

**FINAL BRIEF**

**No. 09-0217-ag**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**EUGENE IOVINE, INC.**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court upon the application of the National Labor Relations Board (“the Board”) for enforcement of its Decision and Order against Eugene Iovine, Inc. (“the Company”), to review the Board’s Decision and Order, which issued on September 30, 2008, and is reported at 353 NLRB No. 36.<sup>1</sup> (A

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<sup>1</sup> “A” refers to the appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

209-20.) The Board filed its application for enforcement on January 14, 2009. This filing was timely; the Act places no time limit on filing for enforcement of Board orders.

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”). This Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in New York.

The Order is final 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 conclusively held that the two-member quorum has the authority under Section 3(b) to issue decisions. Accordingly, the Company’s contrary contention (Br. 17-24) must be rejected.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees without notifying the Union and giving it an opportunity to bargain over the layoff decision. In addition, a subsidiary issue is whether the Board is

entitled to summary affirmance of its decision that the Company failed to bargain over the effects of its layoff decision.

2. Whether the Board properly used its broad remedial discretion by awarding the laid off employees full backpay for the duration of the layoff.

### **STATEMENT OF THE CASE**

This case came before the Board on a complaint issued by the Board's General Counsel pursuant to charges filed against the Company by Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO ("the Union"). (A 181-82.) The complaint alleged that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees between December 1996 and May 1998. (A 182; A 11-18.)

A hearing was held on February 21, 2002. On April 17, 2002, Administrative Law Judge Howard Edelman issued a decision, finding that the Company had engaged in the alleged unfair labor practices. (A 182.) On May 31, 2006, the Board (Chairman Battista and Members Schaumber and Kirsanow), concerned that Judge Edelman had "copied extensively from the General Counsel's brief in his decision," remanded the case to the chief administrative law judge for reassignment to a different administrative law judge with the instruction to "review the record and issue a reasoned decision." (A 182.)

On August 31, 2006, Administrative Law Judge David Goldman found that the Company violated the Act when it laid off employees without providing the Union notice and the opportunity to bargain over the layoff decision and the effects of the layoffs. The judge rejected the Company's affirmative defense that it had an established past practice with the Union that required it only to notify the benefit funds, and not the Union, of a layoff. The judge found that "the record is devoid of evidence from which a past practice regarding layoffs *with [the Union]* can be established." (A 186.) As the judge explained: "A past practice is not part of the 'status quo' because it happened in the past, lay dormant, and an employer seeks to revive it to privilege unilateral changes taken years later." (A 187.) The judge further found, in the alternative, that "assuming *arguendo*" that the Company had an established past practice with the former union, Local 363, International Brotherhood of Teamsters ("Local 363"), the Union never acquiesced to this practice, thereby barring the Company from continuing to rely on that practice to privilege its unilateral layoff. (A 187-88.) On September 30, 2008, the Board issued its Decision and Order finding that the Company's unilateral layoffs violated Section 8(a)(5) and (1) of the Act. (A 209-20.) The Board agreed with the judge that the Company failed to establish a past practice of notifying the funds, not the Union, of a layoff, and found it unnecessary to rely on the judge's alternative finding.

## STATEMENT OF THE FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Overview of the Company

The Company, in business since 1965, provides electrical contracting services to other businesses and government entities at jobsites in New York City and the surrounding area. (A 182.) The Company is a member of the United Electrical Contractors Association (“UECA”), an organization composed of employers engaged in electrical contracting in the construction industry. (A 182; 104.) UECA represents the Company in negotiating and administering collective-bargaining agreements with the Union. (A 182; 104.)

#### B. **The Union Wins an Election; this Court Orders UECA To Bargain with the Union; the Parties Commence Bargaining**

From 1971 through 1992, the Company had a collective-bargaining agreement with Local 363, covering the same group of employees now represented by the Union. (A 183; 104.) On February 23, 1993, following an election, the Board issued an order certifying the Union as the exclusive collective-bargaining representative of a multiemployer unit of employees employed by members of UECA. (A 183.) UECA challenged that certification and refused to bargain with the Union. (A 183.) On October 29, 1993, the Board found that UECA’s refusal

to bargain violated the Act and ordered UECA to bargain with the Union. On September 12, 1994, this Court enforced the Board's order.<sup>2</sup> (A 183.)

In October 1994, following UECA's unsuccessful challenge of the certification, the parties commenced bargaining for an agreement. As of the date of the unfair labor practice hearing, the parties had not yet reached an agreement. (A 183.)

**C. The Company Lays Off Employees Without Providing the Union with Advance Notice**

Starting in December 1996 and continuing through May 1998, the Company laid off a total of 30 employees over 12 layoffs. (A 183.) Between December 1996 and January 1997, the Company laid off three employees and concedes that it did not provide the Union with any notice before or after the fact of the layoffs. (A 183; 110-11.) The Company did, however, notify the Local 363 funds still applicable to and covering two of the employees. (A 183.)

In the months following the initial layoffs, the Union filed unfair labor practice charges with the Board over the layoffs. (A 183.) In response to the Union's filing of charges, the Company began to provide the Union with notice of the layoffs either simultaneously with or after the layoff. (A 183.) In doing so, the Company also informed the Union that it had no obligation to notify the Union

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<sup>2</sup> See *United Elec. Contractors Assoc.*, 312 NLRB 1118 (1993), *enforced*, 41 F.3d 1500 (2d Cir. 1994).

about the layoffs, but was doing so “in order to meet possible legal obligations that may be imposed at a later date.” (A 183; 143.) The Union responded by requesting information from the Company regarding the layoffs and requesting negotiations. (A 146-47.) The last layoff at issue occurred on May 15, 1998.

The Company laid off the following employees on the following dates; notice, if provided, was given on the date indicated:

<b>Employee</b>	<b>Layoff Date</b>	<b>Notice Date</b>
Alleyne (A 183)	12/6/96	None
Oakley (A 183)	1/3/97	None
Thomas (A 183)	1/19/97	None
Longo, Sarullo	1/9/98	1/12/98
Betancourt, Capasso, Matone, Munyon, Spannagel, Stafford, Anderson, DePetro, Pelzer (A 183; 141.)	1/16/98	1/20/98
Grady, Schulz, Wellington (A 183; 143)	1/23/98	1/23/98
Tu, LaSalle, Shane, Cordero, Medrano (A 183; 143)	1/16/98	1/26/98
Nola (A 184; 161)	2/20/98	2/25/98
Thalassinios (A 164)	3/13/98	3/16/98
Lillibridge, Zeller (A 167)	3/27/98	3/27/98
Lock, Sauna, Sino (A 170)	3/27/98	3/27/98
Robinson (A 184)	5/15/98	5/19/98

**D. This Court Enforces the Board's Order Finding that the Company Violated the Act by Reducing the Unit Employees' Hours of Work Without Notifying the Union**

On April 30, 1999, the Board issued an order finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the hours of work of its unit employees. (A 174.) The Board then filed for enforcement of its order in this Court. Before the Court, the Company defended its unilateral action by claiming it had an established practice with Local 363 of reducing hours instead of laying off employees, and that Local 363 did not require the Company to notify it of the reduction. (A 174-75.)

On January 4, 2001, this Court entered a judgment enforcing the Board's order. *See Eugene Iovine, Inc.*, 328 NLRB 294 (1999), *enforced*, 1 Fed. Appx. 8 (2d Cir. 2001). Specifically, this Court rejected the Company's "past practice" defense because the Company failed to present any "concrete facts" as to its practice and offered only a "generalized" and "conclusory" explanation for why such reductions had been implemented and accepted without question by Local 363. (A 176.) Given the "generality and conclusory nature of the . . . evidence presented by" the Company, this Court upheld the Board's conclusion that the Company failed to establish that the reduction in hours "was merely an instance of [the Company's] prior practice." (A 176.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found that the Company violated Section 8(a)(5) and (1) of the Act by laying off employees without providing the Union timely notice and an opportunity to bargain over the layoff decision and the effects of the layoffs. (A 209.) In doing so, the Board affirmed the judge's rejection of the Company's affirmative defense that it was merely adhering to the past practice of unilaterally implementing layoffs in response to work or weather-related delays on its construction projects. Specifically, the Board found that the Company failed to present any evidence regarding past layoffs, including "when or how frequently or under what circumstances" any past layoffs occurred. Thus, the Company's evidence fell far short of proving that the challenged layoffs were a "continuation of an established past practice." (A 209.) Given this finding, the Board found it "unnecessary to pass on the judge's discussion of whether a past practice based on the acquiescence of a prior union can be relied on to unilaterally impose changes on a new union." (A 209.)

The Board's Order requires 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 the rights guaranteed them by Section 7 of the Act. (A 209-10.) (29 U.S.C. § 157). Affirmatively, the Order

requires the Company to notify and, on request, bargain with the Union prior to laying off employees for economic reasons, and to offer reinstatement to the employees who were laid off and to make those employees whole for any loss of earnings or other benefits suffered as a result of the Company's unlawful conduct. (A 210.) The Order also requires the Company to post a remedial notice. (A 210.)

### **SUMMARY OF ARGUMENT**

It is undisputed that over an 18-month period, the Company laid off 30 employees. It is also undisputed that the Company did not give the Union any notice of the first three layoffs, and provided only after-the-fact notice of the remaining layoffs. Thus, the Company violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees without providing the Union notice and an opportunity to bargain over the layoff decision and the effects of the layoffs.

The Company attempts to make an end run around its bargaining obligation by setting forth several defenses to its failure to provide advance notice of the layoffs. First, the Company contends that it was not required to provide the Union with notice because it had an established past practice of notifying only Local 363's benefit funds, and not the Union, of a layoff. However, before the Board, the Company failed to present evidence establishing that any unilateral layoffs occurred between the Union's certification and the layoffs at issue. Thus, the Company cannot show that prior unilateral layoffs occurred with such regularity

that the employees would reasonably expect such a practice to reoccur on a regular basis.

The Company further argues that the layoffs were the result of compelling economic exigencies that exempted the Company from its duty to bargain altogether. However, the Company's alleged economic emergencies are actually reoccurring events in its industry -- disruptions caused by various circumstances such as inclement weather, lack of support services, and scheduling delays. Such disruptions are not unforeseen emergencies, but rather common business problems. Moreover, the regularity of such disruptions resulting in layoffs render the layoffs more, not less, suitable for bargaining as the parties can negotiate the manner in which such layoffs can or should occur.

Finally, the Board's remedy in this case -- reinstatement and full backpay -- is the traditional remedy in unilateral layoff cases. The alternative remedy that the Company seeks -- a monetary award equal to 3 days backpay -- falls short of fully vindicating the rights of those harmed by the Company's actions.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY LAYING OFF EMPLOYEES WITHOUT NOTIFYING THE UNION AND GIVING IT AN OPPORTUNITY TO BARGAIN OVER THE LAYOFF DECISION AND ITS EFFECTS**

“A primary purpose of the Act is to promote peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.” *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964). To that end, the Act requires parties to bring “problem[s] of vital concern . . . within the framework established by Congress as most conducive to industrial peace.” *Id.* at 211. *See also H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) (“The basic theme of the Act [is] that through collective-bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it [is] hoped, to mutual agreement.”).

Here, the Company sought to solve a problem inherent within the construction industry -- sporadic disruptions in work -- by circumventing the collective-bargaining process, choosing instead to unilaterally lay off employees without giving the Union notice and an opportunity to bargain over the Company’s decision or its effects. Because the Company cannot establish any meritorious defense that privileged it to act unilaterally, the Board reasonably found that the Company violated the Act.

**A. An Employer Violates Its Duty To Bargain in Good Faith When It Fails To Give the Bargaining Representative Advance Notice and a Reasonable Opportunity To Bargain Over Proposed Changes in Terms and Conditions of Employment**

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 of his employees.” *See Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the bargaining obligation as requiring the parties to “meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”

An employer violates Section 8(a)(5) and (1) of the Act “if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.”<sup>3</sup> *Litton Financial Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 198 (1991). “Such unilateral action ‘detracts from the legitimacy of the collective-bargaining process by impairing the union’s ability to function effectively, and by giving the impression to members that a union is powerless.’” *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990) (quoting *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979)).

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<sup>3</sup> Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *See Porta-King Bldg. Sys., Inc. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994).

*See also Firch Baking Co. v. NLRB*, 479 F.2d 732, 735 (2d Cir. 1973) (unilateral action “seriously impair[s]” union’s ability to function and “amounts to a declaration on the part of the [employer] that not only the union, but the process of collective-bargaining itself may be dispensed with”). Employees’ terms or conditions of employment, specified in Section 8(d) of the Act, are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

It is well established that the lay off of unit employees is a change in terms and conditions of employment over which an employer must bargain. *Tri-Tech Serv., Inc.*, 340 NLRB 894, 894 (2003). Obviously, laying off employees works a “dramatic change” in their working conditions. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). If an employer lays off employees without consulting the union, and without having agreed to procedures for layoffs in an agreement, “it sends a dramatic signal of the union’s impotence.” *Id.*

It is also well settled that an employer violates Section 8(a)(5) and (1) of the Act when it fails to give the union advance notice and an opportunity to bargain about a proposed decision’s impact on employees’ interests. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Indeed, the duty to engage in such “effects bargaining” is mandatory, *id.*, and, as such, the duty continues until the parties reach “a final agreement or a bargaining impasse.” *Trouser Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001). Layoffs and their

effects are particularly amenable to bargaining because a union, if given the opportunity, can negotiate the effects of the layoff so as to get the “best possible deal” for the employees. *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1162 (5th Cir. 1976).

Judicial review of Board orders is “quite limited,” *NLRB v. Katz Delicatessen, Inc.*, 80 F.3d 755, 763 (2d Cir. 1996), and “highly deferential.” *International Union United Automobile, Aerospace, & Agricultural Implement Workers of America, AFL-CIO v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008). Moreover, “the Board’s answer to the particular question of whether an employer’s conduct constitutes a refusal to bargain is ‘entitled to considerable deference.’” *Ciabo Meat Prod., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979)). Overall “[t]his [C]ourt reviews the Board’s legal conclusions to ensure they have a reasonable basis in law. In so doing, [it] affords the Board a degree of legal leeway.” *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001). Finally, this Court upholds the Board’s factual findings if supported by “substantial evidence.” *UNITE Here v. NLRB*, 546 F.3d 239, 242 (2d Cir. 2008). When reviewing for substantial evidence, the Court limits its inquiry to “whether the supporting evidence, even if not preponderating in this [C]ourt’s view, nevertheless provides a sufficient basis for the Board’s decision.” *Id.* (citations omitted).

**B. The Board is Entitled to Summary Affirmance of Its Decision That the Company Failed to Bargain Over the Effects of Its Layoff Decision**

The Board found (A 209-10) that the Company failed to bargain over the effects of its layoff decision, and the Company's brief fails to challenge this finding. Rule 28 of the Federal Rules of Appellate Procedure provides that a party's opening brief must contain "the [party's] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [party] relies." FED. R. APP. P. 28(a)(9)(A). This Court has made clear that when an employer does not challenge in its brief the Board's findings regarding a particular violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement of those findings. *See Torrington Extend-A-Care v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994) (failure to raise issue in brief bars judicial review); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir. 1992) (failure to challenge Board's conclusions waives issue and entitles Board to summary enforcement).

In its brief, the Company does not expressly challenge the Board's finding that it failed to bargain over the effects of its layoff decision. At most, the Company makes a passing and unsupported assertion (Br. 40) that bargaining occurred. However, this uncorroborated statement is not sufficient to preserve the issue for review. *See Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1005 n.1

(9th Cir. 1995) (passing reference to an issue, without discussion and supporting legal authority, constitutes a waiver). Thus, the Board's finding that the Company failed to bargain over the effects of the layoffs is entitled to summary enforcement.

**C. The Company Laid Off Employees Without Providing the Union Timely Notice and an Opportunity To Bargain Over the Layoffs**

An employer violates the Act if it takes unilateral action when, as here, the parties are engaged in bargaining for an initial contract, even if the employer previously set the terms and conditions of employment. *See generally NLRB v. Katz*, 369 U.S. at 742-47; *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 863-64 (6th Cir. 1990). During contract negotiations, an employer's "obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). *See also Litton Microwave Cooking Prods. v. NLRB*, 949 F.2d 249, 251 (8th Cir. 1991) ("The Board and the courts have long recognized that an employer's unilateral change in conditions of employment under negotiation is an unfair labor practice," and that "until parties reach impasse in negotiations over labor matters, an employer must maintain the status quo."). The law is also clear that "[u]ntil the modalities of layoff are established in the agreement, a company

that wants to lay off employees must bargain over the matter with the union.”

*NLRB v. Advertisers Manuf. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1986).

The following facts are undisputed: The Company laid off 30 employees over an 18-month period, from December 1996 through May 1998. (A 183-84.) The Company laid off the first three employees without providing the Union with any notice. (A 183; 110-11, Br. 8.) The Company provided notice to the Union of the remaining layoffs only after the layoffs occurred. (A 183-84; Br. 9.) Finally, when the layoffs occurred, the Union and the Company’s bargaining association were engaged in collective-bargaining negotiations regarding the employees’ terms and conditions of employment. (A 183.)

The evidence shows that the Company announced the layoff, not as a proposal for the Union to consider, but as a *fait accompli*. Because the Company did not provide sufficient and timely notice of the layoff to the Union, thereby eliminating any meaningful opportunity to bargain, the Company violated Section 8(a)(5) and (1) of the Act. *See Tri-Tech Serv., Inc.*, 340 NLRB 894, 895 (2003) (“It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain.”). *See also Firch Baking Co. v. NLRB*, 479 F.2d 732, 735 (2d Cir. 1973) (“[F]ew obligations are more firmly established than that of an employer to bargain collectively with a union representing its employees, including its duty not to alter terms and

conditions of employment without first giving notice to and conferring in good faith with the union.”).

### **1. The Company did not give timely notice**

The Company argues (Br. 36) that it notified the Union “promptly” of the layoffs and bargained with it. By “promptly,” the Company means “after each [layoff] occurred.” (Br. 36.) However, not only is this argument simply a “repackaged version of the [Company’s] assertion that it has no duty to bargain,” but it also reveals the Company’s misunderstanding of the definition and purpose behind timely notice of a change in employment terms. (A 193.)

To be timely, “notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain.” *Ciba-Geigy Pharmaceutical Div.*, 264 NLRB 1013, 1017 (1982), *enforced*, 722 F.2d 1120 (3d Cir. 1983). “[I]f notice is too short a time before implementation . . . then the notice is nothing more than a *fait accompli*.” *Id.* Moreover, “[a]n offer to bargain over layoffs after they have occurred is no substitute for . . . prior notice. Once the layoffs have taken place and unit jobs lost, the union’s position has been seriously undermined and it cannot engage in meaningful bargaining that could have occurred if the [employer] had offered to bargain at the time that the Act required it to do so . . . .” *Porta-King Building Sys.*, 310 NLRB 539, 539 (1993).

Here, the Company's notice was indisputably after-the-fact, occurring several days after the layoffs. The Union learned of the layoffs far too late to offer alternatives or proposals to ameliorate the layoffs' undeniably harsh effects. Thus, the Board properly found (A 192) that the Company's argument "misconstrues the point of the statutory duty to bargain," and that its "notice after-the-fact is inadequate."<sup>4</sup>

Moreover, the Company misses the mark with its claims (Br. 37) that after-the-fact notice and bargaining is "preferable" and "productive," and that the Board's rejection of such an option is "arbitrary." It is well established that "[t]he overriding goal of federal labor law is labor peace . . . . Anything that interferes with the negotiation process and makes reaching agreement less likely interferes with this goal." *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 997 (7th Cir. 2000). One such interference is an employer's failure to notify and bargain with its employees' representative over changes to mandatory terms and condition of employment. This Court has recognized the destructive nature and inadequacy of

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<sup>4</sup> The Company engages in selective reading of the record by contending (Br. 35) that the General Counsel suggested a "more relaxed standard" of notice. Rather, the General Counsel specifically stated that "[t]imely [notice] is sufficient enough time for the Union to negotiate over the decision to layoff . . . [The Company has] an obligation to bargain with the union over that decision." (A 121.) In any event, the General Counsel's comments do not alter the well-established principle: Economic layoffs are mandatory subjects of bargaining, and an employer must provide a union with sufficient notice and an opportunity to bargain over such a decision.

after-the-fact notice, explaining that an employer’s unilateral action “seriously impair[s]” the union, *NLRB v. General Electric Co.*, 418 F.2d 736, 748 (2d Cir. 1969), and “‘must of necessity obstruct bargaining, contrary to . . . congressional policy.’” *Firch Baking Co. v. NLRB*, 479 F.2d 732, 735 (2d Cir. 1973) (quoting *NLRB v. Katz*, 369 U.S. 736, 747 ((1962))).

**2. The difference between the complaint allegation of failure to provide notice and the Board’s finding of an unlawful unilateral layoff is inconsequential**

The Company (Br. 25, 31) faults the Board for deciding that the Company’s *unilateral* layoffs violated the Act, arguing that unilateral action “was not the issue complained of or tried,” but instead the issue was whether the Company laid off employees without providing timely notice. (Br. 31.) However, this Court lacks jurisdiction to consider the issue because the Company failed to raise it before the Board in either its exceptions (A 199-209) or its brief in support of the exceptions. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”). *See also NLRB v. Chelsea Labs., Inc.*, 825 F.2d 680, 682-83 (2d Cir. 1987) (employer’s failure to raise argument regarding the difference between the complaint allegation and the actual Board finding waived the employer’s right to raise the issue before the court).

In any event, “actions before the Board are not subject to the technical pleading requirements that govern private lawsuits.” *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1411 (9th Cir. 1985) (citations omitted). The differences between the allegations and the findings that the Company complains of are mere technical or semantic distinctions. The complaint (A 16) alleges that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and both parties had a full and fair opportunity to litigate the issue. In fact, the Company repeatedly asserted in its brief before the Board that its “unilateral” action was lawful. *See* Company’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge, pp. 15, 18, 22-23. It is clear that the Company understood the basis of the complaint and, therefore, the difference in language between the allegation and the Board’s findings is inconsequential. *See Chelsea Laboratories, Inc.*, 825 F.2d at 682-83 (where employer demonstrated an “awareness” of the Board’s legal theory, semantic differences between the complaint allegation and Board findings are insignificant). *See also The All American Gourmet*, 292 NLRB 1111, 1134-35 (1989) (variance between complaint allegations and Board findings are of no consequence if issue was “fully and fairly litigated” by both parties at the hearing).

**D. The Company Has No Viable Defense To Justify Its Failure to Give the Union Notice and an Opportunity To Bargain Over the Layoffs**

The Company proffers several defenses to its failure to bargain over the layoffs. First, the Company claims (Br. 27-28) that it had a longstanding practice with the Union that required it only to notify the funds, and not the Union, of the layoff. Second, the Company argues (Br. 37-38) that the disruptions in its workload resulted from extraordinary and unforeseen events that privileged the Company to take unilateral action, and (Br. 29-31) that the intermittent nature of employment that is characteristic of the construction industry renders advance notice of a layoff impractical. Finally, the Company contends (Br. 34, 36-37) that the Board's bargaining principles suffer from a flawed inflexibility. Overall, the Company's defenses lack merit and demonstrate a misunderstanding of its bargaining obligation.

**1. The Company failed to prove that it had an established practice with the Union regarding notification of the layoffs**

The Company cannot justify its failure to provide the Union with notice and an opportunity to bargain over the layoffs by claiming that it had a longstanding past practice with the Union of notifying only the funds. When a new union is certified, the employer must maintain the existing terms and conditions of employment -- the status quo -- while the parties bargain. *Litton Microwave Cooking Prods. v. NLRB*, 949 F.2d 249, 251 (8th Cir. 1991). The status quo

includes its past practices, which the Board has defined as “an activity which has been ‘satisfactorily established’ by practice or custom; an ‘established practice’; an ‘established condition of employment.’” *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) (citations omitted). *See also NLRB v. Hendel Mfg. Co.*, 523 F.2d 133, 135 (2d Cir. 1975) (discussing past practices as “established patterns of practice”).

Therefore, an employer, contending that a unilateral change in employment terms was consistent with a past practice, must demonstrate that the practice occurred “with such regularity or frequency that employees could reasonably expect the practice to continue or reoccur on a regular basis.” *Sunoco, Inc.* 349 NLRB 240, 244 (2007). Thus, in order to prevail, the employer must show that its action was in conformity with an established pattern of activity, rather than unfettered discretion. *See NLRB v. Eugene Iovine, Inc.*, 1 Fed. Appx. 8, slip op. at \*9-10 (2d Cir. 2001). An employer who asserts a past practice as a defense to a charge that it has refused to bargain carries the burden of proving such a practice. *See Local 512 Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 711 (9th Cir. 1986); *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875 (5th Cir. 1979).

The Company offered “few specifics” (A 209) regarding when or how frequently or under what circumstances *any* unilateral layoffs occurred, both before and after 1993, when the Union became the certified bargaining representative. The Company’s sole witness -- Company President Eugene Iovine -- provided only

generalities about the layoffs, testifying that he “did not know exactly what the reason was” for each layoff, and that the layoffs “would be for any of the various reasons that work was not made available.” (A 124.) He did not, however, testify regarding the circumstances of any specific unilateral layoffs that occurred prior to those at issue. (A 124.) Thus, the Board correctly found that the record “falls short” (A 209) of showing that unilaterally laying off employees and then providing the funds, not the Union, with notice of the layoff was an established practice that occurred “with such regularity or frequency that employees could reasonably expect the practice to continue or reoccur on a regular basis.” *Sunoco, Inc.*, 349 NLRB at 244. The administrative law judge aptly set forth the obvious shortcomings of the Company’s asserted defense:

[The Company] relies upon a past practice, the evidence of which is nonexistent for the 2 years after its recognition of [the Union], for the 3 ½ years since [the Union’s] certification, for 4 years since its collective-bargaining relationship ended with Local 363 (not to mention 5 years since Local 3’s selection by the bargaining unit employees).

(A 186-87.) In the circumstances, the Board properly rejected the Company’s past-practice defense.

This case does not mark the first time that the Company failed to prove that its unilateral action was the result of an established practice with the Union. In that regard, the Company’s attempt (Br. 31, n.25) to distinguish this case from this Court’s earlier decision in *NLRB v. Eugene Iovine* falls flat; the cases are strikingly

similar. In the earlier case, this Court found that the Company could not establish a past practice of unilaterally reducing employees' hours because it could provide only "generalized" and "conclusory" reasons for the reduction in hours and could not present "any evidence from its own records or officers, either as to any specific occasion on which it had previously reduced hours or as to the reason for its reduction of hours." See *NLRB v. Eugene Iovine, Inc.*, 1 Fed. Appx. 8, slip op. at \*11 (2d Cir. 2001). (A 176.) Likewise, here, the Company claimed that a past practice justified its unilateral action, but failed to offer evidence sufficient to show the existence of an established past practice. (A 209.) In short, the Company once again is a victim of its inability to demonstrate with the requisite specificity a past practice between itself and the Union.

**2. The challenged layoffs were not the result of an unforeseen occurrence**

The Company contends (Br. 37-38) that the challenged layoffs were the result of an economic business exigency that privileged the Company to take unilateral action. However, the Company misunderstands the economic exigency exception to an employer's duty to bargain.

The Board recognizes an "economic exigency" exception to the general rule that an employer may not make unilateral changes until an overall impasse has been reached on bargaining for the new agreement as a whole. *Bottom Line Enters.*, 302 NLRB 373, 374 (1991). Under that exception, an employer may act

unilaterally “when economic exigencies compel prompt action.” *Id.* The Board limits its definition of “economic exigency” to “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *Ciabo Meat Products, Inc. v. NLRB*, 547 F.3d 336, 340 (2d Cir. 2008). To establish such a defense, the employer must show that the exigency was “caused by external events, was beyond the employer’s control, or was not reasonably foreseeable.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995).

The Board properly found that inclement weather, project delays, and lack of support services that typically cause layoffs in the construction industry are not extraordinary and unforeseen events compelling the Company to act without bargaining. Rather, the Board reasonably found that such events are “a predictable characteristic” of the construction industry “that can be and [are] anticipated by [the Company].” (A 191.) Moreover, as the Board has explained, “business necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, [an employer] faced with a gloomy economic outlook could take any unilateral action it wished . . . simply because it was being squeezed financially.” *Farina Corp.*, 310 NLRB 318, 321 (1993). Thus, if the Board were to accept that inclement weather, delayed scheduling, and lack of support services excused bargaining entirely, then the Board would essentially

“vitate the duty to bargain over layoffs . . . in the construction industry generally, and any other industry where production and work opportunities are subject to occasional disruption.” (A 191.)

The Board does recognize a second category of economic exigency when the parties, like here, are in contract negotiations, and “circumstances arise that are not sufficiently compelling enough to excuse bargaining altogether, but require ‘prompt action’ and ‘cannot await’ final agreement or impasse on the collective-bargaining agreement as a whole.” *Monroe Mfg. Inc.*, 323 NLRB 24, 24-25 (1997) (citations omitted). In such a situation, an employer “will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain” over the specific change requiring prompt action. *RBE Electronics*, 320 NLRB at 82. If the employer does so, then it may unilaterally implement the proposed change “if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change,” even though the parties have not reached an overall impasse on the agreement as a whole. *Id.* However, the Board properly found that the Company “cannot rely on this limited exception to the general duty to bargain as it did not provide the Union with notice of the layoffs in time to permit discussion and counterproposals prior to the implementation of the layoffs.” (JA 192).

In sum, the “fitful nature of employment” (Br. 29) characteristic of the construction industry does not justify the Company’s failure to give the Union notice and an opportunity to bargain over the layoffs. Rather, intermittent layoffs caused by project disturbances “can be and [are] anticipated” by the Company; therefore, the Board correctly found that the layoff decision was “eminently suitable” to collective bargaining. (A 191.) Because the Company knew in advance that project disturbances can result in layoffs, an expectation that the parties should bargain in advance for an arrangement regarding the layoffs is reasonable. Moreover, the decision to lay off employees raises issues appropriate for bargaining, such as weighing the cost of work delays versus having a skilled workforce available for upcoming work; such matters are “precisely the type of action over which an employer must bargain with a newly certified union.”

*Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (quoting *NLRB v. Katz*, 369 U.S. 736, 746 (1962)), *enforced* 1 Fed. Appx. 8 (2d Cir. 2001). *See also Adair Standish Corp. v. NLRB*, 912 F.2d 854, 864 (6th Cir. 1990) (“economic considerations did not entitle the company to maintain an ad hoc, subjective layoff policy without bargaining over such a program”); *Local 512 Warehouse & Officer Workers’ Union v. NLRB*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with the union over economic layoff, which is “inherently discretionary, involving

subjective judgments of timing, future business, productivity, and reallocation of work”).

**3. The Board’s bargaining principles are neither inflexible nor flawed, but recognize that negotiation is best-suited to achieving labor peace**

The Company faults (Br. 33-34) the Board for requiring it to delay the layoffs in order to notify and bargain with the Union, claiming such a suggestion is “vagu[e],” “lacks business sensitivity,” and ignores the Union’s likely refusal to offer concessions necessary to ease the Company’s economic burden. However, the Company errs in dismissing the effectiveness of bargaining to solve the conflict.

This Court has rejected the overreaching claim that bargaining is futile and has recognized the efficacy of collective bargaining in resolving disputes:

One party cannot side-step mandatory bargaining simply by declaring that negotiations would be fruitless. Collective bargaining is mandated for the purposes of attempting to resolve even the most difficult disputes . . . .Experience teaches that the initial belief of one party in the inflexibility of the other is often dispelled by subsequent concessions. To excuse mandatory bargaining because one party thinks it would be futile would tear the fabric of the entire collective bargaining process.

*Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 186 (2d Cir. 1991).

Accordingly, the Company cannot avoid its bargaining obligation merely because it surmises that negotiation will be unfruitful or difficult. *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 214 (1964) (“[A]lthough it is not possible

to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting [mandatory issues] to the process of collective-bargaining.”). Moreover, the Company gains no ground by claiming (Br. 33, 34) that it faced economic loss if it did not lay off the employees. When “labor costs are the driving force behind the [employer’s] action, . . . the problem is particularly suited to resolution through collective-bargaining.” *Olivetti Office*, 926 F.2d at 186. Thus, the Board correctly found (A 192) that the parties “can negotiate a solution to this problem.”

The Company does itself no favors by its reliance on precedent discussing the Worker Adjustment and Retraining Notification Act (“WARN”).<sup>5</sup> Such precedent is irrelevant as it establishes a separate statutory scheme for a separate problem. Moreover, adopting an exception to the notice requirement similar to that in WARN is not necessary because, contrary to the Company’s assertions (Br. 36), the Board’s rules regarding the parties’ bargaining obligations do not suffer from a “flawed inflexibility.” Rather, the Board’s approach is adaptable to

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<sup>5</sup> The WARN Act imposes a federal mandate on employers requiring 60 days advance notice to employees of a plant closing or a mass layoff. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 873 (10th Cir. 2009). Congress has recognized certain statutory exceptions to this notice requirement. *Id.* One such exception excuses an employer from the 60-day notice requirement where a mass layoff “was the result of an unforeseen business circumstance.” *Id.*

business circumstances and recognizes that “management does need to run its business.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 80 (1995). In that regard, the Board allows for exceptions to the bargaining requirement. However, as discussed above, the Company meets none of them.

## **II. THE BOARD PROPERLY USED ITS BROAD REMEDIAL DISCRETION BY AWARDING THE LAID OFF EMPLOYEES FULL BACKPAY FOR THE DURATION OF THE LAYOFF**

### **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 had 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.

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." *Coca-Cola Bottling Co.*, 191 F.3d at 323-34. Accordingly, the Board's remedial decisions are to be set aside only for a "clear abuse of discretion." *Calif. Pacific Medical v. NLRB*, 87 F.3d 304, 311 (9th Cir. 1996). Such an abuse occurs if the Board's choice of remedy "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Fugazy Continental Corp.*, 817 F.2d 979, 982 (2d Cir. 1987). The Company has failed to make such a showing.

**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 Provides an Effective Deterrent Against Future Unlawful Layoffs**

The customary remedy for an employer's unlawful unilateral layoff -- reinstatement and full backpay -- "is presumptively valid; it aims to return the employee to the economic status quo before the employer's unilateral action." *Pan American Grain Co., v. NLRB*, 558 F.3d 22, 29 (1st Cir. 2009). *See also Bryant &*

*Stratton Bus. Institute, Inc. v. NLRB*, 140 F.3d 169, 182 (2d Cir. 1998) (affirming Board’s backpay award as fair restitution for employer’s unlawful unilateral change); *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 865 (6th Cir. 1990) (“As bargaining may preclude the necessity of laying off employees, we find that backpay commencing on the date of the layoff is warranted to remedy a failure to bargain.”); *Plastonics, Inc.*, 312 NLRB 1045, 1045 (1993) (“traditional and appropriate” Board remedy for an unlawful unilateral layoff requires the payment of full backpay, plus interest, for the duration of the layoff). This remedy furthers the purposes of the Act because “it provides an economic incentive for an employer to comply with the rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit . . . [thereby] prevent[ing] the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them.” *Adair Standish*, 912 F.2d at 865.

The Company requests a “limited” remedy akin to that awarded in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), specifically offering

(Br. 40) a backpay award equal to 3 days of pay.<sup>6</sup> This request is misguided because it provides an incomplete remedy and ignores the well-established axiom that the Board's remedies must be tailored to fit the nature and the extent of the violations found. *Alwin Manufacturing Inc.*, 326 NLRB 646, 647 (1998).

The Board applies a *Transmarine* remedy where an employer fails to bargain over the *effects* of its otherwise *lawful* decision. In contrast, here, the Company failed to bargain over a mandatory subject of bargaining, and 30 employees lost their jobs as a result of the Company's unilateral actions. In the circumstances, 3 days backpay does not remedy the injustice that the Company caused -- lost jobs and a union whose "position has been seriously undermined." *Porta-King Building Sys.*, 310 NLRB 539, 540 (1993). Moreover, it does little to deter the Company from yet again unilaterally altering its employees' terms and conditions of employment. *See Pan American Grain*, 558 F.3d at 29 & n.8 (rejecting employer's request for a *Transmarine* remedy where employer laid off employees

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<sup>6</sup> A *Transmarine* remedy is the Board's standard remedy in effects bargaining cases and requires that the employer bargain over the effects of its decision, and provide unit employees with limited backpay, from 5 days after the date of the Board's decision, until the occurrence of one of four specified conditions. Bargaining must take place and backpay be paid until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith. *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968).

without giving notice and opportunity to bargain over decision).

### **C. The Company Has Waived Its Remaining Contentions**

In challenging the remedy, the Company raises two contentions before this Court that it failed to raise before the Board. Specifically, the Company contends (Br. 42-43) that the Board's decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), *petition for review dismissed sub nom. Sheet Metal Workers Int'l Assoc., Local 270 v. NLRB*, 561 F.3d 497 (D.C. Cir. 2009), renders the Board's remedy here inappropriate, and that the Board's delay (Br. 44-45) in deciding this case is partly responsible for the amount of backpay that the Company owes. However, because the Company failed to raise either argument before the Board, this Court lacks jurisdiction to consider them. *See* 29 U.S.C. § 160 (e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances”). *See also KBI Security Service, Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996) (court lacks jurisdiction to review a finding where party failed to raise issue before the Board); *Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 123 (2d Cir. 2001) (rejecting employer's challenge to Board's remedy where employer failed to raise challenge before the Board).

In any event, both arguments lack merit. The Company has failed to show how *Oil Capitol* impacts the Board's remedial order. In that case, the Board

determined that, where the discriminatee is a union “salt” (a paid union organizer), it would no longer apply its traditional rebuttable presumption that the backpay period extends indefinitely from the date of the discriminatory discharge or refusal to hire until the employer extends a valid job offer to the discriminatee. *Oil Capitol*, 349 NLRB at 1348. The Board also stated that in salting cases it would not apply the related rebuttable presumption for construction-industry cases established in *Dean General Contractors*, 285 NLRB 573, 575 (1987), that a discriminatee would have transferred to a new jobsite or project after the first job ended. *Oil Capitol*, 349 NLRB at 1353.

The *Oil Capitol* decision applies only in cases involving union salts and is therefore inapplicable here. Moreover, contrary to the Company’s contention, *Oil Capitol* does not signal the end of the *Dean General Contractors* presumption for employees who are not union salts. As the Company concedes (Br. 43), the *Oil Capitol* rule eliminates the rebuttable presumption only in cases involving *union salts*. See *Sheet Metal Workers Int’l Assoc., Local 270, AFL-CIO*, 561 F.3d at 500. In short, *Oil Capitol* has no relevancy to the Board’s remedy in this case.

The Company also argues (Br. 44-45) that the Board’s delay in deciding this case warrants “rejection” of the Board’s remedy. Although some of the delay may be attributable to the Board, that “in itself cannot serve as a basis for reducing the backpay award.” *Bufco Corp. v. NLRB*, 147 F.3d 964, 967 (D.C. Cir. 1998). The

Supreme Court has held that “the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). During this delay, the Company had use of money rightfully belonging to its workers. “Meanwhile, the wronged employees have lacked funds that they could have invested . . . . [T]he money belongs to the victim, not the wrongdoer . . . .” *NLRB v. Int’l Measurement & Control Co.*, 978 F.2d 334, 336 (7th Cir. 1992).

Overall, the Company’s protests regarding the harsh effect of the remedy are quite disingenuous. The Company ignores the undeniable fact that it is the wrongdoer in this case. As such, the Company, not the victims of the wrongdoing, should bear the consequence of its action. *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”).

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court grant the Board's application and enforce its Order in full.

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September 2009

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Petitioner

\* 09-0217-ag

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v.

\* Board Case No.

\* 29-CA-21052

EUGENE IOVINE, INC.

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Respondent

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 8,816 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben\_\_\_\_\_

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This 16th day of September, 2009

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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](mailto: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 e-mail and first-class mail upon the following counsel at the address listed below:

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This 16th day of September, 2009