*⁹⁸ that Wise be reimbursed for all search for work and work-related expenses regardless of whether he received interim earnings in excess of these expenses or not at all during a given quarter or during the overall back pay period.⁹⁹

Nowhere in the opening statement did the General Counsel seek reinstatement of Wise; and the Consolidated Complaint referenced in the opening statement likewise did not request reinstatement.¹⁰⁰ Instead, the Consolidated Complaint

⁹⁷See *N.L.R.B. v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977); *Associated Gen. Contractors v. N.L.R.B.*, 514 F.2d 433, 437 (9th Cir. 1975).

⁹⁸“**Consolidated Complaint**” refers to Exhibit 1-EE in Trial Transcript entitled Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, *EYM King of Mo., L.L.C. v. Workers' Org. Comm. –Kan. City* consolidating Charge Nos. 14-CA-148915, 14-CA-150321, 14-CA-150794, filed on June 24, 2015 by the General Counsel.

⁹⁹Trial Transcript of Record at vol. 1 Ex. 4, 19:1-19:12.

¹⁰⁰See *id.* at vol. 1, 17:1-19:12.

sought for Wise only remedies of a notice reading and an order requiring reimbursement for all expenses.¹⁰¹ Nowhere did the Consolidated Complaint seek reinstatement of Wise.¹⁰²

41. Moreover, although the Union sought reinstatement in its original charge, it amended its charge to omit reinstatement. “It is well-established that an amended complaint supersedes an original complaint and renders the original complaint without legal effect.”¹⁰³ In its original charge specifically regarding Wise, the Union explicitly requested “injunctive relief pursuant to Section 10(j) in the form of immediate reinstatement and other appropriate relief to return the employee to the position, salary, benefits and working conditions to which he is entitled.”¹⁰⁴ However, the amended charge omitted any request for injunctive relief in the form of immediate reinstatement.¹⁰⁵

¹⁰¹Official Reporters Record, Consolidated Complaint & Notice of Hearing General Counsel Ex. 1-EE, at pt. 12, 6, *EYM King of Mo., LLC v. Workers Org. Comm.—Kan. City*, Nos. 14-CA-148915, 14-CA-150321, 14-CA-150794 (N.L.R.B. June 24, 2015).

¹⁰²*See id.*

¹⁰³*In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000) (citing *Washer v. Bullitt Cty.*, 110 U.S. 558, 562 (1884)); accord 29 U.S.C. § 160(j); see 29 U.S.C. § 107; cf. *Franklin v. Kan. Dep’t of Corr.*, 160 Fed. Appx. 730, 734 (10th Cir. 2005) (“An amended complaint supersedes the original complaint and renders the original complaint of no legal effect.” (citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991); *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir. 1990))).

¹⁰⁴Union’s Original Charge Ex. 1-A, *supra* note 7, at ¶ 2.

¹⁰⁵Official Reporters Record, Union’s First Amended Charge Against Employer Ex. 1-I, at ¶ 2, *EYM King of Mo., LLC v. Workers Org. Comm.—Kan. City*, No. 14-CA-148915 (N.L.R.B. April 22, 2015).

42. As the Original Charge seeks injunctive relief in the form of immediate reinstatement¹⁰⁶ and the amended charge contained no request for such relief,¹⁰⁷ the Board did not have the power to issue an injunction outside of the complaint. Under 29 U.S.C. § 107, Congress mandated:

No court of the United States *shall have jurisdiction to issue a temporary or permanent injunction* in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) *in support of the allegations of a complaint.*¹⁰⁸

This holding clearly derives from the Due Process Clause of the Fifth Amendment to ensure procedures protect the private interests of a party, and provide notice to the party.¹⁰⁹

43. Under the Due Process Clause, federal courts must consider whether the administrative procedures are constitutionally sufficient, analyzing the governmental and private interests affected, requiring consideration of three distinct factors: (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safeguards,” and (3) the nature and magnitude

¹⁰⁶Union’s Original Charge Ex. 1-A, *supra* note 7, at ¶ 2.

¹⁰⁷*See* Consolidated Complaint Ex. 1-EE, *supra* note 101, at pt. 12, 6; Union’s First Amended Charge Ex. 1-I, *supra* note 105, at ¶ 2.

¹⁰⁸29 U.S.C. § 107; *see id.* at § 109.

¹⁰⁹*See Sioux City Foundry Co. v. N.L.R.B.*, 154 F.3d 832, 839 (8th Cir. 1998).

of any countervailing interest in not providing “additional or substitute procedural requirement[s].”¹¹⁰

44. The NLRB must provide specific findings to support the injunction factors.¹¹¹ Neither the ALJ nor the Board in the underlying decisions made specific findings for each factor. Without actual knowledge of Wise’s consent to instatement, Wise would be forced to work for Respondent by use or threat of coercion through the legal process.¹¹² Similarly, the Union would commit an unfair labor practice if it threatened or coerced Wise to resign from his current employment in order to work for Respondent.¹¹³

45. Wise has employment rights with his current employer. To Respondent’s knowledge, since 2015, Wise has never individually represented that he sought injunctive relief in the form of immediate instatement with Respondent. Rather, the only representation of such relief has come from the Union’s attorney,

¹¹⁰*Turner v. Rogers*, 564 U.S. 431, 444-45 (2011) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹¹¹*N.L.R.B. v. Mansion House Ctr. Mgmt. Corp.*, 473 F.2d 471, 473 (8th Cir. 1973); see *Osthus v. Whitesell Corp.*, 639 F.3d 841, 845 (8th Cir. 2011); *James River Flood Control Ass’n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982).

¹¹²See *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

¹¹³See, e.g., *Int’l Union of Elevator Constructors Local Union No. 8 v. N.L.R.B.*, 665 F.2d 376,380 (D.C. Cir. 1981); *N.L.R.B. v. Oil, Chemical & Atomic Workers Int’l Union, Local 6-578*, 619 F.2d 708, 713-14 (8th Cir. 1980); see also 29 U.S.C. § 158(b)(1)(A).

Wickham, who has refused to confirm through any documentation from Wise that Wise is seeking immediate reinstatement.

46. Second, Respondent's inability to comply was not "self-induced."¹¹⁴ Wickham represented that back pay and front pay presented an opportunity to make Wise whole and conceded there might be an amount Wise would accept. Moreover, "front pay is *the* alternative to the preferred equitable remedy of reinstatement."¹¹⁵ Since the NLRB omitted reinstatement from its requested remedies before the ALJ, it can be inferred that Wise did not want reinstatement.¹¹⁶ He was already employed. Combined with Wickham's representations, it was reasonable to conclude Wise was, in fact, seeking front pay in lieu of reinstatement, and bargaining to receive higher front pay.

47. Meanwhile, Wickham also created a reasonable suspicion that his interests conflicted with Wise. As the Union's attorney, Wickham was obligated to maintain a paramount duty of loyalty to the Union¹¹⁷ creating a conflict of interest to the extent Wickham represented the Union to the exclusion of Wise's

¹¹⁴*In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803-04 (1st Cir. 1991).

¹¹⁵*E.g., Mathieu v. Gopher News Co.*, 273 F.3d 769, 782 (8th Cir. 2001).

¹¹⁶Consolidated Complaint Ex. 1-EE, *supra* note 101, at pt. 12, 6.

¹¹⁷*See* MODEL CODE OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

interests.¹¹⁸ Wickham’s duties are further complicated by the Union’s duty of fair representation to its members as a whole, not to the individual member’s interests. To establish a violation of the duty of fair representation, a union’s conduct is arbitrary if “in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.”¹¹⁹

48. The Union does not necessarily have the same interests as Wise. The Union may desire to instate Wise to continue engaging in protected activity, whereas Wise may have accepted front pay in lieu of instatement. Combined with his employment elsewhere and the omission of any request for instatement as a remedy, it was not clear Wise even wanted to be instated.

49. Ultimately, Wickham did not dispel these conflicts. When presented with the simple alternative of demonstrating Wise’s will, as opposed to the will of his other client, the Union, he essentially refused. His persistent and unreasonable refusal indicated Respondent’s offers were not being presented to Wise. The timing of the Petition in relation to the Pending Appeal further evidences an

¹¹⁸*See id.* at 1.7(a).

¹¹⁹*Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 75 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, (1953))

ulterior motive.¹²⁰ All of the foregoing derives directly from the conduct of Wickham, who also has been Respondent's only access to Wise.

50. Third, Respondent has made "in good faith all reasonable efforts to comply."¹²¹ Given the circumstances, it is irrational to believe the Union's attorney was representing Wise's interests. Under the Model Rules of Professional Conduct, "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."¹²² Respondents have merely requested Wickham confirm Wise's interests as opposed to the Union's.¹²³ Based on Wickham's involvement in the Pending Appeal, Respondent is even more concerned that Wickham's loyalty is conflicted.¹²⁴ Because of this conduct beyond Respondent's control, it has been impossible for Respondent to resolve this matter in compliance with the court's judgment.

¹²⁰*N.L.R.B. v. Pinkerton's, Inc.*, 621 F.2d 1322, 1326 (6th Cir. 1980) (citing *Nat'l Food Stores, Inc.*, 186 NLRB 127, 75 LRRM 1292, 1293 (1970); *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 34 LRRM 1222, 1224 (1954)).

¹²¹*See Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992).

¹²²*See* MODEL CODE OF PROF'L CONDUCT r. 1.4 cmt. 7.

¹²³MODEL CODE OF PROF'L CONDUCT r. 4.1(a), (b); *see, e.g., In re Filosa*, 976 F. Supp. 2d 460, 466 (S.D.N.Y. 2013); *In re Steele*, 868 A.2d 146, 149 (D.C. 2005).

¹²⁴*See* MODEL CODE OF PROF'L CONDUCT r. 1.13(a).

III. CONCLUSION

51. In conclusion, Respondent has satisfied its burden of production by showing that compliance is presently impossible. First, the evidence shows Respondent categorically unable to comply because Petitioner has failed to demonstrate Wise, individually, sought instatement. Second, the evidence shows Respondent's inability to comply was not self-induced. The NLRB obfuscated the relief sought, and Wickham has intentionally refused to confirm Wise individually rejected Respondent's offers. Finally, the evidence shows Respondent has made all reasonable attempts to comply by persistently attempting to communicate with Wise.

52. Respondent has satisfied its burden of production by showing that compliance is presently impossible, and the burden of proof and production remains on Petitioner to prove by clear and convincing evidence that Respondent violated the Court's order.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,157 words. This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font size and Times New Roman style font.

/s/ Douglas C. Bracken

Douglas C. Bracken

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of each of the Respondent's Response to The National Labor Relations Board's Petition for Adjudication for Civil Contempt and Other Civil Relief, accompanying Exhibits, have this day been served via CM/ECF to Pia Winston, counsel for Petitioner.

/s/ Douglas C. Bracken

Douglas C. Bracken

Dated March 22, 2018.