No. 09-60088

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SEAPORT PRINTING & AD SPECIALTIES, INC., d/b/a PORT PRINTING AD AND SPECIALTIES

Respondent

ON APPLICATON FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

Substantial evidence supports the Board's finding that the Company unlawfully failed to recognize and bargain with the Union. Since this case involves settled Board law and a straightforward application of undisputed facts, the Board does not believe that oral argument is necessary. If the Court nonetheless finds that oral argument is necessary, the Board requests that it be permitted to participate.

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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 ("the Board") to enforce a Board Order issued against Seaport Printing & Ad Specialties, Inc., d/b/a Port Printing Ad and Specialties ("the Company").

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"). The Board's Decision and Order issued on December 28, 2007, and is reported at 351 NLRB No. 91.[1] (D&O, 1-19.) The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f))). The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the underlying unfair labor practices occurred within this judicial circuit in Lake Charles, Louisiana.

The Board filed its application for enforcement on February 9, 2009. The Board's application for enforcement was timely; the Act contains no time limit on the institution of proceedings to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding its post-hurricane decisions, including the effects of its layoff of unit employees as well as its decision to use nonunit personnel to perform unit work.

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[1] "D&O" references are to the Board's Decision and Order. "Tr." references are to the transcript of the administrative hearing. "GCX" and "RX" refer to the exhibits introduced during the hearing by the Board's General Counsel and the Company, respectively. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by Lake Charles Printing and Graphics Union, Local 260, affiliated with Graphics Communications International Union, AFL-CIO ("the Union"), the Board's General Counsel issued a complaint alleging that the Company committed various unfair labor practices when it laid off employees without giving the Union notice and an opportunity to bargain over the layoff and the effects of the layoff. (D&O 1, 6; GCX 1(h).) The complaint also alleged that the Company violated the Act by using nonunit and supervisory personnel to perform unit work without prior notice to the Union and without giving the Union an opportunity to bargain over this conduct. (D&O 1, 6; GCX 1(h).)

Following a hearing, the administrative law judge found that the Company engaged in the alleged unfair labor practices. (D&O 18-19.) The Company then filed exceptions to the judge's decision. The Board (Members Schaumber, Kirsanow, and Walsh) reversed the judge's finding that the Company violated the Act by not providing the Union with notice and an opportunity to bargain over its decision to lay off the employees. (D&O 2.) However, the Board (Members Kirsanow and Walsh, Member Schaumber dissenting) adopted the judge's other findings that the Company violated the Act by failing to give notice and to bargain

over the effects of the layoff as well as the Company's decision to use nonbargaining unit employees to perform bargaining unit work. (D&O 2.)

The Company then filed a motion for reconsideration of the Board's Decision and Order. On May 28, 2008, the Board (Chairman Schaumber and Member Liebman) denied the motion.[2] This case is before the Court on the Board's application for enforcement of its Order.

[2] The Board's order denying the Company's motion for reconsideration was issued by a properly constituted two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit, the Second Circuit, and the Seventh Circuit have agreed, upholding the authority of the two-member Board to issue decisions. *Snell Island SNF LLC v. NLRB*, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 845-848 (7th Cir. 2009), *petition for cert. filed*, __ U.S.L.W. _ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40-42 (1st Cir. 2009), *reh'g denied*, No. 08-1878 (May 20, 2009). The D.C. Circuit has disagreed. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-73, 476 (D.C. Cir. 2009), *reh'g denied*, Nos. 08-1162, 08-1214 (July 1, 2009).

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Overview of the Company; the Company's Bargaining Relationship with the Union; the Unit Employees

The Company furnishes printing and typesetting services in Lake Charles, Louisiana. (D&O 6.) The Company produces "a little of everything," including letterheads, envelopes, brochures, and business cards. (D&O 6; Tr. 38.) Gloria Robinson and Joseph Soileau, Jr., co-own the Company. (D&O 7; Tr. 13.) Robinson is the president and maintains the client list, supervises the salespeople, and handles finances. (D&O 7; Tr. 34.) Joseph Soileau is the vice-president, overseeing all the daily duties of the production department and the sales section. (Tr. 14, 92.)

Since at least 1997, the Union has represented the production employees at the Company. (D&O 6, n.1.) The parties' collective-bargaining agreement by its terms renewed annually, and the parties took advantage of this provision. (GCX 2, p. 3.)[3] The most recent bargaining agreement was effective from February 28, 2003, to February 28, 2004. (GCX 2, p. 1 n.1.)

The bargaining unit consists of seven employees, in the following order of seniority: Vince Mott, Gail Courtney, Jane Soileau, Randy Soileau, Jutta Zienow,

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[3] The General Counsel's Exhibit 2 is the Board's Decision and Order in *Port Printing Ad & Specialties, Inc.*, 344 NLRB 354 (2005).

Renee Ellis, and Joel Williams. (D&O 6-7; Tr. 32.) Mott, Randy Soileau, and Williams run the Company's five printing presses. (D&O 6-7; Tr. 38-40.) Courtney takes care of the pre-press duties; Jane Soileau and Ellis perform the finishing work, including bindery; and Zienow is the typesetter. (D&O 6-7; Tr. 38-41.)

B. The Company Withdraws Recognition from the Union; The Board Finds that the Company's Withdrawal of Recognition Was Unlawful

In December 2003, the Company, claiming that the Union no longer in fact represented a majority of unit employees, informed the Union that it would not renew the parties' collective-bargaining agreement when it expired in February 2004. (GCX 2, pp. 1-2.) On January 13, 2004, Union President Vince Mott wrote to Robinson and Joseph Soileau, requesting negotiations. (GCX 2, p. 4.) On January 23, 2004, Joseph Soileau responded that "the Company is not interested in renewing the contract. Consequently, the Company is not interested in meeting." (GCX 2, p. 4.)

The Union filed a charge against the Company alleging that its withdrawal of recognition violated the Act. On March 7, 2005, the Board determined that the Company's withdrawal of recognition was unlawful because the Company failed to "conclusively demonstrate that a majority of the employees no longer supported the Union at the time the employer withdrew recognition." (GCX 2, p. 4.) The

Board ordered the Company to bargain with the Union. (GCX 2.) However, the Company refused to comply with the Board's order. Therefore, in April 2005, the Board filed an application for enforcement of its order with this Court. (GCX 3.)[4]

C. An Approaching Hurricane Prompts an Evacuation of Lake Charles; the Company's Facility Sustains Damage; the Company Tells Employees that It Does Not Know When They Can Return to Work

While this Court was considering the legality of the Company's withdrawal of recognition, Lake Charles experienced a significant storm. Specifically, on September 22, 2005, the mayor of Lake Charles ordered a mandatory evacuation of the city due to the impending arrival of Hurricane Rita, a category three hurricane. (D&O 1; Tr. 93-94.) In response to the evacuation order, the Company closed its facility. (D&O 1, 7; Tr. 14, 93.) That morning, before dismissing his employees, Joseph Soileau instructed them to stay in touch and to inform the Company if they would be unable to return to work. (D&O 7; Tr. 93.)

On September 28, Joseph Soileau returned to Lake Charles and, together with Robinson, inspected the damaged facility. (D&O 1, 7; Tr. 14.) The facility lacked power, there were signs of mold damage, water covered the floor, material had fallen from the ceiling, and the roof was damaged and leaking, including the area above the production department. (D&O 1, 7-8; Tr. 97, RX 2.) After

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[4] General Counsel Exhibit 3 is this Court's decision in *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 192 Fed. Appx. 290 (5th Cir. 2006).

inspecting the facility, Joseph Soileau called the employees, informed them that the building had sustained damage and lacked electricity, that he would "stay in contact" with them, and that he did not know when the employees could come back to work. (D&O 8; Tr. 35, 102-03.) The Company then sent each employee a check for $1,000 to cover the payroll period that ended a few days after the hurricane. (D&O 8; Tr. 105, 191.)

D. The Company's Facility Regains Power; Joseph Soileau and Robinson Complete Unfinished Projects and Invite Two Unit Employees To Return To Work

On October 8, the power came back on at the facility. (D&O 1; Tr. 15.) At that point, Joseph Soileau and Robinson evaluated the work that was already done in the shop. They attempted to finish the work that was not damaged and sent the remaining work, especially the bigger jobs typically performed on the large printing press, out to another print ship to complete. This practice continued for at least a year and "pretty much eliminated" the tasks that employees Mott and Courtney once performed. (D&O 1, 8; Tr. 15, 130-32.)

On October 10, Joseph Soileau and Robinson invited Jane Soileau, a unit employee, to return to work to assist in completing the undamaged printing jobs. (D&O 1, 9; Tr. 15-16). Prior to the hurricane, Jane Soileau had performed bindery work, which she did upon her return along with cleaning up the facility. (D&O 9; Tr. 32.) Two other more senior employees, Mott and Courtney, had also

performed bindery work but were not called back. (Tr. 17.) Joseph Soileau also "quickly" asked Zienow, a unit employee who performed graphic computer work and typesetting, to return to the facility. (D&O 1, 10; Tr. 109.) Shortly after their return, both Jane Soileau and Zienow were working full-time. (D&O 8, Tr. 112; GCX 9-12.)

E. The Company Invites a Nonunit Employee To Return To Work; Joseph Soileau and the Nonunit Employee Perform Unit Work

Joseph Soileau and Robinson also invited Lannis Soileau, a nonunit employee and Joseph Soileau's brother, to return to work. (D&O 1, 9; Tr. 19.) Prior to the hurricane, Lannis Soileau worked in sales, which he attempted to do upon his return from the evacuation. (D&O 9; Tr. 19.) However, sales were slow, and Lannis Soileau soon began performing other tasks such as assisting in cleaning up the facility, getting the equipment in work-ready condition, checking on jobs, and straightening up inventory. (D&O 9; Tr. 36.) Lannis Soileau also began running the presses, a job he continued as of the day of the unfair labor practice hearing. (D&O 9-10; Tr. 20, 28.) By mid-December, Lannis Soileau was working over 40 hours a week. (D&O 12 n. 8; GCX 6.)

In addition to Lannis Soileau, Joseph Soileau also tried to do "whatever press work [the Company] had." (Tr. 37.) In fact, upon resuming production, Joseph Soileau did "a little bit of everything," including pre-press work, running the press, bindery work and delivery. (D&O 8; Tr. 26-27.)

F. Joseph Soileau and Robinson Notify the Employees that the Company Is Laying Them Off

Following the restoration of power, and the rehiring of a few unit and nonunit employees, Joseph Soileau and Robinson decided to lay off the rest of the employees, reasoning that they were unsure of when the building would be repaired and how much work they would have. (D&O 1 and n. 4, 10; Tr. 35.) Therefore, on October 17, the Company sent out the following letter:

> Joe [Soileau] and I [Gloria Robinson] tried very hard to be fair and generous in dealing with the aftermath of Hurricane Rita . . . It was a hard decision . . . to lay-off employees, but we felt it was the fair thing to do as the [C]ompany cannot continue to pay you while we are waiting for this building to be repaired and for inspectors to tell us it is safe for you to come back to work . . . That being said, we are just waiting, and have no idea as to a time frame for this to be completed. The best we can do is to allow you the opportunity to be paid something with unemployment benefits.

(GCX 4.) It is undisputed that Joseph Soileau and Robinson did not contact the Union before making this decision or initiate any bargaining with the Union over the layoff. (D&O 10; Tr. 35, 57.) As Robinson explained, she "wasn't aware that she needed to" inform the Union of the decision. (D&O 10; Tr. 36.)

G. Unit Employees Visit the Facility and Observe Nonunit Employees Performing Their Old Jobs

Both before and after receiving the above letter, Mott, the union president and a 24-year employee, visited the facility several times, at least once a week until the beginning of December. (D&O 9; Tr. 48.) In his first visit after receiving the

layoff letter, Mott explained to Robinson that the Company did not have to lay off the employees in order for them to receive unemployment. (D&O 10; Tr. 229.)

During each of Mott's other visits, Mott asked Joseph Soileau when he could return to work, and Joseph Soileau told Mott that he did not know when the building would be repaired, that the conditions were not safe for work, and that work was not sufficient for a full-time press operator. (D&O 9; Tr. 45, 54.) However, during each visit, Mott saw Lannis Soileau operating the presses. (D&O 9; Tr. 48.) At one point, Mott complained to Robinson about Lannis Soileau's performing Mott's old job, telling her that he "didn't think it was right." (D&O 11; Tr. 53.) Robinson responded that the Company did not have enough work to employ Mott full-time, although Mott noted that every time that he visited, "there [was] always work . . . a table full of jobs," and that "there was enough work . . . to keep everybody busy." (D&O 11; Tr. 53, 230.) During a December visit, Joseph Soileau suggested that work might increase after the holidays; however, no one ever contacted Mott about returning to work. (D&O 12; Tr. 56.)

Courtney, a 20-year unit employee, also visited the facility when she returned from the evacuation. (D&O 7; Tr. 85.) Robinson informed Courtney that there was no work, and that Courtney would have to "wait and see" about returning to work. (D&O 7; Tr. 86.) During her visit, Courtney observed Jane Soileau

performing bindery work, and Zienow doing some typesetting, two tasks that Courtney had also performed prior to the evacuation. (D&O 7; Tr. 86-88.)

In January, Mott visited the facility again and asked Robinson for his sick and vacation leave. (D&O 14; Tr. 79, 142-46.) Mott explained to Robinson that he was making the request on behalf of himself and was not acting in his capacity as union president. (D&O 14; Tr. 142.) Robinson initially contested Mott's right to the sick leave, but relented and gave it to him in February. (D&O 14; Tr. 146, 238.)

H. This Court Affirms the Board's Finding that the Company Unlawfully Withdrew Recognition

On July 27, 2006, this Court granted the Board's application for enforcement of its March 7, 2005 order, affirming the Board's finding that the Company unlawfully withdrew recognition from the Union. (GCX 3.) The Court specifically found that the Company had failed to show that the Union had in fact lost majority support. Thus, the Court enforced the Board's order requiring the Company to recognize and bargain with the Union.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Schaumber, Kirsanow, and Walsh) disagreed with the administrative law judge that the Company violated the Act by failing to give the Union notice and an opportunity to bargain over the layoff decision. (D&O 2.) Specifically, the Board found that the economic exigency created by Hurricane Rita -- which led to the "unexpected shutdown of the facility" and "resulted in the forced layoff" -- excused the Company from bargaining with the Union over the decision to lay off its employees. (D&O 2.) The Board also disagreed with the judge's finding that the layoff occurred on October 17, the date of the letter sent to employees notifying them of the layoff. Instead, the Board found that the layoffs actually occurred on September 22, when the Company closed the facility and ceased operations. The Board reasoned that the October 17 letter "merely served to confirm what had already taken place." (D&O 1 n.4).

However, the Board (Members Kirsanow and Walsh, Member Schaumber dissenting) agreed with the judge that the Company violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and to bargain over the effects of the layoff as well as by deciding to use nonbargaining unit personnel to perform unit work. As the Board explained, "the exigency created by the hurricane did not excuse the Company from . . . bargaining over the effects of [its layoff] decisions,"

and that the "need for immediate decision-making created by the hurricane was over by the time the [Company] made the decision" to employ nonunit personnel. (D&O 2.)

The Board majority (Members Kirsanow and Walsh, Member Schaumber dissenting) also agreed with the judge that the Union's failure to request negotiations did not excuse the Company's failure to bargain. In so finding, the Board noted that the Company had withdrawn recognition from the Union, and was still defending that withdrawal in court during the events in question. Therefore, "[t]hat stance foreclosed any reasonable possibility that the [Company] would engage in bargaining," and rendered "futile" any request by the Union to bargain over the effects of the Company's post-Rita decisions. (D&O 2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act. (D&O 3.) Affirmatively, the Board's Order requires the Company to notify and bargain with the Union, on request, before implementing any changes to the employees' wages, hours, and terms and conditions of employment, and to bargain with the Union regarding the effects of its decision to lay off its employees. (D&O 3.) The Board also imposed a limited backpay requirement designed to make the employees whole for the losses suffered as a

result of the Company's failure to bargain.[5] (D&O 3.) The Order also requires the Company to make the employees whole for any loss of earnings and other benefits attributable to its unlawful actions and to post an appropriate remedial notice. (D&O 4.)

The Company filed a motion seeking reconsideration of the Board's Order. The Board (Chairman Schaumber and Member Liebman) denied the motion, finding that the Company "presented no extraordinary circumstances warranting reconsideration of the Board's decision." *Seaport Printing & Ad Specialties, Inc.*, No. 15-CA-17976 (May 29, 2008) (order denying Company's motion for reconsideration).

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[5] The limited backpay remedy is based on the Board's seminal decision in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), where the Board endeavored to fashion a remedy that created conditions essentially similar to those that would have existed had good-faith bargaining occurred at the appropriate time. Therefore, the make-whole provision of the Board's Order requires the Company to provide backpay for a period beginning 5 days after the date of the Board's Order, until the occurrence of one of four specified conditions. Bargaining must take place and backpay be paid until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith. In no event, however, shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the employer closed its facility, to the time they secured equivalent employment elsewhere, or the date on which the employer shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the employer's employ. (D&O 3.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to give notice to the Union and to bargain with the Union over the Company's post-hurricane decisions, including the effects of the layoff and the use of nonunit personnel to perform unit work. Both matters are well-established mandatory subjects of bargaining. The Company had ample opportunity to inform the Union of these decisions, yet it failed to do so.

Contrary to the Company's claims, the Union did not waive its right to bargain with the Company. The Board properly excused the Union's failure to request bargaining, finding that such a request would be futile for two reasons: First, the Company presented these decisions to the Union as a *fait accompli*. Second, the Company's unlawful refusal to recognize the Union foreclosed any possibility for meaningful bargaining to occur.

The law is well established that a union's demand to bargain will be considered futile when the employer presents a decision as a *fait accompli*, or a foregone conclusion. Here, the Union learned of the Company's post-hurricane decisions after the fact. Therefore, the Board properly recognized that notice of a *fait accompli* is simply not the timely notice upon which an employer can argue the defense of waiver.

Further, the Union's failure to request bargaining is excused by the Company's ongoing and steadfast challenge to the Union's status as the employees' collective-bargaining representative. The Company's behavior, both before and after the hurricane, illustrates that it no longer considered the Union to be the employees' collective-bargaining representative. Prior to the hurricane, the Company had withdrawn recognition from the Union, had flatly rejected the Union's request to bargain, and had refused to obey a Board order requiring it to recognize and bargain with the Union. The Company was still challenging that order in this Court when the hurricane hit Lake Charles, and the Company did not indicate that with the hurricane came a change of heart. Thus, the Board properly found that this challenge excused the Union's failure to request bargaining, because such a request would serve no real purpose and "would have fallen on deaf ears." (D&O 16.)

Moreover, the Board reasonably concluded that the consequences to the Company if it bargained with the Union rendered the possibility of bargaining quite remote. Specifically, if the Company did bargain with the Union, it would have waived its right to contest the Union's majority status, an option that the Company did not indicate it wanted to pursue.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION REGARDING ITS POST-HURRICANE DECISIONS, INCLUDING THE EFFECTS OF THE LAYOFF AS WELL AS ITS DECISION TO USE NONUNIT PERSONNEL TO PERFORM UNIT WORK

The Board found that the exigent circumstances of the fast-approaching hurricane excused the Company from bargaining over its decision to lay off its employees. However, those circumstances did not excuse the Company from bargaining over the effects of those layoffs or its use of nonunit personnel to perform unit work. Rather, as we show below, the Company had an obligation to give notice to the Union and to bargain over those matters, but it failed to do so.

The Company posits several arguments in its defense. First, it claims that the Union waived its right to bargain over the post-hurricane decisions because, despite having knowledge of these decisions, the Union failed to request bargaining. The Company also claims that it was willing to and did engage in the required bargaining regarding the effects of the layoff. These arguments have no merit and, most importantly, ignore the legal milieu within which the Company made its post-hurricane decisions: The Company was refusing to comply with a

prior Board order requiring it to bargain with the Union and was challenging the Union's majority status before this Court.[6]

A. The Board Reasonably Found that the Company Violated Section 8(a)(5) and (1) of the Act by Failing To Bargain Over Its Post-Hurricane Decisions

1. An employer violates its duty to bargain in good faith when it fails to give the bargaining representative advance notice and a reasonable opportunity to bargain over proposed changes in terms and conditions of employment

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. (29 U.S.C. § 158(a)(5)). Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining in relevant part as "the mutual obligation of the employer and

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[6] In its brief, the Company does not argue, as it did before the Board, that the economic exigency created by the hurricane excused its failure to bargain over its post-hurricane decisions. The Company's failure to raise this issue in its initial brief waives that issue on appeal. *See* FED. R. APP. P. 28(a)(9)(A) and *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (Pursuant to Rule 28, a petitioner "abandons all issues not raised and argued in its initial brief on appeal"). The Company's brief (Br. 7-8) merely contains a verbatim quotation of the dissenting Board Member's view that exigency excused the Company's use of nonunit personnel to perform unit work. This narration lacks specific or substantive argument, however, and is not sufficient to raise the issue before this Court. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (failure to present specific and distinct arguments regarding particular claims waives any challenge to underlying decision). *See also Martin v. Atlantic Coast Line Railroad Co.*, 289 F.2d 414, 417 n.4 (5th Cir. 1961) ("An original brief abandons all points not mentioned therein, and also these points assigned as error but not argued in the brief.").

the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

An employer violates Section 8(a)(5) of the Act not only by an outright refusal to bargain, but also by making "a unilateral change in conditions of employment . . . for a [unilateral change] is a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962).[7] As the Supreme Court has explained, such unilateral action by the employer "minimizes the influence of organized bargaining" and "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective-bargaining agent." *May Dep't Stores v. NLRB*, 326 U.S. 376, 385 (1945). Indeed, as this Court has recognized, a unilateral change frustrates the Act's goal of "encourag[ing] collective bargaining, which by its very nature is a mutual undertaking." *Houston Shipping News Co. v. NLRB*, 554 F.2d 739, 745 (5th Cir. 1977).

Accordingly, an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) when it makes a unilateral change "in the terms and

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[7] Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) of the Act therefore produces a "derivative" violation of Section 8(a)(1). *See, e.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

conditions of employment in an area that is a compulsory subject of bargaining without giving the bargaining representative both reasonable notice and an opportunity to negotiate about the proposed change." *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994). *See also NLRB v. Harris*, 200 F.2d 656, 659 (5th Cir. 1953).

2. This Court gives considerable deference to the Board's determination regarding an employer's bargaining obligation

The Board has the primary responsibility for determining the scope of an employer's statutory duty to bargain. Thus "construing and applying the duty to bargain . . . [is a] task at the heart of the Board's function." *Gulf States Manuf., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983) (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)). Therefore, the Board's answer to the particular question of whether an employer's conduct constitutes a refusal to bargain is "entitled to considerable deference." *Ford Motor Co.*, 441 U.S. at 495-96. *See also NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural, & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 350 (1978).

This Court's role in reviewing a Board order is "narrowly limited." *NLRB v. Brookwood Furniture*, 701 F.2d 452, 456 (5th Cir. 1983). Therefore, this Court may not disturb the Board's factual findings unless "'after full review of the record, [it is] unable conscientiously to conclude that the evidence supporting the

Board's decision is substantial.'" *Id.* (quoting *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 707 (5th Cir. 1975)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citations omitted).

3. The Company was required to bargain over the effects of the layoff and the use of nonunit personnel to perform unit work

Although the Board and the courts have long held that an employer's decision to lay off employees is a mandatory subject of bargaining, here the Board found (D&O 2) that the exigency of the impending hurricane excused the Company's failure to bargain regarding its layoff decision. *See Local 2179, United Steelworkers of America v. NLRB*, 822 F.2d 559, 571 n.17 (5th Cir. 1987). Nonetheless, even when an employer has no obligation to bargain about a decision, it violates Section 8(a)(5) and (1) of the Act when it fails to give the union advance notice and an opportunity to bargain about that decision's impact on employees' interests. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Indeed, the duty to engage in such "effects bargaining" is mandatory, *id.*, and, as such, the duty continues until the parties reach "a final agreement or a bargaining impasse." *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001).

This Court has noted that layoffs and their effects are particularly amenable to bargaining because the union, if given the opportunity, can negotiate the effects of the layoff so as to get "the best possible deal" for the employees. *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1162 (5th Cir. 1976). Thus, an employer's failure to give the union an opportunity to bargain about the effects of its layoff decision, which obviously affected the employees' working conditions, effectively "denigrate[s] the [u]nion and the viability of the process of collective bargaining itself," *Vico Product Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003), and violates Section 8(a)(5) and (1) of the Act. *Bashas' Food City*, 352 NLRB No. 56, 2008 WL 1967116, at *14 (April 30, 2008) (failing to give union notice and an opportunity to bargain concerning effects of decision violates Act).

In addition to bargaining over the effects of the layoff, the Act also requires an employer to bargain over its decision to use nonunit employees and supervisory personnel to perform unit work. The allocation of work to a bargaining unit is a term and condition of employment, and "an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain." *Road Sprinkler Fitters Local Union, No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1986). Similar to layoffs and their effects, the allocation of work is particularly suitable to bargaining, because "[a] change in the employer's established use of its union and nonunion sides in work assignments will almost

always involve factors within the union's control." *Geiger Ready-Mix Co. v. NLRB*, 87 F.3d 1363, 1369 (D.C. Cir. 1996).

4. The Company failed to bargain over the effects of the layoff as well as its decision to use nonunit employees to perform unit work

The Board properly found (D&O 2) that the Company unlawfully failed to bargain with the Union regarding the effects of the layoff decision. The record lacks any evidence that the Company provided the Union with reasonable advance notice of and an opportunity to bargain over the effects of its layoff decision. Rather, as company co-owner Robinson candidly admitted, and the Company concedes in its brief (Br. 12), the Company simply "never contacted" the Union. (Tr. 35.) Instead, the Company laid off the employees, and then unilaterally instituted numerous significant changes after the layoff -- including the order of recall, the elimination of positions, and the contracting out of unit work -- without giving the Union sufficient opportunity to weigh in on or to discuss such matters with the Company. This conduct plainly violates Section 8(a)(5) and (1) of the Act. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.").

In addition to refusing to bargain over the effects of its layoff decision, substantial evidence also supports the Board's finding that the Company failed to

give notice to the Union and to bargain over the use of nonunit personnel. The Company concedes in its brief (Br. 11, 26-27) that it used both nonunit employees and supervisors to perform unit work. Moreover, the credited evidence shows that, on numerous occasions after the hurricane, unit employees Mott and Courtney witnessed nonunit employees performing the jobs that they had both worked before the hurricane. Because the diversion of unit work is a mandatory subject of bargaining, the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally "divert[ed] work from bargaining unit employees to non-bargaining unit employees." *Road Sprinkler Fitters*, 676 F.2d at 831. As discussed below, the Company fails to present any worthy defense excusing its failure to bargain over this issue, as well as the effects of the layoff, with the Union.

B. The Company Has No Viable Defense to Its Failure To Bargain Over the Effects of Its Layoff Decision or Its Decision To Use Nonunit Personnel To Perform Unit Work

In challenging the Board's findings, the Company argues that the Union waived its right to bargain over the post-hurricane decisions by failing to request bargaining. The Company also claims that it was willing to and did bargain with the Union. However, the Company's attempts to avoid liability for its failure to meet its good-faith bargaining obligation fall flat.

1. The Union was not required to request bargaining because the Company presented its post-hurricane decisions as a *fait accompli*

The Company presented its post-hurricane decisions to the Union as binding and definite changes to the unit members' terms and conditions of employment. The Company now argues, rather disingenuously, that the Union waived its right to bargain because it did not ask to bargain over these final decisions. However, the Company's argument flounders upon the faulty premise that a union is required to request bargaining over already-decided matters.

As this Court has recognized, "[a]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). Agreement by the union is not a prerequisite to implementation of a change, but "the union must be allowed to air its views beforehand." *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1163 (5th Cir. 1976).

It is well settled, however, that a "union is not required to go through the motions of requesting bargaining . . . if it is clear that an employer has made its decision and will not negotiate." *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003). Simply put, a union cannot be found to have waived bargaining when it never had an opportunity to bargain. *Citizens Hotel*, 326 F.2d at 1397. *See also Clear Channel Outdoor, Inc.*, 346 NLRB 696, 704 (2006) ("[A]n employer

cannot implement a change and then claim that a union waived its right to bargain by failing to do so retroactively."). Thus, when an employer merely informs the union of its decision to make changes, it has presented the union with a *fait accompli*, to which the union is not required to respond with a bargaining request. *See Gulf States Manuf., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983) (evidence does not support employer's waiver defense where union learned of layoffs 15 minutes before they took effect); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981) ("Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated."). *See also Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023 (2001) (finding of *fait accompli* prevents a finding that a failure to request bargaining constitutes waiver).

Substantial evidence supports the Board's finding (D&O 16-17) that the Company presented its decisions to the Union as a *fait accompli*, thereby excusing the Union from the pointless exercise of requesting to bargain. The Company gave no notice and made no offer to bargain with the Union regarding its post-hurricane decisions. In fact, Robinson admitted as much, stating that she "never contacted the [U]nion" before making post-hurricane decisions, and that she "wasn't aware that she needed to." (Tr. 35.)

Nevertheless, the Company (Br. 15, 17, 21, 27) faults the Union for not requesting to bargain over the post-hurricane decisions. The Company finds no

support for this waiver argument by relying (Br. 20-21, 29-30) on *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996), *Lenz & Riecker*, 340 NLRB 143 (2003), *Assoc. Milk Producers, Inc.*, 300 NLRB 561 (1990), and *Citizens National Bank of Willmar*, 245 NLRB 389 (1979). In each of those cases, the employers gave the unions reasonable advance notice of their proposed changes, leaving ample opportunity for the union to request bargaining. *See Oklahoma Fixture Co.*, 79 F.3d at 1035 (4-days advance notice provides "significant opportunity" for union to request bargaining); *Lenz & Riecker*, 340 NLRB at 145 (4-days notice accompanied by employer's specific request to bargain); *Assoc. Milk Producers*, 300 NLRB at 563 (10-days written notice of proposed change); *Citizens National Bank of Willmar*, 245 NLRB at 389 (5-days notice). Unlike the precedent discussed above, the Company has not shown that it provided the Union with a reasonable opportunity to request bargaining. Therefore, absent any notice, the Union had no obligation to request bargaining. *See Gulf States Manuf.*, 704 F.2d at 1397 ("It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*."). *See also Oklahoma Fixture Co.*, 79 F.3d at 1035 (timely notice to the union of a proposed change is necessary, so that "good faith bargaining does not become futile or impossible").

2. The Board correctly determined that the Company's avowed and persistent refusal to recognize the Union would have rendered any request to bargain futile

A union is not required to request bargaining when to do so would be futile. In this case, the Company's repeated claim (Br. 21, 22, 29) that the Union had knowledge of its post-hurricane decisions yet failed to request bargaining ignores the context within which the decisions occurred -- the Company was refusing to recognize and bargain with the Union and was contesting the Board's order to do so in this Court. The Board properly determined that the Company's pending challenge to the Union's status "foreclosed any reasonable possibility that the [Company] would engage in bargaining." (D&O 2.) *See Fall River Savings Bank*, 260 NLRB 911 (1982) ("[I]nasmuch as [the employer] specifically refused to recognize the [u]nion as the exclusive bargaining representative . . . it cannot now claim that the [u]nion waived its rights [to bargain].").

Despite the Company's claim (Br. 26) to the contrary, the record is replete with evidence demonstrating the Company's steadfast and persistent refusal to recognize and bargain with the Union. The Company withdrew recognition from the Union in late 2003 and had flatly refused the Union's January 2004 request to bargain, boldly informing the Union that it was "not interested in renewing the contract and [was] not interested in meeting." (GCX 2 p. 4.) Given the Company's refusal to comply with the Board's 2005 order requiring it to recognize

and bargain with the Union, it is not surprising that Union President Mott felt, "that from all [its] actions, [the Company] no longer wanted the [U]nion in the place." (Tr. 239.)

Moreover, the Company's post-hurricane conduct demonstrates that it was unwilling to forgo its challenge to the Union's majority status. The Company freely admitted that it did not contact the Union before it sent the layoff letter to the unit employees, and insisted that it did not know that it had a statutory duty to do so. (Tr. 35.) This conduct provides ample support for the Board's conclusion that "the [Company] was not going to change course in midstream . . . and from the [Company's] viewpoint, the [U]nion was not even in the picture." (D&O 16.)

In sum, as the Board explained, the Company had created a situation where it was refusing to recognize the Union, and where any request to bargain "would have fallen on deaf ears . . . [and] would have been met with the figurative back of the hand which had already been shown with the unlawful withdrawal of recognition." (D&O 16.) Thus, any request to bargain by the Union would have been "an exercise in futility." *See NLRB v. Union Carbide Caribe, Inc.*, 423 F.2d 231, 235 (1st Cir. 1970) (finding no waiver of right to bargain where employer had refused to recognize the union; "union could not be expected to make what promised to be a totally futile gesture - another demand for bargaining").

3. The Company would have waived its challenge to the Union's status by bargaining with the Union over the post-hurricane decisions

The Board supported its finding that there was no "reasonable possibility" that the Company would have bargained by explaining that "[h]ad the [Company] bargained over the effects of its decisions, it would have waived its right to contest the Union's status as the collective-bargaining representative of the employees." The Company claims (Br. 23) this statement is an "erroneous conclusion of law," and further asserts that "if the Union had requested effects bargaining and if [the Company] had agreed there is nothing about the 'effects' bargaining which would have impacted the issue then pending before the Fifth Circuit Court of Appeals." (Br. 25.) The Company's assertions demonstrate a misunderstanding of the relationship between its challenge to the Union's majority status and its claimed willingness to bargain post-hurricane.

Contrary to the Company's assertion (Br. 22), the Board was not "speculating" when it determined that bargaining was a remote possibility; rather, the Board was setting forth well-established law. When an employer bargains with a union, it is recognizing that union's validity as the employees' designated collective-bargaining representative. *Opportunity Homes, Inc.*, 315 NLRB 1210 (1994) (employer recognizes a union once that employer signals a willingness to bargain). Therefore, an employer cannot challenge a union's representational

status while simultaneously recognizing and bargaining with that union. Such paradoxical behavior is contrary to law. *See King Radio Corp. v. NLRB*, 398 F.2d 14, 20-21 (10th Cir. 1968) (employer that bargains with certified representative waives right to challenge the union's certification); *NLRB v. Blades Manuf. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965) (employer "prejudice[s]" its litigation of union's status when it bargains with union). *See also Michael Konig*, 318 NLRB 901, 904 (1995) (employer waives its right to challenge union's status by bargaining with union); *Knapp-Sherrill Co.*, 263 NLRB 396, 397-98 (1982) (employer, by recognizing and bargaining with a union, waives its right to challenge the union's status as the employees' collective-bargaining representative). Thus, the Company could not both challenge the Union's majority status and bargain with the Union post-hurricane, because, by doing so, it would have been forced to admit that the Union was the employees' bargaining representative.

The Company argues (Br. 24-25) that the Board's reliance on *Technicolor Government Services, Inc. v. NLRB*, 739 F.2d 323 (8th Cir. 1984), is misplaced because it involves an employer's challenge to the propriety of a collective-bargaining unit. In *Technicolor*, after the employer started negotiations with the union, the employer sought to challenge the union's certification by the Board as the exclusive bargaining representative. The court determined that the employer

did not have the right to contest the certification, explaining that "[o]nce an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid." *Id.* at 327.

The Company's attempt to distinguish *Technicolor* illustrates its misunderstanding of the basic principle that an employer cannot challenge a union's status as its employees' collective-bargaining representative while simultaneously bargaining with that union. Thus, like *Technicolor*, if the Company had bargained with the Union post-hurrican, it would bestow upon the Union the very legitimacy that the Company was contesting before this Court. Moreover, the fate of the Company's challenge would have been akin to that of the employer in *Technicolor* in that the Company would have waived its objection to the Union's majority status. Thus, because the Company had not indicated that it wished to withdraw its pending challenge, the Board reasonably concluded that the Company had "made the choice not to bargain." (D&O 2 n.5.)

In sum, an employer, like the Company, that challenges a union's representative status by refusing to recognize and bargain with the union, does so at its peril. *Farina Corp.*, 310 NLRB 318, 321 (1993). As the Board succinctly stated, "the [Company] had to choose, and it made the choice not to bargain."

(D&O 2 n.5.) It cannot now try to avoid the consequences of that choice. Rather, "[the Company] has been hoisted on its own petard." (D&O 16.)

4. The Company did not engage in effects bargaining

The Company details (Br. 13-19) conversations among Mott, Soileau, and Robinson, claiming that this "frequent communication" was in essence "effects bargaining." (Br. 14.) However, the Company overstates the significance of these conversations. The Company's occasional references and adherence to the parties' expired collective-bargaining agreement does not constitute recognition and good-faith bargaining and certainly does not override the Company's repeated refusals to recognize the Union.[8] More importantly, all of the Company's discussions with Mott about its post-hurricane decisions occurred after the fact. Good faith bargaining requires discussion *prior* to the time the change is initiated, allowing opportunity for counterarguments or proposals. *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964).

[8] The Company (Br.27-28) also faults Mott for failing to file a grievance pursuant to the parties' expired agreement and claims that this failure bars finding a Section 8(a)(5) violation. This argument again ignores the obvious: The Company was not recognizing the Union and had not indicated any change of that position. Thus, an attempt by Mott to file a grievance to enforce that agreement would likely have "fallen on deaf ears." (D&O 16.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full.

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National Labor Relations Board
July 2009

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	
	:	
	:	No. 09-60088
v.	:	
	:	
SEAPORT PRINTING & AD SPECIALTIES, INC., d/b/a PORT PRINTING AD AND SPECIALTIES	:	Board Case No. 15-CA-17976
	:	
	:	
Respondent	:	
	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,223 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 10th day of July, 2009

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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	:	
	:	
Respondent	:	
	:	

CERTIFICATE OF SERVICE

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

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