

**Nos. 18-1083 & 18-1106**

---

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

---

**MIKE-SELL'S POTATO CHIP COMPANY**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**KIRA DELLINGER VOL**  
*Supervisory Attorney*

**MICAH P.S. JOST**  
*Attorney*

*National Labor Relations Board*  
**1015 Half Street, SE**  
**Washington, DC 20570**  
**(202) 273-0656**  
**(202) 273-0264**

**PETER B. ROBB**

*General Counsel*

**JOHN W. KYLE**

*Deputy General Counsel*

**LINDA DREEBEN**

*Deputy Associate General Counsel*

**National Labor Relations Board**

---

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

MIKE-SELL’S POTATO CHIP COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1083, 18-1106
	)	
v.	)	Board Case No.
	)	09-CA-094143
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

**A. Parties, Intervenors, and Amici:** Mike-sell’s Potato Chip Company (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (“the Union”), was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

**B. Ruling Under Review:** This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of a Supplemental Decision and Order issued by the Board on March 7, 2018, and reported at 366 NLRB No. 29.

**C. Related Cases:** The Supplemental Order fixes the amount of backpay the Company owes its employees under a prior Board order, reported at 360 NLRB 131 (2014), which the Court enforced, *Mike-sell's Potato Chip Co. v. NLRB*, 807 F.3d 318 (D.C. Cir. 2015). This case has not otherwise previously been before this or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570-0001

(202) 273-2960

Dated at Washington, DC  
this 18th day of December 2018

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	1
Statement of the issue .....	2
Statutes and regulations .....	3
Statement of the case.....	3
I. Facts and procedural history.....	4
A. The underlying unfair-labor-practice proceeding.....	4
B. The compliance proceeding.....	7
II. The Board’s Supplemental Decision and Order.....	9
Summary of argument.....	10
Standard of review .....	13
Argument.....	14
I. The Board acted within its discretion in excluding evidence in support of the Company’s argument that an alleged June 2013 impasse tolled its backpay .....	14
A. The Merits Order requires make-whole relief that continues to accrue until the Company restores the unlawfully changed terms.....	15
B. The Company’s request for modification of the Merits Order to eliminate or condition the restoration requirement is untimely .....	19
1. The Board cannot modify a court-enforced order in the compliance phase of a case.....	20

**TABLE OF CONTENTS (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
2. There is no merit to the Company’s claim that it did not have to challenge the Board’s remedy in the unfair-labor-practice proceeding .....	26
3. The Company cannot blame the Union, the General Counsel, or the administrative law judge for its own failure to timely seek a modified remedy .....	33
C. Sound policy considerations support the Board’s decision .....	37
II. The Board acted within its discretion in excluding evidence in support of the Company’s attempt to offset wages and sick pay owed with payments of other, non-equivalent categories of backpay .....	39
A. Established Board law prohibits offsets between non-equivalent elements of employee compensation.....	40
B. The Board reasonably found that the offsets the Company sought were impermissible .....	42
Conclusion .....	46

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alden Leeds, Inc. v. NLRB</i> , 812 F.3d 159 (D.C. Cir. 2016).....	21, 24
<i>Aroostook Cnty. Reg’l Ophthalmology Ctr.</i> , 332 NLRB 1616 (2001).....	33, 35
<i>Beta Steel Corp. v. NLRB</i> , 210 F.3d 374 (7th Cir. 2000) .....	35
<i>Boeing Co.</i> , 364 NLRB No. 24, 2016 WL 3213022 (2016) .....	32
<i>Burndy, LLC</i> , 364 NLRB No. 77, 2016 WL 4395865 (2016).....	23
<i>Cauthorne Trucking</i> , 256 NLRB 721 (1981).....	28
<i>Chelsea Indus., Inc. v. NLRB</i> , 285 F.3d 1073 (D.C. Cir. 2002).....	35
<i>City of New York v. Nat’l R.R. Passenger Corp.</i> , 776 F.3d 11 (D.C. Cir. 2015).....	36
<i>Cobb Mech. Contractors, Inc. v. NLRB</i> , 295 F.3d 1370 (D.C. Cir. 2002).....	21, 24, 27
<i>Colgate-Palmolive Co.</i> , 323 NLRB 515 (1997).....	29
<i>Coronet Foods, Inc. v. NLRB</i> , 981 F.2d 1284 (D.C. Cir. 1993).....	32

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Coronet Foods, Inc. v. NLRB</i> , 158 F.3d 782 (4th Cir. 1998) .....	31, 32
<i>Coronet Foods, Inc.</i> , 305 NLRB 79 (1991) .....	32
<i>Dean Gen. Contractors</i> , 285 NLRB 573 (1987) .....	32
<i>Dependable Maintenance Co.</i> , 274 NLRB 216 (1985) .....	28
<i>Dependable Maintenance Co.</i> , 276 NLRB 27 (1985) .....	28
<i>Dupuy v. NLRB</i> , 806 F.3d 556 (D.C. Cir. 2015) .....	20
<i>Fallbrook Hosp. Corp. v. NLRB</i> , 785 F.3d 729 (D.C. Cir. 2015) .....	13, 26
<i>FES</i> , 331 NLRB 9 (2000) .....	32
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (1964) .....	15, 17, 40
<i>Haddon House Food Prods.</i> , 260 NLRB 1060 (1982) .....	20
<i>Hood Indus.</i> , 273 NLRB 1587 (1985) .....	25

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Interstate Bakeries Corp.</i> , 360 NLRB 112 (2014).....	33
<i>K&amp;H Specialties Co.</i> , 163 NLRB 644 (1967), <i>enforced</i> , 407 F.2d 820 (6th Cir. 1969).....	40, 41, 43
<i>La Porte Transit Co., Inc. v. NLRB</i> , 888 F.2d 1182 (7th Cir. 1989).....	29
<i>Lear Siegler</i> , 295 NLRB 857 (1991).....	31, 32
<i>Lee's Roofing &amp; Insulation</i> , 280 NLRB 244 (1986).....	35
<i>Master Iron Craft Corp.</i> , 289 NLRB 1087 (1988).....	42
<i>Mastro Plastics Corp.</i> , 136 NLRB 1342 (1962).....	41
<i>Mike-sell's Potato Chip Co. v. NLRB</i> , 807 F.3d 318 (D.C. Cir. 2015).....	2, 3, 6, 7, 15, 16, 19, 26
<i>Mimbres Memorial Hospital</i> , 342 NLRB 398 (2004), <i>enforced sub nom.</i> , <i>NLRB v. Community Health Services, Inc.</i> , 483 F.3d 683 (10th Cir. 2007).....	30
<i>Mimbres Mem'l Hosp.</i> , 356 NLRB 746, <i>enforced in pertinent part sub nom.</i> , <i>Deming Hosp. Corp. v. NLRB</i> , 665 F.3d 196 (D.C. Cir. 2011).....	15, 17, 30, 31, 39

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Mining Specialists, Inc.</i> , 330 NLRB 99 (1999).....	41, 42, 43
<i>Niagara Mohawk Power Corp. v. Fed. Power Comm'n</i> , 379 F.2d 153 (D.C. Cir. 1967).....	13
<i>NLRB v. Cauthorne</i> , 691 F.2d 1023 (D.C. Cir. 1982).....	15, 27, 28
<i>NLRB v. Downtown BID Servs. Corp.</i> , 682 F.3d 109 (D.C. Cir. 2012).....	29
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	15, 17, 41
<i>NLRB v. Seven-Up Bottling Co. of Miami</i> , 344 U.S. 344 (1953).....	40
<i>NLRB v. Tamper</i> , 522 F.2d 781 (4th Cir. 1975).....	36
<i>NLRB v. U.S.A. Polymer Corp.</i> , 272 F.3d 289 (5th Cir. 2001) .....	23
<i>Pac. Coast Supply, LLC v. NLRB</i> , 801 F.3d 321 (D.C. Cir. 2015).....	14
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	40
<i>Porta-King Bldg Sys.</i> , 310 NLRB 539 (1993) <i>enforced</i> , 14 F.3d 1258 (8th Cir. 1994) .....	15, 17

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Pub. Serv. Co. of N.M. v. NLRB</i> , 843 F.3d 999 (D.C. Cir. 2016).....	13
<i>Quicken Loans, Inc. v. NLRB</i> , 830 F.3d 542 (D.C. Cir. 2016).....	13
<i>Ralphs Grocery Co.</i> , 360 NLRB 529 (2014), <i>enforced</i> , 669 F. App'x 397 (9th Cir. 2016) .....	25
<i>Reg'l Imp. &amp; Exp. Trucking Co., Inc.</i> , 323 NLRB 1206 (1997).....	20
<i>Rush Univ. Med. Ctr. v. NLRB</i> , 833 F.3d 202 (D.C. Cir. 2016).....	14
<i>Scepter, Inc. v. NLRB</i> , 448 F.3d 388 (D.C. Cir. 2006).....	13, 20, 21, 24, 27, 37, 38
<i>Scepter Ingot Castings, Inc.</i> , 341 NLRB 997 (2004).....	24
<i>Spectrum Health-Kent Cmty. Campus v. NLRB</i> , 647 F.3d 341 (D.C. Cir. 2011).....	21, 23
<i>Stanford Hosp. &amp; Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003).....	29
<i>Storer Communications, Inc.</i> , 297 NLRB 296 (1989) .....	28
<i>The Ruprecht Co.</i> , 366 NLRB No. 179, 2018 WL 4184226 (Aug. 27, 2018), <i>petition for review filed</i> , No. 18-1297 (D.C. Cir. Oct. 31, 2018) .....	38

**TABLE OF AUTHORITIES (cont'd)**

<b>Cases</b>	<b>Page(s)</b>
<i>Tuv Taam Corp.</i> , 340 NLRB 756 (2003) .....	32
<i>UC Health v. NLRB</i> , 803 F.3d 669 (D.C. Cir. 2015).....	13
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	21
<i>Va. Mason Med. Ctr. v. NLRB</i> , 558 F.3d 891 (9th Cir. 2009) .....	13
<i>Va. Sportswear, Inc.</i> , 234 NLRB 315 (1978) .....	43
<i>Wackenhut Corp. v. NLRB</i> , 178 F.3d 543 (D.C. Cir. 1999).....	13
<i>We Can, Inc.</i> , 315 NLRB 170 (1994) .....	25
<i>Whole Foods Mkt., Inc.</i> , 366 NLRB No. 77, 2018 WL 2041729 (May 1, 2018) .....	20
<i>Willis Roof Consulting, Inc.</i> , 355 NLRB 280 (2010) .....	20
<i>Windstream Corp.</i> , 352 NLRB 510 (2008), <i>incorporated by reference</i> , 355 NLRB 600 (2010) .....	25

**TABLE OF AUTHORITIES (cont'd)**

<b>Statutes</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 5
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	20, 26
Section 10(f) (29 U.S.C. § 160(f)).....	2
<b>Regulations</b>	<b>Page(s)</b>
29 C.F.R. § 102.48(b) .....	23
29 C.F.R. § 102.48(c).....	24

**GLOSSARY**

Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Opening brief filed by Mike-sell's Potato Chip Co.
Company	Mike-sell's Potato Chip Co.
JA	Joint Appendix
Merits Order	<i>Mike-sell's Potato Chip Co.</i> , 360 NLRB 131 (2014)
Supplemental Order	<i>Mike-sell's Potato Chip Co.</i> , 366 NLRB No. 29 (Mar. 7, 2018)
Union	General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957

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

---

**Nos. 18-1083, 18-1106**

---

**MIKE-SELL’S POTATO CHIP COMPANY**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Mike-sell’s Potato Chip Company to review, and on the cross-application of the National Labor Relations Board to enforce, the Supplemental Decision and Order reported at 366 NLRB No. 29 (Mar. 7, 2018) (“the Supplemental Order”) (JA 1-12), which concludes the compliance phase of this case before the Board. The Supplemental Order fixes the

amount of backpay the Company owes its employees under a prior Board order, reported at 360 NLRB 131 (2014) (“the Merits Order”) (JA 37-48), which the Court enforced, *Mike-sell’s Potato Chip Co. v. NLRB*, 807 F.3d 318 (D.C. Cir. 2015).<sup>1</sup>

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act. 29 U.S.C. § 160(a). The Supplemental Order is final and the Court has jurisdiction over this proceeding under Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that a petition for review may be filed in this Circuit, and that the Board may file a cross-application for enforcement. The Company’s petition and the Board’s cross-application are timely; the Act places no time limit on those filings.

### **STATEMENT OF THE ISSUE**

The issue is whether the Board acted within its discretion in declining to accept evidence in the compliance proceeding that could not affect the Company’s backpay liability based on the Board’s reasonable determinations that: (1) the Company’s liability continues to accrue until it complies with a court-enforced order to restore terms and conditions of employment it unlawfully changed; and (2)

---

<sup>1</sup> References preceding a semicolon are to the Supplemental Order; references that follow are to the Merits Order or the record in the compliance proceeding.

the Company cannot offset payments of nonequivalent forms of employee compensation to reduce its total backpay liability.

### **STATUTES AND REGULATIONS**

All applicable statutes and regulations are contained in the addendum to the Company's brief.

### **STATEMENT OF THE CASE**

In the underlying unfair-labor-practice proceeding, the Board found that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally implementing its collective-bargaining offers without first reaching agreement or a good-faith impasse in bargaining with the union that represents its employees, General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957. (JA 45-46.) To remedy that violation, the Board ordered the Company, on the Union's request, to restore the employment terms it had unlawfully changed, to maintain those terms until it reaches an agreement or impasse in bargaining with the Union, and to make the employees whole for the losses they suffered due to the unlawful changes. (JA 46-47.) The Court enforced the Board's Merits Order in full. *Mike-sell's*, 807 F.3d 318 (2015).

Thereafter, the Union requested that the Company restore, honor, and continue the pre-violation terms and conditions of employment. (JA 5; JA 156.)

The Company refused to do so. (JA 5; JA 156.) The General Counsel initiated a compliance proceeding, in which the Company took the position that an alleged bargaining impasse in June 2013 tolled its backpay obligation, and that certain payments it had made since its unlawful November 2012 implementation should offset the backpay owed. (JA 63-181.)

At the conclusion of the compliance proceeding, in the Supplemental Order now before the Court, the Board found that that the Company's make-whole obligation under the Merits Order continues to accrue because the Company never restored the pre-November 2012 terms, as that order requires. It rejected the Company's tolling and offset arguments as a matter of law and thus precluded the Company from adducing evidence to support them.

## **I. Facts and Procedural History**

### **A. The underlying unfair-labor-practice proceeding**

The Company manufactures and distributes snack foods. (JA 37.) The Union has long represented the Company's route-sales drivers, over-the-road drivers, and warehouse employees in two separate units. (JA 38.) The Company and the Union were parties to two collective-bargaining agreements covering the three groups of employees, which expired in October and November 2012. (JA 38.) On November 19, while the parties were in the process of bargaining for

successor collective-bargaining agreements, the Company declared an impasse in bargaining and unilaterally imposed its bargaining proposals. (JA 43.)

The Union filed an unfair-labor-practice charge, and the Board's Acting General Counsel issued a complaint on February 21, 2013, alleging that the Company had violated the Act by unilaterally implementing its proposals without first bargaining to a good-faith impasse with the Union. (JA 5; JA 37.) An administrative law judge held a hearing in April 2013. (JA 37.) He admitted evidence concerning bargaining sessions beginning in September 2012 and continuing until March 20, 2013. (JA 39-44.)

The judge issued a recommended order on June 18, 2013, finding that the Company's unilateral implementation of new terms and conditions of employment on November 19, 2012, violated Section 8(a)(5) of the Act. (JA 45-46.) In doing so, he concluded that the Company had failed to meet its burden of establishing its defense that the parties had reached a good-faith impasse prior to its unilateral implementation of its bargaining offer. The judge further rejected the Company's alternative argument that its obligation to make employees whole for the losses they suffered as a result of its unilateral changes was tolled by a subsequent February 2013 impasse. (JA 47 n.26.) Accordingly, the judge issued a recommended order requiring, among other things, that the Company, on the Union's request, "restore, honor and continue the terms of the collective-

bargaining agreements” that were in effect before the Company’s unilateral changes, “until the parties agree to a new contract or bargaining leads to a good-faith impasse.” (JA 5; JA 47.) The recommended order also required the Company to make the employees whole “for any and all loss of wages and other benefits incurred as a result of the [the Company]’s unilateral implementation of its full and final offers on November 19, 2012.” (JA 5; JA 47.)

On January 15, 2014, the Board issued the Merits Order, in which it rejected the Company’s exceptions to the administrative law judge’s decision, affirmed his recommended findings, and adopted his recommended order. (JA 37.) The Company did not file a motion for reconsideration of the Board’s remedy or a motion to reopen the record.

On January 30, 2014, the Union requested that the Company put the pre-November 2012 terms back in place. (JA 5; JA 156.) The Company refused to do so. (JA 5; JA 156.) Instead, the Company filed a petition for review of the Merits Order in this Court, and the Board cross-applied for enforcement. (JA 5.)

On December 11, 2015, the Court denied the petition for review and enforced the Merits Order. *Mike-sell’s*, 807 F.3d at 325. In a published opinion, the Court upheld the Board’s finding that the Company had violated the Act by unilaterally implementing proposed contract terms in November 2012. The Court agreed with the Board that the Company failed to establish that the parties had

reached impasse before the unilateral implementation. *Id.* at 324-25. The Court rejected as “insubstantial” the Company’s “fallback position” that “even if no impasse existed prior to its institution of its last offer, an impasse was created the next February.” *Id.* at 322-23.

### **B. The compliance proceeding**

After the Court enforced the Merits Order, the General Counsel issued a compliance specification setting forth the amounts of backpay the Company owed. (JA 110-27.) The specification alleged that “[t]he backpay period for all employees began November 17, 2012, and will continue until [the Company] restores, honors and continues the terms [that it unlawfully changed], or until an employee’s last day of employment, whichever comes first.” (JA 111.) The specification calculated the losses employees had suffered as a result of the Company’s unilateral changes to their wage and commission structures, the number of paid sick days for route-sales drivers, the amount of pay for stops made by over-the-road drivers, and the amount of employee pension contributions. (JA 111-12.)

In its answer, the Company disputed the alleged backpay period. (JA 155-81.) The Company admitted that the Union had requested, on January 30, 2014, that it “restore, honor, and continue the [prior] terms,” and that “the Company declined to do so.” (JA 156.) As an affirmative defense, however, the Company

asserted that it had no obligation to restore the prior terms because “the parties reached a good faith bargaining impasse on June 13, 2013”—that is, five days before the judge’s recommended order issued in the underlying unfair-labor-practice proceeding, and seven months before the Board’s Merits Order issued—“at which point backpay liability ceased.” (JA 168.) In addition, the Company argued that, to the extent it had paid a route-sales driver more in commission-based wages, sick pay, holiday pay, or vacation pay than he would have received under the pre-November 2012 terms, its overpayment should be offset against the backpay it owed that driver in any of those categories. (JA 169-70.) The Company did not seek any offset against the pension-based portion of the backpay award, or with regard to any backpay it owes the over-the-road drivers or warehouse employees. (JA 188 n.1.)

At the compliance hearing, and in his subsequent decision, an administrative law judge rejected both of the Company’s defenses as a matter of law and consequently declined to accept evidence in support of either theory. (JA 6-10, 281-85, 312-19.) The judge also rejected as a matter of law an argument advanced by the Union that the Company’s backpay obligation should be increased to account for additional hours route-sales drivers worked as a result of the Company’s unilateral changes. (JA 6, 261-70.)

## II. The Board's Supplemental Decision and Order

The Board (then-Chairman Kaplan and Members Pearce and McFerran) affirmed the administrative law judge's findings and adopted his recommended order. (JA 1.) As to the Company's claim that its backpay obligation ceased in June 2013 due to an alleged impasse, the Board observed that the Merits Order that issued seven months later (in January 2014) required the Company to restore the terms and conditions of employment it unlawfully changed in November 2012, and to maintain those terms until the parties bargained to an agreement or impasse. (JA 7, 312-14.) In agreement with the judge, the Board concluded that it was too late for the Company, in a compliance proceeding four years later, to ask the Board to eliminate the restoration requirement from the court-enforced Merits Order. (JA 7, 316-17.) Because the Company admittedly never restored the prior terms and conditions as the Merits Order required, the Board concluded that its employees continued to suffer losses resulting from the unlawful changes in 2012, and the Company's backpay obligation continued to accrue. (JA 10, 315-16.)

As to the Company's request to offset payments across different categories of employee compensation, the Board, in further agreement with the judge, concluded that route-sales drivers' wages, sick pay, vacation pay, and holiday pay were not equivalent benefits. (JA 6-7, 281-85.) Accordingly, the Board ruled that, in calculating the make-whole relief due as a result of the unlawful changes, the

Company could not reduce the amount it owed individual route-sales drivers for losses they had suffered in any one of those categories by offsetting excess amounts it may have paid them in other categories. (JA 6-7, 285.)

The Board ordered the Company to pay backpay to 53 individually named employees totaling approximately \$239,888.61 as of March 31, 2017, plus interest. (JA 2-3.) That sum includes \$4,169.00 to make the Company's route-sales drivers whole for lost commission-based wages, and \$24,022.37 for lost sick pay.<sup>2</sup> (JA 3.) The backpay and interest continue to accrue "until such time as the [Company] restores, honors, and continues the terms [that it unlawfully changed], and maintains such terms until the parties agree to a new contract or bargaining leads to a good-faith impasse." (JA 1.)

### **SUMMARY OF ARGUMENT**

The Board acted within its discretion in excluding evidence that could not affect the scope of the Company's backpay obligation under the court-enforced order in this case. As the Board reasonably concluded, the Company offered that evidence in support of arguments for tolling and offsetting backpay that fail as a matter of law.

---

<sup>2</sup> The parties, however, stipulated to payment of commissions at 50 percent, for a total of \$2,084. (JA 1 n.2; JA 198-99.)

1. The Board reasonably rejected the Company's tolling argument. The Merits Order requires the Company to restore the terms it unlawfully changed and maintain them until it reaches an agreement or impasse in bargaining with the Union. The Company undisputedly never took the first step to comply with that order by restoring the prior terms, and employees' losses and the Company's backpay obligation will continue to accrue until it does so. In this compliance proceeding, the Company effectively requests modification of the Merits Order by arguing that its backpay obligation should nonetheless be tolled as of June 2013, and that it should never have to restore the status quo ante. The Board, however, lacks jurisdiction to grant that request because the Court has already enforced the Board's remedy as written.

As the Board reasonably concluded, the Merits Order does not implicitly allow the Company to raise an argument in a compliance proceeding for avoiding restoration based on events from June 2013. The Company does not show otherwise by citing cases in which employers timely argued in unfair-labor-practice proceedings that orders requiring restoration were unwarranted. That is exactly what the Company failed to do here. Nor does the Company advance its case by citing decisions applying established Board frameworks for deferring particular remedial issues to the compliance stage, as the Board has established no such framework for the issue the Company now seeks to litigate.

Contrary to the Company's claims, its restoration obligation is not affected by anything the Union, the General Counsel, or the administrative law judge did in this case. The Company alone was responsible for timely objecting to the Board's remedy when the Board had jurisdiction to change it. The Company failed to do so, and the time for modifying the Merits Order has passed.

2. The Board reasonably rejected the Company's offset arguments. The Company's make-whole obligation requires it to compensate route-sales drivers who lost commission-based wages or sick pay due to the proposed terms that the Company unlawfully implemented. Under well-established Board law, an employer is entitled to an offset only for additional compensation it paid that is equivalent to an element of the backpay it owes. Applying that standard, the Board reasonably determined that wages and sick pay are not equivalent to each other, nor are they equivalent to the vacation pay and holiday pay that the Company asserts it overpaid. As the Board found, those benefits are facially distinguishable, and the parties memorialized the distinct nature of each by providing for them separately in their collective-bargaining agreements, and separately maintaining, calculating, and paying them. The Board reasonably found that it makes no difference that the dollar values of those distinct elements of backpay are calculated with reference to commissions rather than hourly rates or salaries.

## STANDARD OF REVIEW

The Court's review in this case is highly deferential. The Court sustains Board rulings excluding evidence unless they constitute an abuse of discretion. *See Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 551 (D.C. Cir. 2016). Under that deferential standard, the Court will not reverse the Board's rulings unless "admission of the excluded evidence would have compelled or persuaded to a contrary result." *Id.* The Board acts "at the 'zenith' of its discretion" in remedial matters, *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015) (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967)), and "the Board's interpretation of its own remedial order enjoys a good deal of discretion," *Va. Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894 (9th Cir. 2009) ((citation and quotation marks omitted)).

The Court will uphold the Board's legal conclusions as to the scope of its own jurisdiction "if they are 'reasonably defensible.'" *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006) (quoting *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 553 (D.C. Cir. 1999)). *See also UC Health v. NLRB*, 803 F.3d 669, 672 (D.C. Cir. 2015) ("Absent plain meaning to the contrary, a court is obliged to defer to an agency's reasonable interpretation of its statutory jurisdiction pursuant to the familiar *Chevron* doctrine."). And the Court grants "substantial deference" to "the Board's interpretation of its precedent," *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d

999, 1004 (D.C. Cir. 2016), as well as its interpretation of its regulations, *Rush Univ. Med. Ctr. v. NLRB*, 833 F.3d 202, 206-07 (D.C. Cir. 2016). Finally, to the extent the Company attacks the Board's order on policy grounds, the Court has recognized that "policy arguments are for the Board—not this [C]ourt—to resolve." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015).

## ARGUMENT

### **I. The Board Acted Within Its Discretion in Excluding Evidence in Support of the Company's Argument That an Alleged June 2013 Impasse Tolled Its Backpay**

The Board acted fully within its discretion in declining to admit evidence that the Company claimed would establish that it reached an impasse in bargaining with the Union in June 2013. As shown below, the court-enforced Merits Order requires the Company to restore the terms and conditions of employment that it changed in November 2012 before it can reach a valid impasse and toll the accrual of backpay. The Company admittedly has not restored the pre-November 2012 terms. And in this compliance proceeding, it is too late for the Company to ask that the Merits Order be modified to remove the restoration requirement.

Accordingly, the evidence the Company proffered concerning a purported impasse in June 2013 could have no effect on the Board's backpay calculations.

**A. The Merits Order requires make-whole relief that continues to accrue until the Company restores the unlawfully changed terms**

In the Supplemental Order now before the Court, the Board reasonably found that the Merits Order was intended to, and explicitly does, require restoration before an impasse can toll the Company's backpay obligation. The Board imposed the Merits Order to remedy the Company's unlawful unilateral implementation of new terms and conditions of employment in violation of its statutory duty to bargain. (JA 46.) *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that "an employer's unilateral change in conditions of employment under negotiation" is "a circumvention of the duty to negotiate which frustrates the objectives" of the Act). As the Court recognized in its decision enforcing the Merits Order, the Board's remedy for that violation, since "the early days of collective bargaining," has been "an order to restore the status quo." *Mike-sell's*, 807 F.3d at 324. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Deming Hosp. Corp. v. NLRB*, 665 F.3d 196, 203 (D.C. Cir. 2011); *Porta-King Bldg Sys.*, 310 NLRB 539, 539 (1993), *enforced*, 14 F.3d 1258 (8th Cir. 1994). In addition, "[s]uch breaches of the duty to bargain are typically remedied by make-whole orders, whereby the offending employer is required to pay [its] employees the wages or benefits that they would have received but for the unlawful unilateral action." *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir.

1982). The Board imposed those time-honored remedies—both restoration and make-whole relief—in the Merits Order.

Specifically, in the Merits Order, the Board first ordered the Company, on the Union’s request, to “restore” the pre-November 2012 terms, and to “honor and continue” them in effect “until the parties agree to a new contract or bargaining leads to a good-faith impasse.” (JA 47.) In other words, as the order detailed, that remedy requires the Company to “put into effect all terms and conditions of employment” as they were before the unilateral changes and then to “maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes.” (JA 46-47.) The Board also imposed a make-whole remedy that requires the Company to compensate its employees for “any and all loss of wages and other benefits” resulting from the unlawful changes in November 2012. (JA 47.) As the Court observed in enforcing the Merits Order, the Board’s make-whole remedy requires “extensive back compensation,” because the Company had “put[] in place significantly diminished compensation.” *Mike-sell’s*, 807 F.3d at 324.

The Board reasonably determined that the Merits Order means just what it says: the Company must first restore the employment terms it unlawfully changed, and then keep those terms in place while it bargains. (JA 8.) That is the settled meaning of a restoration order, and it flows from the basic purpose underlying the

remedy. Accordingly, the Board orders restoration of the status quo when it deems that remedy necessary “to insure meaningful bargaining,” *Fibreboard Paper Prods.*, 379 U.S. at 216, after an employer’s unilateral changes have “frustrated the statutory objective of establishing working conditions through bargaining,” *Katz*, 369 U.S. at 744. *Accord Deming*, 665 F.3d at 203. Restoration accomplishes that purpose by reestablishing the bargaining position of a union after it has been “seriously undermined” by the employer’s unlawful conduct, *Porta-King Bldg. Sys.*, 310 NLRB at 539, and by preventing the employer from “tak[ing] advantage of [its] wrongdoing to the detriment of the employees,” *Deming*, 665 F.3d at 203.

In sum, based on precedent, the express terms of the Merits Order, and the policies animating the remedy, the Board reasonably determined that “restoration is effectively a condition precedent to reaching an impasse that can toll [the Company’s] liability.” (JA 8.) Because the Company admittedly never reinstated the terms to which its employees are entitled under the Merits Order, the employees continue to suffer losses relative to those terms, and the Company’s make-whole obligation continues to accrue. *See Deming*, 665 F.3d at 203 (backpay liability continued to accrue for employer who had not rescinded unlawful changes); *Porta-King Bldg. Sys.*, 310 NLRB at 540 (same). Whether or not the parties reached a bargaining impasse in June 2013 is irrelevant because it cannot, in the absence of restoration, arrest that backpay accrual.

The Company incorrectly asserts that the Merits Order does not, in fact, require it to “restore, honor and continue” the former terms of employment until the parties reach agreement or impasse, despite the order’s explicit language to that effect. Instead, the Company argues that the Merits Order should be interpreted to require something else entirely, which the Company terms “retroactive restoration.” (Br. 38; *see also* Br. 27-28.) What the Company asks for is not restoration at all, but rather a temporally limited make-whole remedy covering a period from November 2012 to June 2013—and the elimination of any requirement that the Company ever restore the terms it unlawfully changed. That narrow, time-limited remedy is nowhere to be found in the Merits Order.

The Company disregards, or improperly attempts to relitigate, the terms of the Merits Order when it insists that it should now be able to submit evidence of a June 2013 impasse to toll backpay. As discussed below (pp. 26-30), the Board has sometimes exercised its remedial discretion to depart from its usual practice and grant requests for tolling by impasse without restoration—if they are timely raised. In such instances, it has issued orders remedying unlawful unilateral changes that toll employers’ backpay liability on particular dates without requiring restoration. But in the unfair-labor-practice phase of this case, after the judge, the Board, and the Court rejected Company’s argument that backpay should be tolled in February 2013, the Company made no other request for the remedial order to be changed to

eliminate the restoration requirement based on subsequent events, or even to reserve the issue for compliance. *See Mike-sell's*, 807 F.3d at 323. Accordingly, the Board issued the order recommended by the judge, pursuant to which restoration is a condition precedent for tolling backpay accrual, and the Court enforced it as written. As we now show, that order definitively resolved the issue, and the Company's request in this compliance proceeding for its backpay obligation to be cut off as of June 2013 comes too late.

**B. The Company's request for modification of the Merits Order to eliminate or condition the restoration requirement is untimely**

As the Board found, the Company "is transparently seeking to modify the [Merits Order] to eliminate the order's requirement that it restore the old terms and conditions and maintain them until it reaches agreement or impasse with the Union." (JA 7.) That cannot be done because "the Board's order has been enforced, as is." (JA 9.) The Company cites a purported "absolute rule" (Br. 35) that impasse stops accrual of backpay after an unlawful unilateral change, with or without restoration of the status quo. But as the Board properly concluded, the absolute rule governing this case is that the Board lacks jurisdiction to modify a court-enforced order. Whether or not the Board or the Court could have—or even should have—cut off backpay or deferred the issue to compliance during the unfair-labor-practice phase of this case, neither the Board nor the Court did so.

The Merits Order's restoration requirement is unequivocal, and it cannot be modified in this compliance proceeding.

**1. The Board cannot modify a court-enforced order in the compliance phase of a case**

It is settled law that the Board “has no jurisdiction to modify a court-enforced order.” *Dupuy v. NLRB*, 806 F.3d 556, 564 (D.C. Cir. 2015) (quoting *Willis Roof Consulting, Inc.*, 355 NLRB 280, 280 n.1 (2010)). The Board's jurisdiction in that regard is constrained by Section 10(e) of the Act, which provides that once the Board has issued a decision and filed the case record with a court of appeals, “the jurisdiction of the court shall be exclusive and its judgment and decree shall be final.” *Scepter*, 448 F.3d at 390-91 (quoting 29 U.S.C. § 160(e)). As the Court has long held, “[t]he Board obviously cannot modify an order over which the court has ‘exclusive’ jurisdiction or that the court has enforced in a final judgment.” *Scepter*, 448 F.3d at 391. *See* JA 7 n.6 (collecting cases). *Accord Whole Foods Mkt., Inc.*, 366 NLRB No. 77, 2018 WL 2041729, at \*1 (May 1, 2018). That principle applies with the same force regardless of whether the request for modification is based on changed facts or asserted legal error in the underlying order.<sup>3</sup>

---

<sup>3</sup> *See, e.g., Willis Roof Consulting*, 355 NLRB at 280 n.1 (the Board lacked jurisdiction to hear a factual argument in compliance that an employer and union had never reached a collective-bargaining agreement because such a finding “would modify the court's order to comply with that agreement”); *Reg'l Imp. &*

Although the Court has authority to modify Board remedies under Section 10(e), it “can provide such relief only to [an employer] that timely asks for it.” *Scepter*, 448 F.3d at 391. “The first and only opportunity for doing so is ordinarily in a petition for review of the Board order imposing the remedy but, if the Board reserves the issue for later consideration, that opportunity will necessarily be deferred until the Board resolves the issue in a subsequent order.” *Id.* In addition, under Section 10(e) and the Board’s regulations, before an argument for modifying or deferring aspects of a remedy can be raised before the Court in a petition for review, it must have been timely presented to the Board in the underlying unfair-labor-practice case. *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 167 (D.C. Cir. 2016); *Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1377 (D.C. Cir. 2002). *See generally United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.”); *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) (“[T]o preserve

---

*Exp. Trucking Co., Inc.*, 323 NLRB 1206, 1206-07 (1997) (the Board lacked jurisdiction to apply a proposed backpay offset in compliance proceeding that would have the effect of modifying court-enforced order); *Haddon House Food Prods.*, 260 NLRB 1060, 1060 (1982) (the Board lacked jurisdiction to consider argument that “events which transpired subsequent to the court’s decision warrant modification of the Board’s Order”).

objections for appeal a party must raise them in the time and manner that the Board's regulations require.”).

Here, as the Board explained (JA 7-10), after the administrative law judge recommended the customary remedies of restoration and make-whole relief in the unfair-labor-practice proceeding, the Company did not ask the Board to defer to a compliance proceeding the question of whether a post-hearing impasse relieved it of the obligation to make employees whole and restore the terms they had previously enjoyed. Nor did the Company otherwise suggest that the Board's standard remedy for an unlawful unilateral change was inappropriate. And so, after rejecting the affirmative defenses the Company did properly raise concerning purported impasses in November 2012 and February 2013, the Board imposed an unqualified restoration and make-whole order in accordance with settled precedent.

Both before and after that order issued, the Company had ample opportunities to ask the Board and the Court to modify the Board's remedy in the unfair-labor-practice proceeding, but it failed to do so. As the Board noted, the Company could have sought a different remedy “even before the issuance of the Board's order in this case.” (JA 7.) The Company argues that the evidence it proffered would show that it reached an impasse in bargaining with the Union on June 5, 2013. (Br. 9-11.) By the Company's own reckoning, then, the purported impasse it seeks to rely on occurred nearly two weeks before the judge issued his

recommended order requiring restoration and make-whole relief on June 18, 2013 (JA 48), and over seven months before the Board adopted that recommended order on January 15, 2014 (JA 37). As a result, if the Company desired a different remedy based on events in June 2013, it had the opportunity and the obligation to request it before the judge in the first instance, or before the Board on exceptions from the judge's recommended remedy. *See Spectrum Health*, 647 F.3d at 349 (a party must challenge a judge's recommended remedy on exceptions). To that end, the Company could have sought to reopen the record at any point before the Board issued its decision. *See NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 298 (5th Cir. 2001) (noting that parties may also seek to reopen the record under 29 C.F.R. § 102.48(b) prior to the Board's decision); *Burndy, LLC*, 364 NLRB No. 77, 2016 WL 4395865, at \*1 n.1 (2016) (adding posthearing material to the record under Section 102.48(b)).

Indeed, the Company could have asked the judge or the Board for a different remedy even without seeking to reopen the record. In that regard, evidence adduced at the unfair-labor-practice hearing showed that bargaining had continued after November 2012, and even after the Company's asserted February 13 impasse, until at least March 20, 2013. (JA 43-44.) If the Company desired a conditional remedy that would leave room for the possibility that ongoing bargaining would result in a subsequent impasse or agreement, obviating the need for an

unconditional make-whole and restoration remedy, it could have asked for that relief in the unfair-labor-practice proceeding based on evidence already in the record. *See Alden Leeds*, 812 F.3d at 166-68 (employer was required to timely ask the Board, in unfair-labor-practice proceeding, to issue an order that would permit it “to contest the scope of its backpay liability at the compliance proceeding”); *Cobb Mech. Contractors*, 295 F.3d at 1377 & n.4 (same). The Company, however, did not make that request before the judge or on exceptions before the Board. *See Scepter Ingot Castings, Inc.*, 341 NLRB 997, 998 (2004) (where employer “did not specifically except to the imposition of [a] remedial requirement in its exceptions to the judge’s decision,” the issue could not be raised in compliance), *enforced*, 448 F.3d 388 (D.C. Cir. 2006).

As the Board further found (JA 7-8), even after the Merits Order issued, which adopted the judge’s restoration order, the Company still made no effort to raise the alleged June 2013 impasse. Under Board regulations, the Company could have filed a motion to reopen the record or for reconsideration of the remedy in early 2014, while the Board retained jurisdiction over the case. (JA 7-8 (citing 29 C.F.R. § 102.48(c).) It is undisputed that the Company did not file either type of motion. Instead, it petitioned this Court to review the Merits Order as written.

The Company argues (Br. 33-34) that the Board would have denied any motion to reopen because the alleged June 2013 impasse occurred after the hearing

in the unfair-labor-practice case, which took place in April 2013. (JA 37.) To be sure, the Board ordinarily does not reopen a closed record to admit evidence that was not in existence at the time of the hearing. But the Company's failure to file a motion deprived the Board of the opportunity to exercise its discretion to either accept additional evidence under the particular circumstances presented or modify the remedy by reserving the issue of a June 2013 impasse for the compliance proceeding. *See We Can, Inc.*, 315 NLRB 170, 175 (1994) (denying motion to reopen but amending remedy to create "conditional restoration order" allowing employer to establish in compliance that the remedy is no longer appropriate).<sup>4</sup>

After the Company sought review of the Merits Order in this Court, the Board filed the agency record in April 2014, divesting the Board of jurisdiction over the case. (Case No. 14-1021, ECF Doc. No. 1487145.) As the Board noted (JA 7), the Company raised no arguments to the Court concerning a purported June 2013 impasse during the review proceeding. Once again, the Company failed to suggest that facts indicating continued bargaining after the unlawful November

---

<sup>4</sup> *See also, e.g., Ralphs Grocery Co.*, 360 NLRB 529 (2014) (admitting documents that were not in existence at the time of the hearing "[i]n the particular circumstances of this case"), *enforced*, 669 F. App'x 397 (9th Cir. 2016); *Windstream Corp.*, 352 NLRB 510, 510 n.1 (2008) (reopening record to admit an email sent after the hearing that "may be relevant to the compliance phase of this proceeding"), *incorporated by reference*, 355 NLRB 600 (2010); *Hood Indus.*, 273 NLRB 1587, 1587 (1985) (reopening record to reconsider appropriateness of remedy).

2012 implementation or purported February 2013 impasse would support modification of the Board's remedy to allow for impasse arguments in the later compliance stage. Nor did the Company avail itself of the procedure laid out in Section 10(e) of the Act for seeking the Court's "leave to adduce additional evidence" regarding post-hearing events. (JA 8 (quoting 29 U.S.C. § 160(e).) *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 740 (D.C. Cir. 2015) (noting that the Court "has the discretion to remand a case to the Board to hear additional evidence").

On December 11, 2015, the Court enforced the Board's Merits Order in full, acknowledging the remedies it imposed without modifying them in any respect. *Mike-sell's*, 807 F.3d at 324. The Company's sole opportunity to challenge those remedies before the Court was when it sought review of the Merits Order. It failed to do so then, and it cannot do so now. "At this point," as the Board explained, "the door has shut." (JA 8.)

**2. There is no merit to the Company's claim that it did not have to challenge the Board's remedy in the unfair-labor-practice proceeding**

As the Board concluded (JA 9-10), there is no merit to the Company's argument (Br. 28-38) that it had no obligation to challenge the Board's remedy because an opportunity to nullify the restoration requirement was automatically deferred for a subsequent compliance proceeding. In support of that proposition,

the Company cites cases in which employers explicitly raised their challenges to restoration based on a subsequent impasse during the unfair-labor-practice stage of the case. (Br. 28-31, 35, 37-38.) As such, “those decisions are inapposite; in each case the employer raised its objection at the first opportunity.” *Scepter*, 448 F.3d at 392. The Company, “in contrast, failed to object until the [Merits] Order had been enforced by this [C]ourt and the Board was powerless to amend it.” *Id.* The Company also cites cases involving particular remedial questions that the Board categorically defers to compliance. (Br. 33-36.) The Board, however, has not reserved the issue the Company belatedly seeks to raise. *See Cobb Mech. Contractors*, 294 F.3d at 1377 n.4 (explaining that although the Board has “sometimes reserved the question whether an employer would have hired particular discriminatees for the compliance proceeding,” “[t]his does not mean, however, that an employer is entitled to raise a discriminatee’s suitability for hire whether or not [it] reserved the issue at the liability stage”).

In the first line of cases upon which the Company relies, the Board decided—at the unfair-labor-practice stage, in response to timely employer arguments—whether or not to impose its normal restoration and make-whole remedy. The leading case in that line is *NLRB v. Cauthorne*, 691 F.2d 1023, 1024-26 (D.C. Cir. 1982), in which the Court remanded a Board order at the unfair-labor-practice stage in response to the employer’s argument that it had reached

impasse following a unilateral implementation, which the employer had timely raised before the Board. *See Cauthorne Trucking*, 256 NLRB 721, 723 n.5 (1981). The Court emphasized that, when “designing a remedy in a section 8(a)(5) case,” the Board should consider the possibility that “substantial bargaining subsequent to the occasion of the unilateral change” may affect “what type of remedial order is appropriate.” *Cauthorne*, 691 F.2d at 1025.

Consistent with *Cauthorne*, in *Dependable Maintenance Co.*, the Board specifically declined to defer to compliance the question of a subsequent impasse, emphasizing that subsequent bargaining could affect the propriety of an “order for a return to the status quo ante” as a remedy for an unlawful unilateral change. 274 NLRB 216, 216 (1985). After remanding for the judge to analyze subsequent alleged impasses at the unfair-labor-practice stage, the Board declined to issue a restoration order because it found that the employers had subsequently reimplemented the changes after the parties reached a valid impasse, properly tolling the make-whole relief. *Dependable Maintenance Co.*, 276 NLRB 27, 30-31 (1985). Likewise, in *Storer Communications, Inc.*, the Board declined to impose an order at the unfair-labor-practice stage requiring an employer to restore an unlawfully changed policy because it found that the employer had subsequently engaged in adequate bargaining with the union. 297 NLRB 296, 297 (1989). In *La Porte Transit Co., Inc. v. NLRB*, the remedial issue was likewise decided at the

unfair-labor-practice stage, and the Seventh Circuit enforced the Board's restoration and make-whole remedy based on the Board's determination that the employer's unlawful change "seriously hindered" bargaining and no subsequent lawful impasse was reached. 888 F.2d 1182, 1186 (7th Cir. 1989).<sup>5</sup>

As the Board explained here, those cases stand for the proposition that subsequent good-faith bargaining may make it appropriate for the Board to "forego an order requiring restoration of the status quo ante and make-whole relief."

(JA 9.) But as the Board emphasized, the employers in each case made timely arguments for a deviation from the Board's normal make-whole and restoration remedies. (JA 9.) This case is in another posture entirely because the Company did not raise the issue of a modified remedy during the unfair-labor-practice case, except to argue that a February 13 impasse tolled its backpay obligation—an argument the Board and Court both rejected. And the Board has issued an order, which the Court has enforced, requiring restoration. Contrary to the Company's claim (Br. 30-31 nn.13-17), it makes no difference that the purported impasse in this case arose after the hearing closed in the unfair-labor-practice proceeding. As

---

<sup>5</sup> The Company also cites (Br. 37) an administrative law judge's order that was not reviewed by the Board and therefore "has no precedential value." *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003). See also *NLRB v. Downtown BID Servs. Corp.*, 682 F.3d 109, 114 n.3 (D.C. Cir. 2012); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997). In any event, like the other decisions the Company cites, that order was issued at the unfair-labor-practice stage, not in a compliance proceeding.

discussed above (pp. 22-26), the alleged impasse predated the judge's recommended order as well as the Board's Merits Order, and the Company had opportunities to request a different remedy or deferral of the issue in the unfair-labor-practice proceeding.

Instead, as the Board recognized, the procedural posture of this case places the Company in the same position as the employer in *Mimbres Memorial Hospital*, 342 NLRB 398, 404 (2004), *enforced sub nom. NLRB v. Community Health Services, Inc.*, 483 F.3d 683 (10th Cir. 2007). The employer there argued in a compliance proceeding that its backpay obligation was tolled when it unsuccessfully attempted to bargain with a union three years after the Board imposed a restoration and make-whole order. *Mimbres Mem'l Hosp.*, 356 NLRB at 746, *enforced in pertinent part sub nom. Deming Hosp. Corp. v. NLRB*, 665 F.3d 196 (D.C. Cir. 2011). The Board acknowledged that an employer may under certain circumstances reimplement prior unlawful changes after bargaining to agreement or impasse without having ever restored the status quo. *Id.* at 746. But that principle, the Board found, had "no application" because the employer had never "restored the status quo ante by rescinding the original unlawful reduction in hours as ordered by the Board," and indeed had "ignore[d] a court's order to restore the status quo ante." *Id.* (emphasis added). On review, the Court upheld the Board's finding that, once an order to restore has been imposed, "an

employer's attempt to negotiate without first rescinding the unlawful action does not toll backpay liability.” *Deming*, 665 F.3d at 203.<sup>6</sup>

As the Board concluded, asking the Board or the Court to depart from the Board's usual remedial order during the unfair-labor-practice proceeding—as the employers did in *Cauthorne*, *Dependable Maintenance*, *Storer Communications*, and *La Porte*, but not in *Deming*—“is the critical step that the [Company] skipped.” (JA 9.) As shown above, the considerable discretion the Board enjoys in crafting a remedy disappears entirely once the Board's remedial order has been enforced by a court of appeals. At that juncture—which is where this case stands—the Board lacks jurisdiction to change the remedy.

Other cases the Company cites (Br. 32-35) merely illustrate the Board's observation (JA 9 & n.10) that, with regard to certain types of cases, it has expressly laid out frameworks for considering particular matters in compliance proceedings. *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782 (4th Cir. 1998), for example, involved the Board's well-established framework, set forth in *Lear Siegler*, 295 NLRB 857, 861-62 (1991), for evaluating at the compliance stage

---

<sup>6</sup> That principle is not limited, as the Company argues (Br. 39-40), to cases where a union has completely refused to bargain after unilateral changes were imposed. To be sure, the Court held in *Deming* that a union has no duty to bargain until the employer has complied with an order to restore. 665 F.3d at 203. But *Deming* lends no support to the Company's apparent view (Br. 40) that an employer has no duty to comply with a court-enforced restoration order unless the union refused to bargain.

whether an order to reopen an unlawfully closed department would impose an undue hardship on the employer. *See Coronet Foods, Inc.*, 305 NLRB 79, 80 n.6 (1991) (citing *Lear Siegler*). Indeed, as the Company acknowledges (Br. 32 n.18), both the Board and this Court in *Coronet Foods* expressly recognized at the unfair-labor-practice stage that, under the *Lear Siegler* framework, the department-reestablishment portion of the remedy was conditional and subject to further litigation at the compliance stage. *Coronet Foods*, 158 F.3d at 787 (citing *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993)).

Similarly, in *Boeing Co.*, the Board recently established a multi-step procedure for information-request cases, permitting an employer to introduce post-hearing evidence, either through a motion to reopen the record or in the compliance stage, to show that a union no longer needs information. 364 NLRB No. 24, 2016 WL 3213022, at \*3-4 (2016). And the Company's other cases fit the same mold. *See, e.g., FES*, 331 NLRB 9, 14-16 (2000) (specifying the elements of refusal-to-hire and refusal-to-consider cases that must be established at the hearing on the merits and those that may be deferred to the compliance stage); *Dean Gen. Contractors*, 285 NLRB 573, 573-75 (1987) (framework for issues to be deferred to compliance in construction-industry unlawful-discharge cases); *Tuv Taam Corp.*, 340 NLRB 756, 761 (2003) (framework for considering questions concerning employee immigration status in compliance).

Those cases, however, do not permit employers to raise other challenges to a remedy for the first time in compliance. Indeed, one of the Company's own examples proves the point: it is settled, contrary to the Company's claim (Br. 35), that if an employer fails to timely "raise the question of whether the circumstances required a different backpay formula" in the unfair-labor-practice proceeding, it is "foreclosed . . . from raising it at the compliance stage." *Aroostook Cnty. Reg'l Ophthalmology Ctr.*, 332 NLRB 1616, 1618 (2001). *See also Interstate Bakeries Corp.*, 360 NLRB 112, 112 n.3 (2014) (in compliance proceeding, the Board could not modify a court-enforced order to add standard remedial requirements to file a report with the Social Security Administration and compensate a backpay recipient for the adverse tax consequences of a lump sum award).

The cases the Company cites in which the Board has established frameworks for deferring certain remedial matters to compliance demonstrate the care the Board has taken to specify the limited issues that may be litigated at that stage. And they underscore that the Board in this case did not implicitly defer consideration of the subsequent alleged impasse the Company now seeks to raise.

**3. The Company cannot blame the Union, the General Counsel, or the administrative law judge for its own failure to timely seek a modified remedy**

Instead of accepting responsibility for its own procedural default in this case, the Company attempts to shift the blame for its still-mounting backpay liability

onto the Union, the General Counsel, and the administrative law judge. (Br. 22-26, 44-45.) Those attempts all fail.

First, the Company claims that the Union somehow waived its right to challenge the impasse the Company belatedly raises. (Br. 22-26.) The Board correctly dismissed that argument as a “red herring.” (JA 10.) The Merits Order required—and still requires—the Company to put back into place the terms and conditions that existed prior to November 2012. The Union was—and still is—entitled to expect compliance with that order, and it had no duty to file a charge in response to every additional unilateral change the Company made after November 2012. The principle that separate charges are required to challenge discrete unfair labor practices (Br. 23-24) has no application here, for the Board found no additional unfair labor practice in this compliance proceeding. Rather, as shown above, the Board found that the Company missed its opportunity to seek modification of the Merits Order based on events that it claims occurred in June 2013.

Moreover, it is nothing short of bizarre for the Company to claim that the Union “tacitly acquiesced” (Br. 25) in unilateral changes to which it expressly objected. As the Company admits, the Union contemporaneously objected to its declaration of impasse and unilateral implementation in June 2013. (Br. 11.) Indeed, at the compliance hearing, the Company acknowledged that the Union

“specifically responded and said, ‘That’s unlawful.’” (JA 310. *Accord* JA 306.)

The Union promptly demanded restoration in January 2014 after the Court enforced the Merits Order. (JA 5; JA 156.) And the Union continued to object when the Company made further changes in 2016. (JA 307.) Thus, although the judge correctly recognized that the Union could have agreed to nonrestoration (JA 316), the Union in fact did just the opposite, repeatedly.

Second, the Company argues that it is unfair to preclude it from pursuing its June 2013 impasse defense because the Board’s General Counsel initially prepared to litigate the matter in the compliance proceeding. (Br. 42-44.) But it is well established that the General Counsel’s litigating positions cannot bind the Board. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (“It is of no moment, therefore, what was the General Counsel’s understanding of the case law before the present decision issued, and the court will take no note of it.”); *Lee’s Roofing & Insulation*, 280 NLRB 244, 247 (1986) (“[T]he General Counsel’s legal position is not the equivalent of Board precedent.”). *Cf. Beta Steel Corp. v. NLRB*, 210 F.3d 374 (7th Cir. 2000) (“[I]t is established law that the Board is not bound by advice given to employers by Board agents . . . .” (internal quotation marks omitted)); *Aroostook Cty. Reg’l Ophthalmology Ctr.*, 332 NLRB at 1619 (“The equitable defense of laches is generally not available in circumstances, like those presently before us, where public policy requires the vindication of the rights

of the employees who have been the targets of an employer's unfair labor practices.”). By the same token, the General Counsel's mere preparation to oppose an affirmative defense at a hearing plainly cannot confer on the Board jurisdiction to consider the issue. Likewise, while the Company understandably laments its investment of resources in preparing to litigate the Company's defense on the facts (Br. 44), those expenditures cannot preclude the Board from properly rejecting that defense as a matter of law, nor can they establish undue prejudice.

Finally, the Board properly rejected (JA 10) the Company's attack on the manner in which the judge conducted the compliance hearing. In *NLRB v. Tamper*, upon which the Company exclusively relies, the Fourth Circuit criticized what it characterized as a judge's “ferreting out evidence of uncharged violations and building a case against the defendant-employer.” 522 F.2d 781, 790 (4th Cir. 1975). The judge in this compliance proceeding did nothing of the sort. The Company raised an affirmative defense in an effort to limit its liability, and the General Counsel prepared to dispute that defense on the facts, arguing that “the backpay period should continue “until [the Company] restores, honors and continues the terms” that it unlawfully changed. (JA 111.) The judge, however, properly inquired into whether the Board had jurisdiction to even consider the Company's defense. *Cf. City of New York v. Nat'l R.R. Passenger Corp.*, 776 F.3d 11, 14 (D.C. Cir. 2015) (stating that Court has “an independent obligation to assure

[itself] of jurisdiction” even if no party contests it). Then, as the Board noted, both the Union and the General Counsel took the position at the hearing and in subsequent briefing that the Company’s June 2013 impasse defense was invalid as a matter of law because the Company had never complied with its obligation to restore. (JA 10.) The judge rejected the Company’s proffered evidence on that basis, and concluded that the backpay period would extend, as the General Counsel had argued from the start, until the Company restores the unlawfully changed pre-November 2012 terms. (JA 10; JA 111.) At all times, as the Board found, the judge acted properly and consistently with the Board’s requirement that its judges regulate the course of a hearing and ascertain the parties’ positions on the issues. (JA 10.)

**C. Sound policy considerations support the Board’s decision**

The Supplemental Order reflects not only settled law, as shown above, but also the sound policy considerations that underlie Section 10(e)’s prohibition on the Company’s attempt to alter a court-enforced Board order at this late stage. As the Board noted (JA 8 n.9), accepting the Company’s position would condone “a calculated withholding” of claims concerning subsequent impasses that would complicate and drag out the final resolution of cases like this one. Section 10(e) “requires a party to file a timely exception to an order of the Board precisely in order to insure against repetitive appeals to the courts, such as this one.” *Scepter*,

448 F.3d at 392 (alteration, internal quotation marks, and citation omitted). The Board and the Court both already considered and rejected the Company's arguments concerning impasses in November 2012 and February 2013. The Company's arguments about a third alleged impasse in June 2013 could have been put to the Board years ago, and they are now too late.

To the extent the Company attacks the Supplemental Order on policy grounds, there is no force to its assertion that the Board's decision will countenance "unintended and absurd results." (Br. 41.) The Board had no need to decide in this case what would happen in the factual circumstance the Company references (Br. 41), in which a union signs a collective-bargaining agreement and then subsequently exercises its right under an enforced Board order to request restoration of prior terms. But we note that the Board has found, in crafting a remedial order at the unfair-labor-practice stage, that it may be appropriate and consistent with the Act's policies to give a union the option of demanding restoration of the status quo ante even after an agreement was reached. *See The Ruprecht Co.*, 366 NLRB No. 179, 2018 WL 4184226, at \*1-2 (Aug. 27, 2018), *petition for review filed*, No. 18-1297 (D.C. Cir. Oct. 31, 2018). And contrary to the Company's baseless claim that the Board's decision here will disincentivize voluntary negotiations (Br. 41), the Board's policy encourages employers to

promptly restore the status quo, thus promoting “meaningful bargaining” in which the union is not disadvantaged by unlawful changes. *Deming*, 665 F.3d at 203.

## **II. The Board Acted Within Its Discretion in Excluding Evidence in Support of the Company’s Attempt To Offset Wages and Sick Pay Owed with Payments of Other, Non-Equivalent Categories of Backpay**

The Board acted within its discretion in barring the Company from introducing evidence of alleged overpayments of certain types of employee compensation that the Company sought to use to reduce its backpay liability. In the compliance proceeding, the Company sought to introduce evidence concerning elements of employee compensation—vacation pay and holiday pay—that it had unilaterally changed in a manner that, it asserted, benefitted route-sales drivers. (JA 169-70.) The Company argued that those elements of compensation should be lumped together with commission-based wages and sick pay, so that overpayments (relative to pre-November 2012 levels) in any backpay category would offset underpayments in any other. (JA 188-92.) The Board rejected that argument on the basis that the various backpay categories were not equivalent, and declined to allow the Company to introduce proffered evidence concerning alleged overpayments and employee use of different types of leave. (JA 6-7, 281-85.) Instead, the Board’s Supplemental Order offsets the Company’s overpayments against its underpayments only within each distinct backpay category. (JA 6.) Because the Board reasonably found that the backpay categories the Company

sought to merge were not equivalent in the relevant sense, it reasonably concluded that the evidence the Company sought to admit could not affect the backpay calculation.

**A. Established Board law prohibits offsets between non-equivalent elements of employee compensation**

Section 10(c) of the Act “charges the Board with the task of devising remedies to effectuate the policies of the Act.” *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953). “The Board’s power is a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods.*, 379 U.S. at 216. In particular, shaping the contours of a remedy requiring backpay “is entrusted to the Board’s discretion.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). “When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown 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.” *Seven-Up Bottling Co.*, 344 U.S. at 346–47 (internal quotation marks omitted).

In determining the amount of backpay an employer owes for unlawfully changing employees’ terms and conditions of employment, the Board’s established policy is to calculate separately employees’ losses in each distinct area of compensation. *See K&H Specialties Co.*, 163 NLRB 644, 648 (1967) (noting that employees were entitled to backpay for wages in addition to fringe benefits they

would have received), *enforced*, 407 F.2d 820 (6th Cir. 1969). That policy ensures that employees are made whole for the distinct injuries they suffer due to unlawful reductions in different forms of compensation. *See, e.g., Mining Specialists, Inc.*, 330 NLRB 99, 103 (1999) (explaining that overtime compensates employees for “additional difficulties, inconvenience, and expenses,” and thus cannot be offset against higher hourly wages). It also reduces an employer’s ability to use one unlawful act to escape liability for another. That is, if an employer unlawfully diminishes one element of employees’ compensation without their union’s consent, it cannot reduce its liability by taking advantage of the fact that it granted increases of another type, also in violation of the Act. *See id. Cf. Katz*, 369 U.S. at 745 (a unilateral increase in wages or benefits is unlawful). Rather, “a respondent is entitled to a setoff only if the additional compensation paid the employees is equivalent to the element of backpay claimed in the specification.” *Id.*

In determining whether elements of backpay are equivalent, “the Board examines the nature and purpose of the payments in question.” *Mining Specialists*, 330 NLRB at 103. Within that inquiry, the Board accords special weight to the understanding of the parties themselves, as set forth in their collective-bargaining agreement. *Id.* The employer bears the burden of proving its entitlement to an offset. *See Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962) (the Board’s “long-standing rule” is that “the burden of proof is upon the [violator of the Act] as

to diminution of damages”); *Master Iron Craft Corp.*, 289 NLRB 1087, 1087 (1988).

**B. The Board reasonably found that the offsets the Company sought were impermissible**

The Board reasonably found that the Company’s payments of wages, sick pay, vacation pay, and holiday pay are not equivalent. As the Board found, the distinct purposes of the different benefits are plainly evident from their names, which the parties incorporated in their agreement. (JA 6, 284.) As the names imply, wages constitute the employees’ regular compensation for their labor, while sick pay compensates them for medical leave, vacation pay compensates them for other time off of their choosing, and holiday pay compensates them for agreed-upon holidays. As the Board noted, the Company does not dispute that those different benefits “are separately set out in the labor agreements, separately maintained, calculated, and paid.” (JA 7.) The Board reasonably relied on the parties’ own collectively bargained categorization of wages and different types of leave and declined to “diminish the value of the contractual benefit[s] that w[ere] negotiated by the Union, agreed to by the [Company], and earned by the employees.” *Mining Specialists*, 330 NLRB at 103. To permit the offsets the Company seeks would be to impose on the parties a bargain they did not strike by effectively merging disparate benefits into one.

The Board's decision is fully consistent with its longstanding precedent. In the cases upon which the Company relies (Br. 46-47), the Board concluded that regular monthly bonuses based on normal performance of regularly assigned duties were equivalent to, and thus could be offset against, regular wages, *K&H Specialties*, 163 NLRB at 648, whereas intermittent performance awards and overtime pay served different purposes and thus were not equivalent, *id.* at 648-49; *Mining Specialists*, 330 NLRB at 103-04. The Board, however, rejected out of hand the proposition that leave payments and regular wages could be equivalent, concluding that an employer was "not entitled to set off vacation payments against backpay claims." *K&H Specialties*, 163 NLRB at 648 n.4. *Accord Va. Sportswear, Inc.*, 234 NLRB 315, 315-16 (1978) (employer was not permitted to offset discretionary bonuses against its separate obligations for overtime pay, vacation pay, holiday pay, and bereavement pay). The Company cites no case in which the Board has departed from that principle to permit anything like the offset it seeks here between wages for work performed and distinct types of paid leave.

The Board was not required to depart from its precedent based on the mere fact that the route-sales drivers work on commission. The Company contends that sick pay, vacation pay, holiday pay, and wages are equivalent for its route-sales drivers because the monetary values of those benefits are calculated based on the commissions each driver has earned. (Br. 48-49.) But as the Board explained, for

employees who do not work on commission, the dollar values of sick pay, vacation pay, holiday pay, and wages are ordinarily calculated based on the employee's hourly rate or salary. (JA 283.) Thus, "the more typical use of hourly wage rates or salaries to calculate the value of benefits also links the value of wages to the value of benefits—in just as sure a way as does the use of commissions." (JA 6.) The Company makes much of its desire to "drive sales" through use of a commission-based compensation system. (Br. 48.) That goal, however, does not meaningfully distinguish this case from one where an employer seeks to incentivize hard work or long service through raises based on performance or seniority, which result in corresponding increases in employees' sick pay, vacation pay, holiday pay, and wages. For the same reasons, it is also nonsense for the Company to claim (Br. 49 n.27) that the Union somehow conceded the equivalency of the distinct benefits by advocating for the dollar value of holiday pay to be calculated based on commission rates rather than be set as a flat amount.

The Board also acted within its discretion in rejecting the Company's fallback argument (Br. 49-50) that sick pay and vacation pay are equivalent to each other, even if they are not equivalent to wages. Although the Board accepted as true the Company's representation that it does not prevent employees from using sick days and vacation days interchangeably (Br. 50), the Board reasonably concluded that the informality with which the Company administers employee

leave is not unusual. (JA 7.) The Company argues that it sought during negotiations to reduce the number of sick days for that reason (Br. 50 n.28), but it does not suggest that it bargained for the separate forms of leave to be “merged so that they are one indivisible benefit” (JA 7).

Finally, there is no merit to the Company’s suggestion that equity requires a different result.<sup>7</sup> The Company asserts that the Union proposed the improvements to vacation and holiday pay that the Company implemented in June 2013. (Br. 51-52.) But regardless of who proposed what during negotiations, it is undisputed that the parties never reached agreement on a new contract. Moreover, as noted above (pp. 34-35), the Union objected to the June 2013 unilateral implementation and exercised its option under the Board’s Merits Order to demand, in January 2014, that the Company restore the pre-November 2012 status quo ante. The Company acted “at its peril” (Br. 51) when it implemented its revised contract offer in June 2013 without first restoring that status quo. Because the Board (and the Court) ultimately held the Company’s unilateral changes unlawful, and because the Company failed to timely ask the Board to forego (or the Court to modify) its

---

<sup>7</sup> It is unclear how the Company arrives at its claim of a \$73,000 “windfall” to employees. (Br. 17, 25, 51.) As noted above, the backpay amounts it seeks to offset are much smaller: the Board ordered the Company, in accordance with the parties’ stipulation, to pay its 38 route-sales drivers sums totaling \$2,084.00 to compensate them for reduced commissions and \$24,022.37 for reduced sick pay as of March 31, 2017. (JA 2-3; JA 111, 198-99.)

traditional restoration and make-whole remedy, the Board appropriately precluded the Company from relying on subsequent unilateral changes, taken at the Company's risk, to reduce the relief to which its employees are entitled.

### CONCLUSION

The Board properly acted at the zenith of its discretion in this case, issuing evidentiary rulings on remedial matters that were reasonable and consistent with Board law and the Court's precedent. Accordingly, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Supplemental Order in full.

/s/Kira Dellinger Vol  
KIRA DELLINGER VOL  
*Supervisory Attorney*

/s/Micah P.S. Jost  
MICAH P.S. JOST  
*Attorney*

PETER B. ROBB  
*General Counsel*

JOHN W. KYLE  
*Deputy General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board  
1015 Half St. SE  
Washington, DC 20570  
(202) 273-0656  
(202) 273-0264

National Labor Relations Board

December 2018

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

MIKE-SELL’S POTATO CHIP COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1083, 18-1106
	)	
v.	)	Board Case No.
	)	09-CA-094143
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this motion contains 10,854 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2960

Dated at Washington, DC  
this 18th day of December 2018

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

MIKE-SELL’S POTATO CHIP COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1083, 18-1106
	)	
v.	)	Board Case No.
	)	09-CA-094143
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-1714

Dated at Washington, DC  
this 18<sup>th</sup> day of December 2018