ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-15097-BB & 08-15596-BB

UNITED STATES COURT of APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM A. GREENE, a.k.a. ARNOLD GREENE, CYNTHIA GREENE

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
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v.	)	Nos. 08-15097-BB & 08-15596-BB
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Respondent/Cross-Petitioner	)	

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1-1 of the Court's Rules, Petitioner National Labor Relations Board (the "Board"), by and through its undersigned attorneys, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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Schifko, John P., Discriminatee

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Wolfe, Theodore D., Discriminatee

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s/Linda Dreeben
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Dated at Washington, DC
This 14th day of January 2009

ORAL ARGUMENT STATEMENT

Board counsel believe that this case involves the application of well-settled principles to undisputed facts, and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board asks to be permitted to participate and assist the Court in its resolution and understanding of this case.

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

INTRODUCTION

By this appeal, petitioners make one final attempt to delay paying backpay totaling $462,755, plus interest, to 118 of their former employees as redress for losses suffered due to their company's commission of numerous and egregious unfair labor practices, as found by the Board and enforced by this Court. Now, in their defense against enforcement, petitioners fail to challenge the Board's finding that they are personally obligated for the employees' backpay; instead, they raise only a meritless due process claim that the Board's associate chief administrative

law judge unfairly denied a motion to continue a compliance hearing in 2002. Given the nature of their reed-thin defense, and the length of time the employees have waited for a remedy, the Board requests that the Court not only enforce the Board's Order in full, but consider doing so expeditiously and without oral argument, under Rule 34(a)(2) of the Federal Rules of Appellate Procedure.

JURISDICTIONAL STATEMENT

These consolidated cases are before the Court on a petition to review, and an application to enforce, a backpay order of the National Labor Relations Board ("the Board") that issued against William A. Greene ("Greene"), and his wife, Cynthia D. Greene (collectively "the Greenes"), holding them personally liable for the outstanding backpay obligations of A.J. Mechanical, Inc. ("the Company"), a defunct corporation of which Greene was an owner. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). Now under review is the Board's Second Supplemental Decision and Order, which issued on July 23, 2008 and is reported at 352 NLRB No. 108, 2008 WL 2962657. (D&O 1-5.)[1] The Order is final with respect to all parties.

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[1] "D&O" refers to the Board's Second Supplemental Decision and Order, which is located in the Record Excerpts at Tab 2. "GCX" refers to exhibits introduced by the General Counsel at the October 30, 2002 compliance hearing, which are contained in Volume II of the record. References to other record materials include the volume and document number as listed in the Board's Certified List.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices were committed in Florida. On September 9, 2008, the Greenes filed a petition for review challenging the Board's Order. On October 2, 2008, the Board filed an application for enforcement of its Order against the Greenes. Those filings were timely because the Act imposes no time limit on the initiation of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUE

Whether the Board reasonably determined that the Greenes failed to establish that the Board's associate chief administrative law judge abused his discretion by denying their motion for continuance of the October 30, 2002 compliance hearing.

STATEMENT OF THE CASE

In 2000, this Court enforced the Board's prior order finding that the Company engaged in numerous and egregious unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)). *See A.J. Mechanical, Inc.*, 330 NLRB No. 178, 2000 WL 420615 (Apr. 14, 2000) (unpublished), *enforced in an unpublished judgment*, 11th Cir. Case No. 00-14628 (Oct. 23, 2000). In the later compliance phase of the case, the District of Columbia Circuit enforced the Board's backpay order establishing the exact amounts the

Company owed 118 employees who had sustained losses as the result of its unfair labor practices, but vacated the Board's finding that the Greenes were not personally liable for the Company's backpay obligations and remanded the issue to the Board for reexamination. *See Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804 (D.C. Cir. 2007) ("*Carpenters & Millwrights, Local Union 2471*").

On remand, the Board found (D&O 1-5) the Greenes personally liable for the Company's backpay obligations. Specifically, based on the undisputed facts found by the administrative law judge, adopted by the Board, and upheld by the D.C. Circuit, the Board pierced the Company's corporate veil and imposed personal liability on the Greenes under the test articulated in *White Oak Coal Co., Inc.*, 318 NLRB 732 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996). On review, the Greenes do not contest the Board's finding that they are personally liable. Rather, the Greenes argue only that they were deprived of due process when the Board's associate chief administrative law judge denied their motion for a continuance of the October 30, 2002 compliance hearing. A statement of the facts, followed by summaries of the course of proceedings and the standard of review, are set forth below.

I. STATEMENT OF FACTS

The undisputed facts are set forth in the D.C. Circuit's opinion, *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 806 & n.1, and are summarized here for the Court's convenience. The Company was a Florida corporation that specialized in refurbishing gas turbines. *Id.* at 806. Greene founded the Company with James Sanders, and they were its sole stockholders and directors. *Id.* During the life of the Company, Greene and Sanders commingled their personal funds and assets with those of the Company, disregarded corporate formalities and procedures, failed to maintain separate corporate records, and kept the Company in an undercapitalized state. *Id.*

In late 1998, the Carpenters and Millwrights, Local Union 2471 ("the Union") launched a campaign to organize the Company's employees. *Id.* The Company actively opposed the Union's organizing efforts through a variety of tactics, many of which were clear violations of the Act. *Id.* As the Board subsequently found, those violations included: barring employees from speaking about the Union; interrogating employees about their membership in and support for the Union; promising benefits for ceasing prounion activity; threatening reprisals if employees continued their prounion activity; refusing to consider job applicants because they were union supporters; and threatening employees with plant closure, loss of jobs, loss of benefits, and discharge because of their prounion

activities. *Id.* The Company then carried out its threats by laying off or firing employees because of their support for the Union. *Id.* The Company's unlawful conduct began in October 1998 and continued through May 1999, and much of it was committed by Greene and Sanders personally. *Id.* at 806-07. In July 1999, notwithstanding these unlawful acts, the Union prevailed in a representation election and was certified by the Board as the employees' bargaining representative; the Company never recognized or bargained with the Union. *Id.* at 807.

In the midst of their battle against the Union, Greene and Sanders wrote themselves a series of checks on the Company's bank account. *Id.* at 807. In the first distribution, made in February 1999, each received $225,000. *Id.* Over the next 10 months, both Greene and Sanders received nine additional distributions. *Id.* The total paid to each man exceeded $1.8 million. *Id.* In September 1999, the Company ceased all operations, and auctioned off all of its property and equipment. *Id.* In December 1999, Greene and Sanders executed a resolution to liquidate the Company. *Id.* In June 2000, they filed articles of dissolution with Florida's Secretary of State. *Id.*

II. COURSE OF PROCEEDINGS

A. The Underlying Unfair Labor Practice Proceeding

Beginning in May 1999—shortly after the first distribution of company funds to Sanders and Greene—and continuing through November 1999, the Union filed a series of unfair labor practice charges alleging that the Company had engaged in numerous violations of Section 8(a)(1), (3), and (5) of the Act since the inception of the union campaign in late 1998.[2] *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 807. Subsequently, the Board's General Counsel issued two complaints against the Company, both of which the Company failed to answer. *Id.* After several months of silence, the General Counsel moved for summary judgment, and the Board issued a notice to show cause why that motion should not be granted. *Id.* Again, the Company failed to respond. *Id.*

[2] Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining . . . ." In turn, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Further, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." And 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 exclusive bargaining representative of its employees.

On April 14, 2000, the Board found that the Company had engaged in the unfair labor practices as alleged, and that Greene and Sanders were personally involved in many of them. *Id.* The Board ordered the Company to pay backpay to 118 employees to make them whole for the losses they sustained as a result of the Company's unlawful conduct. *Id.* Subsequently, this Court enforced the Board's unfair labor practice order in full. *See A.J. Mechanical, Inc.*, 330 NLRB No. 178, 2000 WL 420615 (Apr. 14, 2000) (unpublished), *enforced in an unpublished judgment*, 11th Cir. Case No. 00-14628 (Oct. 23, 2000).

B. The Compliance Proceeding

After enforcement, disputes arose over the amount of backpay due under the Board's unfair labor practice order and whether Greene, Sanders, and their wives (who shared equally in the distributions) were personally liable for the Company's backpay obligations. *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 807. As part of the compliance investigation, the Board's General Counsel took depositions of the Greenes on September 6, 2001, and Sanders and his wife on September 20, 2001, to gather facts relating to the large cash disbursements they had made to themselves, in preparation for ascertaining their personal liability. (Vol. II, GCX 7, 11(a), 14(a), 15(a).) In February 2002, Sanders and his wife agreed to pay $112,500 to settle all backpay claims against them in their personal capacity. *Id.* The Greenes chose not to settle at that time. *Id.*

On October 1, 2002, the Board's Regional Director issued a compliance specification and scheduled a hearing for October 30 to determine two issues: (1) "the amount of backpay due employees who suffered financial consequences as a result of the unfair labor practices of the now-defunct" Company; and (2) whether the Greenes "should be held personally liable for such backpay." *Id.* (quoting *A.J. Mechanical, Inc.*, 345 NLRB 295, 295 (2005)). Over 2 weeks later, on October 16, the Greenes served a motion to continue the hearing date, citing insufficient time to prepare and an attorney scheduling conflict. The Board's associate chief administrative law judge denied the motion, as well as the Greenes subsequent motion for reconsideration. (D&O 1 n.5.) Despite the denial, the Greenes filed an answer, personally appeared at the compliance hearing, and testified on their own behalf. *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 807. The Company itself, however, failed to answer the compliance specification or appear at the hearing. *Id.*

After the hearing, the presiding administrative law judge issued a supplemental decision in which he determined that the total amount of backpay owed was $462,755, plus interest, and that Greene and his wife were personally liable for payment. *Id.* (citing *A.J. Mechanical, Inc.*, 345 NLRB at 299-305). In deciding to "pierce the corporate veil" and find the Greenes personally liable, the judge applied the Board's established test articulated in *White Oak Coal Co., Inc.*,

318 NLRB 732 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996): "[T]he corporate veil may be pierced when: (1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *White Oak*, 318 NLRB at 732.

The administrative law judge concluded, after reviewing Greene's "misuse of the corporate assets and form," and the large cash distributions that he and his wife received in 1999, that both prongs of the *White Oak* test were satisfied and that personal liability should be imposed. *A.J. Mechanical, Inc.*, 345 NLRB at 303-05. Specifically, the judge found that "the Greenes along with James Sanders, engaged in blurring the separate corporate entity of [the Company,] and their misuse of the corporate assets and form[] is unfair, unjust," and resulted in an evasion of the Company's backpay obligations for unfair labor practices committed by Greene and others. *Id.* at 305. In reaching this decision, the judge determined that Greene "was not credible," and stated that he did "not credit any of [Greene's] testimony, except that which other, credited, evidence corroborates or that which constitutes an admission against interest." *Id.* at 303.

C. The Board's Prior Backpay Decision

On review, the Board adopted the administrative law judge's recommended backpay order against the Company, but reversed the judge's recommended

finding that the Greenes were personally liable. *A.J. Mechanical, Inc.*, 345 NLRB at 295-99; *see also* Revised Supplemental Order, *A.J. Mechanical, Inc.* (Mar. 17, 2006) (unpublished) (Vol. IV, Tab 14). In doing so, the Board adopted the judge's findings of fact and credibility determinations, and accepted arguendo the judge's conclusion that the Company's separate legal identity had not been maintained under the first prong of the *White Oak* test. *Id.* at 295 n.1, 297.

The Board, however, concluded that the second prong of the *White Oak* test was not satisfied, disagreeing with the judge that "adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *Id.* at 296, 297. Specifically, the Board found that "the timing of the corporate distributions does not support the judge's conclusion," *id.* at 297, because, even though the unfair labor practices themselves were ongoing when the distribution of assets began, the Union had not yet filed unfair labor practice charges. Thus, according to the Board, "it was not until these dates that . . . Greene was aware that the [Company's] actions were being challenged and that monetary liability could result." *Id.*

D. The D.C. Circuit's Opinion

The Union petitioned the D.C. Circuit for review of the Board's *White Oak* analysis that resulted in the conclusion that the Greenes were not personally liable, and the Board cross-applied for enforcement of its backpay order against the

Company. *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 808. The court summarily enforced the Board's backpay order against the Company itself, given that it was uncontested. *Id.*

As to the Greenes' liability, however, the court held that the Board had "failed to identify evidence sufficient to support its finding that the Company had decided to shut down before it began distributing cash to its owners," or to support its conclusion that Greene would not have known his conduct might give rise to backpay liability until after the Union had filed a charge. *Id.* at 810, 813. Analogizing to criminal law, the court explained that "[s]urely it is reasonable to infer that a thief who robs a bank in broad daylight knows well before the date of his indictment that he may one day face criminal liability," concluding that "[t]he corporate conduct at issue here was the labor-law equivalent of a daylight robbery." *Id.* at 809. Moreover, the court stated that "[i]t is hard to believe that anyone in Greene's position could have been unaware that [his] conduct . . . could result in monetary liability," particularly given his extensive personal involvement in many of the unfair labor practices. *Id.* at 810.[3] Accordingly, the court remanded the issue of the Greenes' liability for the Board to reexamine. *Id.* at 813.

[3] The D.C. Circuit summarized the numerous Board findings, which this Court upheld in the prior enforcement proceeding in 2000, that detail Greene's personal commission of unfair labor practices. *See Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 810. The court, for example, noted that Greene directly threatened employees with plant closure and job loss because of their union

E. The Board's Second Supplemental Decision and Order, Which Is Currently Under Review

On July 23, 2008, the Board (Chairman Schaumber and Member Liebman) issued its Second Supplemental Decision and Order in which it accepted the D.C. Circuit's remand as law of the case, and reexamined application of the *White Oak* test in a manner consistent with the court's opinion. Having done so, the Board held that both prongs of the test were satisfied, and that the Greenes were personally liable for the Company's backpay obligations. (D&O 1-5.)

The Board's Order requires the Greenes to make whole the 118 employees who sustained financial losses as a result of the Company's unfair labor practices by paying each of those employees specified amounts of backpay. The total amount of backpay due is $462,755, plus interest, and minus tax withholdings required by federal and state law, if any. (D&O 4-5.)

The Board also rejected (D&O 1 n.5) the Greenes' due process claim that the Board's associate chief administrative law judge abused his discretion in not granting them a continuance of the October 30, 2002 compliance hearing. The

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activities; told them that the Company was not hiring any more employees who supported the Union; discarded numerous job applications because the applicants indicated that they were union supporters; threatened that he would shut down the job and reopen using employees who were not union supporters; threatened that he would relocate the business if the employees did not cease their union activities; and repeatedly told employees that it would be futile for them to select the Union as their bargaining representative. *Id.*

Board reasonably concluded (D&O 1 n.5) that the Greenes failed to establish that the judge abused his discretion, or that their due process rights were in any way violated. As shown below, the Greenes have presented this Court no basis to disturb any aspect of the Board's Order.

III. STANDARD OF REVIEW

An administrative law judge's refusal to grant a hearing continuance is reviewed for an abuse of discretion, and his determination "should ordinarily not be interfered with by a reviewing court." *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1126 n.3 (5th Cir. 1980). *See also NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 576 (5th Cir. 1966). Further, the judge's ruling will not be reversed unless it is "demonstrated to clearly prejudice the appealing party." *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1035 (9th Cir. 1982). *See also Kenrich Petrochems., Inc. v. NLRB*, 893 F.2d 1468, 1484-85 (3d Cir. 1990) ("actual prejudice" must be shown), *rehearing on other grounds*, 907 F.2d 400 (3d Cir. 1990); *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 910 (11th Cir. 1982) (a "positive showing of prejudice" is required).

SUMMARY OF ARGUMENT

The Greenes' sole contention on appeal is that they were deprived of due process when the Board's associate chief administrative law judge denied their motion for a continuance of the October 30, 2002 compliance hearing. Indeed, the

Greenes do not contest any portion of the Second Supplemental Decision and Order in which the Board determined that they are personally liable for the Company's backpay obligations. Moreover, the exact amounts of those obligations—having been previously enforced by the D.C. Circuit in *Carpenters & Millwrights, Local Union 2471*, 481 F.3d 804—are beyond reproach. Therefore, if the Court rejects the Greenes' due process argument, as it should, then the Board is entitled to summary enforcement of its Order in full. *See NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999) (Board is entitled to enforcement of its uncontested findings); *Northport Health Servs., Inc. v. NLRB*, 961 F.2d 1547, 1551 n.3 (11th Cir. 1992) (same).

On the merits, the Board reasonably found that the Greenes failed to establish that the judge abused his discretion by denying their motion. With no elaboration, the Greenes' motion only claimed that their lead counsel had an unnamed scheduling conflict on the hearing day and that they had insufficient time to prepare a defense because the compliance specification was 26 pages long and covered backpay for 118 employees. The judge denied the motion, finding that the Greenes had not established good cause for delaying this case, which had been actively litigated since 1999. Specifically, the judge stated that the Greenes' counsel had given no particulars regarding his asserted calendar conflict, nor had he suggested what issues, if any, complicated hearing preparation other than the

length of the compliance specification. In their motion for reconsideration, which was also denied, the Greenes did not cure those deficiencies, adding only that their lead counsel would be in New Jersey on the hearing date, again with no elaboration, and itemizing his current workload. At the hearing, the Greenes appeared, testified, and put on a defense, represented by an associate of the firm. On those facts, the Board found that the judge did not abuse his discretion and that the Greenes' due process rights were not violated.

The Greenes present this Court with no basis to disturb the Board's finding. Many of their contentions, for instance, amount to little more than admissions that counsel misjudged case strategy and lacked knowledge of the Board's rules and regular operations. The Greenes also fail to understand that the unavailability of lead counsel does not necessitate a continuance where, as here, another attorney of the firm representing them is available. Moreover, their claim that they were given only 15 working days to prepare a defense is ludicrous, given that litigation was ongoing since 1999, and in 2001, they were deposed by the Board's Regional Director to establish facts relating to their personal liability for the Company's backpay. Under those circumstances, the Greenes had ample time to collect backpay information and develop a defense, but simply chose not to do so. The Board's Order is entitled to enforcement in full.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT THE GREENES FAILED TO ESTABLISH THAT THE BOARD'S ASSOCIATE CHIEF ADMINISTRATIVE LAW JUDGE ABUSED HIS DISCRETION BY DENYING THEIR MOTION TO CONTINUE THE COMPLIANCE HEARING

On review, the Greenes' sole contention is that they were deprived of due process when the Board's associate chief administrative law judge denied their motion for a continuance of the compliance hearing back in October 2002. As shown above, an administrative law judge's refusal to grant a hearing continuance is reviewed only for abuse of discretion, and the judge's ruling should ordinarily not be disturbed. Here, the Board reasonably determined (D&O 1 n.5) that the Greenes failed to establish that the judge abused his discretion in denying their motion, and before this Court they present no basis to disturb the Board's finding.

A. Record Evidence Relevant to the Judge's Denial of the Greenes' Motion for Continuance

As shown, the Union filed the first of its unfair labor practice charges against the Company in May 1999. The subsequent unfair labor practice proceeding found that the Company committed numerous and egregious unfair labor practices—many of which Greene personally committed—that adversely affected 118 of his employees. In October 2000, this Court enforced the Board's unfair labor practice order, and subsequently the Board's Regional Director began working on obtaining compliance with the Board's order. As part of the

compliance investigation, the Board's General Counsel took the Greenes' depositions on September 6, 2001, and depositions of Sanders and his wife on September 20, 2001, to ascertain facts relating to the large cash disbursements they had made to themselves, in preparation for ascertaining their personal liability. In February 2002, Sanders and his wife agreed to pay $112,500 to settle all backpay claims against them in their personal capacity. *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 807.

After disputes arose over the exact amounts due, and whether Greene and his wife were personally liable for the remaining backpay, the Regional Director issued a compliance specification on October 1, 2002, and scheduled a hearing for October 30, to address those issues. More than 2 weeks later, on October 16, the Greenes served a motion to continue the hearing. Specifically, the Greenes "requested that the hearing be continued to an agreeable date after January 15, 2003, in order to avoid a conflict with Mr. [William] Andrews' scheduling and the intervening holidays, and to allow [the Greenes] sufficient time to prepare [their] defenses to the [s]pecification." (Motion, 10/16/02, p. 3.) With no elaboration, the motion stated that Mr. Andrews had "a previously scheduled conflict" on the October 30 hearing date. *Id.* at 2. Moreover, although the Greenes asserted that they needed more time to prepare a defense, the motion justified this claim only by

stating that "the compliance specification is 26 pages long and sets forth backpay claims of 118 individuals." *Id.*

On October 21, the Board's associate chief administrative law judge denied the motion on the following grounds:

> Any continuance would further delay resolution of these matters which have been ongoing since mid-1999. [The Greenes]'s counsel does not give any particulars regarding his asserted calendar conflict nor does he suggest what, if any issues, complicates the compliance specification other than its length. I am persuaded good cause for a continuance has not been established.

(Order, 10/21/02.)

On October 22, the Greenes filed a motion for reconsideration. Concerning the asserted scheduling conflict on October 30, the motion added only that "counsel will be in Newark, New Jersey (travel agenda attached as Exhibit 'A')." (Motion for Reconsideration, 10/22/02, at p. 2.) Pertaining to the assertion that they needed more time to prepare a defense, the motion offered only that, prior to October 30, Mr. Andrews had been working on the defense of a Board Section 10(j) injunction proceeding for the Greenes, was scheduled to speak at a conference on October 24 and 25, and was scheduled for an arbitration on October 28 and 29. *Id.* Finally, the reconsideration motion also stated that copies of the Regional Director's backpay records that the Greenes requested on October 18 would not be received until October 28, and that the Greenes had been subpoenaed to produce a "voluminous amount of documents and records." *Id.* at 2-3. On

October 23, the associate chief administrative law judge denied the motion for reconsideration. (Order, 10/23/02.)

At the hearing, another attorney from the firm representing the Greenes, Mr. Eric Holshouser, appeared in place of Mr. Andrews. (Vol. I, Tr. 6.) At the opening of the hearing, Mr. Holshouser renewed their motion for a continuance, restating the same grounds; he added that settlement had been suggested that morning, but that, because the Greenes had filed for bankruptcy 2 days earlier, he did not want to proceed with those discussions without consulting the bankruptcy attorney. (Vol. I, Tr. 10-11.) In response, the presiding administrative law judge, noting that he could not grant a motion for a continuance based on the previously stated grounds that had been denied, offered to give Mr. Holshouser time that morning to consult the Greenes' bankruptcy attorney, while the General Counsel's witnesses waited to testify. (Vol. I, Tr. 11-13.) Mr. Holshouser, however, declined the opportunity. (Vol. I, Tr. 13.) Thereafter, the hearing proceeded, and the Greenes testified on their own behalf, with Mr. Holshouser acting as counsel.

B. The Board Reasonably Found No Abuse of the Judge's Discretion in Denying the Greenes a Hearing Continuance

On those facts, the Board reasonably found (D&O 1 n.5) that the Greenes failed to establish that the Board's associate chief administrative law judge abused his discretion by denying their motion for a continuance, and in rejecting the slightly-more detailed motion for reconsideration. As the Board explained (D&O

1 n.5), the judge properly denied the motion, "citing [the Greenes'] failure to establish the particulars of [their] hearing preparation difficulties and counsel's scheduling conflicts." Indeed, with no details or description, the motion only generally asserted that Mr. Andrews had a previously scheduled conflict on October 30. And concerning the assertion that there was insufficient time to prepare a defense, the motion stated only that the compliance specification was 26 pages and included backpay for 118 employees, with no details itemizing the particular difficulties that the Greenes were having in developing their defense. Given the length of time the case had been pending, and the Greenes' vague assertions, the judge acted well within his discretion in denying the motion.

Compounding their error, in their motion for reconsideration, the Greenes failed to correct the deficiencies in particularity. For example, although adding that Mr. Andrews was scheduled to be in New Jersey on October 30, the Greenes failed, again, to state the exact nature of the scheduling conflict. Similarly, the motion's statements that the Greenes were awaiting the backpay records that they requested on October 18 (which they could have requested earlier) and that they were required to respond to the General Counsel's documents subpoena, failed to state what exact complications, if any, were impeding their ability to prepare for the hearing. As such, the motion failed to provide a basis upon which the judge could find "proper cause" for continuing the hearing date. *See* 29 C.F.R.

§ 102.16(a). Accordingly, the judge did not abuse his discretion in denying the Greenes' motion for a continuance.

The Board also explained (D&O 1 n.5) that the Greenes' due process rights had not otherwise been violated, and that the Greenes had appeared at the hearing with substitute counsel and put on a defense. Although, at the hearing, Mr. Holshouser added another reason for a continuance, citing the Greenes' filing for bankruptcy 2 days before the hearing, the Board noted (D&O 1 n.5) that "[t]he [presiding] judge granted counsel the opportunity to contact the Greenes' bankruptcy attorney regarding the impact of a proposed settlement," but that "counsel declined the judge's offer." Accordingly, the Board reasonably held (D&O 1 n.5) that "[i]n these circumstances, we find that the [Greenes] ha[ve] not established that the judge abused his discretion by denying the continuance motion or otherwise violated the [Greenes'] due process rights."

C. The Greenes' Contentions Are Wholly Without Merit and Border on the Specious

There is no merit to any of the Greenes' contentions in support of their due process claim. First, many of their assertions are little more than admissions that their counsel made misjudgments in case strategy. For example, the Greenes acknowledge (Br. 9 & n.5) that their counsel "did not substantially involve other firm lawyers in the defense," and apparently was not otherwise bothering to prepare a defense, because he "believed" and "assume[d]" that the motion for

continuance would be granted. Those internal case-management decisions, however, obviously are no basis for finding a due process violation.

Next, the Greenes' counsel was apparently unaware that, under relevant case law, his unavailability on the hearing date did not necessitate a continuance. It is well-settled that a scheduled Board hearing may proceed, even if the desired lead counsel is unavailable, when other associates of the firm are available. *See Franks Flower Express*, 219 NLRB 149, 149-51 (1975) (no abuse of discretion where principal counsel was ill but junior member of the firm was available and tried the case over his own protest that he was not adequately prepared), *enforced mem.*, 529 F.2d 520 (5th Cir. 1976).

As one court has explained, "[i]t is unfortunate, of course, that the particular individual attorney who desired to represent the respondent met with conflicting engagements," but the firm "'should have secured one of their staff of attorneys or some other counsel who was free from other engagements to undertake the case with the instant attention contemplated by the Congress.'" *NLRB v. Glacier Packing Co.*, 507 F.2d 415, 416 (9th Cir. 1974) (quoting *NLRB v. American Potash & Chem. Corp.*, 98 F.2d 488, 492 (9th Cir. 1938)). It is also settled that, although more preparation time "might well have been advantageous to [the Greenes'] counsel, it did not automatically entitle him to a continuance nor did it relieve him

of the burden of going forward." *Spiegel Trucking Co.*, 225 NLRB 178, 179 (1976), *enforced mem.*, 559 F.2d 188 (D.C. Cir. 1977).

The Greenes similarly and mistakenly complain (Br. 10, 13) that their counsel had only "15 working days to prepare a defense" (Br. 13), while, in contrast, the Board's compliance officer began working on backpay calculations 2 years earlier, shortly after this Court enforced the Board's unfair labor practice order. Contrary to their suggestion that they were limited to 15 days of preparation by the Board's actions, in fact, their counsel was free to begin collecting backpay information and preparing a defense in the same time period as the compliance officer, or earlier, but simply chose not to do so. Indeed, an ideal time to begin a defense would have been September 2001, when the Greenes were deposed by the General Counsel and it was clear that their personal liability was at issue. In any event, counsel should not have been surprised that the compliance officer began collecting backpay information after this Court enforced the Board's order, given that Section 10506.9 of the Board's *Casehandling Manual (Part Three) Compliance Proceedings* requires that "[t]he compliance officer should initiate compliance action immediately on entry of the judgment."

Similarly, the Greenes misconceive what rules apply to the Board, by contending (Br. 14-15) that state laws governing professional conduct are controlling here, rather than the Board's Rules and Regulations. For instance,

while the Greenes complain (Br. 15) that the hearing should not have been "unilaterally scheduled," the Board's Rules and Regulations provide for such a unilateral setting of the hearing date (*see* 29 C.F.R. § 102.54), which is a matter generally within the Regional Director's discretion. *See Casehandling Manual (Part One) ULP Proceedings*, § 10256.1; *Casehandling Manual (Part Three) Compliance Proceedings*, § 10650.2.

In that same vein, the Greenes incorrectly claim (Br. 13, 17) that they had no reason to begin preparing a backpay defense before receiving the compliance specification, because, they argue, it "included the Greenes personally for the first time in the litigation." This is simply a reframing of the argument that the D.C. Circuit rejected. Again, as the court explained, "[t]he corporate conduct at issue here was the labor-law equivalent of a daylight robbery," and "[i]t is hard to believe that anyone in Greene's position could have been unaware that [such] conduct . . . could result in monetary liability," particularly given his extensive personal involvement in many of the unfair labor practices. *Carpenters & Millwrights, Local Union 2471*, 481 F.3d at 809, 810. Moreover, the Greenes certainly should not have been surprised by the compliance specification's including them personally because, as noted, they participated in depositions to assess their personal liability over a year before the compliance specification issued. Therefore, the Greenes had ample notice that they should begin early

preparation to defend against backpay liability, but chose not to do so; their neglect should not now be rewarded.

Also mistaken is the Greenes' insistence (Br. 10, 13) that the 29 days between the issuance of the October 1 compliance specification and the October 30 hearing, was somehow an extraordinarily short time. Contrary to their suggestion, that amount of time is fairly typical. Section 102.54 of Board's Rules and Regulations provides as follows: "The specification shall contain or be accompanied by a notice of hearing before an administrative law judge . . . at a time not less than 21 days after service of the specification." 29 C.F.R. § 102.54. Accordingly, the 29-day period between notice of hearing and the hearing was well within typical limits, and within counsel's power to anticipate.

Moreover, the Greenes have failed to assert—let alone establish—the requisite "positive showing of prejudice" needed to support a finding that an administrative law judge abused his discretion. *See Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 910 (11th Cir. 1982), and cases cited at p. 14. Instead, the Greenes continue to allege, only in a general fashion, that they had insufficient time to prepare a defense, without explaining how their defense might have been prejudiced. As one court has explained, there is "no basis for judicial intervention" where, as grounds challenging a denial of a motion for continuance, counsel alleged only "possibilities of prejudice, but was unable to point to anything

specific." *Retail Store Employees Union Local No. 400 v. NLRB*, 458 F.2d 792, 793 (D.C. Cir. 1972). Moreover, here, where the Greenes were represented at the hearing by Mr. Holshouser, a member of the firm representing them, and the Greenes testified and put on a defense, no clear prejudice or abuse of discretion can be shown. *See Franks Flower Express*, 219 NLRB at 149-51.

And finally, entirely unwarranted is the Greenes' summarily raised request (Br. 20) that the Court remand the case to the Board with the instruction that the Greenes be granted a new compliance hearing. In addition to the fact that, as shown, their contentions are utterly meritless and touching on the specious, the Greenes have yet to even hint at what new evidence they would potentially present that would mandate a different result. In response, Board counsel submits that the only guaranteed outcome, if their request for a new hearing were to be granted, would be years of additional delay and evasion of the Greenes' obligation to pay the amounts of backpay they owe to 118 of their former employees. Accordingly, the Board requests that the Court not only enforce the Board's Order in full, but consider doing so expeditiously and without oral argument, as provided in Rule 34(a)(2) of the Federal Rules of Appellate Procedure.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM A. GREENE, a.k.a. ARNOLD GREENE, CYNTHIA GREENE	*	
Petitioner/Cross-Respondents	*	Nos. 08-15097-BB
v.	*	08-15596-BB
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 15-CA-25350
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 6,431 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 14th day of January 2009

UNITED STATES COURT OF APPEALS
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ARNOLD GREENE, CYNTHIA GREENE	*	
	*	
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	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No.
	*	15-CA-25350
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

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

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