

**No. 10-1260 & 10-1270**

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**UNITED STATES COURT of APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SPECTRUM HEALTH-KENT COMMUNITY CAMPUS  
Petitioners/Cross-Respondents**

**v.**

**NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES,  
RULINGS AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(1) and 28(a)(1)(A), counsel for the Board certifies the following:

(A) Parties: Spectrum Health-Kent Community Campus, respondent in the case before the Board, is the petitioner/cross-respondent here; the Board is the respondent/cross-petitioner. The Board's General Counsel, and International Union Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Local 2609, were parties before the Board.

(B) Ruling under Review: This case involves the Board's Decision and Order issued on August 23, 2010, and reported at 355 NLRB No. 101, adopting and incorporating by reference, a remanded Decision and Order issued by a two-member Board on February 26, 2009, and reported at 353 NLRB No. 99, as corrected on March 6, 2009.

(C) Related Case: There are no related pending cases.

Respectfully submitted,

/s Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board

Dated at Washington, DC  
this 22d day of February 2011

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on a petition filed by Spectrum Health-Kent Community Campus (“the Company”) to review, and a cross application by the National Labor Relations Board (“the Board”) to enforce, a Decision and Order issued by the Board against the Company. The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160 (a)) (“the

Act”), and its Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company’s petition for review, filed on August 25, 2010, and the Board’s cross-application for enforcement, filed on August 30, 2010, were timely; the Act places no time limits on such filings. This Court has jurisdiction under Section 10(f) of the Act, which allows aggrieved parties to petition for review in this Circuit.

The Board’s Decision and Order issued on August 23, 2010 and is reported at 355 NLRB No. 101. (A. 64, 44-57.)<sup>1</sup> That Decision and Order adopts and incorporates by reference an earlier Decision and Order issued on February 26, 2009, as corrected on March 6, 2009, by what was then a Board that, with three vacancies, consisted of only two members. (A. 64, 44-57.)

The Board subsequently vacated its 2009 two-member Decision and Order on August 17, 2010, after the Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), that the two-member Board had no authority to decide cases under the Act. At that time, the 2009 two-member decision was pending before this Court on a company petition for review and a Board cross-application for enforcement. On September 30, 2010, the Court granted the

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<sup>1</sup> “A.” references are to the joint appendix. “SA” references are to the supplemental appendix submitted by the Board which consists of a single document—the Company’s exceptions to the administrative law judge’s decision

Board's motion to dismiss. Thereafter, as noted above, the Board issued the Order that is now before this Court.

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

1. Whether the Board reasonably determined that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union when the Union enjoyed an irrebuttable presumption of majority status under well-settled Board law.

2. Whether, if the Company's withdrawal of recognition was unlawful, the Board is entitled to summary enforcement of its further findings that the Company violated Section 8(a)(5) and (1) of the Act by immediately announcing wage increases and other improved benefits now that the employees were no longer "UAW staff" and violated Section 8(a)(1) of the Act by immediately and repeatedly informing employees that they no longer were "UAW staff" and, as such, would be receiving further wage increases and improvements in the near future.

3. Whether Section 10(e) of the Act forecloses the Company from challenging the Board's issuance of a remedial bargaining order because the

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and order. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Company failed to contest the bargaining order during the proceedings before the Board.

### **RELEVANT STATUTORY PROVISIONS**

In addition to the provisions referenced by the Company in the Addendum to its brief, Section 8(d) of the Act (29 U.S.C. § 158(d)) is also relevant to the Court's disposition of this case. The Board has appended a copy of that provision to the end of this brief.

### **STATEMENT OF THE CASE**

Based upon a charge filed by International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO and its Local 2600 (collectively, "the Union"), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union and terminating its union agreement fewer than three years from the date that agreement began to run and therefore at a time that the Union was entitled to a conclusive presumption of majority status. The General Counsel also alleged that the Company thereafter committed other unlawful refusals to bargain and acts of interference with the exercise of its employees' protected rights by immediately announcing that the employees, because they were no longer "UAW staff," would

be receiving specified wage increases and other improved economic benefits, and could expect further increases and improvements in the near future. (A. 46; 90.)

Following a hearing, a Board administrative law judge affirmed the complaint's allegations. The judge found that, under Board law, the Union was entitled to a three-year period of repose while the parties' extant collective bargaining agreement was in effect and that the period had nearly three months to run when the Company declared that it was withdrawing recognition from the Union. The judge found that, notwithstanding the dates appearing on the cover of the agreement—"January 1, 2005, through April 1, 2008"—the agreement did not come into being, and therefore could have had no contract bar effect—until April 13, 2005, the date it was ratified in an employee vote and the date specified in the agreement's first paragraph when the agreement became "effective." The judge rejected the Company's attempt to draw a distinction between when the agreement's "term" began and its effective date. Rather, he concluded that, whatever the import of the January 1 date on the agreement's cover, the other terms of the agreement itself, the circumstances surrounding the agreement's negotiation, and the parol evidence concerning the agreement's provisions, left no room for doubt that the agreement began to run on April 13, 2005, the date it became effective. (A. 49-54.)

The judge accordingly found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union and repudiating the parties' agreement at a time when the Union was entitled to a conclusive presumption of majority status for another ten weeks.

(A. 49-54.) The judge further concluded that, because the withdrawal was unlawful, it followed that the Company's ensuing unilateral grant of wage increases and other benefits and promise of still further benefits to employees whom the Company insisted were "former UAW staff" violated the Act as alleged.

(A. 54-55.) To remedy the violations, the judge, among other things, issued an affirmative bargaining order that insulated the Union from attacks to its majority status for a reasonable period of time after the Company, having posted a notice acknowledging its prior violations, recognized the Union and commenced bargaining. (A. 55-57.)

The Company filed exceptions to the judge's finding that the Company's withdrawal of recognition was unlawful, but filed no exception to the judge's conclusion that an affirmative bargaining order was an appropriate remedy.

(SA 1-10.) The Board agreed with the judge that the General Counsel had met his burden of proof to establish that the contract served as a bar to the Company's withdrawal of recognition, and therefore sustained the judge's unfair labor practice findings. (A. 64, 45-46, 45 n.4.) The Board also gave a detailed explanation,

consistent with the dictates of this Court, as to why a remedial bargaining order was appropriate in the circumstances of this case. (A. 64, 45-46.) The pertinent facts follow.

## **STATEMENT OF THE FACTS**

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

#### **A. Background: the Company's Operations and its 2002 Collective-Bargaining Agreement with the Union**

The Company operates a hospital in Grand Rapids, Michigan, from which it provides long-term acute care, more generalized long-term care, sub-acute care, and outpatient neurological services. (A. 47.) Since about 1999, and continuing through January 7, 2008, when the withdrawal of recognition here occurred, the Company had a relationship with the Union as the exclusive bargaining representative for a wide-ranging unit of company employees. The parties entered into a series of collective-bargaining agreements, the most recent of which was executed on April 15, 2005, after reasonably protracted negotiations. (A. 47; 88-96, 107.)

The cover of the preceding 2002 Agreement stated on the bottom of the cover page, "Date of the Agreement: January 1, 2002, through December 31, 2004." Those dates corresponded with the "effective date" of the agreement in the very first sentence of the body of the Agreement itself and with the date specified

in the agreement's final paragraph as the time and date upon which the agreement "terminated"—12:01 a.m. on January 1, 2005. (A. 47; 112, 137-38.)

**B. Protracted Negotiations Produce a Tentative Agreement on March 31, 2005, which Became Binding and Effective upon Employee Ratification on April 13, 2005**

The Company and the Union began negotiating for a successor to its 2002-2005 agreement on November 3, 2004. The parties failed to reach a new agreement by the old contract's expiration date, December 31, 2004, and agreed to extend that agreement's term through January 15, 2005. The parties failed to reach a new agreement by that date and agreed to no further extensions. (A. 47; 108.)

On January 14, 2005, the Company presented the Union with what it styled a "final proposal." Most of the changes proposed by the Company had been incorporated in a proposal made the previous week, including new and less attractive health-care and pension benefits that applied retroactively to employees from January 1, 2005. (A. 168-70.) The Company's January 14 proposal worked off a copy of the 2002 Agreement. All changes from the 2002 agreement's terms were made in text that was shaded in blue, and was referred to by the parties as the "blue draft" or "blue paper." In the draft's first paragraph, the "effective date" was to be January 1, 2005; the termination date in the final paragraph was, 12:01 a.m., November 2, 2007. Consistent with these dates, the legend across the bottom of the cover page of the draft contract stated: "Date of Agreement: January 1, 2005

Through November 1, 2007.” (A. 47; 107, 145-81.)

On February 7, 2005, the Union submitted the Company’s final offer to its membership for ratification. The membership rejected the proposal. (A. 48; 108.). On February 18, 2005, the Company faxed the Union a letter with a copy of a notice that it simultaneously distributed to employees. Both documents announced that the Company regarded the parties to be at impasse and that the Company intended to implement certain of its proposals forthwith, which it proceeded to do. The Company posted a special notice advising employees that it was suspending benefit accruals under the employee retirement plan, which was being replaced with individual retirement plans for employees. (A. 48; 108, 186-97.) The Union filed a range of unfair labor practice charges, including one that alleged that there was no lawful impasse and that the Company had acted unlawfully by unilaterally implementing its proposals. (A. 197-202.)

On March 2, 2005, the Company faxed the Union a letter acknowledging that one of the proposals that it had implemented, a proposal concerning overtime, was incompatible with federal wage-hour requirements. The Company stated that it was rescinding all the changes that it had implemented, that it was prepared to resume negotiations with the Union and was modifying its last proposal to make its overtime proposal conform with federal law. The Company also posted a notice to employees acknowledging that it had acted unlawfully in declaring an impasse and

unilaterally implementing its proposals, that it was withdrawing the changes it had implemented, and was willing to resume bargaining with the Union. (A. 203-15.)

The parties resumed bargaining on March 23, 2005, at which time the Company modified its “final” proposal in several respects; most particularly, it made improved offers with regard to overtime, retiree benefits, and one job classification. (A. 48; 216-19.) The Company also proposed, in contrast to the contract it had offered previously, which ran only until November 2, 2007, that the parties “consider instead entering into a 3 year agreement which would expire three years after ratification/final approval by the Union.” (A. 48; 219.) The issue of contract length was left open; when the parties reached a tentative agreement at the ensuing session the following week subject to employee ratification, the term of the agreement seemingly ran for three years from the date of ratification.

(A. 48; 219, 230, 261-62.)

During that next and final bargaining session on March 31, the Company made further concessions that addressed several problematic issues the Union had identified. Several were reflected in written proposals regarding wages and others in a complicated proposal regarding health-benefit premium contributions by future retirees. The Company’s written proposal on wages began with its agreement to a union-proposed 3 percent yearly increase for “Future Hires (i.e.: Hired on/after April 3, 2005)” with the qualification that “[a]nnual increase dates

to be as of the anniversaries of contract effective date, not ‘January 1.’” (A. 48; 107, 109, 220.)

The Company also made an improved proposal for yearly-wage increases for “current employees (i.e. hired on/or before April 2, 2005)” in various percentages in each of the three years of the agreement, with a lump sum for any employees who would max out in the new classification limits the Company had previously proposed. The proposal specified that the first year’s increase would be “[r]etroactive to January 1, 2005, if final approval by the Union occurs by \_\_\_\_\_, 2005 (April 7? ),” with the proviso that the retroactivity offer would automatically rescind after that date. (A. 48; 109, 139-40, 220-21.) The Company also submitted a proposal on health insurance coverage that decreased the percentage of premium contributions employees would need to make by 3 percent, and employees who had been participants in the Company’s plan since December 1, 2004 would pay “no more than \$88.33 per month between January 1 and December 31, 2005.” (A. 48; 139-40, 222-23.)

The parties reached a tentative agreement, subject to employee ratification, that subsumed these proposals. The agreement was ratified by an employee vote on April 13. (A. 48; 109.) The next day, the Company faxed the Union a copy of the agreement to be executed. (A. 48; 226, 228, 261-62.) The agreement in its first paragraph defined what the document was—“this is an agreement between

[the parties] effective April 13, 2005.” The agreement specified in the closing paragraph that it would run three years to the minute after the anniversary of the date, March 31, on which the parties’ negotiators had reached a tentative agreement, that is, “12:01 a.m. on April 1, 2008.” (A. 48; 226, 228, 261-62.) The cover for the agreement read “date of agreement: January 1, 2005 to March 31, 2008.” (A. 228.)

The agreement provided for an initial wage increase for incumbent employees made “retroactive to January 1, 2005,” but that the two ensuing increases were to take place “at the beginning of the second and third contract years.” The wage provision defined “incumbent employees” as those “hired on or prior to April 13, 2005.” The wage provision pertaining to “future hires” turned entirely on April 13—it defined such employees as those “hired on/after April 13, 2005” and provided wage reclassifications to become “effective with the first payroll periods beginning after April 13, 2005, April 13, 2006, April 13, 2007.” (A. 48; 257-58.) The health insurance provision recited that a final agreement had been reached on “January 15, 2005” and used “January 1, 2005” as not only the beginning date for the formula for determining the capping-proposal made by the Company on March 31, but also as the defining the date after which employees who chose to retire would be required to pay the entire premium for coverage in the Company’s health care plan. (A. 48, 252-54.) One other provision in the

agreement turned on the January 1, 2005 date—a “Retirement Plans” provision that, as of that date, terminated all contributions for any employee for whom contributions had been made in the past to the company retirement plan established on October 1, 1999, and going forward from that date permitted all employees to participate in a retirement-account plan established by the Company in 2004 for its non-unionized employees. (A. 256-58.)

The agreement was executed by both parties without change; there was no date on the signature page, but the parties stipulated that the agreement was executed on April 15. (A. 48; 109, 272, 275, 296-304, 306-07, pp. 48-49 on A. 336-37.)

**C. The Company Withdraws Recognition Fewer than Three Years From When the Parties’ Agreement Became Effective; Repudiates that Agreement; Implements New Terms; and Makes Promises to What It Refers to as “Former UAW Staff”**

By hand-delivered letter dated January 7, 2008, the Company informed the Union that it was withdrawing recognition based upon its recent receipt of a petition signed by a majority, stipulated to be either 142 or 143, of the bargaining unit’s 273 employees. (A. 48; 268, 268 n.1, 312-13.) The next day, on January 8, the Company mailed a letter to all bargaining unit employees addressed to “Former UAW Staff.” The letter was also posted in the facility on January 8. The letter informed the employees that the Company had received a petition signed by a

majority of unit members stating that they no longer wished to be represented, and that, “[i]n compliance with federal labor law, effective immediately [the Company] will no longer recognize the UAW,” that the parties’ agreement was no longer “in effect,” and that, among other things, “Union dues will no longer be deducted from your paychecks.” (A. 48; 268-69, 314-15.)

The Company stopped deducting dues from employee paychecks on January 8, 2008, and thereafter refused to consider a grievance filed under the collective-bargaining agreement because it would handle the issue would be handled under its (nonbargained) “fair treatment policy.” (A. 48; 269, 314-15.) The Company held meetings for all employees on January 8-12, which were conducted by top company officials. The Company informed employees at these meetings that it had withdrawn recognition from the Union because it had received a petition signed by a majority of the bargaining unit. The Company also stated that it was considering annual spring wage and benefit adjustments. (A. 48; 269, 314-15.)

During the week of February 25, 2008, the Company posted in its facility a notice of “Town Hall Meetings” to be held on March 3 and March 7. The notice promised “Exciting News For Former UAW Staff.” On March 3 and 7, the Company held the town hall meetings with employees at which it announced that it had implemented (effective March 2) the following changes to the employees’ wages and benefits: an across-the-board wage increase of 4.25 percent; an

additional 2 percent increase to all employees who scored 3.5 or better on their performance evaluations from the prior year; 1.5 times the base rate for holiday hours worked instead of a 65 cents per hour holiday wage premium; an increase in weekday shift premiums from 65 cents per hour to \$1 per hour for the 3 p.m. to 11 p.m. shift and the 11 p.m. to 7 a.m. shift; an increase in weekend shift premiums from 65 cents per hour to \$1.50 per hour for all shifts worked from 3 p.m. Friday to 7 a.m. Monday; a reduction from 12 to 6 months in the eligibility waiting period for the Company's short term disability plan; and movement of the bargaining unit employees into the established pay ranges that existed for the Company's nonunion employees. At the meetings, Company officials also made reference to additional possible wage adjustments in October 2008. (A. 48; 269-71.)

On March 17, the Company mailed a "Fact Sheet" to each employee that detailed the changes to the individual's pay and identified his or her new pay rate. (A. 48; 271, 320.) On March 19, the Company mailed a letter to all employees addressed to "Former UAW Staff." This letter informed employees that the employees could expect a further pay increase and perhaps also improved benefits in October 2008. (A. 4; 271, 321-23.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board, in agreement with the administrative law judge, found that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union at a time when the Union was entitled to a conclusive presumption of majority status by virtue of the parties' extant collective bargaining agreement that had several months to run. The Board accordingly found that the Company violated those same provisions by terminating the extant agreement, by failing to abide by its terms, including its duty to arbitrate grievances, and by unilaterally implementing wage increases and other benefit improvements. The Board also accordingly found that the Company violated Section 8(a)(1) of the Act by repeatedly informing employees that they were former "UAW staff" and that, as such, would be receiving other wage increases and improved benefits in the ensuing months. (A. 64, 44-45, 53-55.)

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 their statutory rights.

Affirmatively, the Board's Order requires the Company to recognize and bargain with the Union and, to the extent that the Union requests it, rescind any unilateral changes made by the Company and reinstate the terms of its prior agreement with the Union, and to make employees whole for any losses suffered due to said

unilateral changes or repudiated contract provisions. The Board's Order also requires the Company to reimburse the Union for any dues, plus interest, it was required to withhold and transmit to the Union under the agreement it unlawfully repudiated, and to post copies of an appropriate notice. (A. 64, 44 & 44 n.1, 55-57.)

### **SUMMARY OF ARGUMENT**

In *Shaw's Supermarkets*, 350 NLRB 585 (2007), the Board held that unions enjoy an irrebuttable presumption of majority support for the first three years of a newly negotiated collective-bargaining agreement. During that period, an employer may not champion employee rights by unilaterally withdrawing recognition, even if it receives proof that the union no longer enjoys majority support. Here, the Company claimed that, at the time that the Company withdrew recognition from the Union in January 2008, the three-year period had run. The Board, however, relying on the agreement's clear statement that it was "effective" fewer than three years earlier than the Company's withdrawal, and supporting parol evidence, reasonably rejected that argument. The Court should enforce the Board's finding.

First, as noted, the parties' agreement specified in its very first paragraph that, "[t]his is an agreement . . . effective April 13, 2005," and, in its very last paragraph, that it would end on March, 31, 2008. Thus, it still had 10 weeks to run

at the time the Company withdrew recognition in January 2008. To rebut this contract language, the Company relies upon wording on the agreement's cover, "Agreement Dated January 1, 2005 to March 31, 2008," and claims that those dates unambiguously define the agreement's term. The Board found that the January 1 date on the cover, at best, created a facial ambiguity as to whether the April 13 effective date meant what it said; however, the Board further recognized that the January 1 date had limited meaning in the agreement itself, only relevant to several changes in retirement and health plans, and the retroactive date for some wage increases. Given the agreement's use of April 13, not only as the stated "effective date," but also as the date for annual wage increases specified to take place "[a]t the beginning of the second and third contract years," the Board properly rejected the Company's argument that the agreement unambiguously commenced on January 1, 2005.

To resolve any remaining ambiguity, the Board relied on the notes of the Company's own negotiator and the wording of the Company's eleventh-hour concessionary proposals. That evidence showed that, after its last final offer of January 15, 2005, the Company reopened negotiations with a new proposal that the agreement last for a term of three years to run from the date of ratification, which occurred on April 13, and that the Company then made proposals that made "the anniversaries of the contract's effective date, not January 1," pivotal. The lone

exception, the proposal that led to the provision making first year increases for “current employees” retroactive to January 1, 2005, was an inducement offered to secure quick ratification; ensuing annual increases for those employees were specified to occur “at the beginning of the second and third contract years,” not on January 1 of the next two years.

In this context, and in the absence of a scintilla of evidence that the parties ever even discussed making the entire agreement retroactive to January 1, the Board reasonably concluded that the conclusive presumption of majority status attached and began to run on precisely the date that an agreement between the parties was finalized, April 13, the date that the agreement itself memorialized as its effective date. Indeed, as the Board was at pains to point out, it made no sense for the Company to insist that a presumption that had no existence until the parties reached a binding agreement somehow commenced running months before that event actually took place.

Since the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, it follows that the Company violated those same provisions by repudiating the agreement, terminating its union security and other provisions, and unilaterally granting wage and other benefit increases. It also follows, as the Board found, that the Company violated Section 8(a)(1) of the Act by repeatedly telling the employees that they

were no longer “UAW staff,” had no agreement or current representative, and, as long as they stayed nonunion, could expect further wage increases in the near future. Together, these violations served to perpetuate the harm done by the withdrawal, and underscored to employees the futility of pursuing collective-bargaining.

Finally, the Company’s attack on the Board’s affirmative bargaining order is not properly before this Court. The Company took no issue in its exceptions to the administrative law judge’s inclusion of an affirmative bargaining order in the remedial order he issued. Therefore, under the waiver provisions of Section 10(e) of the Act (29 U.S.C. § 160(e)), no issue concerning that order is properly before the Court. This Court has repeatedly held that an exception to a remedial order “in its entirety” is inadequate to preserve a challenge for review, and the fact that the Board might *sua sponte* undertake a detailed exposition of the need for such an order does nothing to change Section 10(e)’s preclusive effect.

## ARGUMENT

### **I. THE BOARD REASONABLY DETERMINED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION, AND TERMINATING THE PARTIES' AGREEMENT, AT A TIME THAT THE UNION WAS ENTITLED TO A CONCLUSIVE PRESUMPTION OF MAJORITY STATUS**

#### **A. Introduction and Applicable Principles**

As has long been recognized, the Act's central purpose is to promote stability in existing collective bargaining relationships consistent with the principles of majority rule and employee free choice. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987). To that end, 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 recognize and bargain” with its employees’ chosen representative.<sup>2</sup> More significantly, Section 8(d) of the Act (29 U.S.C. § 158(d)), which defines the duty to bargain, explicitly holds parties to their agreements, stating that, “where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party

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<sup>2</sup> Section 8(a)(1) of the Act 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 prompts a “derivative” violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

to such contract shall terminate or modify such contract,” except in circumstances not relevant here.

Balancing the statutory interests of promoting stability in extant bargaining relationships and insuring employee free-choice, the Board has long adopted various iterations of what has always been referred to as its “contract-bar” rule, a period during the life of an agreement in which the incumbent union would be insulated from having its majority status challenged in an election. *See General Cable Corp*, 139 NLRB 1123, 24-28 (1962). As the Board long emphasized, the justification for permitting a bar in the first place is that an agreement between the parties has become binding:

We believe that our contract-bar policy should rest on the fundamental premise that the postponement of employees’ opportunity to select representatives can be justified only if the statutory objective of encouraging and protecting industrial stability is effectuated [when] . . . contracting parties have entered into mutual and binding commitments.

*Pacific Coast Pulp and Paper Mfrs.*, 121 NLRB 990, 994 (1958). And, it is for this reason that the Board has long held that, “[w]here a contract contemplates ratification, the relationship between the parties cannot be deemed stabilized,” and thus the conclusive presumption of majority status cannot attach, “until ratification occurs.” *American Broadcasting Co.*, 114 NLRB 7, 8 (1955).

Thus, under the Board’s contract-bar policy, an incumbent enjoys a conclusive or irrebuttable presumption of majority status during the life of a

collective bargaining agreement for a period of up to three years. Thereafter, the presumption of majority status continues, but becomes rebuttable and the Board will entertain an election petition by a rival union or the employees themselves.<sup>3</sup>

As the Supreme Court has recognized, these presumptions depend “‘not so much on an absolute certainty that the union’s majority status will not erode,’ . . . as on the need to achieve ‘stability in collective-bargaining relationships.’” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786-87 (1996) (citations omitted).

Indeed, without the period of repose the irrebuttable presumption provides, the compromises and concessions that reaching an agreement often requires would make the process of collective bargaining as much a vehicle for undermining the stability of established bargaining relationships, as for advancing it. *Id.* The presumptions and the Board’s discretion in applying them in different contexts

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<sup>3</sup> Rather than requiring employees to wait until a three-year agreement to actually expire, the Board affords employees and unions a 30-day “open period” before expiration within which to file. In all industries but the health care industry, that open period is between 90 to 60 days from the date of expiration. During the 60 day period immediately proximate to expiration, the so-called “insulation period,” no petitions will be entertained, consistent with the legislative purpose of the procedures mandated under Section 8(d)(1) of the Act (29 U.S.C. 159(d)(1)) for the negotiation of new agreements—that is, to increase the likelihood that such agreements will be negotiated without resort to industrial strife. *See Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962). In the health-care industry, which is governed by slightly different statutory provisions, the insulation-period is 90 days, and the 30-day open period is pushed back accordingly. *See Trinity Lutherine Hospital*, 218 NLRB 199, 199 (1975).

have accordingly received widespread acceptance by the courts. *Id.* at 786-88 (citing cases).

In *Shaw's Supermarkets*, 350 NLRB 585 (2007), the Board transported the three-year limitation from the contract-bar—governing when employees or outside parties may challenge a union's majority status through the Board's election process during an extant contract's term—to withdrawals of recognition from unions during a live contract, as occurred here. Under well-settled law, an employer may bypass the Board's election machinery to vicariously champion employee rights by withdrawing recognition from an incumbent union based upon proof that a majority of unit members informed the employer that they no longer desired union representation. *See Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 725 (2001). In *Shaw's*, the Board permitted an employer, "in possession of untainted evidence of the [u]nion's actual loss of majority status, to withdraw recognition from the [u]nion after the third year of a contract of longer duration," even though it had contractually agreed to recognize the union for the full term of the contract. *Id.* at 587. In so holding, the Board concluded that allowing withdrawal of recognition based on actual evidence of majority status after the first three years of a contract would advance both employees' rights to choose their representative and the industrial stability that a three-year contractual relationship provides. *Id.* at 587-88.

Thus, either under *Shaw's* or the contract-bar rule, it is crucial to establish the beginning and end of the three-year period of repose to which unions are entitled when a collective-bargaining agreement is still in effect. Typically, Board findings about the meaning of contractual provisions are reviewed *de novo*, *Commonwealth Communications, Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2002), except to the extent that they depend upon inferences about the import of bargaining history evidence, which constitutes the type of fact-finding that the Act commands must be upheld if supported by substantial evidence, *NLRB v. Cook County School Bus, Co.*, 283 F.3d 888, 892 (7th Cir. 2002). Here, however, the Board's rationale for beginning the three-year period of repose on the contract's effective date, not the date noted on its cover, turns not simply on principles of contract construction and the proper use of parol evidence, but ultimately on the Board's judgment that it made no sense in terms of federal labor policy to give the presumption that attaches to a contract a retroactive effect. That is precisely the type of judgment to which the Board is due "considerable deference" and which must be upheld if rational in light of the federal labor policies implicated. *Auciello*, 517 U.S. at 787-88.

**B. The Board's Determination that the Parties' Agreement Was Effective April 13, 2005 Properly Applied Contract Interpretation Principles as Informed by the Board's Reasonable Construction of the Dictates of Federal Labor Policy**

The Board's unfair labor practice finding here turns on when the parties' contract became effective for the purpose of determining when the three-year period of repose promised under Board policy began to run. In the Company's brief (Br. 16), it "readily agrees that the Agreement was not legally effective until ratified" on April 13, 2005. Thus, the question is whether the contract-bar period should begin running on the date the contract became effective, or the date that the parties agreed that some provisions would have retroactive effect, as apparently noted on the agreement's cover. The Board reasonably concluded, based on the contract itself, parol evidence, and the underlying principles of the Act, that the effective date should control, and accordingly found that the Company's withdrawal of recognition on January 7, 2008—approximately ten weeks shy of the contract's almost three-year duration—violated the Act. The Court should enforce that finding.

**1. The Plain Language of the Agreement's Provisions Establishes that It Became Effective on April 13, 2005, and Substantially Reduces the Facial Ambiguity Created by the Agreement's Cover**

First, the Board properly construed (A. 51) the parties' agreement as becoming "effective" precisely on the date that the parties' declared in the clearest of terms in the very first sentence in the body of the agreement itself—"This is an Agreement between [the parties] . . . effective April 13, 2005." As the Board recognized, a facial ambiguity about whether that statement meant what it said arose because the agreement's cover was in apparent conflict, reading "Date of Agreement: January 1, 2005 Through March 31, 2008." Yet, the Board found (A. 51) that when the rest of its provisions were taken into consideration the language of the agreement itself strongly indicated that it began on April 13. *Cf. Cooper Tire Co.*, 181 NLRB 509, 509 (1970) (reading the agreement as a whole revealed that the agreement was not effective from the date specified on the agreement's cover but instead was a three-year agreement that ran from a date made clear from other provisions).

While the plain language of the contract stated that it was effective April 13, 2005, only three provisions in the agreement gave effect to the January 1 date on the cover. Two did so by stating that their benefits retroactively took effect on January 1. As the Board recognized (A. 51), "if the contract's term was intended

to begin January 1, one wonders why the contract had to specifically designate those particular provisions that were retroactive to January 1.”

Most importantly, the third provision invoking the January 1 date, the agreement’s wage provision, most thoroughly undercuts the Company’s claim that the agreement’s effective date was unambiguously January 1. That provision established wage structures for “incumbent employees” and “future hires.” The portion concerning incumbent employees reads, “[d]uring the first year of the contract, such employees will receive, retroactive to January 1, 2005, a wage rate equal to 104.5% of his or her pre-March 31, 2005, wage rate,” and then provides for ensuing annual increases for those employees to commence, not on January 1, but “at the beginning of the second and third contract years.” The remainder of the wage provision then fills in the gap, by making April 13 the point of demarcation for whether an employee is an “incumbent” or a “future hire.”

If contractual terms are to be given their plain meaning, indeed, if the words in this provision are to have any meaning at all, it must be the case that the “effective” date of the agreement, the date the agreement began, was not January 1, but rather sometime afterward. Indeed, it is difficult to understand the use of those terms and the April 13, 2005 date used to distinguish between classes of employees as signifying anything but that the agreement became effective and commenced to run on that date, which is of course what the agreement itself says. And, if more is

needed, it was provided by the fact that the contract gave future hires a bump to a higher wage category on “the first payroll periods beginning after April 13, 2005, April 13, 2006, and April 13, 2007.” (A. 302.)

In short, read as a whole, the agreement’s terms—which the Company drafted and which therefore must be construed in the manner least favorable to it, *see Segar v. Mukasey*, 508 F.3d 16, 25 (D.C. Cir. 2007) (citing Supreme Court and in-circuit precedent)—strongly indicate that April 13 was exactly what the parties said it was in the agreement’s first paragraph, that is, the date that the agreement became effective. In this context, the Company’s persistent refrain that the agreement unambiguously established January 1, 2005, as its effective date, and the arguments used to prove it, are “extraordinary,” as the Board found (A. 50). The only place where there is an express attempt to define when the agreement is “effective” is in its first sentence, and the body of the agreement completes the definition of when the agreement begins and ends by specifying a termination date, down to the very minute, in the agreement’s very last paragraph.

Thus, the cover’s use of January 1, 2005, when read in conjunction with the rest of the agreement, only reflects that three of the agreement’s provisions applied retroactively to that date. Consequently, while the explanation as to why the Agreement’s cover includes the January 1 date remained unclear, it was all but certain, from the agreement’s own provisions, that the cover could not be

interpreted to mean what the Company says it does under common rules of construction. Indeed, while the Board allowed that “at best . . . the 2005 agreement is ambiguous as to its term,” (A. 50), the Company’s interpretation that January 1 unambiguously represents the agreement’s effective date is untenable under the settled principles of contract construction that foreclose any interpretation that would leave portions of a contract useless, inexplicable, inoperative, meaningless, or superfluous, which is exactly what the Company’s interpretation does. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (noting that it is a “cardinal principle of contract construction[ ] that a document should be read to give effect to all its provisions and to render them consistent with each other”); *accord Ball State Univ. v. United States*, 488 F.2d 1014, 1116 (Ct. Cl. 1973). The Board logically rejected (A. 50) the Company’s argument that the Agreement clearly stated that it was effective on January 1, 2005, and, as shown below, properly relied on parol evidence to conclude that April 13, 2005—the date the agreement was ratified—began the Union’s three-year irrebuttable presumption of majority status.

**2. With the Agreement Ambiguous on its Face, Parol Evidence Demonstrated that the Parties Intended for the Agreement To Begin on April 13, 2005**

As the Board explained (A. 50), “[a] review of all the [parol] evidence of intent points in one direction only—that the 2005 agreement was effective April

13, 2005, and its term was not made generally retroactive so that the term of the agreement can be said to have begun January 1, 2005.” Substantial evidence soundly supports this finding.

To begin, it is undisputed that January 1, 2005 was the first day after the parties’ prior agreement expired. That explains why the Company chose it as the starting date for the retroactive provisions covering health-care and retirement benefits, and why the first year’s wage increase for incumbent employees was also made retroactive to that date.

Next, the negotiation history makes crystal clear that April 13 was, in fact, the intended starting date for the contract. When negotiations resumed after a month and a half hiatus in March 2005 due to the Company’s having admittedly declared an unlawful impasse on improper terms, the Company offered a series of concessions to reach an agreement, the first of which was a proposal that the agreement be for a three-year term to commence from the date of ratification—which, of course, is precisely what the contract did. (A. 48; 221.) The Company’s own bargaining notes contained no suggestion that either party advanced January 1 as an alternative to April 13, the date of ratification, for the Company’s three-year proposal to begin. There was no evidence that the January 1 date was discussed after negotiations resumed, except evidence that undercuts the Company’s argument.

Thus, the Company offered a wage proposal for current employees that was structured to induce ratification by making the first year's increase retroactive to January 1 (presumably an earlier date than the date for "Second" and "Third" year increases) provided that those employees voted for ratification shortly after a tentative agreement was reached. More significantly, when the Company offered to accept a union proposal for annual 3 percent increases for future hires, it did so on condition that the increases take effect on "the anniversaries of the *contract's effective date*, not 'January 1.'" (emphasis supplied) (A. 220.) The Company's contention that the parties intended the agreement to start January 1, 2005, became all the more untenable in light of the wage provision's repeated use of April 13 as the trigger for annual raises, as noted above.

This evidence, as the Board found (A. 50), served to confirm that the "agreement was effective April 13, 2005," and that the Company's efforts to draw a distinction between when the agreement became effective and when its term began was unpersuasive. The most that can be said of the January 1, 2005 date on the cover of the agreement is that it reflects the retroactive starting date of three key economic provisions. There was no proof whatsoever to support the untenable conclusion that it reflected an intention by the parties to make the agreement's term "generally retroactive so that . . . [it] could be said to have begun on January 1, 2005," a construct that would have left the "effective date" in the first paragraph of

the agreement bereft of all meaning. Because the agreement was effective on April 13, 2005, the Union enjoyed an irrebuttable presumption of majority status until the agreement expired on March 31, 2008, approximately two weeks short of the three-year irrebuttable presumption period.

Indeed, any other conclusion would turn the irrebuttable presumption of majority status on its head. The reality is that there was no agreement between the parties from January 1, 2005 (when the prior contract expired) until April 13, 2005 (when the new contract was effective), as the Company admits (Br. 16). During that time, the Union stood without protection to having its majority status attacked, and the employees stood without constraint to seek decertification, if that was their want. That was a secret to no one. Retroactivity, even if it had been agreed to, would not have retroactively protected the Union from any challenge to its majority status between January 1 and April 13. Thus, to provide the three years of stability to the contractual relationship the parties entered into on April 13, that date is the only date that could be used to compute when the Union's entitlement to a conclusive presumption to majority status began to run. The Board, in fact, ended its analysis by making exactly that point:

The contract's "term" began (*Trailmobile Trailer, L.L.C.*, 343 NLRB 95 (2004)), it had "life" (*Levitz*, 333 NLRB 717 (2001)), and was 'accepted' (*Auciello Ironworkers, Inc. v. NLRB*, 517 U.S. 781 (1996)), no earlier than April 2005. Given that the 2005 Agreement was in effect only since 2005, the conclusive presumption of majority support to which a

union is entitled during the life of a contract up to three years renders the January 2008 withdrawal of recognition unlawful.

(A. 51.) It does not appear how a different conclusion would make a modicum of sense in light of the federal labor policies that the Board’s presumption, most particularly the three-year limit found to be appropriate in *Shaw’s Supermarkets*, were designed to advance. Thus, the Company’s insistence (Br. 16, 24) that the critical issue here is the agreement’s “term,” not its effective date, demonstrates a fundamental misunderstanding of the policy underlying the three-year period of repose.<sup>4</sup>

### **3. The Company’s Arguments to the Contrary Rest on Mischaracterizations and Misunderstandings**

In response to the basic facts described above—demonstrating that the parties imbued their agreement with life on April 13, 2005, and that the three year period of industrial stability should run only during the actual life of the agreement—the Company puts forth several arguments that that simply miss the mark. The Court should reject them, and hold that the Board properly found that

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<sup>4</sup> To the extent the Company relies (Br. 21) on the Supreme Court’s use of the word “term” in *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996), to describe the three years of an agreement that bars an election under the Board’s contract bar rule, it takes that language out of context. To the contrary, the *Auciello* language was not intended to address the issue presented here, and cannot supplant longstanding Board doctrine that precludes the operation of the irrebuttable presumption before an agreement actually exists.

the Company unlawfully withdrew recognition during the first three years of the contract.

First, the Company's case, *Ben Franklin Paint and Varnish Co.*, 124 NLRB 54 (1959) (cited at Br. 28-29), does not undermine the Board's finding here that the three-year period of repose commenced on the contract's effective date, April 13. There, the only place where the agreement contained any suggestion of a starting and termination date was on its cover, and a rival union filed a petition that was timely based upon the starting date on the cover. *Id.* at 55. The parties sought to block the petition by claiming that the agreement actually became extant on the date of execution, a month later, and that the earlier date on the cover only signified its retroactive application. *Id.* The Board found that the date of execution—on which the contract was silent—was not a reliable indicator of the term for, as the Board explained, “it is this term on the face of the contract to which the employees and outside unions look to predict the appropriate time for the filing of a representation petition.” *Id.*

Here, by contrast, the agreement on its face plainly stated that its effective date was April 13, and that January 1 was only the date for three of its provisions. Indeed, rather than distinguishing *Ben Franklin's* reliance on the effective date as controlling, the Board's decision embraced it, citing *Ben Franklin* and noting that, “[a]s [the Company] concedes, the express effective term in this agreement is April

13, 2005.” (A. 50.) Further, especially given that this case arises in the withdrawal of recognition context, not in the context of an election petition filed by nonparties to the contract, any conflict between the January 1 and April 13 dates works against the Company. The reason for requiring facial clarity for invocation of a contract as a bar to an election—to assure that third parties are able to determine the appropriate time for filing, *Union Fish Co.*, 156 NLRB 187, 191 (1965)—has no application to determining whether an employer is barred by its own agreement (which it should understand) from unilaterally withdrawing recognition, regardless of whether the effective date of the agreement is ambiguous and requires parol evidence to be ascertained. See *Tinton Falls Conva Cenra*, 301 NLRB 937, 939 (1991); *YWCA*, 349 NLRB 762, 763-64 (2007) (oral agreement on new contract forecloses withdrawal of recognition based upon ensuing acquisition of proof of actual loss of majority status).

Next, there is no logical basis for the Company’s argument (Br. 25) that the contract’s three retroactive provisions, as reflected in the January 1 date on the cover, should count for determining whether the three-year period of repose promised the Union under established Board doctrine had run as of the date that the Company withdrew recognition on January 7, 2008. Simply put, the Union was not entitled to fewer than three years of protection under an agreement that had not yet expired simply because the agreement had retroactive components that were

clear on their face and a cover reflecting that retroactivity. To the extent the Company suggests that the parties made their *entire agreement* retroactive to January 1, the contract language and the parol evidence belie that argument here, even if making the entire agreement retroactive could defeat the plainly stated “effective date” as the first day of the period of repose.

The commercial contract cases the Company cites (Br. 25-27) speak to the unexceptionable point that the parties to such agreements can agree to a retroactive “effective” date. They do not speak to the question of whether such agreements can override a statutory policy dependent on when an agreement actually came into effect. Here, the agreement itself declared when that was, “[t]his is an agreement . . . effective April 13,” and the extrinsic evidence demonstrates that the term “effective” was chosen deliberately to reflect that the agreement came into effect on its date of ratification, and that its “term” was intended to start running from that date.

Finally, the complaint (Br. 38-40) that the Board’s decision ignores that it would have violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) if the Company had continued to honor the parties’ agreement in the face of evidence that the Union no longer had majority support is patently untrue. The Company was obligated to honor its agreement for a period of three years from the date it became effective and had no reason to doubt when that date was. During that time,

the Union enjoyed an irrebuttable presumption of majority support. Thus, continuing to recognize the Union for three years—even in the face of an untainted petition showing no actual majority support—was the Company’s duty. No case holds that an employer could be found to have violated Section 8(a)(2) of the Act by doing precisely what the law required of it.

## **II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS REMAINING UNFAIR LABOR FINDINGS**

Having concluded that the Company acted unlawfully by withdrawing recognition and repudiating its union agreement, the Board properly found (A. 54) that the Company necessarily had a continuing obligation to refrain from implementing any changes in extant terms and conditions of employment without the Union’s consent, which is precisely what the Company proceeded to do. The Company came forward the first week of March with an array of improvements that served only to underscore just how fortunate the employees were that a bare majority of them had repudiated the Union. In the context of referring to the employees as “Former UAW Staff,” the Company announced to employees that it had just implemented the following:

An across-the-board wage increase of 4.25 percent; an additional 2 percent increase to all employees who scored 3.5 or better on their performance evaluations from the prior year; 1.5 times the base rate for holiday hours worked instead of a 65 cents per hour holiday wage premium; an increase in weekday shift premiums from 65 cents per hour to \$1 per hour for the 3 p.m. to 11 p.m. shift and the 11 p.m. to 7 a.m.

shift; an increase in weekend shift premiums from 65 cents per hour to \$1.50 per hour for all shifts worked from 3 p.m. Friday to 7 a.m. Monday; a reduction from 12 to 6 months in the eligibility waiting period for the Company's short term disability plan; and movement of the bargaining unit employees into the established pay ranges that existed for the Company's nonunion employees.

(A. 48; 269-71.) At the meetings, company officials also made reference to additional possible wage adjustments in October 2008.

This display of largesse, when contrasted to what the Union had secured and lost for employees in the 2005 elections, was nothing short of startling and plainly violated the duty to bargain imposed by Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). Indeed, as has long been recognized, such unilateral changes in employees' terms and conditions "frustrate [statutory] objectives . . . much as does a flat refusal." *NLRB v. Katz, Inc.*, 369 U.S. 736, 743 (1962). They served to amplify the message already conveyed by the unlawful withdrawal of recognition of just how pointless a return to the process of collective bargaining actually would be. *See May Department Store v. NLRB*, 326 U.S. 376, 376, 385 (1945) (unilateral action "minimizes the influence of organized bargaining" and emphasizes "that there is no necessity for a collective bargaining agent").

In a similar vein, because it had a continuing duty to bargain, the Board also properly found that the Company violated Section 8(a)(1) of the Act by repeatedly referring to employees as "Former UAW Staff" and promising them that further

wage increases would follow, as long as employees stayed on the “non-union staff pay cycle.” This was of a piece with the Company’s unlawful unilateral withdrawal and served to make all the less probable that employees, almost half of whom never signed the pre-withdrawal petition, would seek what the Company’s unilateral withdrawal denied them—the chance to vote on the question of continued representation in the privacy and protection of a Board supervised voting booth. *See Windsor Center North Long Beach*, 351 NLRB 975, 987-88 (2007) (such statements plainly “undermine the Union’s role” and insure that employees would “reasonably be reluctant to avail themselves of their Section 7 rights”).

### **III. SECTION 10(e) OF THE ACT PRECLUDES THE COURT FROM CONSIDERING THE COMPANY’S CHALLENGE TO THE BOARD’S AFFIRMATIVE BARGAINING ORDER, BECAUSE THE COMPANY FAILED TO RAISE THAT OBJECTION BEFORE THE BOARD**

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” The Supreme Court has interpreted Section 10(e) as depriving the Court of jurisdiction over objections not presented to the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). This Court “requires, at a minimum, that the ground for the exception be ‘evident by the context in which [the exception] is raised.’” *Parsippany Hotel Mgmt. Co. v.*

*NLRB*, 99 F.3d 413, 417 (D.C. Cir. 1996) (citations omitted). Further, this Court has consistently held that its standard is not met as it applies to affirmative bargaining orders when a generalized exception does no more than raise an objection to an order “in its entirety,” *Prime Serv. Inc. v. NLRB*, 266 F.3d 1233, 1241 (D.C. Cir. 2001), which is exactly the wording of the Company’s lone remedial exception here. (See SA 10.) Indeed, this Court has, not once, not twice, but repeatedly faulted litigants for challenging an affirmative bargaining to the Court without having raised the objection to the Board in the first instance. See, e.g., *Highlands Hospital Corp. v. NLRB*, 508 F.3d 28, 33 (D.C. Cir. 2007) (objection to “excessive breadth” of multipart remedy too general); *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (objection to “any remedial relief” too general); *Quazite Division of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 498 (D.C. Cir. 1996) (objection to remedial order “in its entirety”).

Furthermore, the Board’s *sua sponte* inclusion of a comprehensive and reasoned explanation for issuing an affirmative bargaining order under the facts of a particular case, consistent with this Court’s jurisprudence, does not excuse the Company’s failure to except to the order with particularity or provide jurisdiction for the Court’s review. See *Highlands Hospital*, 508 F.3d at 33 (application of Section 10(e) unaffected by “the fact that the Board . . . discussed [the] issue”); *Scepter, Inc.*, 280 F.3d at 1057 (the same).

Therefore, because the Company failed to challenge specifically the Board's entry of an affirmative bargaining order, the Court should not pass on the Company's challenge here (Br. 40-47).

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review, granting the Board's cross-application, and enforcing the Board's Order in full.

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National Labor Relations Board  
February 2011

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPECTRUM HEALTH-KENT )  
COMMUNITY CAMPUS )  
 )  
Petitioner/Cross-Respondent )  
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v. ) Nos.: 10-1260, 10-1270  
 )  
NATIONAL LABOR RELATIONS )  
BOARD )  
 )  
Respondent/Cross-Petitioner )

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,790 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC  
this 22nd day of February, 2011

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**CERTIFICATE OF SERVICE**

I certify that on February 22, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, D.C.  
this 22nd day of February 2011

## **STATUTORY ADDENDUM**

**SUPPLEMENT TO THE STATUTORY-ADDENDUM  
VOLUME SUBMITTED BY THE COMPANY**

**Section 8(d) of the Act (29 U.S.C. § 158(d):**

**(d) [Obligation to bargain collectively]** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.