

Nos. 10-1382, 11-1006

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

CHEVRON MINING, INC., f/k/a THE PITTSBURG & MIDWAY COAL MINING COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED MINE WORKERS OF AMERICA

Amicus Curiae for Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

MacKENZIE FILLow
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-3823

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
DAVID HABENSTREIT
Assistant General Counsel
National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON MINING, INC., f/k/a)
THE PITTSBURG & MIDWAY COAL)
MINING COMPANY)
)
Petitioner/Cross-Respondent) Nos. 10-1382
) 11-1006
)
v.) Board Case No.
) 27-CA-19566
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
UNITED MINE WORKERS OF AMERICA)
)
Amicus Curiae for Respondent/)
Cross-Petitioner)

**THE BOARD'S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Chevron Mining, Inc., formerly known as The Pittsburg & Midway Coal Mining Company, was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. The United Mine Workers of America was the Charging Party before the Board and is appearing as Amicus Curiae before the Court.

B. Rulings under Review

The Company is seeking review of a Decision and Order issued by the Board in case number 27-CA-19566 on September 29, 2010, and reported at 355 NLRB No. 197.

C. Related Cases

None.

s/David Habenstreit _____
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

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

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of issues presented	3
Pertinent statutes and regulations.....	3
Statement of the case.....	3
Statement of facts.....	4
I. The Board’s findings of fact.....	4
A. The collective-bargaining agreement allows the union to call limited work stoppages known as “memorial periods”	5
B. The Company’s bonus plan	6
C. In response to the Union’s calling of memorial periods, the Company restricts the bonus plan.....	7
II. The Board’s conclusions and order.....	8
Summary of argument.....	9
Standard of review	10
Argument.....	12
Substantial evidence supports the Board’s finding that the Company violated the Act by amending its bonus plan in response to its employees’ participation in contractually-authorized work stoppages	12
A. It is illegal to retaliate against employees for engaging in protected concerted activity.....	12

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
B. The Board reasonably found that the Union’s calling of memorial periods was protected concerted activity.....	14
1. The Union’s assertion of its collective-bargained right to call memorial periods was not prohibited by the contract.....	17
a. The parties expressly negated the implied no-strike provisions by agreeing that the Union could call memorial periods	18
b. The contract puts no restriction on the Union’s use of memorial periods	21
2. The Union was engaged in protected activity when it called the contractually-authorized memorial periods on behalf of the employees.....	25
C. Substantial evidence supports the Board’s finding that, under <i>Wright Line</i> , the Company violated the Act by amending the bonus plan in retaliation for the Union’s exercise of protected activity.....	26
1. The General Counsel met his burden of proving that the employees’ protected concerted activity was the motivating factor in the Company’s decision to amend the bonus plan	27
2. The Company failed to meet its burden of showing that it would have restricted the bonus plan absent the employees’ protected concerted conduct of participating in memorial periods, or prove any other affirmative defense	28
D. The Board properly applied <i>Wright Line</i> , in accordance with the Company’s stipulation, and therefore properly declined to consider the Company’s economic weapon defense	31
1. The Company is bound by its stipulation of the issue to be decided	32

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
2. The Company’s economic retaliation defense has no merit.....	38
E. The Company’s objection to the remedy is premature	40
Conclusion	42

TABLE OF AUTHORITIES

Cases	Page(s)
<i>America Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1965).....	38, 39
<i>Ark Las Vegas Restaurant Corp. v. NLRB</i> , 334 F.3d 99 (D.C. Cir. 2003).....	12
<i>Atlas Plastering Co.</i> , 285 NLRB 185 (1987)	21
<i>BE&K Constr. Co. v. NLRB</i> , 536 U.S. 516 (2002).....	26
<i>BE&K Constr. Co.</i> , 329 NLRB 717 (1999)	26
<i>Brockton Hospital v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	11
<i>Bunney Brothers Construction Co.</i> , 139 NLRB 1516 (1962)	14
<i>Caban Hernandez v. Philip Morris USA, Inc.</i> , 486 F.3d 1 (1st Cir. 2007).....	36
<i>Capital Cleaning Contractors, Inc. v. NLRB</i> , 147 F.3d 999 (D.C. Cir. 1998).....	40
<i>Capitol Steel & Iron Co. v. NLRB</i> , 89 F.3d 692 (10th Cir. 1996)	31

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Central Illinois Public Service Co.</i> , 326 NLRB 928 (1998)	35, 38
<i>Citizens Investment Services Corp. v. NLRB</i> , 430 F.3d 1195 (D.C. Cir. 2005)	11, 12
<i>Cobb Mechanical Contractors, Inc. v. NLRB</i> , 295 F.3d 1370 (D.C. Cir. 2002)	40
<i>Commonwealth Commc’ns, Inc. v. NLRB</i> , 312 F.3d 465 (D.C. Cir. 2002)	22
* <i>Computer Associates Int’l, Inc. v. NLRB</i> , 282 F.3d 849 (D.C. Cir. 2002)	33, 34
<i>Cook Paint & Varnish Co. v. NLRB</i> , 648 F.2d 712 (D.C. Cir. 1981)	20
<i>Decas Nursing Support System, Inc. v. NLRB</i> , 7 F.3d 511 (6th Cir. 1993)	34
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978)	11, 12
* <i>FTC v. GlaxoSmithKline</i> , 294 F.3d 141 (D.C. Cir. 2002)	32, 33
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964)	40

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	11, 30
* <i>Gateway Coal Co. v. United Mine Workers of America</i> 414 U.S. 368 (1974).....	18
<i>GIC Corp., Inc. v. United States</i> , 121 F.3d 1447 (11th Cir. 1997)	35
<i>G&W Super Markets, Inc. v. NLRB</i> , 581 F.2d 618 (7th Cir. 1978)	12
<i>Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	40
<i>HK Porter Co. v. NLRB</i> , 397 U.S. 99 (1970).....	17
<i>Haynes v. Gasoline Marketers, Inc.</i> , 84 F. Supp. 2d 1261 (M.D. Ala. 1999).....	35, 37
<i>International B’hood of Boilermakers Local 88 v. NLRB</i> , 858 F.2d 756 (D.C. Cir. 1988).....	38
<i>Irvin H. Whitehouse v. NLRB</i> , 659 F.2d 830 (7th Cir. 1981)	19
<i>Ishikawa Gasket America, Inc. v. NLRB</i> , 354 F.3d 534 (6th Cir. 2004)	27
<i>Isla Verde Hotel Corp. v. NLRB</i> , 702 F.2d 268 (1st Cir. 1983).....	27
<i>Local Union 1395 IBEW v. NLRB</i> , 797 F.2d 1027, 1033 (D.C. Cir. 1986).....	21

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Local Union No. 47, IBEW v. NLRB</i> , 927 F.2d 635 (D.C. Cir. 1991)	11
<i>Meadow Gold Prods. Co. v. Wright</i> , 278 F.2d 867 (D.C. Cir. 1960)	36
<i>Manno Electric</i> , 321 NLRB 278 (1996)	13, 26
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	13
<i>Michigan Screw Products</i> , 242 NLRB 811 (1979)	15
<i>Microimage Display Division of Xidex Corp. v. NLRB</i> , 924 F.2d 245 (D.C. Cir. 1991)	13, 26
<i>Micro Pac. Dev. Inc. v. NLRB</i> , 178 F.3d 1325 (D.C. Cir. 1999)	37
<i>Mohave Electric Co-op., Inc. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000)	17, 34
<i>NLRB v. Autodie International, Inc.</i> , 169 F.3d 378 (6th Cir. 1999)	31
<i>NLRB v. Brown</i> , 380 U.S. 278 (1995)	38
<i>*NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984)	11, 15

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. C&C Plywood Corp.</i> , 385 U.S. 421 (1967).....	21
<i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221 (1963).....	35, 38
<i>NLRB v. Grand Canyon Mining Co.</i> , 116 F.3d 1039 (4th Cir. 1997)	31
<i>NLRB v. Great Dane Trailers, Inc.</i> , 388 U.S. 26 (1967).....	32, 33, 34, 35, 38, 39
<i>NLRB v. Hale Container Line, Inc.</i> , 943 F.2d 394 (4th Cir. 1991)	16
<i>NLRB v. Howard Electric Co.</i> , 873 F.2d 1287 (9th Cir. 1989)	16
<i>NLRB v. Insurance Agents’ International Union</i> , 361 U.S. 477 (1960).....	38, 39
<i>NLRB v. J.H. Rutter-Rex Manufacturing Co.</i> , 396 U.S. 258 (1969).....	41
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	30
<i>NLRB v. Katz’s Deli of Houston Street, Inc.</i> , 80 F.3d 755 (2d Cir. 1996).....	41
<i>NLRB v. Local 138 International Union of Operating Engineers</i> , 293 F.2d 187 (2d Cir. 1961).....	31

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. P*I*E Nationwide, Inc.</i> , 923 F.2d 506 (7th Cir. 1991)	16
<i>NLRB v. Transport Management Corp.</i> , 462 U.S. 393 (1983).....	14
<i>NLRB v. United Insurance Co.</i> , 390 U.S. 254 (1968).....	11
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962).....	17
<i>NLRB v. Weingarten, Inc.</i> , 420 U.S. 251 (1975).....	11
<i>Office of Workers’ Compensation Programs v. Greenwich Collieries</i> , 512 U.S. 267 (1994).....	14
<i>OPW Fueling Components v. NLRB</i> , 443 F.3d 490 (6th Cir. 2006)	16
<i>Parsippany Hotel Management Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	35
<i>Passaic Daily News v. NLRB</i> , 736 F.2d 1543 (D.C. Cir. 1984).....	32
<i>Peerless Plating Co., Inc.</i> , 263 NLRB 1025 (1982)	14

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Perdue Farms, Inc. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998)	10
* <i>Petrochem Insulation, Inc. v. NLRB</i> , 240 F.3d 26 (D.C. Cir. 2001)	25, 26
<i>RGC (USA) Mineral Sands, Inc. v. NLRB</i> , 281 F.3d 442 (4th Cir. 2002)	31
<i>Radio Officers’ Union of Commercial Telegraphers Union v. NLRB</i> , 347 U.S. 17 (1954)	13
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999)	31
<i>Roosevelt Memorial Medical Center</i> , 348 NLRB 1016 (2006)	35
<i>Ross Stores, Inc. v. NLRB</i> , 235 F.3d 669 (D.C. Cir. 2001)	34
<i>Schenk Packing Co.</i> , 301 NLRB 487 (1991)	38
<i>Springfield Television, Inc. v. City of Springfield</i> , 462 F.2d 21 (8th Cir. 1972)	35, 37
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	41
<i>Teamsters Local 115 v. NLRB</i> , 640 F.2d 392 (D.C. Cir. 1981)	40

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Teamsters Local 174 v. Lucas Flour Co.</i> , 369 U.S. 95 (1962).....	18
<i>The Ark</i> , 244 NLRB 198 (1979)	14
<i>U.S. ex rel. Miller v. Bill Harbert International Construction, Inc.</i> , 608 F.3d 871 (D.C. Cir. 2010)	23
<i>United Mine Workers of America v. NLRB</i> , 879 F.2d 939 (D.C. Cir. 1989)	17, 19
<i>United Parcel Serv. of Ohio</i> , 321 NLRB 300 (1996)	14
<i>United States v. One 1978 Bell Jet Ranger Helicopter</i> , 707 F.2d 461 (11th Cir. 1983)	36
<i>United States v. Reading Co.</i> , 289 F.2d 7 (3d Cir. 1961).....	35, 36
<i>United Steelworkers v. NLRB</i> , 405 F.2d 1373 (D.C. Cir. 1968).....	41
<i>United Steelworkers of America v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960).....	20, 23
<i>Venetian Casino Resort, LLC v. NLRB</i> , 484 F.3d 601 (D.C. Cir. 2007).....	26
<i>W&M Properties of Conn., Inc. v. NLRB</i> , 514 F.3d 1341 (D.C. Cir. 2008).....	10

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Waldorf v. Shuta</i> , 142 F.3d 601 (3d Cir. 1998).....	36
<i>Williams Enterprises, Inc. v. NLRB</i> , 956 F.2d 1226 (D.C. Cir. 1992).....	40
* <i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced</i> , 662 F.2d 899 (1st Cir. 1981).....	9, 10, 13, 14, 26, 32, 34, 35, 37

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

Page(s)

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157) 8,12,13,14,15,25,26
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....4,8,9,13,34,42
Section 3(a)(3) (29 U.S.C. § 158(a)(3))..... 3,4,8,9,12,27,31,32,34,37,39,42
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....4,9
Section 10(a) (29 U.S.C. § 160(a))2
Section 10(c) (29 U.S.C. § 160(c))40
Section 10(e) (29 U.S.C. § 160(e))2
Section 10(f)(29 U.S.C. 160(f))2

Miscellaneous:

Paul M. Secunda, *Inherently Destructive Conduct, Institutional Collegiality,
and the National Labor Relations Board*,
32 Fla. St. U. L. Rev. 51 (2004).....32

GLOSSARY

The Act	= The National Labor Relations Act (29 U.S.C. §§ 151 <i>et seq.</i>)
The Board	= The National Labor Relations Board
Br.	= The Company's Opening Brief
The Company	= American Standard Companies, Inc., American Standard Inc., d/b/a American Standard
UMWA	= United Mine Workers of America
The Union	= United Mine Workers of America

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 10-1382, 11-1006

CHEVRON MINING, INC., f/k/a THE PITTSBURG & MIDWAY COAL
MINING COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED MINE WORKERS OF AMERICA

Amicus Curiae for Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Chevron Mining, Inc. to
review, and the cross-application of the National Labor Relations Board to enforce,

a Board Order issued on September 29, 2010 and reported at 355 NLRB No. 197.¹

The Board found that the Company discriminatorily amended its bonus plan to retaliate against its employees for engaging in protected concerted activity. The United Mine Workers of America, which represents employees at the Company's mines, has filed a consent notice of intention to participate as amicus curiae. The Board's Order is final with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act, as amended.²

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act,³ which empowers the Board to prevent unfair labor practices. The Company's petition, filed on November 10, 2010, and the Board's cross-application, filed on January 6, 2011, were timely; the Act places no time limitations on such filings. This Court has jurisdiction over both the petition for review and the cross-application for enforcement pursuant to Section 10(e) and (f),⁴ which provides that petitions for review of Board orders may be filed in this Court and that the Board may cross-apply for enforcement of its order.

¹ J.A. 223-30. "J.A." references are to the joint appendix. "S.A." references are to the Supplemental Appendix. "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.

² 29 U.S.C. § 160(e) & (f).

³ *Id.* § 160(a).

⁴ *Id.* § 160(e) & (f).

STATEMENT OF THE ISSUE PRESENTED

It is illegal to retaliate against employees who engage in protected concerted activity. The Company admits it amended its bonus plan in response to its employees' participation in contractually-authorized work stoppages and to deter such work stoppages in the future. Does substantial evidence support the Board's finding that the Company violated the Act by doing so?

PERTINENT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

In 2004, the Union called memorial periods, which are work stoppages authorized by its collective-bargaining agreement with the Company, at one of the Company's mines. None of the union-represented employees worked during the memorial periods. In response, the Company amended its bonus plan in February 2005 in a manner calculated to deter its employees from conducting such contractually-authorized work stoppages in the future.

On April 6 and 7, 2005, the Union filed unfair-labor-practice charges in the Board's Regional Office in Denver, Colorado. (J.A. 1-2.) Finding merit in the charges, the Regional Director, on behalf of the General Counsel, issued an unfair-labor-practice complaint alleging that the Company violated Section 8(a)(3) and

(1) of the Act by amending the bonus plan to discourage the employees from asserting their contractual right to call work stoppages. (J.A. 56.) The General Counsel also alleged that the Company's amendment to the bonus plan violated Section 8(a)(5) and (1) of the Act because it changed the Union's contractual right to call work stoppages without bargaining. (J.A. 56.)

The General Counsel and the Company stipulated to the facts (J.A. 7-20) and the issues to be decided (J.A. 21), and the case was transferred to the Board for decision without a hearing (J.A. 222). All parties filed briefs, and on September 29, 2010, the Board issued its decision. The Board agreed with the General Counsel that the Company violated Section 8(a)(3) and (1) of the Act by amending the bonus plan, but it declined to decide the Section 8(a)(5) allegation because the remedy would be cumulative. (J.A. 223-30.) The Board's findings of fact are set forth below, followed by a summary of the Board's conclusions and order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Company operates mines in Alabama, New Mexico, and Wyoming. The Union has represented employees at these mines since 1978. (J.A. 223; J.A. 9.) The Union is organized into districts with geographic boundaries unrelated to the location of any particular employer's mine. (J.A. 223; J.A. 125.) The mines at issue in this case are located in Districts 20 and 22. (J.A. 223; J.A. 12.)

A. The Collective-Bargaining Agreement Allows the Union To Call Limited Work Stoppages Known as “Memorial Periods”

Since their relationship began, the Company and the Union have entered into a series of collective-bargaining agreements, each of which has contained a “Memorial Periods” provision. (J.A. 223; J.A. 11.) A memorial period is a work stoppage that results in the cessation of operations at the mine at which it is called. (J.A. 223.) The provision in the agreement covering the Company’s North River Mine reads as follows:

The International Union, United Mine Workers of America, may designate memorial periods not exceeding a total of ten (10) days during the term of this agreement at any mine or operation provided it shall give reasonable notice to the Employer.

(J.A. 223; J.A. 11, 96.)

The memorial period provision has a long history in the mining industry. For at least 40 years, memorial period provisions have been included in the National Bituminous Coal Wage Agreement, which is negotiated on a periodic basis between the Union and the Bituminous Coal Operators Association and is substantially identical for all relevant purposes to the agreements between the Company and the Union. (J.A. 11, 169.) As a result, there are numerous arbitration decisions discussing the use of memorial periods in the mining industry, and the parties included and incorporated by reference several of these decisions in their stipulated facts to explain the “history and purpose of the Memorial Periods

Clause.” (J.A. 223; J.A. 12, 126-67.) These arbitration decisions indicate that the Union has called memorial days to commemorate mine disasters, to allow employees to take time off for union business, to support the Union’s position in local disputes, and even to permit employees to take a day off at the start of the hunting season. (J.A. 223.)

B. The Company’s Bonus Plan

In 1995, the Company created a bonus plan for its employees. Recognizing that a bonus plan affects terms and conditions of employment, the Company and the Union agreed that the bonus plan was a mandatory subject of bargaining and proceeded to bargain over the plan’s application to union-represented employees. (J.A. 224; J.A. 13, 173.) The bargaining resulted in a letter of agreement, separate from the collective-bargaining agreement, under which union-represented employees participate in the bonus plan. (*Id.*) During negotiations over the letter of agreement, the Company proposed language that would have given the letter of agreement precedence over the collective-bargaining agreement. (J.A. 224; J.A. 14, 174.) The Union objected, and the Company removed that language. (*Id.*)

The letter of agreement states that “[the Company] may, without prior notice, modify, amend or terminate [the bonus plan].” (J.A. 224; J.A. 14, 173.) Between 1996 and 2002, the Company amended the bonus plan seven times, without objection from the Union. (J.A. 224; J.A. 15, 175-211.) Disputes over the

bonus plan are not subject to the grievance and arbitration provisions of the collective-bargaining agreement. (J.A. 224; J.A. 14, 173.)

C. In Response to the Union’s Calling of Memorial Periods, the Company Restricts the Bonus Plan

In 2004, on behalf of employees at the Company’s North River Mine, the Union called memorial days at that mine only on February 26, 27, and 28, and July 19, 21, and 30, in order to place economic pressure on the Company with respect to ongoing grievances that were being taken to arbitration. (J.A. 224; J.A. 17-18, 215-17.) In response, on February 3, 2005, the Company modified the bonus plan to include a provision requiring employees to forfeit the financially-based portion of their bonus at any mine at which the Union called a memorial day, if the memorial day was called on less than a districtwide basis. (J.A. 224; J.A. 16, 78-82.) The modification states:

No [bonus], other than for safety, will be made to any UMWA represented employees at a mine if the UMWA designates a memorial period or day for such mine without having designated a memorial period or day for all signatory mines and facilities in the UMWA District in which such mine is located.

(J.A. 224; J.A. 16, 82.) The Company admitted that it enacted this modification in response to the Union’s calling of six memorial days at the North River mine in 2004 and to deter such conduct in the future. (J.A. 224; J.A. 19.) In its position statement to the Board, the Company stated the amendment was intended to “put the Union on notice that there will be economic consequences to employees in the

event the Union again exercises its contractual right to call selective memorial days to put additional economic pressure on” the Company. (J.A. 33.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On September 29, 2010, the Board (Chairman Liebman and Members Becker and Pearce) found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily modifying the terms of its bonus plan in response to the Union’s calling of memorial periods at the North River Mine. (J.A. 223.) The Board concluded that the exercise of rights under a collective-bargaining agreement constitutes protected concerted activity, and therefore the Union’s exercise of its contractual right to call memorial days is protected. Because the Company stipulated that it amended the bonus plan in response to this protected activity, the General Counsel met his burden of showing that the employees’ protected conduct motivated its decision to modify the bonus plan. The Board determined that the Company failed to prove any affirmative defense. (J.A. 224-27.)

To remedy this unfair labor practice, the Board’s Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board’s Order requires the Company to rescind the 2005 amendment to the bonus plan, make whole any

employees who lost bonuses due to the discriminatory amendment, and post a remedial notice to employees at its mines. (J.A. 229.)

The Board declined to rule on the complaint's additional allegation that the Company violated Section 8(a)(5) of the Act by adversely affecting the Union's contractual right to call memorial periods without bargaining. The Board found that the remedy would not be substantially different. (J.A. 228.)

SUMMARY OF ARGUMENT

For over 30 years, the Company and the Union have entered into collective-bargaining contracts in which they agreed the Union had the right to call 10 memorial days per contract term. But when the Union asserted that right in 2004, the Company retaliated. It amended its bonus plan to restrict employees' bonuses if they exercise that collectively-bargained right in the future. As the Supreme Court has recognized, the assertion of a right derived from a collective-bargaining agreement constitutes protected concerted activity. Accordingly, the Company violated Section 8(a)(3) and (1) when it amended its bonus plan to punish employees for asserting a right their union won for them in bargaining.

Before the Board, the Company stipulated that the issue in this case was whether "under *Wright Line*, the [Company] violated Sections 8(a)(3) and (1) of the Act by amending" the bonus plan. So the Board decided that issue, concluding that the General Counsel met his burden of proof due to the Company's admission

that it amended the bonus plan in response to the Union's calling of memorial periods in 2004 and also to prospectively deter employees from engaging in activity protected by the Act. The Board further concluded that the Company failed to prove any affirmative defense. Now, however, despite its stipulation with the General Counsel, the Company asks this Court to require the Board to analyze this case under a different framework simply because it believes that analysis is more amenable to its economic weapon defense. But the Board properly decided this case in accordance with the parties' stipulation and concluded that the Company's justifications for its conduct do not constitute a proper defense under *Wright Line*.

Finally, the Company objects to the Board's remedy. However, that argument is premature and can be made during the Board's compliance proceedings. Because substantial evidence supports the Board's Order, the Court should enforce it in full.

STANDARD OF REVIEW

The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole.⁵ This Court gives great deference to the Board's factual findings regarding motive.⁶ The Board's construction of the Act is

⁵ *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998).

⁶ *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008).

entitled to deference if “reasonably defensible,” even if the Court would have preferred another view of the statute.⁷ The Board’s application of the law to the facts is reviewed under the substantial evidence standard.⁸ The Court construes contract language *de novo*.⁹

As this Court has noted, “[t]he Board’s determination that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable.”¹⁰ That determination involves “the ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management,”¹¹ and “‘implicates [the Board’s] expertise in labor relations.’”¹² Accordingly, “the balance struck by the Board is ‘subject to limited judicial review.’”¹³

⁷ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); accord *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

⁸ *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968).

⁹ *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991).

¹⁰ *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005); see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978) (noting that “delineat[ing] precisely the boundaries of the ‘mutual aid and protection’ clause . . . is for the Board to perform in the first instance as it considers the wide variety of cases that come before it”).

¹¹ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (citations omitted).

¹² *Citizens Inv. Servs.*, 430 F.3d at 1198 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (alteration in original)).

¹³ *J. Weingarten, Inc.*, 420 U.S. at 267 (citations omitted); see also *Citizens Inv. Servs.*, 430 F.3d at 1198.

ARGUMENT

Substantial Evidence Supports the Board’s Finding that the Company Violated the Act by Amending its Bonus Plan in Response to Its Employees’ Participation in Contractually-Authorized Work Stoppages

A. It Is Illegal To Retaliate Against Employees For Engaging In Protected Concerted Activity

Section 7 of the Act guarantees employees the right to engage in “concerted activities for the purpose of . . . mutual aid or protection.”¹⁴ To be protected under Section 7, employee activity must be both “concerted” in nature and pursued either for union-related purposes aimed at collective bargaining or for other “mutual aid or protection.” These protections are construed broadly.¹⁵

When an employer “tak[es] an adverse employment action in order to discourage union activity,” it violates Section 8(a)(3) of the Act,¹⁶ which prohibits discrimination “to encourage or discourage membership in any labor organization.”¹⁷ The Supreme Court long ago held that discouraging membership

¹⁴ 29 U.S.C. § 157.

¹⁵ *Eastex*, 437 U.S. at 565; *Citizens Inv. Servs.*, 430 F.3d at 1197.

¹⁶ *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 103 n.1, 104 (D.C. Cir. 2003); see *G&W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 624 (7th Cir. 1978) (stating “it has long been recognized” that action motivated “by a desire to discourage protected activity” violates Section 8(a)(3)).

¹⁷ 29 U.S.C. § 158(a)(3).

in a labor organization includes discouraging participation in concerted activities.¹⁸ In addition, such union-motivated retaliation derivatively violates Section 8(a)(1) of the Act because it interferes with employees' Section 7 right to engage in union activity.¹⁹

Where motive is at issue, the Board applies the framework set out in *Wright Line*.²⁰ Under this test, the General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision to take adverse employment action.²¹ The burden of persuasion then shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.²² If the employer carries its burden of proof under this construction, its adverse employment action is lawful. The Supreme Court has approved the Board's framework.²³

¹⁸ *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 39-40 (1954).

¹⁹ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

²⁰ 251 NLRB 1083, 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

²¹ *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991); *Manno Electric*, 321 NLRB 278, 280 n.12 (1996).

²² *Microimage Display*, 924 F.2d at 252; *Manno Electric*, 321 NLRB at 280 n.12.

²³ *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397 (1983), *overruled on other grounds by Office of Workers' Compensation Programs v. Greenwich Collieries*,

B. The Board Reasonably Found That the Union’s Calling of Memorial Periods Was Protected Concerted Activity

To prove that the Company unlawfully retaliated against the employees for calling memorial periods, the General Counsel’s *Wright Line* burden required him to show that the Union’s calling of memorial periods was protected, concerted activity. There is no dispute in this case about the “concerted” nature of that conduct here: when the Union called memorial periods on behalf of the employees, all employees stopped working. The question is whether the Union’s calling of memorial periods was protected. The Board reasonably found that it was.

For almost 50 years, the Board has held that the assertion of a right rooted in a collective-bargaining agreement is an integral part of the collective-bargaining process and therefore protected activity under Section 7 of the Act.²⁴ This is

512 U.S. 267, 278 (1994) (rejecting a footnote in *Transportation Management* but stating “the holding in that case remains intact”).

²⁴ *United Parcel Serv. of Ohio*, 321 NLRB 300, 300 n.1 (1996) (assertion of right to file grievance, found in collective-bargaining agreement, is protected concerted activity); *Peerless Plating Co.*, 263 NLRB 1025, 1028 (1982) (employee’s assertion of right to work hours set out in collective-bargaining agreement is protected concerted activity); *The Ark*, 244 NLRB 198, 199-200 (1979) (employee’s request for overtime pay in accordance with collective-bargaining agreement was protected activity); *Bunney Bros. Constr. Co.*, 139 NLRB 1516, 1519 (1962) (stating “the implementation of [a collective-bargaining] agreement by an employee is but an extension of the concerted activity giving rise to that agreement”).

because “[i]nvolving a contractually provided right . . . is necessarily an attempt to implement and enforce the agreement which is the product of the exercise of rights guaranteed by Section 7 of the Act,” and “[t]o hold otherwise would be to render nugatory the exercise of those rights.”²⁵

In *NLRB v. City Disposal Systems*,²⁶ the Supreme Court agreed: “[A]n employee’s invocation of a right derived from a collective-bargaining agreement meets § 7’s requirement that an employee’s action be taken ‘for purposes of collective bargaining or other mutual aid or protection.’”²⁷ In that case, a single employee refused to drive a truck he believed was unsafe, pointing to a provision in the collective-bargaining agreement giving him that right of refusal. The Supreme Court agreed with the Board that the employee was engaged in protected concerted activity. Since then, courts have consistently held that the assertion of a right found in a collective-bargaining agreement is protected under Section 7 because it is an extension of the protected concerted activity that produced the contract.²⁸

²⁵ *Michigan Screw Prods.*, 242 NLRB 811, 813-14 (1979).

²⁶ 465 U.S. 822 (1984).

²⁷ *Id.* at 830.

²⁸ See *OPW Fueling Components v. NLRB*, 443 F.3d 490, 496 (6th Cir. 2006) (asserting contractual right to file grievance is protected); *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 400 (4th Cir. 1991) (asserting contractual right to reimbursement of travel expenses is protected); *NLRB v. P*I*E Nationwide, Inc.*,

Here, the parties' agreements, which were the result of the collective-bargaining process, gave the Union the right to call memorial days at each mine, so long as it gave reasonable notice and did not exceed 10 days per contract term. By asserting that right on behalf of the employees, the Union was engaged in protected concerted activity.

Despite decades of law supporting the Board's decision, the Company contends the calling of memorial periods was not protected for two reasons. First it argues that, even though the collective-bargaining agreement explicitly gives the Union the right to call memorial periods, the same agreement somehow prohibits the Union from calling memorial periods. Second, the Company claims Section 7 protects employees, not unions, leaving the Union's calling of memorial periods unprotected. As shown below, the Company's arguments have no merit.

923 F.2d 506, 514-15 (7th Cir. 1991) (asserting honest and reasonable (but mistaken) contractual right to refuse work assignment is protected); *NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1291 (9th Cir. 1989) (asserting contractual requirement that only electricians move electrical wire is protected).

1. The Union’s assertion of its collectively-bargained right to call memorial periods was not prohibited by the contract

As this Court has recognized, “[f]reedom of contract is one of the fundamental policies of the” Act.²⁹ For this reason, activity that is concerted and for mutual aid and protection can still be found unprotected if it is in breach of a collective-bargaining agreement.³⁰ The Company contends (Br. 24-31) that the Union’s calling of memorial periods violated a no-strike provision implied into the parties’ agreement and therefore was unprotected. The Company also argues (Br. 26-27) that the parties’ agreement limits the purposes for which the Union can call memorial periods. However, the Board properly found (J.A. 225-26) that, since the parties’ agreement expressly permits the Union to call memorial periods and puts no restriction on the purposes for which memorial periods can be used, the Union did not breach the contract by calling memorial periods in 2004. Accordingly, those actions remained protected.

²⁹ *United Mine Workers of Am. v. NLRB*, 879 F.2d 939, 943 (D.C. Cir. 1989); *see also H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

³⁰ *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1190-91 (D.C. Cir. 2000) (noting that “conduct in breach of a collective bargaining agreement is one of ‘the normal categories of unprotected concerted activities’”) (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962)).

a. The parties expressly negated the implied no-strike provision by agreeing that the Union could call memorial periods

In *Teamsters Local 174 v. Lucas Flour Co.*, the Supreme Court held that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes.³¹ But in *Gateway Coal Co. v. United Mine Workers of America*, the Court clarified that the parties are free to “expressly negate any implied no-strike obligation.”³² Here, the collective-bargaining agreement contains an arbitration provision, but it also contains express language authorizing work stoppages – specifically, authorizing the Union to call 10 memorial days during the term of the agreement. In accordance with the principles set forth by the Supreme Court, the Board rightly concluded (J.A. 226) that the memorial period provision “expressly negate[d],” to a limited extent, the implied no-strike obligation. So long as the Union gives reasonable notice and calls no more than 10 memorial periods (conditions indisputably met in this case), the Union does not violate the implied no-strike agreement.

³¹ 369 U.S. 95, 104-05 (1962).

³² 414 U.S. 368, 382 (1974).

In its misguided effort to show otherwise, the Company cites (Br. 26) *Irvin H. Whitehouse v. NLRB*,³³ in which the Seventh Circuit, disagreeing with the Board, ruled that the safety concerns of two employees were subject to arbitration and therefore the employees violated the implied no-strike clause – and lost protection of the Act – by walking off the job over that issue.³⁴ However, the contract in *Whitehouse* did not contain express language authorizing the activity alleged to be protected (the walk out), while here the contract explicitly permits the Union to call memorial periods.

This same reasoning dooms the Company's contention that the Union's use of memorial periods is the equivalent of an intermittent strike, which is generally not protected by the Act. Here, the parties agreed – as they were free to do³⁵ – that the Union could call a limited number of memorial periods during the term of the contract. Accordingly, because the memorial periods were contractually authorized limited work stoppages, they remained protected even if used intermittently. In fact, the parties stipulated that the Union was permitted to call memorial periods as a single day or a few consecutive days at a single mine.

(J.A. 13.)

³³ 659 F.2d 830 (7th Cir. 1981).

³⁴ *Id.* at 834.

³⁵ *United Mine Workers of Am. v. NLRB*, 879 F.2d 939, 943 (D.C. Cir. 1989).

Moreover, as the Board pointed out (J.A. 226), the Company's amendment to the bonus plan negates its *Gateway Coal* argument because it admittedly allows the Union to call memorial periods in connection with arbitrable disputes. Specifically, under the amended plan, employees still receive their bonuses if they call a memorial period to support a union dispute that is subject to arbitration so long as they call it on a districtwide basis. Conversely, employees do not receive their bonuses if they call a memorial day over a non-arbitrable issue (such as the death of a miner) if the memorial day is called at a single mine. As a result, the Company's sanction is unrelated to whether the Union is using the memorial period over an arbitrable dispute.

The Company also points (Br. 30) to what it characterizes as "the federal labor policy favoring arbitration rather than economic pressure to resolve grievances." But the Supreme Court has noted that "arbitration is a matter of contract."³⁶ The fact that the parties' agreement contained an arbitration provision cannot be used to imply restrictions on other rights the parties expressly agreed the Union would have. As the Board recognized in a similar case: "If the contract explicitly acknowledges that the Union may authorize strikes during the contract's

³⁶ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 721 (D.C. Cir. 1981) ("Arbitration is a matter of contract between the parties.").

duration, it is inconsistent to imply . . . a no-strike clause.”³⁷ The Board’s finding that the memorial periods provision expressly negated the implied no-strike provision is consistent with the stipulated record and the law.

b. The contract puts no restriction on the Union’s use of memorial periods

Equally mistaken is the Company’s suggestion (Br. 26-27) that the collective-bargaining agreement prohibits the Union from calling memorial periods for any reason other than to mourn the death of a miner or commemorate a mining disaster. Recognizing that there is absolutely nothing suggesting such a limitation in the contract itself, the Company relies (Br. 26) heavily on the dictionary definition of the word “memorial.” But this Court has noted that it is not “appropriate to interpret collective bargaining agreements in a vacuum, solely in accordance with ‘abstract definitions unrelated to the context in which the parties bargained.’”³⁸ Instead, “collective bargaining agreements must be read in light of

³⁷ *Atlas Plastering Co.*, 285 NLRB 185, 186 (1987) (finding implied no-strike clause negated by contractual language stating “No party to this agreement, whether employer or employee, shall work for or with . . . a person as employer or employee, who is acting in violation of this Agreement”).

³⁸ *Local Union 1395 IBEW v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir. 1986) (quoting *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 (1967)).

the realities of labor relations . . . which make up the background against which such agreements are entered.”³⁹

The Board properly looked to documents that the parties submitted and incorporated into the stipulated record to explain “[t]he history and purpose of the Memorial Periods Clause.” (J.A. 12.) Relying on those documents was appropriate because the collective-bargaining agreement is entirely silent on the uses the Union may make of memorial periods.⁴⁰ These documents include two arbitration decisions (J.A. 126-46, J.A. 154-67), a decision from the U.S. District Court for the Southern District of West Virginia (J.A. 147-53), and a memo from the Board’s Division of Advice (J.A. 168-72), all of which demonstrate that the Union has called memorial periods for a variety of reasons over the last 40 years, not simply to commemorate mining deaths and disasters.

Indeed, the 1996 federal court decision involved an employer’s attempt to enjoin the Union from calling memorial periods “in connection with arbitrable disputes.” (J.A. 226; J.A. 147.) The court denied the injunction, stating that the “right to call a memorial period is a unilateral right that may be exercised by the

³⁹ *Id.*

⁴⁰ *Commonwealth Commc’ns, Inc. v. NLRB*, 312 F.3d 465, 469-70 (D.C. Cir. 2002) (where contract was “entirely silent” on issue, the Board must “look beyond the written agreement, and consider extrinsic evidence on the question”).

International Union for, depending on one's point of view, good or bad reasons.”

(J.A. 152.) And an arbitration decision from 1991 noted that

memorial periods under this provision have been used to provide [e]mployees with time off work to participate in certain activities deemed important by the International Union, and have also been used to provide a cooling off period in the course of a work stoppage in the coal fields. There is no limitation in the contract which restricts the purpose for which a memorial period may be used.

(J.A. 160, *see also* J.A. 169.)

Each of these decisions involved the memorial period provision of the National Bituminous Coal Wage Agreement, which, the parties stipulated, is identical to the memorial period provision at issue in this case. (J.A. 10-11.) The Company contends (Br. 28-29) that these decisions are “due no weight” because it was not a party to those proceedings. However, the Company stipulated (J.A. 12) that these decisions explain the “purpose of the Memorial Periods Clause.” Indeed, the parties agreed to incorporate these decisions by reference into their stipulated facts. (J.A. 12-13.) That stipulation bars the Company from arguing now that the purpose of the memorial period provision was only to permit the Union to call memorial periods when a miner dies or a mining disaster occurs.⁴¹

⁴¹ *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 889 (D.C. Cir. 2010) (“Stipulations of fact bind the court and parties. . . . This is their very purpose.”); *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (noting that “the industrial common law – the practices of the industry and shop – is equally a part of the collective bargaining agreement”).

In fact, as the Board noted (J.A. 226), the Company's own actions suggest it does not really believe that the parties' agreement contains such a restriction on the Union's use of memorial periods. When the Union called memorial periods in 2004 for reasons unrelated to a mining tragedy, the Company neither filed unfair-labor-practice charges nor sued the Union in court for breach of contract. (J.A. 226.) Furthermore, the Company did not make this argument to the Board. Rather, the Company's brief to the Board acknowledged the Union's right to use the memorial period provision as it did, stating that "[b]y calling Selective Memorial Days in 2004, the Union utilized a contractual provision to place economic pressure" on the Company,⁴² and that "the reasons for the [Union's] decision to call Selective Memorial Days at North River [were] immaterial to the question presented."⁴³

In the face of this overwhelming evidence that the Union has called memorial periods for a variety of reasons over the last several decades and that the parties never agreed that the use of memorial periods would be restricted, the

⁴² S.A. 28; *see also* S.A. 18 ("This dispute involves the consequences of the UMWA's exercise of a contractual right, under the North River CBA, to call Selective Memorial Days."), S.A. 19 (recognizing "the UMWA's exercise of that contractual right" to call memorial periods), S.A. 28 ("The Company only invoked its contractual rights in response to the Union's invocation of its contractual rights.").

⁴³ S.A. 23.

Board reasonably rejected (J.A. 226) the Company's claim to the contrary.

Because the contract expressly permits the Union to call memorial periods and imposes no restriction on how the Union may use them, the Union did not violate the contract when it called memorial periods in 2004. Therefore, the Union's actions did not lose their status as protected concerted activity.

2. The Union was engaged in protected activity when it called the contractually-authorized memorial periods on behalf of the employees

The Company next argues (Br. 32) that Section 7 protects only employees, not unions, and therefore the Union's calling of memorial periods was unprotected. This claim is easily dismissed as the Union speaks and acts on behalf of the employees as their collective-bargaining representative.

In *Petrochem Insulation, Inc. v. NLRB*,⁴⁴ this Court held that unions were engaged in concerted activity for "mutual aid or protection" when they objected to the issuance of zoning and construction permits to nonunion developers and contractors. Although the employer claimed that unions do not enjoy Section 7 rights, this Court recognized that "it would be a 'curious and myopic' reading of the Act's core provisions 'to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid or protection," the conduct of the unions they form and join for those purposes is not protected by the

⁴⁴ 240 F.3d 26 (D.C. Cir. 2001).

Act.”⁴⁵ The Court repeated this language in *Venetian Casino Resort, LLC v. NLRB*, enforcing the Board’s finding that a union demonstration against an employer who had not yet hired employees was protected by Section 7.⁴⁶ The Board therefore reasonably concluded (J.A. 225) that the Union was engaged in protected activity when it called the contractually-authorized memorial periods on behalf of the employees.

C. Substantial Evidence Supports the Board’s Finding That, Under *Wright Line*, the Company Violated The Act By Amending the Bonus Plan In Retaliation For the Union’s Exercise Of Protected Activity

As noted above on pages 13-14, the *Wright Line*⁴⁷ framework requires the General Counsel to persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer’s decision.⁴⁸ The burden of persuasion then shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.⁴⁹ As shown below, the General Counsel met his burden of proof

⁴⁵ *Id.* at 29 (quoting *BE&K Constr. Co.*, 329 NLRB 717, 724 (1999), *rev’d on other grounds*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)).

⁴⁶ 484 F.3d 601, 608 n.7 (D.C. Cir. 2007) (stating unions enjoy section 7 rights).

⁴⁷ 251 NLRB 1083, 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

⁴⁸ *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991); *Manno Electric*, 321 NLRB 278, 280 n. 12 (1996).

⁴⁹ *Id.*

– indeed, the Company stipulated that it amended the bonus plan to punish the employees’ protected activity – while the Company failed to prove that it would have amended the bonus plan even if the Union had not called memorial days in 2004.

1. The General Counsel met his burden of proving that the employees’ protected concerted activity was a motivating factor in the Company’s decision to amend the bonus plan

As shown above,⁵⁰ the Board first properly determined (J.A. 225) that the Union’s calling of contractually-authorized memorial periods is protected concerted activity. Next, since the Company stipulated (J.A. 19) that it amended the bonus plan in response to that protected activity, the Board concluded (J.A. 225) that the General Counsel had met his burden of proving that protected activity was *the* motivating factor in the Company’s decision.⁵¹ As the parties further stipulated (J.A. 16-17), under the amended bonus plan, it is only employees at a mine where the Union engages in this protected activity who lose their bonus. The Company’s non-union employees, as well as union-represented employees who do not assert this protected right, will continue to receive their full bonuses.

⁵⁰ See *supra* notes 24 & 28 and accompanying text.

⁵¹ See *Ishikawa Gasket Am., Inc. v. NLRB*, 354 F.3d 534, 537 (6th Cir. 2004) (finding employer violated Section 8(a)(3) by reducing bonuses because of employees’ union activities); *Isla Verde Hotel Corp. v. NLRB*, 702 F.2d 268, 271 (1st Cir. 1983) (finding employer illegally decided not to pay bonus in retaliation for employee filing unfair-labor-practice charge).

Consequently, substantial evidence in the stipulated record demonstrates that the Union's protected concerted activity of calling memorial periods was the only factor motivating the Company's decision to modify the bonus plan to restrict employees' eligibility for a bonus based on whether they exercised that contractual right.

2. The Company failed to meet its burden of showing that it would have restricted the bonus plan absent the employees' protected concerted conduct of participating in memorial periods, or prove any other affirmative defense

The Board found (J.A. 227) that the Company failed to meet its burden of demonstrating that it would have amended the bonus plan even if the Union had not called memorial days in 2004. Although the Company argues (Br. 38) that it "had a legitimate business purpose for modifying the Bonus Plan (increased productivity for the Company and increased incentive income for all employees)," the Board reasonably rejected this argument (J.A. 227) in light of the Company's admission that the amendment "was implemented in response to the Memorial Days called by the Union at the North River Mine in 2004" (J.A. 19).

The Board further noted (J.A. 227 n.8) that the old bonus plan already accounted for memorial periods' effect on productivity and profitability. The employees' bonus was directly proportional to their mine's actual productivity, which would reflect the effect of any memorial periods on the Company's bottom line. For example, if a mine where the Union called memorial days was actually

less productive, the employees' bonus would decrease correspondingly. (J.A. 14-15.) Conversely, the Company's amendment to the bonus plan has no connection to productivity. Instead, employees who participate in a memorial period at a single mine forfeit their bonus completely, even if that mine exceeded its goals and had its most productive year ever. As a result, the amendment punishes employees' participation in memorial periods regardless of the work stoppages' true effect on productivity. Given the lack of correlation between the amendment to the bonus plan and actual productivity, the Board reasonably concluded that the amendment was intended to retaliate against employees who participated in memorial periods in 2004 and discourage employees from asserting that collectively-bargained right in the future.

In fact, the Company's animus toward the Union's protected conduct could not be clearer: in a position statement to the Board, the Company stated the amendment was intended to "put the Union on notice that there will be economic consequences to employees in the event the Union again exercises its contractual right to call selective memorial days." (J.A. 33.) Despite this explicit threat of "economic consequences" for employees who engage in protected activity, the Company claims (Br. 41-43) that its amendment to the bonus plan was not "adverse" since no employee had yet been denied a bonus under the amended plan at the time the stipulated record closed. The Board reasonably rejected

(J.A. 227 n.8) this argument because actual loss is not necessary to establish a violation of Section 8(a)(3).⁵² The Company indisputably modified the bonus plan in a way that restricts an employee's eligibility to receive a bonus if he participates in a contractually-authorized work stoppage on less than a districtwide basis. As the Board observed (J.A. 227 n.8), the fact that employees did not participate in memorial periods after the bonus plan's amendment, and the resulting lack of monetary loss, may indicate the Company's success in discouraging them from exercising their contractual rights.

The Board also rejected (J.A. 227) the Company's next contention (Br. 44-46) that the Union somehow waived its right to be free of discrimination when it agreed that the Company could unilaterally amend the bonus plan. As this Court noted, "a party cannot exercise its contractual rights in violation of the law."⁵³ The

⁵² *NLRB v. Local 138 Int'l Union of Operating Engineers*, 293 F.2d 187, 197 (2d Cir. 1961) (stating "no monetary loss to the employee is necessary to constitute a violation"); *see also NLRB v. Autodie Int'l, Inc.*, 169 F.3d 378, 380-81 (6th Cir. 1999) (enforcing Board order finding transfer of employees, unaccompanied by change in wages, violates Section 8(a)(3) if motivated by anti-union animus); *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1048-49 (4th Cir. 1997) (same).

⁵³ *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281 (D.C. Cir. 1999); *see also RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 449-50 (4th Cir. 2002) ("[A]n employer cannot exercise contractual rights to punish employees for protected activity."); *Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 696-97 (10th Cir. 1996) (rejecting employer's authority to use waiver clauses in contract to undermine collective-bargaining process).

fact that the Union may terminate the bonus plan at any time does not relieve the Company of its legal obligation to avoid punishing employees who engage in union or protected concerted activity. While the Company is entitled to modify the bonus plan, it may not do so in a manner calculated to retaliate against its employees for engaging in protected concerted activity. Since the Company admits its amendment to the bonus policy was intended to do just that, the Board reasonably concluded that the amendment violated the Act under *Wright Line*.

D. The Board Properly Applied *Wright Line*, In Accordance With the Company's Stipulation, and Therefore Properly Declined To Consider the Company's Economic Weapon Defense

As the Company rightly notes, motive is central to finding a violation of Section 8(a)(3).⁵⁴ The General Counsel may establish anti-union motivation in two ways: through specific evidence of unlawful intent, or through inference resulting from the very nature of the conduct itself. In *Wright Line*,⁵⁵ the Board established the analytical framework that applies when the General Counsel undertakes to prove an 8(a)(3) violation based on specific evidence (either direct or circumstantial) of anti-union motivation. In *NLRB v. Great Dane Trailers, Inc.*,⁵⁶ the Supreme Court set out the test that applies when specific evidence of intent is

⁵⁴ *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1552 (D.C. Cir. 1984).

⁵⁵ 251 NLRB 1083, 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

⁵⁶ 388 U.S. 26 (1967).

not required.⁵⁷ As shown below, the Board properly determined this case under *Wright Line*, in accordance with the parties' stipulation.

1. The Company is bound by its stipulation of the issue to be decided

This Court and a number of others have held that, for purposes of fairness and judicial economy, parties are bound by their framing of the issues to be decided.⁵⁸ In *FTC v. GlaxoSmithKline*,⁵⁹ this Court faulted a district court for ignoring a pretrial stipulation regarding the presentation of issues for judicial review. The Court pointed out that the stipulation was intended “to narrow . . . the claims and documents that would require judicial resolution,” and that the defendant was prejudiced when the Court ruled against it for failing to prove

⁵⁷ See generally Paul M. Secunda, *Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 Fla. St. U. L. Rev. 51, 52-78 (2004).

⁵⁸ *FTC v. GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002) (FTC bound by pretrial stipulation regarding issues to be presented to court); *GIC Corp., Inc. v. United States*, 121 F.3d 1447, 1450 (11th Cir. 1997) (“[P]arties are bound by their stipulations and a pretrial stipulation frames the issues for trial.”); *Springfield Television, Inc. v. City of Springfield*, 462 F.2d 21, 23 (8th Cir. 1972) (stipulation “serve[s] only as an agreement to put aside and not press the [other] issues as a possible basis of recovery”); *United States v. Reading Co.*, 289 F.2d 7, 9 (3d Cir. 1961) (stipulations can “limit the issues which were presented to the district court as being dispositive of the controversy”); *Haynes v. Gasoline Marketers, Inc.*, 84 F. Supp. 2d 1261, 1272 (M.D. Ala. 1999) (“While it is true that parties cannot be bound to an incorrect stipulation as to controlling law, parties will be held to a stipulation which narrows the issues for consideration.”).

⁵⁹ 294 F.3d 141 (D.C. Cir. 2002),

something the parties had previously agreed was not at issue.⁶⁰ The Court noted the benefits of ““eliminating unnecessary proof and issues, lessening the opportunities for surprise and thereby expediting the trial.””⁶¹ Other courts have come to the same conclusion.⁶²

Indeed, this Court has chastised the Board in the past for *failing* to hold parties to their stipulations. For example, in *Computer Associates International, Inc. v. NLRB*,⁶³ the Court held that the Board was precluded from finding that two companies constituted a joint employer because the Union had stipulated that there was only one employer. The Court ruled that “the stipulation is binding on the parties, absent a showing of ‘changed or unusual circumstances entitling [a party]

⁶⁰ *Id.* at 146.

⁶¹ *Id.* at 147 (quoting *Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867, 869 (D.C. Cir. 1960)).

⁶² *Caban Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 5 (1st Cir. 2007) (stating stipulations “husband[] scarce judicial resources” and “are important to the efficient and expeditious progress of litigation”); *Waldorf v. Shuta*, 142 F.3d 601, 616 (3d Cir. 1998) (“[C]ourts encourage parties to enter into stipulations to promote judicial economy by narrowing the issues in dispute during litigation.”); *United States v. One 1978 Bell Jet Ranger Helicopter*, 707 F.2d 461, 463 (11th Cir. 1983) (noting that pretrial stipulation is “nothing more or less than an agreement by the parties to simplify the issues to be decided”); *United States v. Reading Co.*, 289 F.2d 7, 9 (3d Cir. 1961) (“No purpose would be served by” failing to hold parties to their stipulation “except to discourage litigants from entering into a stipulation for fear that one of them, when faced with an adverse decision, might attempt to repudiate it.”).

⁶³ 282 F.3d 849 (D.C. Cir. 2002).

to withdraw its stipulation.”⁶⁴ Because the union had shown no changed circumstances, “the Board had no ground to deviate from the . . . undisputed, unambiguous stipulation.”⁶⁵

The stipulation here was equally unambiguous. The General Counsel and the Union stipulated that the issue presented to the Board was “[w]hether, under *Wright Line*, the [Company] violated Sections 8(a)(3) and (1) of the Act by amending” the bonus plan. (J.A. 21.) So that’s exactly what the Board decided. The Company now effectively argues (Br. 37) that the Board should have decided a different issue: whether the Company proffered a viable defense under the *Great Dane* framework.

The Company’s brief contains no *Wright Line* analysis at all. Instead, all the cases the Company cites (Br. 37-38) apply *Great Dane*. This is because the Company’s defense simply does not fit within the *Wright Line* framework given its concession regarding its motivation for restricting the employees’ bonus plan.⁶⁶ As

⁶⁴ *Id.* at 852 (quoting *Micro Pac. Dev. Inc. v. NLRB*, 178 F.3d 1325, 1335 (D.C. Cir. 1999)).

⁶⁵ *Id.* at 852; see also *Decas Nursing Support Sys., Inc. v. NLRB*, 7 F.3d 511, 515 (6th Cir. 1993) (application of Board law on test for bargaining unit cannot “trump an unambiguous stipulation as to an appropriate bargaining unit”).

⁶⁶ See *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 675 (D.C. Cir. 2001) (agreeing that employer “failed to meet its burden under *Wright Line* of showing it would have discharged [employee] even if he had not been a union organizer”); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 n.5 (D.C. Cir. 2000) (stating employer

the Company acknowledges (Br. 36-37), *Wright Line* and *Great Dane* are two different tests, and each is used in different circumstances.

Under *Great Dane*, the Board must first determine whether the employer's conduct is "inherently destructive" of important employee rights.⁶⁷ If it is, and the employer fails to come forward with a substantial and legitimate business justification for its conduct, "an unfair labor practice charge is made out."⁶⁸ If the employer does come forward with a business justification, the Board "may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights."⁶⁹ If, however, the adverse effect of the discriminatory conduct is not "inherently destructive" but rather "comparatively slight," and the employer comes forward with evidence of

"failed to overcome its *Wright Line* burden of showing it would have fired [employee] absent the filing of the petition"); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 424 (D.C. Cir. 1996) (applying *Wright Line* and finding employer failed to show that it "would have taken the same action against [employee] regardless of his union activity").

⁶⁷ *Great Dane*, 388 U.S. at 34.

⁶⁸ *Id.* at 33 (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963)).

⁶⁹ *Great Dane*, 388 U.S. at 33; see also *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1018 n.5. (2006).

“legitimate and substantial business justifications” for its conduct, the General Counsel must prove anti-union motivation in order to find a violation of the Act.⁷⁰

Great Dane applies when there is no need for specific evidence of the employer’s improper motive because it has engaged in some act so destructive of employees’ protected rights that it must have intended to interfere with those rights.⁷¹ In such cases, the Board permits the employer to rebut the inference of such an unlawful motive by proving its actions are “something different than they appear on their face,” or in other words, that the employer had a substantial and legitimate business reason for its conduct and was not acting with illegal motive.⁷²

In contrast, under *Wright Line*, where the General Counsel has *proved* unlawful motive (rather than relying on an inference), the employer must show that it would have taken the same action even absent the protected concerted activity. Here, however, the Company admits that it restricted the bonus plan because of the Union’s conduct; it does not even claim that it would have taken the same action in the absence of the Union’s conduct. Regardless of whether the Company’s economic weapon justification would have met its burden to rebut an inference of

⁷⁰ *Great Dane*, 388 U.S. at 34.

⁷¹ *Id.* at 33 (“[S]ome conduct carries with it unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent.”) (internal quotations omitted).

⁷² *Id.*

unlawful motive under *Great Dane*, that defense does not disprove the specific evidence of unlawful motive under *Wright Line*. The Board therefore correctly declined (J.A. 227) to consider the economic weapon defense as inconsistent with the *Wright Line* stipulation where, before the Board, the Company relied only on *Central Illinois Public Service Co.*,⁷³ which evaluated that defense as a legitimate business justification under a *Great Dane* “inherently destructive” analysis.

The Company has not asked to withdraw its stipulation, let alone shown changed or unusual circumstances that would justify releasing it from its agreement. The “effect” of the stipulation “is that the [parties] have chosen to forego their opportunity to litigate [any other] issue.”⁷⁴ The Company “cannot now, after having received an unfavorable ruling, change the issue presented to the [Board] and require” it to address a different issue.⁷⁵ The Board therefore properly declined to deviate from that stipulation to consider the Company’s *Great Dane*-based defense.

⁷³ 326 NLRB 928, 930 (1998) (“[T]he following framework was developed by the Supreme Court in *Great Dane Trailers...*”).

⁷⁴ *Springfield Television, Inc. v. City of Springfield*, 462 F.2d 21, 23 (8th Cir. 1972).

⁷⁵ *Haynes v. Gasoline Marketers, Inc.*, 84 F. Supp. 2d 1261, 1272 (M.D. Ala. 1999).

2. The Company's economic retaliation defense has no merit

In any event, the Board noted that the Company's defense is "baseless."

(J.A. 227 n.11.) The *Great Dane* cases that the Company cites (Br. 33-39) (each of which involved a strike or lockout during negotiations for a successor collective-bargaining agreement,⁷⁶ circumstances obviously not present here) do not provide the "broad immunity for economic retaliation" that the Company suggests.

(J.A. 228 n.11.)

The Board rightly concluded (J.A. 227 n.11) that an employer may not use an economic weapon to selectively punish employees who engage in protected conduct that the employer does not like.⁷⁷ Yet that is exactly what the Company did here. Only employees who assert their contractual right to participate in memorial periods at a single mine will forfeit their bonuses. And even under the *Great Dane* framework, the Board may find a violation where, as here, "an

⁷⁶ *NLRB v. Brown*, 380 U.S. 278, 279-80 (1995); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 28-29 (1967); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 301-02 (1965); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 222-23 (1963); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 479-80 (1960); *Int'l B'hood of Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 757-58 (D.C. Cir. 1988); *Cent. Ill. Pub. Serv. Co.*, 326 NLRB 928, 928 (1998), *enforced*, *Local 702 IBEW v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000).

⁷⁷ *See Schenk Packing Co.*, 301 NLRB 487, 489-90 (1991) (employer unlawfully discriminated where it only considered employees for employment during lockout if they resigned from union).

affirmative showing of improper motivation” is made.⁷⁸ By amending its bonus plan to punish employees who engage in protected activity – activity enshrined in the parties’ contract – the Company has acted “in the service of designs inimical to the process of collective bargaining.”⁷⁹

Because the Company stipulated to the application of *Wright Line*, admitted it was motivated to amend the bonus plan by its employees’ participation in protected concerted activity, and failed to prove it would have amended the bonus plan absent that protected conduct, the Board reasonably concluded that the Company violated Section 8(a)(3) of the Act. While the use of certain economic weapons may be permissible in cases involving a strike or lockout during negotiations for a successor collective-bargaining agreement as “part and parcel of the system” the Act protects,⁸⁰ an employer subverts that system when it retaliates against a union for asserting a right *it has already won* through the collective bargaining process.

⁷⁸ *Great Dane*, 388 U.S. at 34.

⁷⁹ *Am. Ship Bldg.*, 380 U.S. at 308.

⁸⁰ *Ins. Agents’ Int’l Union*, 361 U.S. at 489 (lawful for union to engage in harassing tactics including work slowdowns after contract expired to pressure employer into reaching terms for successor agreement).

E. The Company’s Objection to the Remedy Is Premature

Finally, the Company objects (Br. 46-47) to the Board’s ordered remedy of backpay because the record did not include any evidence that any employees have suffered monetary losses due to the Company’s illegal behavior. The Company’s objection, however, is premature and should instead be made during compliance proceedings.

Section 10 of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator “to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act].”⁸¹ The Supreme Court has noted that the Board’s remedial power “is a broad discretionary one, subject to limited judicial review”⁸² because the Board “draws on a fund of knowledge and expertise all its own.”⁸³ This Court has repeatedly said that it owes Board remedial orders “special respect” and that review of such orders is limited.⁸⁴

⁸¹ 29 U.S.C. § 160(c).

⁸² *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

⁸³ *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

⁸⁴ *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *see, e.g., Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002) (“[T]he Board is accorded broad discretion in fashioning an appropriate remedy.”); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir. 1998) (“[A] reviewing court must give special respect to the Board’s choice of remedy.”);

As the Supreme Court has noted, the Board’s practice is to litigate liability first “but I[eave] disputes over the details of reinstatement and back pay to the compliance stage of the proceedings,”⁸⁵ including whether anyone is entitled to backpay at all. Indeed, in *Sure-Tan, Inc. v. NLRB*, the Supreme Court reiterated its support for the Board’s procedures and made clear that “compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, *if any*, to which the discharged employees are individually entitled.”⁸⁶

Here, the administrative record closed in 2006 and does not reflect whether or how the Company’s amendment to the bonus policy affected employees after that date. During compliance proceedings, the Board will determine whether any employees were subsequently required to forfeit payment due to the Company’s discriminatory amendment to the bonus plan.

Teamsters Local 115 v. NLRB, 640 F.2d 392, 399 (D.C. Cir. 1981) (“The Board’s choice of remedies is entitled to a high degree of deference.”).

⁸⁵ *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 260 (1969); *see also United Steelworkers of America v. NLRB*, 405 F.2d 1373, 1377 (D.C. Cir. 1968) (noting that an employee’s “right to reinstatement and back pay, if any, can be determined in the compliance proceedings”); *NLRB v. Katz’s Deli of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (likening compliance proceedings to the damages phase of a civil proceeding).

⁸⁶ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (emphasis added).

CONCLUSION

The Company has admitted that it amended the terms of its bonus program in response to its employees' assertion of a right they obtained through collective bargaining and to deter them from asserting that right in the future. Given this admission, the Board reasonably concluded that the Company violated Section 8(a)(3) and (1) of the Act. Accordingly, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's petition for review.

s/Usha Dheenan
USHA DHEENAN
Supervisory Attorney

s/MacKenzie Fallow
MACKENZIE FALLOW
Attorney
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
202-273-2948
202-273-3823

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
DAVID HABENSTREIT
Assistant General Counsel

July 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON MINING, INC., f/k/a)
THE PITTSBURG & MIDWAY COAL)
MINING COMPANY)
)
Petitioner/Cross-Respondent) Nos. 10-1382
) 11-1006
)
v.) Board Case No.
) 27-CA-19566
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
UNITED MINE WORKERS OF AMERICA)
)
Amicus Curiae for 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 9,818 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

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

**STATUTORY
ADDENDUM**

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.....

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 8(d). [Sec. 158(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. . .

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Sec. 10(f). [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON MINING, INC., f/k/a)
THE PITTSBURG & MIDWAY COAL)
MINING COMPANY)
)
Petitioner/Cross-Respondent) Nos. 10-1382
) 11-1006
)
v.) Board Case No.
) 27-CA-19566
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
UNITED MINE WORKERS OF AMERICA)
)
Amicus Curiae for Respondent/)
Cross-Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system; all parties or their counsel are registered users.

s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

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