

No. 18-70144

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**UNITE HERE LOCAL 11
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent**

**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)
Statement of jurisdiction	1
Statement of the issue	2
Relevant statutory provisions.....	2
Statement of the case.....	2
I. Findings of fact and procedural history.....	2
A. Background: The Board orders a remedy for Smoke House’s unfair labor practices, and the Court enforces.....	2
B. The parties litigate the amounts owed under the Board’s 2006 Order in compliance proceedings.....	4
II. The Board’s conclusions and order.....	4
Standard of review	5
Summary of argument.....	5
Argument.....	7
The Board’s 2006 Order does not provide for back payments to the Welfare Fund, and could not be modified to add such payments in compliance proceedings	7
A. The language of a Board order establishes the remedy in a particular case; compliance proceedings cover implementation of, but not challenge to, the remedy	8
B. The 2006 Order does not provide for Welfare Fund payments	10
1. Language and practice support the Board’s reading	10

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
2. Local 11 mistakes the issue and fails to honor the post-enforcement posture of the case.....	16
Conclusion	22

TABLE OF AUTHORITIES

Cases	Page(s)
<i>1849 Sedgwick Realty LLC,</i> 337 NLRB 245 (2001)	13,17
<i>Ace Green, LLC,</i> 356 NLRB 754 (2011)	13
<i>Achilles Construction Co.,</i> 290 NLRB 240 (1988)	19
<i>Antonino’s Restaurant,</i> 246 NLRB 833 (1979)	12
<i>Automotive Engineering Co.,</i> 317 NLRB No. 71 (1995)	13,14
<i>Carpenters Local 60 v. NLRB,</i> 365 U.S. 651 (1961).....	17
<i>Coca-Cola Bottling Co. of Buffalo, Inc.,</i> 299 NLRB 989 (1990)	13
<i>Coletti Color Prints, Inc.,</i> 204 NLRB 647 (1973)	9,10
<i>Dahl Fish Co.,</i> 299 NLRB 413 (1990)	8,9
<i>Designed Fire Systems, Inc.,</i> 303 NLRB No. 71 (1991)	13
<i>Ferro Mechanical Corp.,</i> 249 NLRB 669 (1980)	13
<i>Grondorf, Field, Black & Co.,</i> 318 NLRB 996 (1995)	11,14,17,18

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Hannah & Sons Construction Co.</i> , 341 NLRB No. 58, 2004 WL 587071 (2004)	9,21
<i>Harding Glass Co.</i> , 316 NLRB 985 (1995)	13
<i>Hen House Market No. 3</i> , 175 NLRB 596, 597 (1969)	13
<i>J.R.R. Realty Co.</i> , 301 NLRB 473 (1991)	19
<i>Kraft Plumbing & Heating, Inc.</i> , 252 NLRB 891 (1980)	12,14,15
<i>Kenmore Contracting Co.</i> , 289 NLRB 336 (1988)	11
<i>Lafayette Grinding Co.</i> , 337 NLRB 832 (2002)	13
<i>Lou's Produce, Inc.</i> , 308 NLRB 1194 (1992)	12,14
<i>Master Iron Craft Corp.</i> , 289 NLRB 1087 (1988)	19
<i>Manhattan Eye, Ear & Throat Hosp.</i> , 280 NLRB 113 (1986)	11
<i>Merryweather Optical Co.</i> , 240 NLRB 1213 (1979)	14

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>McKenzie Engineering Co.</i> , 326 NLRB 473 (1998)	12
<i>Mine Workers v. Eagle-Picher Mining & Smelting Co.</i> , 325 U.S. 335 (1945).....	9,21
<i>Mohawk Steel Fabricators, Inc.</i> , 289 NLRB 1193 (1988)	19
<i>NLRB v. JLL Restaurant, Inc.</i> , 325 F. App'x 577 (9th Cir. 2009)	3,20
<i>NLRB v. Nat'l Med. Hosp. of Compton</i> , 907 F.2d 905 (9th Cir. 1990)	5,7
<i>NLRB v. Trident Seafoods Corp.</i> , 642 F.2d 1148 (9th Cir. 1981)	8
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	8
<i>Rappazzo Elec. Co.</i> , 281 NLRB 471 (1986)	13
<i>Roman Iron Works, Inc.</i> 292 NLRB 1292 (1989)	19
<i>Ron Tirapelli Ford, Inc.</i> , 304 NLRB 576, 581 (1991)	13
<i>Ryan Iron Works, Inc.</i> , 345 NLRB 893 (2005)	12
<i>Scepter, Inc. v. NLRB</i> , 448 F.3d 388 (D.C. Cir. 2006).....	9,20

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Shawnee Ready-Mix Concrete & Asphalt Co.</i> , 363 NLRB No. 88 (2015)	13,14
<i>Starco Farmers Market</i> , 237 NLRB 373 (1978)	13
<i>Stone Boat Yard</i> , 264 NLRB 981 (1982)	11,14
<i>Stone Boat Yard v. NLRB</i> 715 F.2d 441 (9th Cir. 1983)	17
<i>Triple A Fire Protection, Inc.</i> , 315 NLRB 409 (1994)	12,14,15
<i>U.S. v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	21
<i>Virginia Mason Med. Ctr. v. NLRB</i> , 558 F.3d 891 (9th Cir. 2009)	5
<i>Willis Roof Consulting, Inc.</i> , 355 NLRB 280 (2010)	9
 Statutes:	 Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 10(a) (29 U.S.C. § 160(a))	1
Section 10(c) (29 U.S.C. § 160(c))	8
Section 10(f) (29 U.S.C. § 160(f))	1
 Regulations:	
29 C.F.R. § 102.52-.59	8

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Unite Here, Local 11 for review of the National Labor Relations Board’s Supplemental Decision and Order issued against Smoke House Restaurant, Inc. on December 15, 2017 (365 NLRB No. 166). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding under Section 10(f), 29 U.S.C. § 160(f). The petition is timely, as the Act provides no time limit for such filings.

Venue is proper in this circuit because the unfair labor practices occurred in Burbank, California.

STATEMENT OF THE ISSUE

Did the Board act within its discretion in interpreting its own order as not providing for back payments to Local 11's Welfare Fund?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the addendum to Local 11's brief.

STATEMENT OF THE CASE

This case involves the scope of the Board's remedial order in an earlier proceeding finding that Smoke House violated the Act. In subsequent compliance proceedings to determine the amount owed, the Board found that its order did not provide for back payments to Local 11's Welfare Fund.

I. FINDINGS OF FACT AND PROCEDURAL HISTORY

A. Background: The Board Orders a Remedy for Smoke House's Unfair Labor Practices, and the Court Enforces

Smoke House operates a restaurant in Burbank, California. Local 11 represents employees at the restaurant, and the most recent collective-bargaining agreement provided for health coverage through the Hotel and Restaurant

Employees Welfare Fund and required employer contributions to that fund. (ER 1.)¹

Upon purchasing the restaurant from a predecessor company in 2003, Smoke House told job applicants that it was going to operate non-union, refused to recognize and bargain with Local 11, and unilaterally discontinued the employees' health coverage. It ceased making payments to the Welfare Fund. Smoke House later implemented a new health plan, which charged higher premiums. (ER 2, 7.)

In a 2006 Decision and Order, the Board found that Smoke House's actions violated the Act, and ordered Smoke House to, among other things, bargain with Local 11 and post a remedial notice. It also directed Smoke House to:

On request of [Local 11], retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement ... and make employees whole for any losses they incurred as a result of unilateral changes made thereto.

347 NLRB 192, 208-09 (2006). The Court enforced the Board's order in an unpublished memorandum disposition. *NLRB v. JLL Restaurant, Inc.*, 325 F. App'x 577 (9th Cir. 2009).

¹ "ER" citations are to Local 11's Excerpts of Record. "Br." cites are to Local 11's opening brief to the Court.

B. The Parties Litigate the Amounts Owed under the Board's 2006 Order in Compliance Proceedings

In subsequent compliance proceedings before the Board, the Board's General Counsel issued a compliance specification alleging the amounts Smoke House owed under the 2006 Order. After a hearing, an administrative law judge determined that Smoke House owed \$223,201, plus interest, to 60 named employees for premiums and out-of-pocket medical expenses incurred as a result of Smoke House's unlawful unilateral changes to health coverage. The judge further found that Smoke House owed approximately \$1.25 million, plus interest, in back payments to the Welfare Fund. (ER 14-16.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 15, 2017, the Board (Chairman Miscimarra and Member Kaplan; Member McFerran, dissenting) issued a Supplemental Decision and Order directing Smoke House to pay the amounts found by the judge to the individual employees for premiums and medical expenses. Reversing the judge, the Board found that Smoke House did not owe back payments to the Welfare Fund, on the grounds that its 2006 Order did not provide for such relief.²

² Smoke House filed a petition for review involving the premiums and out-of-pocket expenses, but that case has settled and the issues it raised are no longer before the Court. Pursuant to the Court's order of June 14, 2018, Smoke House's petition was severed from this case.

STANDARD OF REVIEW

The Court has explained that, “[i]n interpreting the language of its own order, the Board, of course, enjoys a good deal of discretion.” *NLRB v. Nat’l Med. Hosp. of Compton*, 907 F.2d 905, 909 (9th Cir. 1990); *see also Virginia Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894 (9th Cir. 2009) (“[T]he Board’s interpretation of its own remedial order enjoys a good deal of discretion.” (internal quotations omitted)).

SUMMARY OF ARGUMENT

The Board acted well within its discretion to interpret the scope of its own orders in concluding that the 2006 Order does not provide for back payments to the Welfare Fund. No reference to the Welfare Fund appears in the 2006 Order. That omission bolsters the Board’s reading when compared with the Board’s typical practice—where the Board orders back payments to a union fund or benefit plan, it generally will do so expressly. Under those circumstances, the Board reasonably read the absence of any such language to mean the absence of that particular remedy. In addition, the generic language that the 2006 Order does contain is not the right fit. It speaks in terms of relief for employees, but says nothing about the Welfare Fund.

Contrary to Local 11’s characterization, the Board’s decision was not a departure from past cases holding that fund payments benefit employees. Those cases discuss the policy reasons for such a remedy, but do not involve the distinct

issue presented here of whether payments actually had been ordered. The Board's decision was a case-specific textual finding, not a doctrinal holding.

The omission of a fund-payment remedy from the 2006 Order may have been inadvertent, but it was an omission nonetheless. Because the Court already had enforced the 2006 Order as written, the Board was without jurisdiction to add that remedy during compliance proceedings. Whether the 2006 Order should have included fund payments thus is not the proper question before the Court. Any such challenge is beyond the scope of the case in this posture.

ARGUMENT

The Board's 2006 Order Does Not Provide for Back Payments to the Welfare Fund, and Could Not Be Modified To Add Such Payments in Compliance Proceedings

The single question in this case is whether a Board Order that did not mention Welfare Fund payments nonetheless required such payments. Given the language of the 2006 Order and the Board's typical practice when ordering such relief, the Board reasonably concluded that it did not.

At the outset, it is important to clarify two points. First, the Board's decision does not represent, as Local 11 asserts, a "change in policy" (Br. 19) or a "formulation of the law" (Br. 21) regarding the proper remedy where an employer fails to make fund payments. It is, instead, a case-specific textual finding as to what the 2006 Order provides. Nowhere does the Board hold that back payments to a fund would not be an appropriate remedy where that remedy was actually ordered. Local 11's arguments regarding the policy rationale for such payments, which comprise the bulk of its brief (Br. 12-22), are thus beside the point.

Second, any challenge to the lack of such relief in the court-enforced 2006 Order is beyond the scope of a compliance case. Ultimately, the question of whether such relief *should* have been ordered is not before the Court; the question is only whether it *was* ordered. With that proper understanding—and the "good deal of discretion" afforded the Board in interpreting its own orders, *Nat'l Med. Hosp.*,

907 F.2d at 909—the case becomes much narrower, and more discrete, than Local 11 presents it.

A. The Language of a Board Order Establishes the Remedy in a Particular Case; Compliance Proceedings Cover Implementation of, But Not Challenge to, the Remedy

When the Board finds that a party has violated the Act, it will issue an order specifying what actions that party must take to remedy the violation. 29 U.S.C. §160(c). Although the Act empowers the Board to order “such affirmative action ... as will effectuate the policies of [the Act],” it does not set forth any specific remedies for particular violations. 29 U.S.C. § 160(c); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (“The Act does not create ... a rigid scheme of remedies.”) No remedy is automatic, therefore—it must be ordered by the Board.

Parties can litigate issues related to implementation of the remedy in a subsequent compliance proceeding. 29 C.F.R. § 102.52-.59; *see also NLRB v. Trident Seafoods Corp.*, 642 F.2d 1148, 1150 (9th Cir. 1981) (describing compliance process). The scope of a compliance proceeding is to implement the remedy, not to challenge it. As the Board has explained, “the goal in the compliance stage ... is not to determine what the remedy should have been or should now be directed,” but, instead, to “apply what has already been decided.” *Dahl Fish Co.*, 299 NLRB 413, 424 (1990), *enforced mem.*, 1991 WL 86408 (D.C.

Cir. 1991). It is “a process narrowly limited to determining what the ordered relief in the original Decision and Order means and how it may be implemented.” *Id.* Issues that were, or could have been, litigated in the initial unfair-labor-practice proceeding thus are not properly raised in compliance. *Hannah & Sons Construction Co.*, 341 NLRB No. 58, 2004 WL 587071, at *2 (2004). Those limits on the scope of compliance proceedings are underscored where such proceedings occur after a court has enforced the underlying unfair-labor-practice order. At that point, the Board simply lacks jurisdiction to modify the court-enforced order. *See, e.g., Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006) (Board “cannot modify an order ... that the court has enforced in a final judgment”); *Willis Roof Consulting, Inc.*, 355 NLRB 280, 280 n.1 (2010) (same). The Board cannot recall such an order even “for the prescription of relief it deems more appropriate to enforce the policy of the [Act]” or on the grounds that “it made a mistake.” *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 336, 340 (1945).

The starting point for determining what relief an order provides is the language of the order itself. *See Coletti Color Prints, Inc.*, 204 NLRB 647, 648 (1973) (“Liability must be determined from the language of the Board’s Order in the original Decision in the case.”) Board decisions often contain a “Remedy” section describing the remedial obligations, which also provides guidance as to the

scope of relief ordered. Wherever located, a specifically worded remedy will put the liable party on clear notice as to its obligations, and the parties receiving relief on notice as to what they are owed.

B. The 2006 Order Does Not Provide for Welfare Fund Payments

Under the 2006 Order, Smoke House must pay several hundred thousand dollars to its employees to remedy its unlawful unilateral changes to their health benefits. Local 11 asks the Court to read into the Board’s Order the additional requirement that Smoke House make back payments to the Welfare Fund—relief that is never mentioned and that the Board itself found was not included. But neither the language nor a reading in light of the Board’s typical practice when ordering such relief suggest that fund payments were ordered here. And because the Court has already enforced the 2006 Order, any challenge to that omission is beyond the scope of this compliance case.

1. Language and Practice Support the Board’s Reading

The 2006 Order does not mention back payments to the Welfare Fund. As the Board noted (ER 3-4), no reference to the Welfare Fund appears anywhere in the Order itself or the Remedy section of the accompanying decision. That silence is compelling support for the Board’s conclusion that the Order does not encompass such relief. Because “[l]iability must be determined from the language of the Board’s Order,” *Coletti Color Prints*, 204 NLRB at 648, the lack of

language setting forth a remedy supports a finding of lack of liability for that remedy. The Board recognized that the omission of fund payments in this case may have been “inadvertent[.]” (ER 4), but it was an omission nonetheless.

The probity of that absence becomes even stronger when comparing the language of the 2006 Order with the Board’s typical practice. When the Board orders back payments to a union fund or benefit plan, it generally will do so expressly. Often, the Board will list such payments as a stand-alone aspect of the order, separate from any directive regarding relief to employees. In *Stone Boat Yard*, for example:

[W]e shall order [the employer] ... to transmit to the appropriate plans the contributions it has failed to make since its unlawful cessation of payments. In addition, we shall order [the employer] to make whole employees in the unit for the losses or expenses they suffered due to [employer’s] unilateral cessation of payments

264 NLRB 981, 983 (1982), *enforced*, 715 F.2d 441 (9th Cir. 1983); *see also Grondorf, Field, Black & Co.*, 318 NLRB 996, 1008 (1995) (same), *enforcement denied in part*, 107 F.3d 882 (D.C. Cir. 1997); *Kenmore Contracting Co.*, 289 NLRB 336, 340 (1988) (ordering employer to “(1) mak[e] whole all unit employees for any loss of wages and benefits ... (2) mak[e] required payments to the various trust funds”), *enforced*, 888 F.2d 125 (2d Cir. 1989); *Manhattan Eye, Ear & Throat Hosp.*, 280 NLRB 113, 115 (1986) (same), *enforced*, 814 F.2d 653 (2d Cir. 1987).

Sometimes, the Board characterizes such relief as a make-whole remedy for the fund, as distinct from make-whole relief for employees. *See, e.g., Ryan Iron Works, Inc.*, 345 NLRB 893, 900 (2005) (“make whole both the unit employees ... and the National Shopmen Pension Fund”); *McKenzie Engineering Co.*, 326 NLRB 473, 474 (1998) (“make whole all employees, the Union, and fringe benefit funds”), *enforced*, 182 F.3d 622 (8th Cir. 1999); *Triple A Fire Protection, Inc.*, 315 NLRB 409, 423 (1994) (“make whole the unit employees and fringe-benefit funds”), *enforced*, 136 F.3d 727 (11th Cir. 1998).

Other times the Board will add specific language concerning fund payments to a general grant of relief for employees. In some cases directing the employer to make employees whole, for example, it has stated explicitly that such relief in those cases would encompass both reimbursing employees and making back payments to the fund:

We shall order the [employer] to make whole its unit employees by making all pension and health and welfare contributions ... which have not been paid, and by reimbursing employees for any expenses ensuing from the [employer’s] failure to make such contributions

Lou’s Produce, Inc., 308 NLRB 1194, 1196 (1992), *enforced*, 21 F.3d 1114 (9th Cir. 1994); *see also Kraft Plumbing & Heating, Inc.*, 252 NLRB 891, 891 (1980) (“Make whole the employees ... by transmitting the contributions owed to the Union’s health and welfare, pension, industry and apprenticeship funds”), *enforced mem.*, 661 F.2d 940 (9th Cir. 1981); *Antonino’s Restaurant*, 246 NLRB

833, 843-44 (1979) (same), *enforced sub nom. NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981). The Board also has appended an express reference to fund payments to a general command that the employer restore terms and conditions of employment. *See, e.g., Ace Green, LLC*, 356 NLRB 754, 756 (2011) (ordering employer to “retroactively restore preexisting terms and conditions of employment, including wage rates and contributions to benefit funds”); *1849 Sedgwick Realty LLC*, 337 NLRB 245, 259 (2001) (“retroactively restor[e] preexisting terms and conditions of employment, including wage rates and benefit plans”).

The connecting theme in all those variations is, unlike here, an express order that the employer make back payments to a fund as part of the remedy.³ The 2006 Order’s lack of any type of express reference to fund payments thus makes it stand out among decisions that included such relief. It does not, by its terms, order such payments. Nor does it contain language about making the Welfare Fund whole. It

³ In addition to the cases already discussed above, almost every other case Local 11 cites expressly provides for fund payments, in contrast to the 2006 Order. *See Shawnee Ready-Mix Concrete & Asphalt Co.*, 363 NLRB No. 88 (2015); *Lafayette Grinding Co.*, 337 NLRB 832, 834 (2002); *Automotive Engineering Co.*, 317 NLRB No. 71 (1995); *Harding Glass Co.*, 316 NLRB 985, 986 (1995), *enforced in relevant part*, 80 F.3d 7 (1st Cir. 1996); *Ron Tirapelli Ford, Inc.*, 304 NLRB 576, 581 (1991), *remanded in part*, 987 F.2d 433 (7th Cir. 1993); *Designed Fire Systems, Inc.*, 303 NLRB No. 71 (1991); *Coca-Cola Bottling Co. of Buffalo, Inc.*, 299 NLRB 989, 993 (1990), *enforced*, 936 F.2d 122 (2d Cir. 1991); *Rappazzo Elec. Co.*, 281 NLRB 471, 483-84 (1986); *Ferro Mechanical Corp.*, 249 NLRB 669, 671-72 (1980); *Starco Farmers Market*, 237 NLRB 373, 377 (1978); *Hen House Market No. 3*, 175 NLRB 596, 597 (1969), *enforced*, 428 F.2d 133 (8th Cir. 1970).

uses the general language “make employees whole” and “retroactively restore terms and conditions of employment for the employees” without any clarification that, in this case, those phrases include fund payments. When interpreting its Order, the Board reasonably read the absence of such language to mean the absence of that particular remedy.

As the Board further explained (ER 3), cases ordering fund payments often contain a citation to *Merryweather Optical Co.*, 240 NLRB 1213 (1979), which explains how the Board will determine what interest an employer must pay on the amounts owed to a fund. *See, e.g., Lou’s Produce*, 308 NLRB at 1196 n.10 (citing *Merryweather Optical*); *Stone Boat Yard*, 264 NLRB at 983 n.6 (same); *Grondorf*, 318 NLRB at 1008 (same). The Board’s 2006 decision contains no such citation—further evidence that the 2006 Order does not include fund payments. Discussion of the interest owed on back payments to the Welfare Fund would have been an “indirect indication” (ER 4) that the payments themselves were owed. A *Merryweather Optical* cite thus could have clarified whether the general language in the 2006 Order covered fund payments. But as with the lack of express enumeration within the Order itself, there was no such clarification here.⁴

⁴ Local 11 identifies cases (Br. 26-27) that it says do not cite *Merryweather Optical*, but the orders in those cases expressly provided for fund payments. *See Shawnee Ready-Mix Concrete*, 363 NLRB No. 88; *Auto. Eng’g*, 317 NLRB No. 71; *Triple A Fire Protection*, 315 NLRB at 423; *Kraft Plumbing*, 252 NLRB at 891 (the latter two also actually do cite *Merryweather Optical*, *see Triple A Fire*

In addition to its contrast with other cases, the generic language that the 2006 Order does contain simply is not the right fit to say what Local 11 wants it to say. As the Board noted, an order to “make *employees* whole” or “retroactively restore the terms and conditions of employment of the *employees*” does not necessarily imply payments to the Welfare Fund—“an entirely different nonemployee recipient” (ER 4). As a practical matter, payments to a fund require something different of the employer than payments to employees. And it makes sense for an order to articulate specifically who will receive payments, so that all parties are on notice. As written, therefore, the 2006 Order requires Smoke House to restore employees to the position they would have been in vis-a-vis their discontinued health coverage by reimbursing them for the costs they incurred for substitute coverage. Without further language saying so, payments to the Welfare Fund are not also encompassed therein. Indeed, as the Board explained (ER 4), payments to the Welfare Fund now would not “restore” healthcare coverage to employees during the period in 2003-09 when Smoke House failed to make such payments.⁵

Protection, 315 NLRB at 422 n.3; *Kraft Plumbing*, 252 NLRB at 891 n.2). The lack of a *Merryweather Optical* citation in those cases is thus irrelevant; there is no need for an “indirect indication” (ER 4) of such relief where there is a direct one.

⁵ In arguing that fund payments fall under the “retroactively restore” command, Local 11 suggests (Br. 23-24) that the payments themselves, independently of the health coverage they finance, are “terms and conditions of employment.” None of

Similarly, Local 11’s assertion that employees have an interest in the future viability of the Welfare Fund (Br. 15-16, 18) does not make back payments now any more of a retroactive restoration. As Local 11 itself explains, that interest implicates employees’ “future needs” and “future benefits” (Br. 18), not the terms of their employment in the past. Regardless of any impact back payments would have on the viability of the Welfare Fund going forward, they would not “restore” that viability during the backpay period. Even if any of the 2006 Order’s language was ambiguous as to whether it included fund payments, moreover, such ambiguity leaves room for the Board’s exercise of discretion in finding it did not.⁶

2. Local 11 Mistakes the Issue and Fails To Honor the Post-Enforcement Posture of the Case

Against the weight of language, practice, and the deference owed to the Board’s reading, Local 11 nonetheless pushes for the 2006 Order to say something

the cases Local 11 cites for that point (Br. 24) analyze the status of fund payments separately from health coverage itself. Moreover, even if fund payments could be deemed “terms and conditions” in the abstract, the fact remains that the Board often will add an express reference to fund payments in cases where they are included within a general “retroactively restore” order. *See* p. 13. It did not do so here.

⁶ Local 11 contends (Br. 24) that the Board’s reading of “retroactively restore terms and conditions” in the 2006 Order as requiring only reimbursement for expenses gives it the same meaning as “make employees whole.” But Local 11’s position has the same effect. Under its view—that back payments to a fund are necessarily part of make-whole relief and restore employees’ terms and conditions of employment (Br. 19, 23)—“make employees whole” and “retroactively restore” would both mean make Welfare Fund payments.

that it does not say. But many of Local 11's arguments rely on cases that did not address the same issue presented here. And the remainder are policy arguments not implicated by this case and beyond the scope of a compliance proceeding in any event.

Local 11 mistakes the issue when it purports (Br. 17-19) to find a conflict between the Board's decision not to read fund payments into the 2006 Order and cases holding that such payments benefit employees who have an interest in the future viability of a fund. Those cases did not involve the textual issue presented here of whether payments had been ordered, but dealt instead with whether payments were a permissible remedy at all. Some of them articulate the reasons an employer that is ordered to make fund payments must do so even if it had provided substitute coverage. *See, e.g., Stone Boat Yard*, 715 F.2d at 446; *Grondorf*, 318 NLRB at 997. Others explain why, as a doctrinal matter, fund payments are remedial rather than punitive, and thus *can* be part of a make-whole order for employees. *See, e.g., Sedgwick Realty*, 337 NLRB at 247 ("ordering contributions to [a] fund ... is remedial because such contributions insure the fund's financial viability necessary to satisfy employees' future needs" (internal quotations omitted)); *see generally Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (explaining that Board remedies must be remedial, not punitive). But they do not hold that such relief is automatically encompassed within that phrase. That is,

those cases—and Local 11’s arguments based on them—go to the purpose that fund payments serve when they are ordered, not how to tell if they have been ordered.

Moreover, nothing in the Board’s decision questions the benefit to employees or the remedial nature of fund payments where such relief is actually ordered. The reason that the Board did not articulate an “explanation for ... departure” (Br. 12) from those principles is that it did not depart from them. If an order that includes back payments to a fund restores or makes employees whole as to their interest in the fund’s future viability, that point has no impact on the Board’s holding that the 2006 Order did not, in fact, include such payments. Contrary to Local 11’s suggestion (Br. 20-22), the Board’s decision also does not depart from the settled policy that where fund payments are actually ordered, an employer must pay them even if it provided substitute coverage and employees did not suffer direct monetary loss. *See, e.g., Grondorf*, 318 NLRB at 997. Again, there was no holding that such payments would not be required in that situation if they were ordered, just that the Board did not order them in this case. And Local 11’s concern that the 2006 Order would “offer no remedy” (Br. 21) for Smoke House’s unilateral change if the employees had not incurred expenses is misplaced, because the employees did have such expenses.

Although Local 11 is correct (Br. 25) that not every Board order that resulted in back payments to a fund expressly mentioned such payments, it cites no case where, like here, payments were directly challenged on those grounds. It points to *J.R.R. Realty Co.*, but the employer in that case challenged the propriety, rather than the existence, of such a remedy. The employer argued that it should not have to make such payments without evidence of direct employee losses as a result of the missed contributions. 301 NLRB 473, 473 n.7, 479 (1991), *enforced*, 955 F.2d 764 (D.C. Cir. 1992).⁷ The Board and parties appeared to assume that the terms of the underlying order encompassed fund payments. Just because an issue may have been overlooked in an earlier case does not mean that the Board must ignore it when raised, however. When squarely presented with the issue here, the Board declined to repeat that oversight. Such a determination was within its discretion to interpret the scope of its orders.

In addition, nothing in the Court's decision enforcing the 2006 Order suggests that the Court read the Order as including fund payments (Br. 27-28).

The Court stated in dicta that Smoke House had raised "challenges to certain

⁷ Similarly, the employer's argument in *Roman Iron Works, Inc.* (and related cases *Mohawk Steel Fabricators, Inc.*, 289 NLRB 1193, 1194 n.13 (1988); *Master Iron Craft Corp.*, 289 NLRB 1087, 1088 n.12, 1092 (1988); and *Achilles Construction Co.*, 290 NLRB 240, 241 n.12 (1988), *enforced mem.*, 875 F.2d 308 (2d Cir. 1989)) was that it had no contractual obligation to make payments during the backpay period and should not have to make back payments if it had provided substitute coverage. 292 NLRB 1292, 1293 n.15, 1296 (1989).

remedies ordered by the Board” that could be raised in compliance, 325 F. App’x at 579, but said nothing about fund payments. And none of the challenges that it mentioned go specifically to fund payments. *See id.* (“whether the expired collective bargaining agreement’s provisions regarding medical benefits had already been changed ..., whether Smoke House would have agreed to the terms of the previous collective bargaining agreement, and when it would have reached an agreement on new terms with the union or reached a bargaining impasse”). Rather, they also implicate the premiums and out-of-pocket expenses that indisputably are part of the 2006 Order. Even if Smoke House erroneously believed at the time that it was liable for fund payments (Br. 27), that misunderstanding is certainly not a binding interpretation of the 2006 Order’s language.

Ultimately, as noted above, the thrust of Local 11’s argument is that ordering back payments to a fund is good policy and that the Board should have done so in the 2006 Order. But, perhaps inadvertently, it did not. Even if that relief is “normal” (Br. 27), it is not automatic. Even if “proper” (Br. 28), or even “necessary” (Br. 20), it was not included here. And as discussed above, any argument that the omission was erroneous is beyond the scope of this compliance case, because the Court has already enforced the 2006 Order as written. *Scepter*, 448 F.3d at 391. Local 11 could have challenged the scope of the remedy in the prior unfair-labor-practice litigation, but did not do so—an omission that also

undermines its cause on appeal. *Hannah & Sons*, 2004 WL 587071, at *2; *see generally U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”). Thus, even if the Board “made a mistake” or Welfare Fund payments would have been “more appropriate to enforce the policy of the [Act],” *Eagle-Picher Mining*, 325 U.S. at 336, 340, it could not modify its court-enforced Order by reading into it additional relief that is not there. Given the posture of the case—as well as the language at issue and its own practice—the Board thus acted well within its discretion to interpret the scope of its own orders in finding that the 2006 Order’s silence as to back payments to the Welfare Fund means that the Order does not require such payments.

CONCLUSION

The Board respectfully requests that the Court deny Local 11's petition for review.

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June 2018

STATEMENT OF RELATED CASES

Smoke House Restaurant, Inc. v. NLRB, Case Nos. 18-70156 and 18-70379, involves a petition for review and cross-application for enforcement of the same Board Order at issue here. That case formerly was consolidated with this case, but has been severed and is in abeyance pursuant to the Court's order of June 14, 2018, pending formalization of a settlement agreement.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITE HERE LOCAL 11)	
)	
Petitioner)	No. 18-70144
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,995 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 25th day of June, 2018

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing 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 certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 25th day of June, 2018