

Nos. 09-0099-ag, 09-0864-ag

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

**KINGSBRIDGE HEIGHTS CARE CENTER, INC., d/b/a
KINGSBRIDGE HEIGHTS REHABILITATION AND CARE CENTER**

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**

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TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Statement of the issues.....	3
Statement of the case.....	3
Statement of facts.....	5
I. The Board’s findings of fact.....	5
A. The Company agrees to contribute to the union-sponsored employee-benefit funds in a collective-bargaining agreement.....	5
B. The Company fails to timely make the required fund contributions, then breaches a settlement agreement that it reached, which required it to correct its delinquencies and make timely payments	5
II. The Board’s conclusions and order.....	7
Summary of argument.....	8
Argument.....	9
I. The Board is entitled to summary enforcement of the uncontested portion of its order requiring the Company to make employees whole for losses suffered as a result of its failure to make timely contributions to the union funds, which is based on its uncontested finding that the Company violated the Act, and the parties’ settlement agreement, by failing to make such timely contributions.....	9

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
II. The Board acted within its broad remedial discretion by ordering the Company to make the fund contributions that it had failed to make on behalf of its employees, and to continue to make the required timely fund contributions until the parties reach agreement or bargain to impasse.....	11
A. Applicable principles and standard of review	11
B. The Board’s remedy is reasonable because it properly restores the employees to the position they would have occupied absent the Company’s violations, and deprives the Company of the advantages it gained by its violations	13
C. The Company’s claims are premature and do not bar enforcement of the Board’s Order	15
Conclusion	23

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Achilles Construction Co.</i> , 290 NLRB 240 (1988), <i>enforced mem.</i> , 875 F.2d 308 (2d Cir. 1989).....	14
<i>Fibreboard Products Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	12
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190 (1991).....	10
<i>Made 4 Film, Inc.</i> , 337 NLRB 1152 (2002).....	15
<i>Manhattan Eye Ear & Throat Hospital v. NLRB</i> , 942 F.2d 151 (2d Cir. 1991)	9, 15, 16, 17, 18, 19, 21
<i>Master Iron Craft Corp.</i> , 289 NLRB 1087 (1988), <i>enforced mem.</i> , 898 F.2d 138 (2d Cir. 1990).....	13
<i>Mattina v. Kingsbridge Heights Rehabilitation & Care Ctr.</i> , 2009 W L 1383330 (2d Cir. No. 08-4059, May 18, 2009), <i>affirming</i> 2008 WL 3833949 (S.D.N.Y, Aug. 14, 2008)	4, 5
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	10
<i>NLRB v. Amateyus, Ltd.</i> , 817 F.2d 996 (2d Cir. 1987)	13
<i>NLRB v. Coca-Cola Bottling Co.</i> , 191 F.3d 316 (2d Cir. 1999)	11, 12, 14, 20
<i>NLRB v. Fugazy Continental Corp.</i> , 817 F.2d 979 (2d Cir. 1987)	12

TABLE OF AUTHORITIES

Cases --cont'd:	Page(s)
<i>NLRB v. J.H. Rutter-Rex Manufacturing Co.</i> , 396 U.S. 258 (1969).....	12
<i>NLRB v. Katz</i> , 80 F.3d 755 (2d Cir. 1996)	8, 9, 13, 16, 17, 18, 22
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	10
<i>NLRB v. Mastro Plastics Corp.</i> , 354 F.2d 170 (2d Cir. 1965)	12, 15
<i>NLRB v. S.E. Nichols, Inc.</i> , 862 F.2d 952 (2d Cir. 1988)	12
<i>NLRB v. Seven-Up Bottling Co.</i> , 344 U.S. 344 (1953).....	11
<i>NLRB v. Springfield Hospital</i> , 899 F.2d 1305 (2d Cir. 1990)	10
<i>NLRB v. State Color Plate Serv.</i> , 843 F.2d 1507 (2d Cir. 1988)	10
<i>NLRB v. Transport Service Co.</i> , 973 F.2d 562 (7th Cir. 1992)	13, 14
<i>Peerless Roofing Co. v. NLRB</i> , 641 F.2d 734 (9th Cir. 1981)	15
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	11

TABLE OF AUTHORITIES

Cases --cont'd:	Page(s)
<i>Resort Nursing Home & Kingsbridge Heights Rehabilitation Center</i> , 340 NLRB 650 (2003), <i>enforced</i> , 389 F.3d 1262 (D.C. Cir. 2004).....	3, 4, 5
<i>Sara Lee Bakery Group, Inc. v. NLRB</i> , 514 F.3d 422 (5th Cir. 2008)	10
<i>Sheet Metal Workers' Local 355 v. NLRB</i> , 716 F.2d 1249 (9th Cir. 1983)	12, 14
<i>Snell Island SNF LLC v. NLRB</i> , 568 F.3d 410 (2d Cir. 2009)	2
<i>Stone Boat Yard v. NLRB</i> , 715 F.2d 441 (9th Cir. 1983)	13, 14
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	11, 12, 17
<i>Virginia Concrete Co., Inc. v. NLRB</i> , 75 F.3d 974 (4th Cir. 1996)	13, 14
<i>Virginia Electric & Power Co. v. NLRB</i> , 319 U.S. 533 (1943).....	12, 14

TABLE OF AUTHORITIES

Statute:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	7
Section 3(b) (29 U.S.C. § 153(b))	2
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	4, 7, 8, 9, 10
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	4, 7, 8, 9, 10
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(c) (29 U.S.C. § 160(c))	11
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f))	2
Section 10(j) (29 U.S.C. § 160(j))	4

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court upon the petition of Kingsbridge Heights Care Center, Inc., d/b/a Kingsbridge Heights Rehabilitation and Care Center (“the Company”) to review, and upon the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board that

issued on December 24, 2008, and is reported at 353 NLRB No. 69. (A 698-712.)¹ The Company filed its petition for review on January 9, 2009. The Board filed its cross-application for enforcement on March 4, 2009. These filing were timely because the Act imposes no time limit on such proceedings.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in Bronx, New York.

The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act. The Board’s Order was issued by a properly constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). In *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), this Court correctly held that the two-member quorum has authority to issue decisions under Section 3(b) of the Act. The *Snell Island* decision is the law of the circuit, and therefore, the Company’s challenge (Br 12-20) to the authority of the two-member quorum must be rejected.

¹ “A” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portion of its Order requiring the Company to make employees whole for losses suffered as a result of its failure to make timely contributions to the union funds, which is based on its uncontested finding that the Company violated the Act, and the terms of the parties' settlement agreement, by failing to make such timely contributions.

2. Whether the Board acted within its broad remedial discretion by ordering the Company to pay into the union funds those contributions that it had failed to make on behalf of its unit employees, and to continue to make the required timely fund contributions until the parties reach agreement or bargain to impasse.

STATEMENT OF THE CASE

This case is the latest in a long line involving this employer. In a prior, related proceeding, the Board found that the Company had unlawfully withdrawn from a multi-employer bargaining association. The Board ordered the Company to sign and abide by the collective-bargaining agreement (or "CBA"), which the association had negotiated on the Company's behalf, including reimbursing the union funds for payments due under the CBA. *See Resort Nursing Home &*

Kingsbridge Heights Rehabilitation Center, 340 NLRB 650 (2003), *enforced*, 389 F.3d 1262 (D.C. Cir. 2004).

Thereafter, the Company failed to timely remit fund contributions as required by the CBA. Upon charges filed by 1199 Service Employees International Union, United Health Care Workers East (“the Union”), the Board’s General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to make timely and complete contributions to the union funds on behalf of the Company’s employees without first bargaining with the Union. (A 699.) At the inception of a hearing before an administrative law judge, the parties reached a settlement resolving the complaint allegations. The judge ordered that the complaint be dismissed, subject to reinstatement upon breach of the settlement agreement. (*Id.*) Upon evidence that the Company had breached the settlement, a hearing was held, after which the judge found that the Company had violated the Act as alleged. (*Id.*) The Company filed exceptions. Finding no merit to the exceptions, the Board adopted the judge’s findings and recommended order as modified. (A 698 & n.1.)²

² Moreover, after the Board issued the Order, this Court affirmed the district court’s issuance, in a related case, of an injunction under Section 10(j) of the Act (29 U.S.C. § 160(j)), barring the Company from engaging in various unfair labor practices, including failing to make contributions to union funds. *See Mattina v. Kingsbridge Heights Rehab. & Care Ctr.*, 2009 WL 1383330 (2d Cir. No. 08-

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Agrees To Contribute to the Union-Sponsored Employee-Benefit Funds in a Collective-Bargaining Agreement

The Company, a New York corporation, operates a nursing home in Bronx, New York. (A 699.) For several years, certain of its employees have been represented by the Union. The Company and the Union have been parties to a series of CBAs, the most recent of which was the CBA addressed in *Resort Nursing Home & Kingsbridge Heights Rehabilitation Center*, which expired on April 30, 2005. (A 701.) The CBA required the Company to make contributions to various union-sponsored employee-benefit funds, including the Benefit (Health), Pension, Education, Job Security, and Child Care funds (collectively, “the Funds”), on or before the 10th day of each month. (A 699, 701.)

B. The Company Fails to Timely Make the Required Fund Contributions, then Breaches a Settlement Agreement that It Reached, Which Required It To Correct Its Delinquencies and Make Timely Payments

Beginning about June 2005, the Company stopped making timely and complete fund contributions. *See* A 700-03 (detailing the Company's numerous untimely and incomplete fund contributions). On December 6, 2005, the Union filed an unfair labor practice charge, and on May 1, 2006, the Board issued a

4059, May 18, 2009) (unpublished summary order), *affirming* 2008 WL 3833949 (S.D.N.Y., Aug. 14, 2008).

complaint alleging the Company violated the Act by failing to make timely and complete fund contributions. (A 700; 347-56.)

After the hearing opened on June 8, 2006, the parties entered into a settlement agreement, which disposed of most of the complaint allegations and required the Company to make “timely” monthly fund contributions. *See* A 701, 706 (describing the settlement agreement).³ On June 26, 2006, the judge approved the parties’ request to dismiss the complaint, subject to reinstatement if the Company failed to comply with the settlement. (A 699.)

The Company thereafter failed to make complete and timely contributions, and ceased making contributions altogether in August 2007. (A 701-03, 710; Br 4). In late 2007, in light of the Company’s alleged breach of the settlement, the administrative law judge reopened the unfair labor practice proceeding. (A 699.) The judge determined that the Company had, in fact, breached the settlement by continuing to make untimely and incomplete fund contributions. *See* A 701-03, 710 (detailing the Company’s repeated untimely post-settlement contributions). Specifically, the Company failed to make timely contributions to the Funds from June 2005 through May 2006. Then, despite entering the settlement agreement in

³ The settlement addressed all of the allegations in the complaint except for a 3-month period in early 2006, during which the Company contended no contributions were due. The parties later entered into a non-Board settlement to resolve this matter. (A 699.)

June 2006, the Company consistently failed to make timely fund contributions, including failing to make any contributions since August 2007. (A 710.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 24, 2008, the Board (Chairman Schaumber and Member Liebman) issued a Decision and Order finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to make timely and complete fund contributions as required by the terms of the CBA and the parties' settlement agreement. (A 698, 710.) The Board ordered the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A 698, 711.) Affirmatively, the Order requires the Company to make the fund contributions that it had failed to make on behalf of its unit employees, to continue to make the required timely fund contributions until the parties reach agreement or bargain to impasse, to make whole employees for any losses suffered by reason of the Company's unlawful failure to make timely fund contributions, and to post a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

The Company does not dispute that it violated Section 8(a)(5) and (1) of the Act, and the terms of the parties' settlement agreement, by failing to make timely and complete contributions to the Funds. Nor does the Company challenge the portion of the Board's Order requiring it to make employees whole for losses suffered as a result of its unlawful failure to make such contributions.

Accordingly, the Board is entitled to summary enforcement of its uncontested finding and the unchallenged portions of its remedial order.

The Board acted well within its broad remedial discretion in ordering the Company to reimburse the Funds for the contributions it failed to make on behalf of its unit employees. It is settled that where an employer fails to make required fund contributions, the Board may restore the *status quo ante* by requiring the employer to reimburse the funds for the missed contributions. Such fund reimbursement is proper because it protects the employees' stake in the future viability of the funds, and removes from the wrongdoer the fruits of its violations. Otherwise, here, the Company's diversion of contributions from the Funds would undercut the funds' ability to provide for the employees' future needs, and the Company would achieve considerable savings as a result of its unlawful conduct.

The Company's claims are premature and do not bar enforcement of the Board's Order. This Court has enforced similar remedial Board orders. *See NLRB*

v. Katz, 80 F.3d 755, 771 (2d Cir. 1996). The Company's arguments are premised on its mistaken view that this Court's decision in *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151 (2d Cir. 1991), conflicts with the Board's reimbursement order. That case, which was in a different procedural posture, addressed evidence brought up during a compliance proceeding where employees had disavowed any present or future interest in the union funds. Because there has not yet been a compliance proceeding, no such evidence has been presented here. As this Court has noted with approval, the Board traditionally defers questions touching upon the extent of a wrongdoer's liability to the compliance stage of the proceeding. *See NLRB v. Katz*, 80 F.3d at 771.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTION OF ITS ORDER REQUIRING THE COMPANY TO MAKE EMPLOYEES WHOLE FOR LOSSES SUFFERED AS A RESULT OF ITS FAILURE TO MAKE TIMELY CONTRIBUTIONS TO THE UNION FUNDS, WHICH IS BASED ON ITS UNCONTESTED FINDING THAT THE COMPANY VIOLATED THE ACT, AND THE PARTIES' SETTLEMENT AGREEMENT, BY FAILING TO MAKE SUCH TIMELY CONTRIBUTIONS

The Company does not contest the Board's finding that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to make timely and complete fund contributions on behalf of its employees.⁴ *See* Br 11 n.2

⁴ Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives

(stating that the Company is not “arguing that it did not violate the Act”); *see also* Br 4, 7 (admitting that the Company was “delinquent in its contributions to the Funds, including a complete cessation of payments in August, 2007”). Nor does the Company (Br 21-25) challenge the portion of the Board’s Order requiring it to make employees whole for any losses suffered as a result of its unlawful failure to make timely fund contributions. Accordingly, the Board is entitled to summary enforcement of its uncontested findings and the unchallenged portions of its remedial order. *See NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1308 n.1 (2d Cir. 1990) (holding that the Board is entitled to “summary affirmance” of its unchallenged findings). *Accord Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008) (“[c]ase law has established that when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement[.]”) (citing cases). *See also NLRB v. State Color Plate Serv.*, 843 F.2d 1507, 1510 n. 3 (2d Cir. 1988) (employer’s “failure to present claim in its original brief before this court provides” grounds for

of [its] employees” That section bars an employer from unilaterally discontinuing those terms of an expired CBA that involve mandatory subjects of bargaining, such as the fund contributions here. *See NLRB v. Katz*, 369 U.S. 736 (1962); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Moreover, a violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ,” is “derivative” of a violation of Section 8(a)(5) of the Act. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

“refusal to hear [the] claim[.]”).

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING THE COMPANY TO MAKE THE FUND CONTRIBUTIONS THAT IT HAD FAILED TO MAKE ON BEHALF OF ITS EMPLOYEES, AND TO CONTINUE TO MAKE THE REQUIRED TIMELY FUND CONTRIBUTIONS UNTIL THE PARTIES REACH AGREEMENT OR BARGAIN TO IMPASSE

The issue on appeal is a narrow one. As just shown, the Company does not dispute that it unlawfully failed to make timely fund contributions on behalf of its unit employees. Rather, it claims that the Board erred when it remedied that violation by ordering the Company to make the fund contributions that it had failed to make. As we show below, the Board’s Order is reasonable, and must therefore be affirmed, because it properly places the employees in the position they would have occupied absent the Company’s unlawful conduct.

A. Applicable Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that “upon finding that an employer has committed an unfair labor practice,” the Board may direct the violator “to take such affirmative action . . . as will effectuate the policies of the Act.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). *Accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *NLRB v. Coca-Cola Bottling Co.*, 191 F.3d 316, 323 (2d Cir. 1999). Under the Act, the Board may properly design the remedy to restore “the economic *status quo* that would have obtained but for the [unfair labor practice].” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194

(1941). *Accord NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). In crafting such a remedy, the Board properly secures the rights of the injured parties and deters the commission of future unfair labor practices by preventing the wrongdoer from gaining an advantage from its unlawful conduct. *Mastro Plastics Corp.*, 354 F.2d at 175; *Sheet Metal Workers' Local 355 v. NLRB*, 716 F.2d 1249, 1256 (9th Cir. 1983) (noting that the Act “requires that a transgressor should bear the burden of the consequences stemming from its illegal acts”).

The Board’s discretion in formulating remedies “is a broad one, subject to limited judicial review.” *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Sure-Tan, Inc.*, 467 U.S. at 898-99; *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 960 (2d Cir. 1988). “Because of the Board’s unique expertise in labor disputes,” this Court accords “deference to the remedy [the Board] imposes.” *NLRB v. Coca-Cola Bottling Co.*, 191 F.3d at 323-24. Accordingly, the Board’s choice of remedy will not be overturned unless the Company shows that the remedy “is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.” *NLRB v. Fugazy Continental Corp.*, 817 F.2d 979, 982 (2d Cir. 1987) (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)); *accord NLRB v. Coca-Cola Bottling Co.*, 191 F.3d at 323-24. As we now show, the Company fails to meet that burden.

B. The Board's Remedy Is Reasonable Because it Properly Restores The Employees to the Position They Would Have Occupied Absent the Company's Violations, and Deprives the Company of the Advantages It Gained By Its Violations

The Board properly remedied the Company's admitted failure to make complete and timely fund contributions by requiring the Company to make the fund contributions that it had failed to make on behalf of its unit employees, and to continue to make the required timely fund contributions until the parties reach agreement or bargain to impasse. The Board's remedy is fully consistent with settled law that where an employer unlawfully fails to make its contributions to a union-sponsored benefit fund, the Board may restore the *status quo ante* by requiring the employer to reimburse the funds for the missing contributions. *NLRB v. Amateyus, Ltd.*, 817 F.2d 996, 997-98 (2d Cir. 1987); *Master Iron Craft Corp.*, 289 NLRB 1087, 1088 n.12 (1988), *enforced mem.*, 898 F.2d 138 (2d Cir. 1990). *Accord NLRB v. Katz*, 80 F.3d 755, 771 (2d Cir. 1996) (noting that the Board may order retroactive fund payments to restore the *status quo ante*). *See also Virginia Concrete Co., Inc. v. NLRB*, 75 F.3d 974, 988 (4th Cir. 1996); *NLRB v. Transport Serv. Co.*, 973 F.2d 562, 569 (7th Cir. 1992); *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). Such an order is remedial, not punitive, because it properly requires the employer to "repay what it has unlawfully withheld." *Stone Boat Yard*, 715 F.2d at 446; *accord Katz*, 80 F.3d at 771; *Transport Serv. Co.*, 973 F.2d at 568-69.

Moreover, as this Court has explained, an employee “who participates in a [union] fund” has “a future interest in the financial strength of the fund.” *NLRB v. Coca-Cola Bottling Co.*, 191 F.3d at 324; *accord Virginia Concrete Co.*, 75 F.3d at 988; *Stone Boat Yard*, 715 F.2d at 446; *Transport Serv. Co.*, 973 F.2d at 568-69. Accordingly, fund-reimbursement is proper in these circumstances because the employer’s “diversion of contributions from the union funds undercuts the ability of those funds to provide for [the employees’] future needs.” *Stone Boat Yard*, 715 F.2d at 446. *Accord NLRB v. Coca-Cola Bottling Co.*, 191 F.3d at 324; *Virginia Concrete Co.*, 75 F.3d at 988; *Achilles Constr. Co.*, 290 NLRB 240, 240-41 n.12 (1988), *enforced mem.*, 875 F.2d 308 (2d Cir. 1989). Indeed, this established basis for fund reimbursement applies with particular force here, where the Company has failed to timely make the required fund contributions over a period of years, including failing to make any contributions since August 2007.

In addition, the Board’s make-whole Order reasonably prevents the Company from reaping the benefits of its unlawful conduct, namely, the savings of unlawfully withheld required fund contributions. *See Virginia Electric & Power Co.*, 319 U.S. at 541 (approving a Board order that “deprives the employer of advantages accruing from a particular method of subverting the Act”); *Sheet Metal Workers’ Local 355*, 716 F.2d at 1256 (noting that “a transgressor should bear the

burden of the consequences stemming from its illegal acts”). *Accord Mastro Plastics Corp.*, 354 F.2d at 175.

C. The Company’s Claims are Premature and Do Not Bar Enforcement of the Board’s Order

The Company seeks to avoid liability for its admitted violations by arguing (Br 21-25) that, under this Court’s decision in *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151 (2d Cir. 1991) (“*Manhattan Eye*”), the Board’s make-whole order, which requires the Company to pay into the Funds those contributions “that it failed to make on behalf of its unit employees,” is punitive and speculative and will result in a windfall payment to the Funds.⁵ This claim fails, however, for three fundamental reasons. First, the claim is premature because, unlike in *Manhattan Eye*, the Board has yet to conduct compliance proceedings to determine the precise contours of the remedy. Second, the facts of this case are plainly distinguishable from the unique context of *Manhattan Eye*. Third, the Company

⁵ It is unclear whether the Company (Br 21-25) is also challenging the portion of the Board’s Order that requires the Company to continue to make the required timely contributions to the Union’s funds until the parties reach agreement or bargain to impasse. The Company’s brief seems only to challenge the retroactive payments to the Funds. In any event, that portion of the Order is supported by settled precedent (*see* cases cited above at p. 9 n.4) and the parties’ stipulation (A 701 n.9), both of which provide that the Company’s obligation to make timely contributions to the Funds continues after the CBA expired and until the parties reach agreement or impasse. *See also Made 4 Film, Inc.*, 337 NLRB 1152 (2002) (imposing a similar remedy) (citing *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981) (employer required to continue making contributions to union funds after CBA expired)).

ignores the facts and established remedial principles which support the Board's Order. We explain each of these points below.

This Court consistently has enforced similar Board remedial orders in the procedural posture of this case. As this Court has recognized, Board cases involve a two-step process: the merits stage and the compliance stage. *See Katz*, 80 F.3d at 771; *Manhattan Eye*, 942 F.2d at 156. At the merits stage, the Board issues a decision that determines whether the Act was violated and an order that provides a remedy for any violations found. Thus, at the merits stage in *Manhattan Eye*, this Court enforced a Board order which, like the Order here, required the employer to make union fund contributions that it had unlawfully failed to make and to make employees whole for losses suffered as a result of that failure. *Manhattan Eye*, 942 F.2d at 154. *See also Katz*, 80 F.3d at 771 (upholding a Board order requiring employer to make retroactive fund contributions). As this Court has explained, such an order should be enforced at the merits stage because it properly restores employees to “the same position they would have been in” absent the employer's wrongdoing. *Katz*, 80 F.3d at 771. *See also* cases cited above at pp. 13-14 (upholding similar orders on similar grounds).

After an order is enforced by a court, the Board, if necessary, then conducts separate compliance proceedings to tailor the remedy to the individual circumstances of the case. *See Katz*, 80 F.3d at 771 (noting that Board

“compliance determinations are routinely made ‘after entry of a Board order directing remedial action, or the entry of a court judgment enforcing such [an] order’”) (citation omitted). Board compliance proceedings can include additional fact-finding and a hearing before an administrative law judge “when it is necessary to resolve compliance issues.” *Katz*, 80 F.3d at 771 (citation omitted). *See Manhattan Eye*, 942 F.2d at 156 (noting that “[d]eferring” the precise contours of “the remedy to the compliance or backpay proceedings is entirely consistent with long-standing administrative practice of the [Board], one which has received the imprimatur of the Supreme Court”) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984)).

As this Court observed in *Katz*, it is generally “premature” prior to compliance proceedings for an employer to argue, as the Company does (Br 21-25), that a fund-reimbursement order conflicts with *Manhattan Eye*. *Katz*, 80 F.3d at 771. This is so because the “Board has yet to determine how [the employer’s] payments should be structured to best [restore the *status quo ante*].” *Katz*, 80 F.3d at 771. Accordingly, as the *Katz* court noted, the *Manhattan Eye* court refused to enforce a fund-reimbursement order “only after the [Board] had conducted

compliance proceedings,” which culminated in an order setting forth the exact amounts owed. *Id.* (citing *Manhattan Eye*, 942 F.2d at 154).⁶

Moreover, the Company’s reliance on *Manhattan Eye* fails because that case is plainly factually distinguishable. Contrary to the Company’s claim (Br 21-22), *Manhattan Eye* was not a sweeping condemnation of fund-reimbursement orders. Rather, the Court carefully limited that case to its unique “factual context,” where, unlike here, it was proven during compliance proceedings that the employees had explicitly disavowed any present or future interest in the union funds. *Manhattan Eye*, 942 F.2d at 157-60. Specifically, in *Manhattan Eye*, the evidence presented during compliance proceedings proved that the employees had “disclaimed any present or future interest in being covered by [the funds];” that they were no longer represented by the union as the union had disclaimed any interest in representing them; and that they had suffered no financial detriment because they received substitute benefits through the employer’s “equivalent or superior” plan. *Id.* at 153, 157-59. The Court observed that ordering fund contributions in these circumstances would “fail [] to benefit the employees” and would “result [] in a windfall for the union funds.” *Id.* at 153, 159-60. Further, the mere “possibility

⁶ Thus, the Company is simply wrong in asserting (Br 24) that the calculation of the exact amounts it owes the Funds, which would occur during compliance proceedings following court enforcement of the Board’s Order, would merely be a “ministerial act.” Rather, as this Court analogized, the compliance proceeding is similar to a separate damages phase of a civil trial. *See Katz*, 80 F.3d at 771.

that the employees might later seek coverage under [the union funds] is too speculative a basis on which to order [reimbursement to those funds].” *Id.* at 157. Accordingly, the Court held that, in this specific context, the Board “must have concrete evidence that the [employees] have an economic interest in the future of the [union funds]” before it may award back payments against the employer for failing to contribute to those funds. *Id.* at 157-58.

In *Manhattan Eye*, the Court made clear that its holding was limited to “the matter at hand”—namely, where the employees had disclaimed any present or future interest in the funds and had already been fully compensated by the employer’s alternate plan. *Id.* at 159. Indeed, the Court clearly stated that it did not in any way question the Board’s authority “to order the imposition of the *status quo ante* in other cases where an employer unilaterally discontinues payments to union-sponsored benefit funds.” *Id.*⁷

It follows that the Company cannot show (Br 23) that the Board’s Order is “necessarily in conflict” with *Manhattan Eye*. Rather, in stark contrast to *Manhattan Eye*, no evidence has been presented that the employees disclaimed any present or future interest in the Funds, or that the Union disclaimed interest in representing the employees, or that the Company provided any substitute benefits,

⁷ Thus, there is no basis for the Company’s claim (Br 21-23) that *Manhattan Eye* precludes the Board from ordering fund-reimbursement even where, as here, no evidence has been presented disputing the employees’ interest in the funds.

much less “equivalent or superior” benefits. Thus, unlike in *Manhattan Eye*, it cannot be said that the Board’s Order “fails to benefit the employees,” or that the employees have only a “speculative” interest in the future viability of the Funds. *Id.* at 157, 159.⁸

Nor can the Company (Br 23-25) escape liability for its admitted delinquencies from November 2007 through mid-February 2008, the period when the Funds suspended employee health benefits due to the Company’s chronic failure to timely remit contributions. (*See* A 704). The Company’s bald assertion (Br 25) that the Board’s Order grants the Funds a “windfall” is unsupported and ignores relevant facts and remedial principles. First, there is no evidence to support its claim (Br 24) that “no benefits were given” during this period. In fact, the Funds suspended health benefits for a few months; there is no evidence that the child care, pension, education, and other funds at issue here were similarly suspended. (*See* A 704.)

Second, the Company’s argument fails to recognize that its chronic and unlawful failure to make timely and complete contributions over a period of years, combined with its breach of the settlement agreement, eventually caused the Funds to temporarily suspend health benefits. *See* A 702-04 (explaining that the Funds

⁸ The Company’s reliance on *NLRB v. Coca-Cola Bottling*, 191 F.3d 316, 324-35 (2d Cir. 1999), is similarly misplaced as the Court was reviewing a final Board order, issued *after* compliance proceedings, that specified the exact amounts owed to the union funds.

withheld benefits only after repeatedly attempting to collect the delinquent payments, and only after warning that continued delinquencies would result in the termination of benefits). Consistent with established remedial law (*see* cases cited above at pp. 12-15), the Board's Order properly places the burden of the Company's unlawful acts on the Company, rather than on the innocent employees who depend on the future viability of the Funds.

Third, there is no evidence of "windfall" here. Rather, the Company simply ignores that its unlawful conduct harmed the employees by diverting money from the Funds, thereby undercutting their ability to meet the employees' future needs. Accordingly, the Board's Order properly makes the employees whole by ensuring the Funds' future viability. The Company dares not suggest, much less point to any facts showing, that the impact of several years worth of delinquent and non-existent payments is offset by the Funds' withholding health benefits for less than a 4-month period. Indeed, at this stage of the proceeding, the Company does not make any specific claim at all, beyond assertions (Br 23-25) that employees do not have an interest in the Funds and that contributions do not account for "staffing levels." The Board's Order does not seek to grant a windfall to the Funds, instead

it simply, and appropriately, requires the Company to pay into the Funds “those contributions that it failed to make on behalf of its unit employees.”⁹

In sum, nothing in the Company’s brief presents an impediment to fully enforcing the Board’s Order at this stage of the proceedings. Rather, the evidence at this stage shows that the employees have an interest in the future viability of the Funds that supports the Board’s Order requiring the Company to reimburse the Funds. Moreover, to the extent that any further evidence of the employees’ future interest in the Funds might be needed, such evidence may appropriately be introduced at the compliance stage of this proceeding. As noted, deferring such matters to compliance comports with the Board’s longstanding practice for determining the specific amounts due under make-whole remedies. As this Court noted, “Only after such determinations have been made can we evaluate whether the Board’s remedial order is consistent with *Manhattan Eye*--ordering retroactive benefit payments only to the extent necessary to restore [] employees to the position they would have been in had [the employer not engaged in unlawful conduct].” *Katz*, 80 F.3d at 771. Accordingly, the Board’s Order should be enforced in full.

⁹ Contrary to the Company’s suggestion (Br 23-24), Chairman Schaumber did nothing more than agree to follow extant Board law. (A 698 n.1) There is nothing in his concurring notes that suggests that the Board’s Order is contrary to *Manhattan Eye*.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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JULY 2009

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FOR THE SECOND CIRCUIT

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AND CARE CENTER	*	Nos. 09-0099-ag,
	*	09-0864-ag
Petitioner/Cross-Respondent	*	
	*	Board Case No.
v.	*	29-CA-27502
	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 5,363 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 24th day of July 2009

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	*
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	*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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Dated at Washington, DC
this 24th day of July 2009