

No. 10-3547

**UNITED STATES COURT of APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**REGENCY GRANDE NURSING & REHABILITATION CENTER
Respondent**

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JILL A. GRIFFIN
Supervisory Attorney

MACKENZIE FILLow
Attorney

**National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-3823**

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Acting Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

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 on the application of the National Labor Relations Board for enforcement of its Supplemental Decision and Order issued against Regency Grande Nursing & Rehabilitation Center (Regency). In this

compliance proceeding, the Board ordered Regency to reimburse employees for specified amounts of dues and other fees it unlawfully deducted from their pay.

The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act,¹ which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) of the Act² because the unfair labor practices occurred in Dover, New Jersey. The Board's Supplemental Decision and Order was issued on August 23, 2010 and is reported at 355 NLRB No. 99.³ That Order is final under Section 10(e) of the Act.

The Supplemental Decision and Order adopts and incorporates by reference the Board's previous decision, issued on October 23, 2009 and reported at 354 NLRB No. 93. That prior decision was issued by a two-member quorum of the Board. Regency petitioned the D.C. Circuit for review of that Order (Case No. 09-1265), and the Board cross-applied for enforcement (Case No. 09-1286). The D.C. Circuit put the case into abeyance on November 23, 2009. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*,⁴ holding

¹ 29 U.S.C. § 160(a).

² 29 U.S.C. § 160(e).

³ A-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.

⁴ 130 S. Ct. 2635 (2010).

that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members. The D.C. Circuit subsequently granted the Board's motion for remand based on *New Process*. The Board then issued its August 23, 2010 Supplemental Decision and Order that adopted and incorporated by reference the October 23, 2009 decision.

The Board filed its application for enforcement in this Court on August 25, 2010. The application is timely; the Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

In this compliance proceeding, the Board determined that Regency must reimburse its employees for the \$74,852.71 in union dues illegally taken from their paychecks. The question presented on appeal is whether the Board abused its broad remedial discretion by ordering Regency to reimburse its employees in that amount. Regency raised only two objections before the Board, requiring this Court to address the following issues:

1. Burden of Proof. This Court already enforced the Board's Order requiring Regency to reimburse employees who had union dues illegally taken from their paychecks. Well-established law puts the burden of mitigating damages on Regency. Did the Board reasonably determine that Regency failed to meet this burden as to the two affirmative defenses it raised?

2. Member Becker's Participation. Courts review a Board Member's recusal decision for abuse of discretion. Board Member Becker has not represented the charging party in this case for at least the past two years, and has no knowledge of any similar disputes involving the charging party. Did Member Becker abuse his discretion by refusing to recuse himself?

STATEMENT OF RELATED CASES AND PROCEEDINGS

This is a compliance proceeding. The underlying unfair labor practice at issue was previously before this Court as case number 06-5013. The Court enforced the Board's Order in that case.⁵ This decision is described in more detail below.

NLRB v. Regency Grande Nursing and Rehabilitation Center, Docket No. 10-3548, 3d Cir. (Board Case No. 22-CA-26331), involves the same parties and is also pending before the Court, but the legal issues in the two cases are distinct. In case 10-3548, the Board found that, following the Court's enforcement of the Board's underlying decision here, Regency discharged an employee for supporting Local 1199 over Local 300S, unlawfully interrogated employees about their union activities, and created the impression of surveillance of those activities.

STATEMENT OF THE CASE

I. The Underlying Unfair Labor Practice

In 2005, the Board found, on charges filed by SEIU 1199 New Jersey Healthcare Union (which has since merged with 1199 SEIU United Healthcare East), that Regency acted unlawfully by recognizing the United Food and Commercial Workers International Union, Local 300S pursuant to a card check agreement and entering into a collective bargaining agreement when that union did

⁵ *NLRB v. Regency Grand Nursing & Rehab. Center*, 265 F. App'x 74 (3d Cir. 2008).

not represent a majority of employees in the unit.⁶ That finding was based primarily on the credited testimony of 74 out of 114 unit employees that they did not sign cards authorizing Local 300S to represent them before Regency signed the contract. As this Court noted when enforcing that finding, such testimony “makes majority support for that union mathematically impossible.”⁷

The Board’s finding in the underlying litigation was further supported by the suspicious actions of David Gross and James Robinson, who were presidents of Regency and Local 300S (respectively) at the time of the unfair labor practice. Gross and Robinson actively sought to prevent employees from finding out about Regency’s recognition of Local 300S, leading to a finding of fraudulent concealment. Although Regency recognized Local 300S on May 22, 2003, neither Gross nor Robinson notified employees that they were represented by a union until after a contract was signed on January 8, 2004, over seven months later.⁸ Contract negotiations were conducted in secret and without input from employees, resulting in a collective bargaining agreement that gave employees fewer benefits than they had received before Regency recognized Local 300S.⁹

⁶ *Regency Grande Nursing & Rehab. Center*, 347 NLRB 1143, 1143 (2006).

⁷ 265 F. App’x at 76 n.3.

⁸ 347 NLRB at 1149.

⁹ 347 NLRB at 1149-50.

Based on these facts, the Board concluded that Regency had violated Sections 8(a)(1), (2), and (3) of the Act by recognizing and entering into an agreement with a minority union. The Board ordered Regency to withdraw its recognition of Local 300S. And because the collective bargaining agreement contained union security and dues check-off provisions, the Board ordered Regency to reimburse employees for any dues or other money deducted from their pay pursuant to those clauses. The Board noted that reimbursement did not extend to those employees who had voluntarily joined Local 300S prior to January 8, 2004, the date when Regency and Local 300S signed the unlawful contract that required payment of union dues.¹⁰

This Court enforced the Board's Order on February 20, 2008.¹¹ In doing so, the Court rejected Regency's claim that the Board's remedy was punitive.¹² The Court noted the Board's broad power to remedy unfair labor practices and stated that the "remedy in this case restores the status quo ante."¹³

II. The Compliance Proceedings

After the Court's enforcement of the Board's Order, the Regional Director

¹⁰ 347 NLRB at 1144.

¹¹ 265 F. App'x at 74-75.

¹² *Id.* at 78.

¹³ *Id.* at 78.

for Region 22 instituted compliance proceedings, pursuant to the Board's Rules and Regulations,¹⁴ to determine the exact amount Regency owes to its employees. The Regional Director concluded that the reimbursement period began on January 8, 2004, the date that Regency illegally signed the collective bargaining agreement, and ended on March 31, 2008, when Regency stopped deducting union dues and fees from the paychecks of its employees. The Regional Director used Regency's payroll records to determine the amount of union dues and initiation fees taken from each employee's paycheck during the reimbursement period.¹⁵ On September 25, 2008, the Regional Director issued a compliance specification and notice of hearing.¹⁶ Attached was a worksheet listing the 209 employees who were owed reimbursement.

On October 10, 2008, Regency filed its answer to the compliance specification.¹⁷ Regency admitted that the reimbursement period is from January 8, 2004 through March 31, 2008, that the total due to each employee is the amount of union dues and initiation fees deducted from their pay during that period, and that the Regional Director determined the amounts owed by using Regency's

¹⁴ 29 C.F.R. § 102.52 et seq.

¹⁵ A-50 ¶ 4.

¹⁶ A-40 – A-63.

¹⁷ A-66 – A-68.

payroll records.¹⁸ However, Regency generally denied that it owed the specific amounts set out in the Regional Director’s worksheet.¹⁹ Furthermore, Regency raised the following affirmative defense: “Respondent will show that 68 employees signed membership cards for Local 300S” before the contract was signed.²⁰

After being notified that its answer did not comply with Board rules,²¹ Regency submitted an amended answer²² in which it listed 95 “employees who [it] acknowledge[d] are due reimbursement.”²³ These employees did not begin working for Regency until 2005, causing Regency to “agree that they likely did not sign cards for Local 300S before January 2004.”²⁴ Regency admitted that it owed these employees a total of \$20,070. However, Regency continued to deny that it owed reimbursement to other employees and again proclaimed its intention to present evidence that 68 unnamed employees voluntarily joined Local 300S prior

¹⁸ A-66.

¹⁹ A-66.

²⁰ A-66. Regency inadvertently inverted the numbers in the date, writing January 4, 2008 rather than January 8, 2004.

²¹ A-69.

²² A-70 – A-71.

²³ A-70 – A-71.

²⁴ A-70.

to January 8, 2004.²⁵ Regency stated its intent to subpoena Local 300S to produce the signed cards,²⁶ even though previous litigation revealed that the cards had been destroyed.²⁷

On December 17, 2008, an administrative law judge held a hearing to determine the amount of unlawfully withheld dues owed to employees. Regency stipulated that the employees listed in the compliance specification worksheet were employed during the reimbursement period and that the amounts listed in that worksheet were accurate.²⁸ Based on these stipulations, the General Counsel presented no witnesses. Regency called one witness, James Robinson, who was president of Local 300S at the time of the unfair labor practice in 2003. Robinson testified that he had obtained 68 signed cards from Regency's employees, but that he no longer had possession of the cards.²⁹ Regency presented no evidence whatsoever as to which 68 employees allegedly signed these cards.

Regency also argued that the remedy in this case was unduly burdensome.³⁰

²⁵ A-70.

²⁶ A-70.

²⁷ 347 NLRB at 1147.

²⁸ A-6; A-26 – A-27.

²⁹ A-6; A-35.

³⁰ A-9; A-37 – A-38.

The collective bargaining agreement that Regency signed with Local 300S contained an indemnification clause, but Robinson testified he believed Local 300S would go bankrupt if it were required to indemnify Regency.³¹ Robinson admitted, however, that his knowledge of the current financial status of Local 300S was “minimal,” since he was no longer employed by the union.³²

In its post-hearing brief, Regency attempted to withdraw the admission it made in its amended answer regarding reimbursement owed to employees who did not begin employment until 2005. However, the administrative law judge, in a supplemental decision issued on May 28, 2009, concluded that Regency’s amended answer constituted an admission that Regency owed \$20,070 to the 94 employees who were hired after the contract was signed.³³ The judge rejected Regency’s argument that the General Counsel had the burden of proving each and every employee had not voluntarily joined Local 300S before January 8, 2004.³⁴ The judge considered and rejected Regency’s claim that the reimbursement order was unduly burdensome, despite the fact that Regency had not raised this

³¹ A-6; A-39.

³² A-6; A-39.

³³ A-7.

³⁴ A-7 – A-8.

affirmative defense in its answer.³⁵ The judge agreed that Regency owed the amounts set out in the General Counsel’s worksheet (with a couple of minor corrections).³⁶ Regency filed exceptions to the judge’s findings and conclusions.

On July 28, 2010, Regency filed a motion requesting that Member Becker recuse himself from this case.³⁷ Regency asserted that Member Becker should recuse himself because SEIU participated in a dispute resolution proceeding – referred to as “Article XX proceedings” – involving the charging party and Local 300S in 2003.

III. The Board’s Supplemental Order

On August 23, 2010, the Board (Chairman Liebman and Members Schaumber and Becker) issued its supplemental decision and order, affirming the administrative law judge’s conclusions and adopting the recommended order, with the correction of two minor errors in the calculations.³⁸ The Board ordered Regency to pay each affected employee a specified amount of money, totalling \$74,852.71, plus interest.

³⁵ A-8 – A-10.

³⁶ A-10 – A-12, A-10 n.23 (consolidating people who were listed under two names).

³⁷ A-85.

³⁸ A-1, A-2 n.2.

Member Becker denied Regency's motion that he recuse himself. He cited *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*,³⁹ in which he explained the principles he will apply in deciding whether to recuse himself.⁴⁰ Member Becker further stated he "played no role in and has no knowledge of" the dispute resolution proceedings referred to by Regency.⁴¹

SUMMARY OF ARGUMENT

By recognizing and entering into a collective bargaining agreement with a minority union, Regency violated the Act. To redress this violation and "vindicate public . . . rights," the Board ordered Regency to reimburse employees for the union dues and fees unlawfully deducted from their paychecks. That order has already been enforced by this Court.

In the compliance matter now before this Court, the Board has determined the exact amount of reimbursement Regency owes to its employees. The calculation of reimbursement was straightforward: the Regional Director used Regency's own payroll records to calculate the amounts owed before interest by simply totaling the dues and fees withheld for union dues from each affected employee.

³⁹ 355 NLRB No. 40 (2010).

⁴⁰ A-1 n.2.

⁴¹ A-1 n.2.

Regency does not dispute that the numbers are accurate; that it took almost \$75,000 from its employees' paychecks pursuant to an illegal contract. Rather, it argues that the Board unfairly required it to come forward with evidence to mitigate these damages. However, it is well-established that the party asserting such an affirmative defense bears the burden of proof. The Board expressly permitted Regency to present evidence that certain employees were not coerced by the illegal contract but voluntarily joined Local 300S before the contract was signed. Regency failed to present any such evidence.

Likewise, Regency utterly failed to support its claim that changed circumstances make enforcement of the Board's Order unduly burdensome. Its arguments are merely dressed-up attempts to relitigate the underlying unfair labor practice determination and renew arguments this Court has already rejected.

Finally, Regency's challenge to Member Becker's participation in this case has no merit. Agency officials are presumed objective and capable of judging a particular controversy fairly on the basis of its own circumstances, a strong and firm presumption that is not easily overcome. Under prevailing ethical standards, regulations, and rules, neither the Company's contention that Member Becker participated in an AFL-CIO "Article XX" dispute resolution proceeding involving Local 1199 and Local 300S in 2003, nor its argument, made for the first time before this Court, that Member Becker represented Local 1199 in two cases—the

most recent of which was decided eight years ago—warrants Member Becker’s recusal. Member Becker did not participate in, or have knowledge of, the referenced “Article XX” proceedings, and he has not represented Local 1199 in the past two years.

Because substantial evidence supports the Board’s Order, the Court should enforce it in full.

ARGUMENT

I. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF DUES REIMBURSEMENT OWED TO EMPLOYEES AS A RESULT OF REGENCY’S RECOGNITION OF A MINORITY UNION

A. Principles Governing Dues Reimbursement Remedies and Standard of Review

Section 10(c) of the Act⁴² authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor practices.⁴³ That section 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.” The Board’s discretion in formulating remedies, including dues reimbursement, is “a broad one, subject to limited judicial review.”⁴⁴ For that

⁴² 29 U.S.C. 160(c).

⁴³ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).

⁴⁴ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 208, 216 (1964).

reason, this Court will not overturn a remedial order ““unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.””⁴⁵

This Court has already determined that the Board’s remedy in this case – reimbursement of dues paid by employees forced to join Local 300S under the union security clause – is proper.⁴⁶ As the Supreme Court recognized long ago, the remedy at issue here is “manifestly reasonable” because it “returns to the employees what has been taken from them to support an organization not of their free choice.”⁴⁷

The Board’s underlying findings of fact are “conclusive” under Section 10(e) of the Act⁴⁸ if supported by substantial evidence on the record as a whole. As the Supreme Court has said, a reviewing court “may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.”⁴⁹ Accordingly, as this Court has recognized, considerable deference should be given

⁴⁵ *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718 (3d Cir. 2001) (quoting 88 *Transit Lines, Inc. v. NLRB*, 55 F.3d 823, 825 (3d Cir. 1995)).

⁴⁶ *Regency Grand*, 265 F. App’x at 78.

⁴⁷ *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 541 (1943).

⁴⁸ 29 U.S.C. 160(e).

⁴⁹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

to the Board’s factual findings, inferences, and conclusions.⁵⁰ Furthermore, this Court will defer to the Board’s legal conclusions so long as they are “rational and consistent” with the Act.⁵¹

B. The Reimbursement Order Constitutes a Reasonable Exercise of the Board’s Broad Remedial Discretion

Regency denies that it is obligated “*to pay any money*” to employees as a consequence of its unfair labor practice.⁵² That issue – whether Regency must make employees whole – has already been decided in the Board’s previous Order and enforced by this Court.⁵³ Instead, the sole issue in this case is *how much* money is due to the employees.

As an initial matter, this Court should reject Regency’s request that the Court refuse to enforce the Board’s order in its entirety. Regency’s amended answer to the compliance specification included the following admission:

“[P]lease be advised that we agree that \$20,070 (or 19,980) of the specification is ‘due.’”⁵⁴ Although Regency later argued that this statement did not constitute an

⁵⁰ *Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980) (en banc).

⁵¹ *NLRB v. D.A. Nolt, Inc.*, 406 F.3d 200, 202 (3d Cir. 2005).

⁵² Br. at 11 (emphasis in original).

⁵³ *NLRB v. Regency Grand Nursing & Rehab. Center*, 265 F. App’x 74 (3d Cir. 2008), *enforcing* 347 NLRB 1143 (2006).

⁵⁴ A-70.

admission, the Board reasonably found to the contrary.⁵⁵ Regency's admission precludes any challenge to the reimbursement awarded to these 94 employees.

Regarding the remaining employees, Regency stipulated that the compliance specification accurately reflects the amount Regency illegally withheld from their paychecks pursuant to the union security clause in the contract it signed with Local 300S. Still, Regency argues that this Court should deny reimbursement altogether for two reasons. First, Regency contends that the Board erred in determining that mitigation of damages is an affirmative defense that Regency had the burden to prove. Second, Regency argues that the Board erred in rejecting its claim that the Board's remedy is unduly burdensome. Neither of these asserted defenses has merit, and this Court should enforce the Board's Order.

1. The Board's Determination Regarding the Allocation of the Burden of Proof is Reasonable and Permissible Under the Act

The Board has established a framework regarding the burden of proof in compliance proceedings. The Board's allocation of the burden of proof in such cases is reasonable and consistent with the Act.

Compliance proceedings always involve parties who have already been found to have engaged in illegal conduct. That finding is "presumptive proof" that employees who suffered loss due to the illegal conduct are owed some amount of

⁵⁵ A-7.

backpay.⁵⁶ Because of this presumption, the Board has long held that “the general burden of proof is upon the General Counsel to establish the damage which has resulted from Respondent’s established [unfair labor practice], i.e., the gross backpay over the backpay period,” but “the burden of proof is upon the Respondent as to diminution of damages.”⁵⁷ There is nothing new about the idea that mitigation of damages is an affirmative defense that must be proven by the party asserting it.⁵⁸ Indeed, this Court has recognized these basic principles many times.⁵⁹

⁵⁶ *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467, 477 (2d Cir. 2009); *NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 423 (7th Cir. 2007); *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1376 n.2 (D.C. Cir. 2002); *Intermountain Rural Elec. Ass’n v. NLRB*, 83 F.3d 432, *4 (10th Cir. 1996) (unpublished).

⁵⁷ *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962).

⁵⁸ *See NLRB v. Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968) (noting in compliance proceeding that “burden is upon the employer to show that there is no liability” because “the defense of wilful loss of earnings is an affirmative defense”).

⁵⁹ *Atlantic Limosine, Inc. v. NLRB*, 243 F.3d 711, 719 (3d Cir. 2001) (“[O]nce the Board’s General Counsel demonstrates the gross amount of backpay that the claimant is due, the burden shifts to the employer to demonstrate that no backpay is due or that the amount due had been improperly determined.”); 88 *Transit Lines, Inc. v. NLRB*, 55 F.3d 823, 827 (3d Cir. 1995) (“The burden was on the Company ‘to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.’”); *Buncher v. NLRB*, 405 F.2d 787, 789 (3d Cir. 1969) (“Where it has been established, as here, that an employer has discharged employees discriminatorily, but it asserts in mitigation of backpay claims that such employees would have been laid off even absent such discrimination, it has the burden of proving that fact.” (internal quotations omitted)).

In this case, the Board’s previous finding that Regency committed an unfair labor practice by signing a contract with a minority union—a contract that required employees to join the union and provided for the automatic deduction of dues from their paychecks—is “presumptive proof” that some backpay is owed.⁶⁰ The Board held that the General Counsel had the burden of proving the exact amount that Regency illegally withheld from its employees’ paychecks pursuant to the contract.⁶¹ The General Counsel determined, and Regency agreed, that such deductions were made from January 8, 2004 through March 31, 2008. Using Regency’s own payroll records, the General Counsel calculated the exact amount Regency took from each employee’s paycheck during this time period. Regency stipulated that the calculations of the General Counsel are accurate.⁶² Based on these facts, the Board reasonably concluded that the General Counsel met its initial burden of establishing the damage that resulted from Regency’s unfair labor practice.⁶³

The Board then permitted Regency to mitigate its damages: it could eliminate its monetary liability to certain employees if it could prove those

⁶⁰ See *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467, 477 (2d Cir. 2009).

⁶¹ A-7.

⁶² A-7.

⁶³ A-7.

employees voluntarily joined Local 300S before the illegal contract was signed.⁶⁴ As with any affirmative defense, the burden of proving mitigation rests with the party asserting it.⁶⁵ In its answer to the compliance specification, Regency recognized that it had this burden of proof. Under the heading “First Affirmative Defense,” Regency wrote, “Respondent will show that 68 employees signed membership cards for Local 300S before January 4, 2004.”⁶⁶ However, at the compliance hearing, Regency presented no such evidence. As the judge noted, Regency “was in a position to readily identify those employees who were employed during the relevant period”⁶⁷ but it presented no testimonial evidence or any evidence that it unsuccessfully attempted to contact these employees. Because of this failure, the Board reasonably concluded that Regency did not meet its burden of proving this affirmative defense.⁶⁸

⁶⁴ A-8.

⁶⁵ *NLRB v. Jackson Hosp.*, 557 F.3d 301, 308 (6th Cir. 2009) (“[T]his being an affirmative defense, the burden remains on the employer.”); *NLRB v. Public Service Elec. & Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998) (regarding “affirmative defense to an unfair labor practice charge[,] the party . . . relying on the defense has the burden of proof”); *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 788 (4th Cir. 1998) (“It is the employer’s burden to demonstrate the affirmative defense of undue hardship . . . as with any affirmative defense.”).

⁶⁶ A-66.

⁶⁷ A-8.

⁶⁸ A-8.

Moreover, Regency's claim that 68 employees voluntarily signed cards for Local 300S before January 2004 is impossible given the facts established during the underlying unfair labor practice proceedings. Of the 117 employees in the bargaining unit at the time Regency and Local 300S entered into the illegal contract, 74 employees testified that they did not sign membership cards for Local 300S before the contract was signed. Yet Regency continues to insist that 68 employees voluntarily signed cards before January 2004, a mathematical impossibility. Its attempt to relitigate a factual issue already decided in the unfair labor practice proceedings should not be permitted.⁶⁹

In yet another effort to avoid its liability, Regency suggests that it should not have to reimburse employees who "voluntarily" signed dues check-off authorizations.⁷⁰ Regency's attempt to equate an employee's voluntary act of signing a union membership card with an employee's signing of a dues check-off authorization pursuant to an unlawful contract is utterly devoid of merit. Although the Board recognized that Regency could mitigate its liability by proving that an employee voluntarily joined the union prior to the contract's enactment and thus was not coerced by the contract into joining the union, the same does not hold true

⁶⁹ See *Regency Grande Nursing & Rehab. Ctr.*, 347 NLRB 1143, 1152 (2006) ("The General Counsel argues that Local 300S did not have signed cards from a majority of the unit employees. Respondent asserts that it did.").

⁷⁰ Br. at 5, 10, 14.

for execution of a dues checkoff. The dues check-off authorization was required of Regency's employees solely by virtue of its illegal contract with Local 300S.⁷¹ It therefore does not provide a basis for reducing Regency's liability.

Regency was hardly deprived of an opportunity to advance its defense here. The burden of proof framework applied here is not new; rather, the rule that mitigation of damages is an affirmative defense is well-established. As this Court and many others have recognized, once an unfair labor practice has been proven, "the burden of proof is on the employer, as the wrongdoer, to establish facts to dispute the claim of the aggrieved employee."⁷² And as evidenced by its answer to the compliance specification,⁷³ Regency knew this was an affirmative defense but presented no evidence to support it. Regency's current claim that it "had no reason

⁷¹ 347 NLRB at 1151 ("[O]n January 9, the day after [Robinson] signed the contract . . . employees . . . signed dual purpose dues-checkoff and authorization forms for Local 300S.").

⁷² *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 720 (3d. Cir. 2001). *See also NLRB v. Mining Specialists, Inc.*, 326 F.3d 602, 605 (4th Cir. 2003) ("[T]he burden is on the employer to establish any affirmative defense which would lessen the amount of backpay owed to the victims of its unlawful practices."); *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998) ("[T]he Board has discharged its burden once it shows the gross amount of back pay due. The burden then shifts to the employer to establish affirmative defenses mitigating liability."); *NLRB v. Akron Paint & Varnish Co.*, 985 F.2d 852, 854 (6th Cir. 1992) (once Board has shown the amount lost by employee due to ULP, burden is on the employer to establish facts that would negate or mitigate liability).

⁷³ A-66 ("And for a first affirmative defense . . . Respondent will show that 68 employees signed membership [sic] cards for Local 300S before January 4, 2008.").

to believe that it had any burden of such proof”⁷⁴ therefore rings hollow. Because the Board reasonably found that Regency failed to meet its well-established burden of proving mitigation of its liability for its unlawful conduct, this Court should enforce the Board’s decision.

2. Regency Failed to Prove that the Board’s Remedy Constitutes an Undue Burden

Regency next contends changed circumstances make enforcement of the Board’s Order unduly burdensome. Just as with its previous affirmative defense, Regency bears the burden of proof.⁷⁵ However, the Board reasonably found that Regency failed to prove either changed circumstances or undue burden.⁷⁶

The only evidence Regency presented of changed circumstances was the testimony of James Robinson, former president of Local 300S.⁷⁷ Robinson testified that the collective bargaining agreement at issue in this case contained a clause requiring Local 300S to indemnify Regency for any claims related to the

⁷⁴ Br. 9.

⁷⁵ *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1138 (11th Cir. 2008) (“The party that seeks to benefit from demonstrating a change of circumstances bears the burden of timely providing the Board with evidence of these changes.”); *NLRB v. USA Polymer Corp.*, 272 F.3d 289, 296 (5th Cir. 2001) (“The party that seeks to benefit from demonstrating a change of circumstances bears the burden of timely providing the Board with evidence of those changes.”).

⁷⁶ A-9.

⁷⁷ A-5; A-34 – A-39.

deduction of dues and fees from employees' paychecks. Robinson further testified that he believed any attempt by Regency to obtain indemnification from Local 300S "would bankrupt the union."⁷⁸ As the judge noted, Robinson's testimony was hardly "competent evidence," given that he was not even working for Local 300S at the time of his testimony.⁷⁹

But even assuming Robinson is right and there has been a change in the financial status of Local 300S, that fact is irrelevant to Regency's obligations to its employees here and is not sufficient to constitute an "undue burden." Regency again improperly disregards its unlawful conduct. Regency unlawfully recognized Local 300S, entered into an unlawful contract, and pursuant to that contract, took money from its employees and transferred it to a union that did not have majority support. As the judge noted, it is a basic tenet that an employer who extends voluntary recognition to a union does so at its own peril.⁸⁰ Whether Regency may have a separate cause of action against Local 300S through the indemnification clause in the unlawful contract is beside the point. Such an indemnification clause cannot protect Regency from the consequences of its illegal actions.

⁷⁸ A-39.

⁷⁹ A-9 n.18.

⁸⁰ A-8.

In any event, Regency's argument is essentially the same one it made in the underlying unfair labor practice litigation: that it is unfair for the Board to require Regency, but not Local 300S, to provide a remedy to the employees.⁸¹ But the mere fact that Regency alone must refund the dues cannot, by itself, constitute an undue burden.⁸² This Court stated as much in the underlying unfair labor practice case: “[Regency] argues that requiring it, but not Local 300, to refund dues is a penalty and not proper make-whole relief. Respondent cites no case law in support of this argument.”⁸³ And although Regency argues that it acted in good faith,⁸⁴ this Court has recognized that “an employer's good faith [is] irrelevant to the propriety of a back pay order.”⁸⁵ The Board therefore reasonably concluded that Regency failed to meet its burden of proving this affirmative defense.

⁸¹ Br. 17 (“It is legally ‘unduly burdensome’ to assess over \$74,000+ [sic] in dues reimbursement to *Regency alone*.”).

⁸² *Blue Grass Provision Co. v. NLRB*, 636 F.2d 1127, 1131 (6th Cir. 1980) (enforcing reinstatement order even though it “may cause hardship”).

⁸³ 265 F. App'x at 78. See also *NLRB v. Harding Glass Co., Inc.*, 500 F.3d 1, 6 (1st Cir. 2007) (“The company is not free to relitigate . . . the underlying finding of liability already decided by this court.”).

⁸⁴ Br. at 15.

⁸⁵ *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 n.17 (3d Cir. 1968).

Lummus Corporation,⁸⁶ repeatedly cited by Regency, does not compel a contrary conclusion. The charge in that case was filed against a union, and the Board – after finding that the charge had merit – ordered the union to reimburse employees who had suffered damages as a result of the union’s unfair labor practice.⁸⁷ The exact same thing happened in this case, except that the charge was filed against Regency.⁸⁸ Since the Board may not proceed without a charge, it was completely without power to order Local 300S to reimburse employees.⁸⁹ If Regency believed Local 300S violated the Act, it was free to file such a charge with the Board. The Board may have found merit to such a charge, and it may have found that Local 300S was jointly obligated, along with Regency, to reimburse employees.⁹⁰ However, no charge against Local 300S was filed with the Board.

⁸⁶ 125 NLRB 1161 (1959).

⁸⁷ *Id.* at 1166.

⁸⁸ 347 NLRB at 1149 n.7 (“The charge was filed against the Respondent [Local 300S] only.”).

⁸⁹ *Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C. Cir. 2003) (noting that the Board “may investigate and prosecute conduct only in response to the filing of a ‘charge,’ that is, a formal allegation made (by a union, an employer, or an employee) against a union or an employer”).

⁹⁰ *See Dean Transportation, Inc.*, 350 NLRB 48, 61 (2007) (ordering union and employer, “jointly and severally, [to] make the employees whole for any dues or agency fees that were deducted from their wages by the Respondent Employer and

As the Sixth Circuit recognized in a similar case, “the employer may be required to pay twice if the union, which received the illegal extractions, does not return the money. [But t]he validity of the order is analyzed in terms of its effect on the employees – does it restore to the employees what they lost by reason of the unfair labor practice.”⁹¹ As this Court already pointed out in enforcing the underlying unfair labor practice decision,⁹² the Board’s remedy in this case does just that: it returns to employees what Regency wrongfully took from them.

II. MEMBER BECKER REASONABLY DETERMINED THAT HE HAD NO DUTY TO RECUSE HIMSELF FROM THIS CASE BASED ON RELEVANT LEGAL AND ETHICAL STANDARDS

A. Introduction and Standard of Review

Regency asks the Court to deny enforcement to the Board’s Order because Member Becker refused to recuse himself from this case based on his past employment with the Service Employees International Union (SEIU). In *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*,⁹³ Member Becker explained the principles he would apply in evaluating recusal requests

remitted to the Respondent Union pursuant to that collective-bargaining agreement”).

⁹¹ *National Cash Register Co. v. NLRB*, 466 F.2d 945, 970 (6th Cir. 1972).

⁹² 265 F. App’x. at 78 (“The Board’s remedy in this case restores the status quo ante.”).

⁹³ 355 NLRB No. 40, slip op. at 5 (2010).

based on his prior representation of labor organizations that might appear before the Board. Applying those principles here, Member Becker properly participated in this case, and the Court should respect that principled decision, under the “deferential, abuse of discretion standard” courts use to review such judgments.⁹⁴

B. Background: Member Becker Has Announced Standards For Recusal Based on His Prior Employment that Go Beyond Federal Regulations and Are in Accordance with the Applicable Executive Order

Prior to his appointment to the Board, Member Becker served as counsel to the SEIU. He resigned that position on April 4, 2010, before he was sworn in as a Board Member.⁹⁵ In *Pomona Valley*, Member Becker decided that, during his first 2 years as a Board Member, he will recuse himself from all cases in which the SEIU is a party. As Member Becker explained,⁹⁶ he based that decision on both longstanding federal ethics law and an executive order President Obama issued with even tighter restrictions than previously existed under federal law.

Specifically, Member Becker first applied regulations that the Office of Government Ethics issued to ensure that agencies engage in the impartial decision-making, free of bias, to which the Constitution’s Due Process Clause and the

⁹⁴ *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995).

⁹⁵ *Pomona Valley*, 355 NLRB No. 40, slip op. at 9.

⁹⁶ *Id.* at 5.

Administrative Procedure Act entitle the public.⁹⁷ Relevant to Member Becker’s analysis, the regulations specifically prohibit executive branch employees from participating in any matter where “a person with whom he has a covered relationship is or represents a party.”⁹⁸ An employee has a “covered relationship” with any person he worked for in the past year.⁹⁹ These regulations, prohibiting decisionmakers from sitting on cases involving parties they represented in the prior year, complement the government’s broader rules requiring employees to “act impartially and not give preferential treatment to any private organization,”¹⁰⁰ and to “avoid any actions creating the appearance that they are violating the law.”¹⁰¹

Member Becker also applied President Obama’s Executive Order 13490, entitled “Ethics Commitments by Executive Branch Personnel,” which, as noted, goes even further than federal regulations to avoid conflicts of interest by executive branch employees. Pursuant to the Executive Order, every executive branch appointee must pledge not to participate in any matter involving any person

⁹⁷ See 5 C.F.R. § 2635.101(b)(8); Sections 556(b), 557, Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (2006); *St. Anthony Hosp. v. U.S. Dept. of Health and Human Services*, 309 F.3d 680, 711 (10th Cir. 2002).

⁹⁸ 5 C.F.R. § 2635.502(a).

⁹⁹ 5 C.F.R. § 2635.502(b)(iv).

¹⁰⁰ 5 C.F.R. § 2635.101(b)(8).

¹⁰¹ 5 C.F.R. § 2635.101(b)(14).

the appointee has worked for in the past *two* years.¹⁰² Following both the regulations and President Obama’s executive order, Member Becker will not participate in any case involving the SEIU for his first two years as a Board member.

Member Becker applied the same regulations and executive order to cases in which a party is one of SEIU’s more than 150 affiliated locals – “separate and distinct legal entities” whose autonomy is guaranteed by federal law.¹⁰³ Consequently, he explained, he would recuse himself from cases involving such local unions if he had actually represented the local during the two years before he became a Board Member, or if an employee of his former employer, e.g., in-house counsel at the SEIU itself, represented the local union.¹⁰⁴

C. Member Becker Reasonably Declined Regency’s Recusal Request

Here, Member Becker appropriately denied Regency’s request for recusal, which was based solely on Member Becker’s asserted participation in a 2003 arbitration over “raiding” charges involving SEIU 1199 and Local 300S,

¹⁰² Exec. Order No. 13,490 (Jan. 21, 2009).

¹⁰³ *See Pomona Valley*, 355 NLRB No. 40, slip op. at 9, and authorities cited. Member Becker further noted that “[a]lthough the relationship between international unions and affiliated local unions is often cooperative, it sometimes results in conflict between the distinct organizations.” *Id.* (citations omitted).

¹⁰⁴ *Pomona Valley*, 355 NLRB No. 40, slip op. at 9.

UFCW.¹⁰⁵ Regency claims¹⁰⁶ that Member Becker should have recused himself because the SEIU was party to that arbitration while he was, according to Regency, its “General Counsel.” In response to the motion, Member Becker stated that he “played no role in and has no knowledge of” that proceeding.¹⁰⁷ He also noted that although he served as counsel to the SEIU prior to coming to the Board, he never served as its general counsel.¹⁰⁸ Member Becker therefore denied Regency’s motion,¹⁰⁹ finding that his participation in this case was consistent with the principles he set forth in *Pomona Valley*.¹¹⁰ In the end, all that Regency has to rely upon is baseless speculation that Member Becker *must have* been “privy” to the

¹⁰⁵ A-85 – A-86. The alleged proceeding apparently refers to a mediation system set up in Article XX of the AFL-CIO constitution to deal with internal jurisdictional disputes between international unions. Article XX, Constitution of the AFL-CIO, available at <http://www.aflcio.org/aboutus/thisistheaflcio/constitution/art20.cfm>.

¹⁰⁶ Br. 20.

¹⁰⁷ A-1 n.2

¹⁰⁸ *Id.* More specifically, Member Becker has explained that he held the position of Associate General Counsel to the SEIU, and that except for a brief period of time in 2005 and 2006, he did so on a part-time basis. *Pomona Valley*, 355 NLRB No. 40, slip op. at 10.

¹⁰⁹ A-1 n.2.

¹¹⁰ 355 NLRB No. 40, slip op. at 14.

SEIU's participation in the Article XX proceedings¹¹¹ – yet, such baseless speculation provides no basis for disqualification.¹¹²

Before this Court, Regency argues for the first time¹¹³ that Member Becker's representation of the local involved here, in a 1999 case and a 2002 case,¹¹⁴ also required his recusal. Even if Regency had given Member Becker an opportunity to address these cases, however, the argument would fail to withstand scrutiny. As noted, under even the most stringent ethical guidelines, recusal is only required where the agency official has represented a party within two years. Yet, Member Becker's representation of Local 1199 (or its predecessors) in Regency's two cited cases occurred *eight* years ago. Moreover, no appearance of partiality is likely here,¹¹⁵ because the two cited cases are geographically and substantively unrelated

¹¹¹ Br. 20.

¹¹² See *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1189 (10th Cir. 1974) (no reason why agency attorney should have been disqualified where, in an affidavit in the record, he stated that upon leaving the FTC's staff, he did not discuss the merits of the case with any of the Commissioners or the Commission's trial staff).

¹¹³ Br. 18 & n.10, 20.

¹¹⁴ See *The Bronx Health Plan v. NLRB*, No. 98-1451, 203 F.3d 51 (D.C. Cir. Sept. 21, 1999) (unpublished) (Member Becker served as counsel to Local 1199 as intervenor in a successorship case); *Avante at Boca Raton, Inc. v. NLRB*, 54 F. App'x 502 (D.C. Cir. Nov. 5, 2002) (unpublished) (Member Becker served as counsel to Local 1199 as intervenor in a refusal to bargain and to provide requested relevant information case).

¹¹⁵ See 5 C.F.R. § 2635.101(b)(8), (14).

to the instant proceeding: one was a successorship case arising from New York City, while the other involved an employer's refusal to bargain and provide information to a Florida division of Local 1199. As such, Member Becker's recusal from this case is not required.

In sum, Member Becker's decision not to recuse himself complies with longstanding federal ethics guidelines and President Obama's ethics pledge, and is entitled to deference from this Court. He thoughtfully considered the applicable regulations and determined that recusal in this case was unnecessary, and Regency has given this Court no reason to question that decision. As explained by the D.C. Circuit, an official's decision not to recuse will be set aside "only where he has 'demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence.'"¹¹⁶ Regency has failed to overcome the "strong and firm presumption,"¹¹⁷ that Member Becker decided this case without bias.

¹¹⁶ *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980)).

¹¹⁷ *NLRB v. Ohio New & Rebuilt Parts, Inc.*, 760 F.2d 1443, 1450 (6th Cir. 1985).

CONCLUSION

The Board respectfully requests the Court grant its application for enforcement in full.

/s/JILL A. GRIFFIN

JILL A. GRIFFIN

Supervisory Attorney

/s/MacKENZIE FILLOW

MacKENZIE FILLOW

Attorney

National Labor Relations Board

1099 14th Street NW

Washington, DC 20570

202-273-2949

202-273-3823

LAFE E. SOLOMON

Acting General Counsel

CELESTE J. MATTINA

Acting Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

December 2010

UNITED STATES COURT OF APPEALS
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Petitioner)	
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v.)	No. 10-3547
)	Board Case No. 22-CA-26231
)	
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)	
REGENCY GRANDE NURSING & REHABILITATION CENTER)	
)	
Respondent)	

CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit LAR 46.1(e) and pursuant to LAR 28.3(d), MacKenzie Fillow certifies that she is a member in good standing of the bar of North Carolina (NC Bar No. 33916) and not required to be a member of the bar of this Court because she represents the federal government in the above captioned case.

s/MacKenzie Fillow
MacKenzie Fillow
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-3823

Dated at Washington, DC
this 30th day of December 2010

UNITED STATES COURT OF APPEALS
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Respondent)

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Board Case No. 22-CA-26231

CERTIFICATE OF VIRUS SCAN

The Board certifies that the electronic copy of the brief submitted in Portable Document Format (PDF) has been scanned for viruses using the Symantec Antivirus Corporation Edition, program 10.1.9.9000, version December 26, 2010, rev. 3, and no virus has been detected.

s/Linda Dreeben (by MF)
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 30th day of December 2010

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REGENCY GRANDE NURSING & REHABILITATION CENTER)	
)	
Respondent)	

CERTIFICATE OF IDENTITY

I certify that hard copies of the text of the brief are identical to the electronically filed copy.

s/Linda Dreeben (by MF)
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,271 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben (by MF)

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, D.C. 20570

(202) 273-2960

Dated at Washington, DC
this 30th day of December 2010

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Respondent)

CERTIFICATE OF SERVICE

The undersigned certifies that the Board has sent to the Clerk of the Court by electronic filing and first-class mail the required number of copies of the Board's brief in this case, and has served that brief by electronic filing and by sending two copies by first-class mail upon the following counsel at the addresses listed below:

Morris Tuchman
Law Office of Morris Tuchman
134 Lexington Ave, 2nd Floor
New York, New York 10016

William S. Massey
Gladstein, Reif & Meginniss
817 Broadway, 6th Floor
New York, NY 10003

s/Linda Dreeben (by MF) _____
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, DC
this 30th day of December 2010