

**[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 12, 2019]**

**Nos. 18-1083 and 18-1106**

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United States Court of Appeals  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

*Petitioner and Cross-Respondent,*

**v.**

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent and Cross-Petitioner.*

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**ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL  
LABOR RELATIONS BOARD**

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**REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT**

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FROST BROWN TODD LLC

*/s/ Jennifer R. Asbrock*

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## GLOSSARY

ALJ . . . . .	Administrative Law Judge
Expired Contracts . . . . .	Former labor agreements with the warehouse unit and the drivers unit that expired October 26, 2012, and November 17, 2012, respectively
Final Offer . . . . .	The last, best, and final offer that was unilaterally implemented on November 19, 2012
General Counsel . . . . .	Counsel for the General Counsel of the National Labor Relations Board
<i>Mike-sell's I</i> . . . . .	<i>Mike-Sell's Potato Chip Co. v. NLRB</i> , 807 F.3d 318 (D.C. Cir. Dec. 11, 2015)
NLRA . . . . .	National Labor Relations Act
Order . . . . .	Decision and Order issued by ALJ Carter in Board Case No. 09-CA-094143
PTO . . . . .	Paid time off
Revised Final Offer . . . . .	The revised last, best, and final offer that was unilaterally implemented on June 13, 2013
Supplemental Order . . . . .	Supplemental Decision and Order issued by ALJ Goldman in Board Case No. 09-CA-094143
Union . . . . .	General Truck Drivers, Warehousemen, Helpers, Sales and Service, & Casino Employees, Teamsters Local Union No. 957

## SUMMARY OF ARGUMENT

Petitioner/Cross-Respondent Mike-sell's Potato Chip Company ("Mike-sells" or "Company") submits this Reply Brief in response to the Principal Brief of Respondent/Cross-Petitioner National Labor Relations Board ("Board").

Contrary to its arguments, the Board abused its discretion by excluding the Company's proffered compliance evidence of an intervening impasse and new implementation, which supports a tolling defense fully consistent with the Court-enforced Order. Incredibly, after deeming post-implementation bargaining irrelevant to the merits analysis, the Board now seeks to preclude the same type of evidence at the compliance stage. *Mike-sell's I*, 807 F.3d at 322 ("Nor did the Board base its approval of the ALJ's decision on his discussion of negotiations that took place after the alleged impasse. . . . The Board explicitly cordoned off . . . [post-implementation bargaining] by deciding it did not rely on it when adopting the ALJ's recommended decision.").

The Board asks this Court to adopt an absolute rule that, as a matter of law, it is impossible to engage in meaningful bargaining—or reach impasse or agreement—in the face of unremedied unfair labor practices. Moreover, the Board goes far beyond seeking deference and instead asks this Court to impose obligations that its own administrative rules do not: namely, a requirement that litigants move to reopen a merits record to introduce evidence of subsequent events

that occurred after the merits hearing, and that are irrelevant to the issues of liability and remedy. The Board's sudden exclusion of the Company's intervening impasse evidence is particularly untenable given its undisputed knowledge of the defense since 2014, and its years of preparation to litigate the issue in compliance.

The Board likewise abused its discretion by excluding the Company's proffered compliance evidence of overpaid commissions and commission-based PTO to offset its backpay liability. Contrary to the Board's arguments, setoffs are appropriate because the "nature and purpose" of the proffered overpayments are "equivalent" to other backpay elements alleged in this compliance proceeding. The Board ignores its own "nature and purpose" analysis and instead focuses entirely on differences in nomenclature, thus exalting form over substance.

When the proffered evidence is properly considered, it is clear the Board's rulings are arbitrary, capricious, and manifestly unjust. There is no question that these evidentiary exclusions have unduly prejudiced Mike-sell's, as the proffered evidence would significantly limit the duration and extent of the Company's liability and obligations under the Order. Accordingly, the Petition for Review should be granted, the Cross-Petition for Enforcement should be denied, and the Supplemental Order should be reversed to the extent indicated, with the case remanded for a compliance hearing to consider previously-excluded evidence.

## STANDARD OF REVIEW

The Board touts its evidentiary rulings as rising to “the zenith of its discretion.” (Br. 13, 46.) However, as this Court wisely recognizes, the Board is not entitled to unlimited deference. *See, e.g., Arc Bridges, Inc. v. NLRB*, 861 F.3d 193, 196 (D.C. Cir. 2017). Agencies may have congressional authority to interpret statutes and make/apply rules, but this delegation of power does not relieve federal courts of their separate duty—per Article III of the U.S. Constitution—to exercise independent judgment in reviewing agency actions.<sup>1</sup> *See, e.g., Philip Hamburger, Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Thus, despite the Board’s plea for deference, this Court should carefully evaluate each of the Board’s rulings, to ensure their reasonableness and compatibility with existing law. *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998).

## ARGUMENT

### **I. The Board improperly excluded the Company’s evidence of an intervening impasse and subsequent implementation, which supports a compliance defense fully consistent with the Court-enforced Order.**

As a threshold matter, the Board disingenuously suggests that Mike-sell’s flatly “refused” to restore the Expired Contracts. (Br. 4, 6.) The record reflects

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<sup>1</sup> If courts blindly defer to agencies without independently analyzing the laws, rules, and facts at issue, they essentially adopt the position of the government, thereby perpetuating systematic institutional bias “in favor of the most powerful of parties.” Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

that, in response to the Union's January 2014 demand for restoration,<sup>2</sup> Mike-sell's complied with the Order to the extent applicable by agreeing to restore the expired terms back to November 19, 2012. (JA156.) The Company simply declined to further extend restoration "after (and based on) the parties' good faith impasse on June 13, 2013." (JA156 (emphasis added).) Its actions are thus consistent with the Order, which requires restoration only "until the parties agree to a new contract or bargaining leads to a good-faith impasse."<sup>3</sup> (JA5 (emphasis added).)

This situation is akin to one where the Board issues an order for full reinstatement and backpay, but due to a time lapse, actual reinstatement or backpay becomes limited or inapplicable based on subsequent events, such as plant closure or worker ineligibility. *See, e.g., Tuv Taam Corp.*, 340 NLRB 756, 759-62 (2003) (issuing full reinstatement/backpay order at merits stage and leaving to compliance whether actual reinstatement/backpay is justified, based on workers' status); *Auburn Foundry, Inc.*, 284 NLRB 242, 242-43 (1987) (despite Seventh Circuit's enforcement of full reinstatement/backpay order, and no motion to reopen record

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<sup>2</sup> This demand came nearly two years before the Order was enforced. (JA5, JA156.)

<sup>3</sup> The Board suggests the idea of "retroactive restoration" is nonsensical and noncompliant. (Br. 18.) Yet, the Board itself relies on a U.S. Supreme Court case that expressly recognizes the identical concept of "restoration by way of back pay," despite an order for "immediate and full reinstatement." (Br. 40 (quoting *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346-47 (1953) (emphasis added), enforcing *Seven-Up Bottling Co. of Miami, Inc.*, 92 NLRB 1622, 1625-26 (1951)). Hence, whether phrased as "retroactive restoration" or "restoration by way of back pay," that is exactly what Mike-sell's has offered in this case.

ever being filed, employer was still permitted to litigate in compliance whether discriminatee was entitled to actual reinstatement and backpay given his criminal conviction and incarceration years before order was ever enforced). This scenario—where a general remedy becomes factually or legally inapplicable prior to compliance—is well recognized in the enforcement of Board orders. *See, e.g., NLRB v. Trinity Valley Iron & Steel Co.*, 290 F.2d 47, 48 (5th Cir. 1961) (“Of course, . . . the enforcement of the Board’s Order . . . does not foreclose the opportunity of establishing facts which have occurred subsequent to the [merits] hearing . . . bearing upon compliance with the Order of reinstatement.”).<sup>4</sup>

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<sup>4</sup> *See also NLRB v. Am. Steel Bldg. Co.*, 278 F.2d 480, 482 (5th Cir. 1960) (declining to modify full reinstatement order, as it did not preclude compliance litigation regarding eligibility for actual reinstatement based on events after merits hearing); *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 245 F.2d 594, 597-98 (5th Cir. 1957) (declining to “clarify” already-enforced order for full reinstatement/backpay, as eligibility for actual reinstatement/backpay was issue for compliance); *NLRB v. Somerset Classics, Inc.*, 193 F.2d 613, 615-16 (2d Cir. 1952) (enforcing order for full reinstatement/backpay and noting “[t]he extent to which compliance is possible . . . is a matter more properly to come before the Board . . . since . . . [it] is material only on the question of compliance . . . and . . . not . . . on the correctness of the order itself at the time of its issuance”); *Home Beneficial Life Ins. Co. v. NLRB*, 172 F.2d 62, 62-63 (4th Cir. 1949) (“The Board has full power . . . to take evidence and make findings . . . carrying out the general order for reinstatement and back pay which this Court approved. . . . After the Board has made orders with respect to specific reinstatements or awards . . . appropriate application can be made . . . to enforce or set them aside.”); *NLRB v. Nat’l Garment Co.*, 166 F.2d 233, 239 (8th Cir. 1948) (enforcing order and noting “it will be for the Board initially to determine how far compliance reasonably can be exacted”).

In short, this is not an attempt to modify the Court-enforced Order.<sup>5</sup> (Cf. Br. 20-25.) Mike-sell’s, in fact, complied with the Order to the extent applicable, and it is against this backdrop that the case is properly analyzed.

***A. It is possible to engage in meaningful bargaining—and reach impasse or agreement—in the face of unremedied unfair labor practices.***

Under the Board’s interpretation of the Order, it would have been impossible for Mike-sell’s and the Union to bargain to impasse unless the terms of the Expired Contracts were actually in effect at the time the bargaining and impasse occurred. (Br. 14-17.) The Board’s stance directly conflicts with ALJ Goldman’s ruling in compliance, where he was careful to expressly limit his decision:<sup>6</sup>

I don’t reach the issue of whether an employer, in this situation, where it’s implemented unlawful changes to the terms and conditions of employment may subsequently bargain [to] impasse without remedying the unilateral changes. And then cut off backpay by having additional implementation of additional changes. I’m not reaching that. It’s not my ruling.

(JA314.) Indeed, both Board and Circuit law confirm that, if an unlawful unilateral implementation occurs, restoration of the *status quo ante* is not a

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<sup>5</sup> The Board insists the Order is “unconditional,” and that “[i]f the Company desired a conditional remedy,” it could have asked for one at the merits stage. (Br. 23-24.) This overlooks the express language of the Order, which is already conditional in that restoration is temporally-limited to last only “until the parties agree to a new contract or bargaining leads to a good-faith impasse.” (JA5 (emphasis added).)

<sup>6</sup> ALJ Goldman immediately rejected the Union’s suggestion that “[the employer hasn’t] remedied the ULP entirely, so [the parties] can’t reach impasse” by confirming that “[parties] can get to impasse subsequent to unremedied ULPs.” (JA297, JA299-JA300.)

prerequisite for bargaining to a subsequent lawful impasse—especially if both parties voluntarily continue to negotiate and reach tentative agreements. *Outrigger Hotels & Resorts*, 2001 WL 1603001 (NLRB 2001); *Storer Comm'ns*, 297 NLRB 296, 297 (1989) (citations omitted); *NLRB v. Cauthorne Trucking*, 691 F.2d 1023 (D.C. Cir. 1982); *La Porte Transit Co. v. NLRB*, 888 F.2d 1182 (7th Cir. 1989).

Excluding the evidence of an intervening impasse from the compliance hearing renders meaningless all bargaining that continued between Mike-sell's and the Union during the course of proceedings in *Mike-sell's I*. Taken to its logical conclusion, the Board's position would permit the Union to demand actual restoration of the Expired Contracts even if the parties' good-faith bargaining had resulted in successor agreements (as opposed to an impasse and new implementation). *See, e.g., The Ruprecht Co.*, 366 NLRB No. 179, at \*1-2 (Aug. 27, 2018), *petition for review filed*, No. 18-1297 (D.C. Cir. Oct. 31, 2018). This consequence is contrary to public policy and cannot stand.<sup>7</sup>

The Board attempts to distinguish *Storer*, 297 NLRB 296, *Cauthorne Trucking*, 256 NLRB 721 (1981), *Dependable Bldg. Maint.*, 274 NLRB 216 (1985) ("*Dependable I*"), and *La Porte*, 888 F.2d 1182, by arguing that those employers

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<sup>7</sup> The Board insists public policy lies exclusively in its purview (Br. 14, 37-39), but its policy decisions can be upheld only if "rational and consistent with the Act." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015). Here, the Board's logic would gut the entire bargaining process by stripping parties of their right to voluntarily continue meaningful negotiations pending the outcome of Board proceedings—a result plainly repugnant to the NLRA.

“raised their challenges to restoration based on a subsequent impasse during the unfair-labor-practice stage of the case.” (Br. 27-29, 31.) But the intervening impasses in *Storer*, *Cauthorne*, *Dependable I*, and *La Porte* occurred before the merits hearing, so of course the evidence was readily available at the liability stage.<sup>8</sup> Those cases do not involve an intervening impasse after the merits record has closed—and before an Order is issued or enforced—that leads to a new unilateral implementation over which no unfair labor practice charge is ever filed.<sup>9</sup> Nevertheless, *Storer*, *Cauthorne*, and *Dependable I* are still helpful to confirm the fundamental premise that parties can reach a good faith impasse, even if it results from post-implementation bargaining and in the absence of restoration.

The Board relies on *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006), but its reliance is misplaced. (Br. 20-21, 24, 27, 37-38.) In *Scepter*, “the Board imposed a remedy that . . . was objectionable on its face” because it required the employer to “rescind either or both of the . . . unilateral changes”—one favorable,

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<sup>8</sup> The scenario in *Dependable Bldg. Maint.*, 274 NLRB 216 (1985) (“*Dependable I*”) is further distinguishable from this case because the employer argued the intervening impasses retroactively validated the initial unlawful implementation. *Id.* at 219. Mike-sell’s makes no such claim here.

<sup>9</sup> In fact, despite an exhaustive search, the undersigned counsel has found no Board or Circuit case (in this Circuit, or any other) that is “on all fours” with the unique situation presented here: where the intervening impasse and new implementation occurred nearly two months after the merits record closed, over 18 months before the Union demanded restoration, and almost 30 months before the Court enforced the Board’s Order. (*Compare* JA5 with JA13 and JA156.)

and one unfavorable—at the union’s request. *Id.* at 389, 391. The employer thus “had fair warning . . . of the ‘heads they win, tails you lose’ nature of the remedy,” which allowed employees to keep the wage increase while demanding rescission of the insurance premium it was designed to subsidize. *Id.* at 392. Unlike in *Scepter*, the Board’s Order here does not—facially or impliedly—preclude Mike-sell’s from introducing evidence of an intervening impasse to limit the extent and duration of its remedial obligations. Rather, the Order expressly confirms that restoration is temporally limited, lasting only “until the parties agree to a new contract or bargaining leads to a good-faith impasse.” (JA5 (emphasis added).)

The Board’s continued emphasis on *Mimbres Memorial Hosp.*, 356 NLRB 744 (2011), *enforced sub nom. Deming Hosp. Corp. v. NLRB*, 665 F.3d 196, 202-03 (D.C. Cir. 2011), is equally unavailing. (Br. 30-31.) The *Mimbres* employer attempted to avoid a restoration order issued in 2004 based on events that occurred in 2007,<sup>10</sup> four months after the order was enforced.<sup>11</sup> Specifically, the employer argued that, despite its invitation to engage in after-the-fact bargaining over

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<sup>10</sup> *Mimbres Memorial Hosp.* (“*Mimbres II*”), 342 NLRB 398, 404 (2004) (rescinding unlawful policy changes, as well as discipline based on same).

<sup>11</sup> *NLRB v. Cmty. Health Servs., Inc.*, 483 F.3d 683, 685 (10th Cir. April 16, 2007) (enforcing orders issued in *Mimbres II* and *Mimbres III*, and noting that “[t]he Board rejected the company’s claim that [unilateral change] charges should have been litigated in *Mimbres I*” because “the events underlying them occurred after the *Mimbres I* hearing”) (emphasis added).

unlawful changes, the union refused to meet until the employer complied with the restoration order. *See* 356 NLRB at 746. The *Mimbres* scenario thus involved a restoration order that was both issued and enforced long before any “subsequent events” occurred, and the employer could not force *ad hoc* bargaining if the union was neither willing nor obligated to participate. *Deming*, 665 F.3d at 202-03.<sup>12</sup>

Unlike in *Mimbres/Deming*, Mike-sell’s did not force the Union to continue bargaining after the November 2012 implementation, nor did the Company rely on events post-dating enforcement of the Board’s Order to toll its liability. Mike-sell’s instead proffered evidence that both parties voluntarily returned to the table and bargained in good faith for seven months after the unlawful implementation,<sup>13</sup> until a lawful impasse was reached in June 2013. (JA26-27, JA32, JA292-JA293, JA305-JA308; ADD13-16, ADD23, ADD32-ADD35.) The Board deemed the parties’ post-implementation bargaining irrelevant at the merits stage, consistent with its ruling in *Mimbres II* that events after the *Mimbres I* hearing need not be litigated in that proceeding. *Compare Mike-sell’s I*, 807 F.3d at 322 with *NLRB v. Cmty. Health Servs., Inc.*, 483 F.3d 683, 685 (10th Cir. April 16, 2007). By

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<sup>12</sup> The Board’s Brief does not dispute the inapplicability of *Pressroom Cleaners*, 361 NLRB No. 57 (2014) and *Adams & Associates, Inc. v. NLRB*, 871 F.3d 358 (5th Cir. 2017), despite ALJ Goldman’s reliance on these cases. (JA218-JA219.)

<sup>13</sup> As this Court wisely recognized, “good faith bargaining simply means a desire to reach an agreement;” “[i]t does not mean that an employer is not entitled to insist on certain terms.” *Mike-Sell’s I*, 807 F.3d at 324.

continuing to bargain after the unlawful implementation, the Union waived its right to challenge the June 2013 impasse due to lack of restoration, as Mike-sell's was under no duty to restore before this Court enforced the Order in December 2015.

In sum, nothing in the Order either states or implies that interim bargaining and bargaining-related events—occurring after the merits hearing—are invalid just because there was no restoration before the parties reached impasse.<sup>14</sup> The Order, by its very terms, grants restoration back to November 2012, and the Company's unilateral implementation of the Revised Final Offer in June 2013 is entirely consistent with the Order's remedy, which only requires restoration "until the parties agree to a new contract or bargaining leads to a good faith impasse."<sup>15</sup> (JA32-JA33 (emphasis added), JA294-JA296, JA303.) Because the Company's

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<sup>14</sup> The Board apparently does not refute the Company's assertion that *Cogburn Healthcare Center Inc.*, 342 NLRB 98 (2004) and *Electro-Voice, Inc.*, 321 NLRB 444 (1996) are inapposite. ALJ Goldman improperly relied on those cases, both of which involve attempts to nullify affirmative bargaining orders due to "changed circumstances," despite that (unlike restoration/backpay) the need for a bargaining order is judged only once—at time of issue—with no prospective considerations. Cf. *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782 (4th Cir. 1998); *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993); *Willis Roof Consulting, Inc.*, 355 NLRB 280 (2010); *D.L. Baker, Inc.*, 351 NLRB 515 (2007).

<sup>15</sup> It is ALJ Goldman who modified the Order's original remedy by injecting a new mandate that "the backpay period will continue until the Respondent restores and honors the terms of the [Expired Contracts] . . . ." (JA220-JA221.) By adopting ALJ Goldman's amended remedy, the Supplemental Order directly conflicts with the original remedy in the Order. (*Compare* JA10 *with* JA32-JA33.)

June 2013 impasse defense is in line with Board law and the Court-enforced Order, the Company's compliance evidence must not be excluded.<sup>16</sup>

***B. The Board's own rules and caselaw confirm that it was not proper—much less required—for Mike-sell's to seek reconsideration, rehearing, or reopening of the record.***

The Board asks this Court to impose a legal duty that its own administrative rules do not: an absolute requirement that litigants move for reconsideration, rehearing, or reopening the record to adduce evidence of subsequent events that are irrelevant to the issues of liability and general remedy.<sup>17</sup> (Br. 22-24.) However, the Board's own law, regulations, and internal procedures conclusively confirm

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<sup>16</sup> See, e.g., *The Boeing Co.*, 364 NLRB No. 24, slip op. at 4 (2016) (“[i]f evidence . . . first becomes available after the merits hearing . . . the respondent may raise the issue in the compliance stage”); *Dean Gen. Contractors*, 285 NLRB 573, 573-74 (1987) (“[R]esolution of . . . reinstatement and backpay obligations . . . is best left to the compliance process. . . . Although parties may litigate certain backpay and reinstatement issues in the original proceeding if they so desire, the absence of a fully litigated record concerning reinstatement and backpay issues is customary at [the merits] stage . . . . Determination of whether an employee may have been transferred or reassigned elsewhere is a factual question and, as such, is best resolved by a factual inquiry at compliance.”)

<sup>17</sup> The Board likewise argues that Mike-sell's “could have sought to reopen the record . . . before the Board issued its decision.” (Br. 23 (citing 29 C.F.R. § 102.48(b)).) But the Board's rules do not seem to envision “pre-decision” motions, as they merely state that, “[u]pon the filing of . . . exceptions and . . . briefs,” the Board may exercise discretion to “decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence . . . .” See 29 C.F.R. § 102.48(b) (provided at ADD59). Unlike 29 C.F.R. § 102.48(c), the language of 29 C.F.R. § 102.48(b) makes no mention of motion practice. While the Fifth Circuit was willing to accept a stipulation that the rule permitted such motion practice, the court also recognized that 29 C.F.R. § 102.48(b) provides “no clear procedural vehicle for such a motion.” *NLRB v. USA Polymer Corp.*, 272 F.3d 289, 295 (5th Cir. 2001).

that motions for reconsideration, rehearing, or reopening the record must be justified by “extraordinary circumstances,” which do not exist here. *See* 29 C.F.R. § 102.48(c) (emphasis added) (provided at ADD59).

To prove “extraordinary circumstances,” motions for reconsideration and rehearing must identify a “material error” as to “finding[s] of material fact,” whereas motions to reopen the record must be based on “additional evidence . . . that . . . would require a different result.” *See* 29 C.F.R. § 102.48(c)(1) (emphasis added) (provided at ADD59). No such motions can prevail unless they proffer “newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which . . . may have been taken at the hearing.” *Id.* (emphasis added). The compliance evidence here fits none of these categories.

First and foremost, the June 2013 impasse/implementation evidence has no bearing on the merits finding that the November 2012 implementation was unlawful—much less does it “require” a different remedy. Although the Order contains a “material finding” as to the date the Company’s liability began (i.e., November 19, 2012) and orders restoration retroactive to that date, the Order contains no finding as to the date liability ended (i.e., how long the unlawful terms remained in place), leaving an open question for compliance.

Additionally, the June 2013 impasse/implementation evidence was neither “newly discovered” nor “newly available,” so there is no way it “may have been

taken at the hearing.” The Board’s own law—touted by its NLRB DIVISION OF JUDGES BENCH BOOK—defines “newly discovered evidence” as that “which was in existence at the time of the hearing, and of which the movant was excusably ignorant.” *Circus Circus Las Vegas*, 366 NLRB No. 110, slip opinion at 1, n.1 (2018) (cites/quotes omitted.) (See also ADD73.)<sup>18</sup> The Board further clarifies that “evidence which did not exist at the time of the hearing because it relates to events that occurred after the hearing . . . is not ‘newly discovered.’” (ADD73 (citing *Allis-Chalmers Corp.*, 286 NLRB 219, 219 (1987)).) In short, “Board precedent is clear: evidence pertaining to events that occurred after the close of the hearing is not considered . . . in a motion to reopen the record.”<sup>19</sup> *Security Walls, Inc.*, 365 NLRB No. 99, slip op. at 7 and n. 17 (2017) (emphasis added).

Furthermore, the Board’s stance here—that evidence of post-implementation bargaining is “untimely” at the compliance stage—conflicts with the Board’s position that the same evidence was “irrelevant” at the merits stage. Compare *Mike-sell’s I*, 807 F.3d at 322 (recognizing that Board did not rely on post-

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<sup>18</sup> The agency manual was just updated this month to reflect citations to new Board and court cases. See Judge Jeffrey D. Wedekind, NLRB DIVISION OF JUDGES BENCH BOOK (Jan. 2019).

<sup>19</sup> The reason for this is plain: by saving mitigation issues for compliance, the Board can promote finality on the threshold question of liability. See, e.g., *Coronet*, 981 F.2d at 1287-88; *NLRB v. Trinity Valley Iron & Steel Co.*, 290 F.2d 47, 48 (5th Cir. 1961); *J. H. Rutter-Rex*, 245 F.2d at 598; *Lear Siegler, Inc.*, 295 NLRB 857, 861-62 (1989); *K & E Bus Lines*, 255 NLRB 1022, 1049 (1981).

implementation bargaining in issuance of Order) *with* JA5-JA7 (finding it “too late under the Board’s rules” to present evidence of post-implementation bargaining).

The Board relies on cases where, although the proffered evidence was both known and available at the time of the merits hearing, the employer either made no attempt to introduce it or filed no exceptions to challenge its disposition. (Br. 21, 23-24, 27 (citing *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 166–67 (D.C. Cir. 2016) (“Once the ALJ found that the Company’s November 9, 2009, offer did not cure the lockout, and instead found that the lockout retained its initial taint of illegality until the Company terminated the lockout and made its employees whole, Alden Leeds was obligated to challenge that finding in its exceptions to the Board in order to preserve the issue for judicial review.”); *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349-50 (D.C. Cir. 2011) (refusing to consider affirmative bargaining order on appeal because employer failed to first assert known facts and arguments in opposition to the order as part of its exceptions before the Board); *Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1377 (D.C. Cir. 2002) (recognizing employer could have, and should have, presented evidence at the merits hearing if it wanted the ALJ to “question whether it would have hired the Union applicants” in the first place, as employer was in possession of evidence of applicants’ employment eligibility at the time of merits hearing).)

These cases are easily distinguishable from the instant appeal, where all the proffered evidence is based on events that occurred after the merits hearing closed.

The Board also tries to distinguish the Company's actions by pointing to cases where the employer did move the Board to reopen the record to take additional evidence. (Br. 25-26.) Many of these motions were unsuccessful; they did not meet the standard under 29 C.F.R. § 102.48(c) by proffering “newly discovered” or “newly available” evidence that “may have been presented at the [merits] hearing.” *See, e.g., We Can, Inc.*, 315 NLRB 170, 174 (1994) (denying motion to reopen record to adduce “evidence that did not exist at the time of the [merits] hearing and that the [employer] asserts will establish that restoration . . . and reinstatement . . . are inappropriate”). In one case where the attempt was successful, *Ralphs Grocery Co.*, 360 NLRB 529 (2014), it was because the proffered evidence in fact existed and had been requested before the merits hearing, but the employer refused to produce it (and the ALJ did not order production) based on a claim of privilege that was later waived in another legal proceeding. This subsequent waiver of privilege presented “extraordinary circumstances,” and satisfied 29 C.F.R. § 102.48(c), because it involved pre-existing information that was newly-available.

None of the Board's cited authority establishes a legal duty for Mike-sell's to move for reconsideration, rehearing, or reopening of the record to preserve its

compliance defense. In fact, the Board readily admits that, “[t]o be sure, [it] ordinarily does not reopen a closed record to admit evidence that was not in existence at the time of the hearing” (Br. 25), and its own caselaw recently clarified that such motions are essentially optional. *See, e.g., The Boeing Co.*, 364 NLRB No. 24, slip op. at 4 and fn.11 (June 9, 2016) (“If evidence . . . first becomes available after the merits hearing . . . the [employer] may raise the issue in the compliance stage,” or “may alternatively move to reopen the record”) (emphasis added); *Lear Siegler, Inc.*, 295 NLRB 857, 861-62 (1989); *K & E Bus Lines*, 255 NLRB 1022, 1049 (1981). Given the Board’s own admission that it “ordinarily does not reopen a closed record to admit evidence that was not in existence at the time of the hearing” (Br. 25), as well as the fact that the Company’s proffered compliance evidence does not meet the standard of 29 C.F.R. § 102.48, Mike-sell’s had no reason to believe the Board would grant a motion to reopen the record in this case—much less a legal duty to file such a motion.

***C. Both the Board and the Union effectively “waived” any right to object to evidence of an intervening impasse in the compliance proceeding.***

It is undisputed that the Union never filed an unfair labor practice charge to challenge the unilateral implementation of the Revised Final Offer in June 2013. It is further undisputed that the June 2013 impasse and implementation were separate and distinct from the November 2012 impasse and implementation that were ultimately held unlawful. The Board recognizes that restoration may be waived, in

whole or in part (JA316), and the following proffered evidence would show that the Union's collective actions throughout this case—at the merits stage, on appeal, and in compliance—served to waive its right to restoration beyond June 12, 2013:

- The parties voluntarily bargained for seven months after the Final Offer was implemented in November 2012, reaching multiple tentative agreements that were implemented as part of the Revised Final Offer in June 2013. (JA26, JA305-JA306; ADD28, ADD35-ADD38, ADD85.)
- Despite a strike vote in February 2013, the Union refused to vote on, accept, or otherwise respond to the Revised Final Offer by the Company's June 12th deadline. (JA302, JA305; ADD17-ADD20, ADD28-ADD29, ADD85.)
- The Union promptly recognized but failed to file a new unfair labor practice charge (or even amend its pending Charge) to address the newly-declared impasse and implementation in June 2013, although the Revised Final Offer differed materially from the Final Offer. (JA286-JA287, JA292-JA293, JA296-JA297, JA303, JA305-JA307, JA309-JA310; ADD84-ADD85.)
- The Union has repeatedly acknowledged the separate and discrete unilateral implementation of the Revised Final Offer—in 2014 settlement negotiations, after a 2016 “catch-up” payment for underpaid holiday pay, after 2016 changes to HSA contributions, and at the 2017 compliance hearing—yet never filed a grievance or unfair labor practice charge to challenge it. (JA296-JA297, JA307-JA308, JA310; ADD86-ADD87.)
- The Union raised no verbal or written objections to litigating the Company's intervening impasse defense, despite participating in extensive pre-compliance settlement discussions, a year-long compliance investigation, multiple pretrial conferences, and robust pretrial motion practice. (JA242-JA285, JA296-JA297, JA303-JA305, JA309-JA310; ADD85-ADD89.)

This Court recognizes the need for separate unfair labor practice charges—or charge amendments—to challenge discrete events. *See e.g. Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012) (although charge filed

February 3, 2011, was untimely as to first refusal to bargain in April 2010, “a new refusal to bargain constitutes a new violation,” so charge was timely as to second refusal in February 2011).

The Company’s unilateral implementation of the Revised Final Offer in June 2013 was a discrete event—separate from implementation of its Final Offer seven months earlier.<sup>20</sup> If the Union wanted to legally challenge the Revised Final Offer, Section 10(b) of the NLRA required the filing of a new unfair labor practice charge (or the amendment of a pending Charge) within six months. But the Union’s first and only Charge was filed in November 2012, amended in February 2013, and litigated in April 2013. (JA13.) The parties continued to bargain during and after the merits phase, and ultimately reached impasse in June 2013, with the Revised Final Offer taking effect June 13th.<sup>21</sup> (JA26, JA302, JA305-JA306; ADD20,

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<sup>20</sup> Indeed, if the November 2012 implementation of the Final Offer had been found lawful, neither the Union nor the General Counsel would likely concede that the June 2013 implementation of the Revised Final Offer was equally valid.

<sup>21</sup> During bargaining on June 5, 2013, the Union witnessed the finality with which Mike-sell’s declared impasse, reiterated its Revised Final Offer, set a seven-day acceptance deadline, and disclosed its future plans. (JA302, JA305; ADD17-ADD20, ADD28-ADD29, ADD85.) Two of these symbolic acts (i.e., announcing an “impasse” at the table, and setting a concrete deadline for acceptance of the Revised Final Offer) had never occurred before, thus distinguishing the June 5th meeting from any prior. Mike-sell’s also followed up with the Union by email a few days later, emphasizing its June 5th message. (ADD85.) The Union refused to accept or otherwise respond to the Revised Final Offer by June 12th, seeming content to ignore the deadline and deny the existence of an impasse. (JA302, JA305-JA307, JA309-JA310; ADD17-ADD20, ADD28-ADD29, ADD85.)

ADD28-ADD29, ADD35-ADD38, ADD85.) The Order did not issue until January 2014 and was not enforced until December 2015—more than two years after the Revised Final Offer was implemented. (JA34, JA37.) Continuing liability past June 12, 2013, would therefore be grossly unjust, given that the Union neither filed a new unfair labor practice charge nor amended its pending Charge to challenge implementation of the Revised Final Offer, which has provided its members with enhanced benefits for over five years. (JA296-JA297.)

The Board appears to contend that the Union’s correspondence to Mike-sell’s in July 2013 and February 2016—which merely acknowledged and objected to the Company’s implementation of its Revised Final Offer (JA306-JA307, JA309-JA310; ADD85)—somehow carries the same legal force and effect as the filing (or amendment) of an unfair labor practice charge for purposes of challenging the second implementation. (Br. 34-35.) This argument is hardly worthy of credence, as it is well-established that informal “gripes” (and even formal contractual grievances) are no substitute for timely-filed unfair labor practice charges. *See, e.g., St. Barnabas Medical Center*, 343 NLRB 1125, 1126-27 (2004) (finding that union’s multiple written objections and demands, for employer to stop excluding and to start recognizing and applying labor contract to certain classes of employees, were insufficient to trigger NLRA protections in the absence of a timely-filed unfair labor practice charge).

In sum, the Union never raised a legal challenge to the Revised Final Offer, under which its members have now enjoyed richer wages and benefits for more than five years. The Union has therefore waived the legal right to contest the June 2013 impasse and implementation, the recognition of which is fully consistent with the language of the Court-enforced Order. (JA296-JA297.)

**II. The Board improperly excluded the Company’s evidence of certain overpayments, the “nature and purpose” of which were “equivalent” to other backpay elements for offset purposes.**

The Board contends that, “if an employer unlawfully diminishes one element of employees’ compensation . . . it cannot reduce its liability by taking advantage of . . . increases of another type, also in violation of the [NLRA].” (Br. 41.) This ignores the fact that the unchallenged June 2013 Revised Final Offer gave drivers higher commissions and commission-based PTO than either the Expired Contract or the November 2012 Final Offer. Indeed, the hike in commission-based pay resulted from the parties’ tentative agreements on non-manufactured product commissions and vacation and holiday pay calculations—all deals struck from December 2012 through February 2013, as Mike-sell’s ceded to Union demands on those subjects. (JA286-JA287, JA305; ADD84.) Because there was no legal challenge to the Revised Final Offer implemented in June 2013, the Board’s “unlawful diminishment” argument cannot justify exclusion of the overpayments.

The Board also disregards portions of its own precedent confirming that forms of compensation need not be identical to be equivalent for offset purposes. In *K & H Specialties Co.*, 163 NLRB 644 (1967), the employer claimed its liability should be offset by monthly bonuses, intermittent bonuses, and extra-contractual wage premiums. *Id.* The Board analyzed all three proffered offsets and ultimately rejected the intermittent bonuses as a setoff because they were paid on an irregular basis as “unexpected, gratuitous rewards either for extraordinary efforts or . . . for the performance of services beyond the [employee’s] primary duties.”<sup>22</sup> *Id.* at 649. But monthly bonuses and wage premiums were based on the performance of normally-assigned duties, and employees did nothing “extra” to earn them, so they were deemed “equivalent” to regular wages and applied as a setoff. *Id.* at 648-49.

Here, Mike-sell’s proffered compelling evidence that certain commission-based overpayments were equivalent to commission-based backpay alleged in the Compliance Specification. (JA278, JA282, JA287.) Drivers are paid on commission to incentivize sales, and their commission-based PTO reflects that

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<sup>22</sup> While its intermittent bonuses were rejected as an offset, the employer at least had the chance to present testimony and evidence showing why the bonuses might be worthy of a setoff. *K & H Specialties Co., Inc.*, 163 NLRB 644, 645 (1967)

same nature and purpose.<sup>23</sup> (JA278-JA279; ADD102-ADD103.) Pursuant to tentative agreements reached in post-implementation bargaining, the unchallenged Revised Final Offer changed the way drivers' holidays and vacations were paid, making those benefits equivalent to commission-based sick/personal days (with which they are interchangeable), as well as commission-based wages. *See Bayshore Ambulance Co.*, 20-CA-35598, 2012 WL 3776857 (NLRB Aug. 30, 2012) (rejecting General Counsel's contention "that the PTO benefit should be treated as separate and distinct from mere wages" and permitting PTO to be "treated as gross backpay . . . [that] can then be offset by interim earnings").

The Board claims that non-commissioned employees are similarly-situated in their motivation to "work hard" based on the prospect of a compensation increase resulting in higher-paid PTO. (Br. 44.) However, this argument overlooks the fundamental difference between commissioned and non-commissioned employees. While non-commissioned workers might wish for a raise so that their active-duty and paid-leave paychecks increase, they have no

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<sup>23</sup> That is, drivers' PTO and wages are paid at a variable rate depending on each driver's individual performance. (JA188-JA193, JA237-JA320; ADD102.) If not for this sales incentive, Mike-sell's would have no reason to link PTO with commissions and could instead propose flat- or hourly-rate PTO that is more cost-effective and easier to budget. (JA275, JA286.) By successfully bargaining for holiday pay to match sick pay, and for sick pay to match vacation pay in the Revised Final Offer, the Union implicitly established the equivalency of these three interchangeable types of commission-based PTO for offset purposes. (JA278-JA279; ADD103.)

actual control over their compensation. In contrast, commissioned workers need not daydream of higher wages and PTO benefits; they can sell more product to directly impact their own bottom line.

Although drivers' PTO is nominally classified as "vacations," "sick/personal days," and "holidays," it is undisputed that these benefits are used interchangeably and may be cashed out in lieu of leave.<sup>24</sup> (Br. 44; JA7, JA275-JA276, JA280; ADD103.) And just as with the monthly bonuses and wage premiums that offset backpay in *K & H Specialties*, employees do nothing "extra" for their commission-based PTO. Hence, although the PTO benefits may bear different nomenclature, they are interchangeably "equivalent" to one another—as well as regular commissions—in their nature and purpose, and thus should be permitted as backpay offsets. To find otherwise would exalt form over substance.

### CONCLUSION

For the reasons stated above, the Petition for Review should be granted, the Cross-Petition for Enforcement should be denied, and the Supplemental Order should be reversed to the extent indicated, with the case remanded for a compliance hearing to consider the Company's previously-excluded evidence.

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<sup>24</sup> Ironically, the evidence would show that this is part of the reason Mike-sell's wanted to reduce the annual "sick/personal day" allotment. (ADD103 at fn.14.)

Respectfully submitted,

*s/ Jennifer R. Asbrock*

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### CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Circuit Rule 32 because this brief (including signature) contains 6,485 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Circuit Rule 32(a)(1). The undersigned used Microsoft Word 2010 to compute the count.

This brief also complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6), as it was prepared in a proportionally-spaced, 14-point Times New Roman font by Microsoft Word 2010.

Dated: January 16, 2019

/s/ Jennifer R. Asbrock

**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2019, Petitioner-Cross Respondent electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which constitutes service upon the following registered CM/ECF user(s):

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