

Nos. 10-1390, 10-1391

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

**AMERICAN STANDARD COMPANIES INC., AMERICAN STANDARD INC., d/b/a
AMERICAN STANDARD**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC, AND ITS LOCAL UNION NO. 7A**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JILL A. GRIFFIN
Supervisory Attorney

HEATHER S. BEARD
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-1788

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN STANDARD COMPANIES, INC.,)	
AMERICAN STANDARD INC., d/b/a)	
AMERICAN STANDARD,)	
)	
Petitioner/Cross-Respondent)	Nos. 10-1390,
)	10-1391
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED)	
WORKERS INTERNATIONAL UNION, AFL-CIO,)	
CLC, AND ITS LOCAL UNION NO. 7A)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

American Standard (“the Company”) was the respondent before the National Labor Relations Board (“the Board”), and is the petitioner/cross-respondent in Case Nos. 10-1390 and 10-1391. The Board is the respondent/cross-petitioner in Case Nos. 10-1390 and 10-1391 herein. The Board’s General Counsel was a party

before the Board. The Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, and its Local Union No. 7A (“the Union”) was the charging party before the Board, and has intervened before this Court.

B. Rulings Under Review

The ruling under review is a decision and order of the Board (Chairman Liebman and Members Becker and Pearce), in *American Standard Companies, Inc.*, Case No. 8-CA-33477, et al., issued on October 22, 2010, and reported at 356 NLRB No. 4. This decision and order incorporates most of an earlier decision, on May 30, 2008, reported at 352 NLRB No. 80, by two sitting members of the Board (then-Chairman Schaumber and Member Liebman) upholding an administrative law judge’s findings that the Company committed numerous violations of Section 8(a)(1) and (5) of the Act.

C. Related Cases

After the Board’s May 30, 2008 two-member panel decision, the Company petitioned for review of the Board’s Order in the D.C. Circuit. That case was previously before this Court as Case No. 08-1388. The Board subsequently filed a cross-application for enforcement. That case was previously before this Court as Case No. 09-1003.¹ The D.C. Circuit put these cases in abeyance while the issue

¹ Prior to the Company’s petition for review in 08-1388 and the Board’s cross-application for enforcement in 09-1003, the parties were, for a brief while, before

regarding the two-member panel's authority made its way to the Supreme Court for resolution.

The Court subsequently granted the Company's petition for review, denied the Board's cross-application for enforcement, vacated the Board's original 2008 decision in light of the Supreme Court's decision in *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635, 2640 (2010), and remanded the case for further proceedings before the Board.

On October 22, 2010, as discussed above, the Board (Chairman Liebman, and Members Becker and Pearce) issued the Decision and Order at issue here, adopting the Board's prior Decision and Order, and incorporating most of it by reference. *See* 356 NLRB No. 4 (2010).

The Company filed the currently pending petition for review in the D.C. Circuit on November 15, 2010 (No. 10-1390). The Board filed the currently pending cross-application for enforcement on November 17, 2010. (No. 10-1391).

this Court on an earlier petition for review by the Company (No. 08-1242) and an earlier cross-application for enforcement by the Board (No. 08-1380). This Court dismissed the Company's earlier petition for review in No. 08-1242 as incurably premature due to the Company's simultaneous maintenance of a petition for reconsideration before the Board. The Board withdrew, without prejudice, its cross-application in No. 08-1380. Once the Board denied the Company's motion for reconsideration, the Company filed its cross-application in 08-1388 and the Board cross-applied for enforcement in No. 09-1003.

The Union, who was the charging party before the Board, has intervened on the side of the Board.

Finally, Board Counsel are unaware of any related cases either pending in this Court or any other court.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th St., NW
Washington, DC. 20570
(202) 273-2960

Dated at Washington, DC
this 1st day of September, 2011

TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	2
Statement of issues presented	5
Relevant statutory provisions.....	6
Statement of the case.....	6
Statement of facts.....	9
I. The Board’s findings of fact.....	9
A. Background: the Tiffin Plant, its employees and employee pay systems.....	9
B. The Union, the 1997-2002 collective-bargaining agreement, and Company personnel changes in the last year of the collective bargaining agreement.....	10
C. The negotiations for a successor collective-bargaining agreement.....	11
1. The parties’ negotiating committees and objectives	11
2. The parties begin negotiating the non-economic, language issues; outside of negotiations, the company asks employees what they want in a contract and if they will go on strike; the company threatens to close the plant if employees go on strike....	12
3. In late April, the parties are still bargaining over non-economic terms and conditions of employment; the parties bring in a private mediator	13
4. The final days before expiration of the CBA on April 30: the Company brings in a new attorney who insists on switching to economic issues but agrees to re-visit language issues	14

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
5. The parties discuss economic issues.....	15
6. The bargaining sessions from April 30-early morning hours of May 1.....	15
a. <u>April 30 between 10 p.m. and 11:45 p.m.</u> : The union tentatively agrees to a majority of the Company’s economic proposals contingent on the Union securing “the whole package,” including resolution of 37 pending languages issues	16
b. <u>April 30 between 11:45 p.m. and just after midnight on May 1</u> : The company responds to the Union’s counter-offer but fails to address all issues, including the critical, non-economic languages issues; the Union informs the Company that it failed to address outstanding issues; midnight passes	17
c. <u>May 1 just past midnight</u> : The union calls a strike; the company agrees to a medical insurance cap, but still fails to address the 37 remaining language issues; Union President Fatzinger sweeps papers off the table and the union committee leaves	18
d. <u>May 1 between Midnight-1 a.m.</u> : The Company pleads with the Union to call off the strike; mediator Pierson curses and calls the Union stupid for striking over language; Fatzinger explains the significance of the non-economic language issues; Union considers extending contract to negotiate language issues.....	18
e. <u>May 1 just before 1 a.m.</u> : Union agrees to extend the 1997-2002 CBA to negotiate the non-economic terms and conditions of employment; parties pick subcommittee members to negotiate; Union calls off strike.....	20

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
f. May 1 at 1 a.m.: Negotiations resume; the Company attempts to get Fatzinger to sign a statement that agreement has been reached; Fatzinger refuses	20
g. May 1 around 3:30 a.m.: the subcommittee agrees to parts of job bidding proposal and then agrees to break for sleep and return at 10 a.m. to continue negotiating	22
7. At 9 a.m. on May 1, corporate vice-president Heshmati tells staff that negotiations are continuing and ask what employees are saying about the situation.....	22
8. At 10 a.m. on May 1, the Union arrives at the hotel to continue negotiating, but the company claims that the parties have already reached agreement.....	23
9. The shocked union nevertheless makes additional proposals	23
10. Massey again asserts that the parties already reached an agreement; Massey tells the Union that the Company is a “gorilla” and the union is only a “pissant;” Massey threatens to sue each union committee member individually for “a million dollars a day”	24
D. The Company publicly announces that the parties have reached agreement.....	25
E. The Union schedules a May 2 vote on the Company’s last proposal but continues to ask the company to resume negotiations; company officials interrogate employees, threaten to close the plant, undermine the union, and threaten an employee with discharge.....	25
F. The Union puts the Company’s last proposal to a vote and employees reject it; the Union renews its request for further bargaining; the Company refuses and implements its proposal	26

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
G. The Company bypasses the Union to directly deal with employees, tells employees not to send letters to newspapers complaining about working conditions, solicits grievances, hires consultants to deal directly with employees, unilaterally changes clean-up time in the glost department and disciplines two employees	27
H. The Company continues to make more unilateral changes and the Union continues to object; the Company again directly polls employees; the union requests information from the Company but the Company does not provide it for two years	28
I. In July 2003, the parties enter into a settlement agreement; in August 2003, the Company unilaterally reduces demand flow wages; the General Counsel moves to rescind the settlement based on the Company’s breach; the Administrative Law Judge agrees and revokes the settlement agreement	29
II. The Board’s conclusion and order	30
Summary of argument.....	34
Argument.....	37
I. The Board is entitled to summary enforcement of it numerous uncontested findings that the Company engaged in extensive unlawful conduct in violation of Section 8(a)(1) and (5) of the Act	37
II. Substantial evidence supports the Board’s findings that the Company violated Section 8(a)(5) and (1) of the Act by refusing to continue negotiating with the Union and unilaterally implementing it bargaining proposal in May 2002 in the absence of agreement or impasse	40
A. General principles and standard of review: an employer cannot make unilateral changes in mandatory subjects of bargaining absent agreement or impasse.....	42

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
B. The parties did not reach agreement on a new CBA.....	43
1. Applicable principles and standard of review regarding agreement.....	43
2. The parties failed to reach agreement because they did not have a meeting of the minds on all substantive and material issues.....	44
3. The Company’s remaining assertions that the parties reached an agreement are without merit.....	48
C. The parties did not reach impasse over the terms of the company’s proposal.....	51
1. Applicable principles and standard of review	51
2. The Company failed to prove that the parties were at impasse when it implemented its proposal	53
3. The Company’s remaining arguments that the parties reached impasse are meritless.....	56
III. Substantial evidence supports the Board’s findings that the company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing demand flow employees’ wages on August 11, 2003	58
Conclusion	63

TABLE OF AUTHORITIES

Cases	Page(s)
<p><i>*American Federal of Television and Radio Artists, Kansas City Local v. NLRB</i>, 395 F.2d 622 (D.C. Cir. 1968), <i>affirming Taft Broad. Co.</i>, 163 NLRB 475, 478 (1967) (“<i>Taft</i>”)</p>	51,52,54
<p><i>American Standard Companies, Inc.</i>, 352 NLRB No. 80 (2008)</p>	2
<p><i>Carson & Gruman Co. v. NLRB</i>, 899 F.2d 47 (D.C. Cir. 1990)</p>	38
<p><i>Colfor, Inc. v. NLRB</i>, 838 F.2d 164 (6th Cir. 1988)</p>	53
<p><i>Crittendon Hospital</i>, 343 NLRB 717 (2004)</p>	43,47
<p><i>Exxel/Atmos., Inc. v. N.L.R.B.</i>, 28 F.3d 1243 (D.C. Cir. 1994)</p>	44
<p><i>Exxon Chemical Co. v. NLRB</i>, 386 F.3d 1160 (D.C. Cir. 2004)</p>	42
<p><i>First National Maintenance Corp. v. NLRB</i>, 452 U.S. 666 (1981)</p>	61
<p><i>Francis J. Fisher, Inc.</i>, 289 NLRB 815 (1988)</p>	58
<p><i>*Hempstead Park Nursing Home</i>, 341 NLRB 321 (2004)</p>	43,50
<p><i>International Union of Petrol. & Industrial Workers v. NLRB</i>, 980 F.2d 774 (D.C. Cir. 1992)</p>	38

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Intermountain Rural Electric Association</i> , 309 NLRB 1189 (1992)	43
* <i>Litton Finance Printing Division v. NLRB</i> , 501 U.S. 190 (1991)	42
<i>M-K Ferguson Co.</i> , 296 NLRB 776 (1988)	44
<i>M&M Backhoe Serv. Inc. v. NLRB</i> , 469 F.3d 1047 (D.C. Cir. 2006)	37
<i>Milk Marketing, Inc.</i> , 292 NLRB 47 (1988)	60
<i>NLRB v. Brookshire Grocery Co.</i> , 919 F.2d 359 (5th Cir. 1990)	38,39
<i>NLRB v. Capital Cleaning Contractors</i> , 147 F.3d 999 (D.C. Cir. 1998)	44
<i>NLRB v. Frigid Storage, Inc.</i> , 934 F.2d 506 (4th Cir. 1991)	40
* <i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	39,42,43
<i>NLRB v. Powell Electric Manufacturing</i> , 906 F.2d 1007 (5th Cir. 1990)	54
<i>Ne. Beverages Corp. v. NLRB</i> , 554 F.3d 133 (D.C. Cir. 2009)	38,39

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct. 2635 (2010).....	3,8
<i>Outboard Marine Corp.-Calhoun</i> , 307 NLRB 1333 (1992)	52
<i>Pan America Grain Co., Inc.</i> , 343 NLRB 318 (2004) <i>vacated and remanded on other grounds</i> , 432 F.3d 69 (1st Cir. 2005).....	61
<i>Paul Mueller Co.</i> , 332 NLRB 312 (2000)	61
<i>Progressive Electric, Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006).....	37
<i>PRC Recording Co.</i> , 280 NLRB 615 (1986), <i>enforced</i> , 836 F.2d 289 (7th Cir. 1987)	52
* <i>Sitka Sound Seafoods, Inc. v. NLRB</i> , 206 F.3d 1175 (D.C. Cir. 2000).....	38,39
<i>Teamsters Local Union No. 175 v. NLRB</i> , 788 F.2d 27 (D.C. Cir. 1986).....	52,53,57,58
* <i>Teamsters Local Union No. 639 v. NLRB</i> , 924 F.2d 1078 (D.C. Cir. 1991).	52,53,54,55
<i>Traction Wholesale Ctr. Co., Inc. v. NLRB</i> , 216 F.3d 92 (D.C. Cir. 2000).....	38

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>TruServ Corp. v. NLRB</i> , 254 F.3d 1105 (D.C. Cir. 2001).....	57
<i>UFCW Local 304A v. NLRB</i> , 772 F.2d 421 (8th Cir. 1985)	43
<i>United States Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998).....	39,43
* <i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	43
<i>U.S. Marine Corp. v. NLRB</i> , 944 F.2d 1305 (7th Cir. 1991)	40
<i>Vincent Industrial Plast., Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000).....	52
<i>W&M Prop. of Conn. Inc. v. NLRB</i> , 514 F.3d 1341 (D.C. Cir. 2008).....	38
<i>Wycoff Steel</i> , 303 NLRB 517 (1991)	56

* 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)33,37
Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... 2,5,6,31,37,38,39,40,42,58,59,61
Section 8(a)(5) (29 U.S.C. § 158(a)(5))..... 2,5,6,31,37,39,40,42,58,59,61
Section 8(d) (29 U.S.C. § 158(d)).....42
Section 10(a) (29 U.S.C. § 160(a))2
Section 10(e) (29 U.S.C. § 160(e))2,38,43
Section 10(f)(29 U.S.C. 160(f))2

Miscellaneous:

Fed . R App. P. 28(a)(9)(A)38,39,59

GLOSSARY

- “A.”** = **Joint Appendix**
- “the Act”** = **The National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)**
- “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**
- “the Union”** = **Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, and its Local Union No. 7A**

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

Nos. 10-1390, 10-1391

**AMERICAN STANDARD COMPANIES INC., AMERICAN STANDARD
INC., d/b/a AMERICAN STANDARD**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED
WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, AND ITS
LOCAL UNION NO. 7A**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of American Standard Companies, Inc., American Standard Inc., d/b/a American Standard (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order against the Company. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board’s Order is final with respect to all parties.

Previously, a two-member panel of the Board (then-Chairman Schaumber and Member Liebman) issued a Decision and Order in this case on May 30, 2008. *American Standard Companies, Inc.*, 352 NLRB No. 80 (2008) (“the 2008 Decision and Order”) (A. 75-92.)¹ In its decision, the Board found that the Company committed multiple violations of Section 8(a)(1) and (5) of the Act (29 U.S.C. § 158(a)(1), (5)), including refusing to continue negotiations with the Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, and its Local Union No. 7A (“the Union”) in the absence of agreement or impasse, unilaterally implementing new terms and conditions of employment, and many

¹ “A.” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

other unlawful acts. (A. 75-92.) The Board later denied the Company's motion asking the Board to reconsider its decision to issue the case with the two-member panel.

The Company petitioned this Court for review of the 2008 Decision and Order (D.C. Cir. No. 08-1388) and the Board cross-applied for enforcement (D.C. Cir. No. 09-1003). This Court held the case in abeyance while the issue regarding the two-member panel's authority made its way to the Supreme Court for resolution.

On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), which held that a Board delegee group must maintain at least three members in order to exercise the delegated authority of the Board. *Id.* at 2640-42. Accordingly, this Court granted the Company's petition for review, denied the Board's cross-application for enforcement, vacated the Board's 2008 Order, and remanded the case for further proceedings before the Board.

On October 22, 2010, a three-member panel of the Board (Chairman Liebman and Members Becker and Pearce) issued the 2010 Decision and Order now before the Court, reported at 356 NLRB No. 4. The 2010 Decision and Order incorporates by reference most of the 2008 Decision and Order and makes a two-paragraph modification to it. (A. 92.)

The Company filed its petition for review on November 15, 2010. The Board filed its cross-application for enforcement on November 17, 2010. The filings were timely because the Act imposes no time limits on such filings. The Union, who was the charging party before the Board, has intervened on the side of the Board.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its numerous uncontested findings that the Company engaged in extensive unlawful conduct in violation of Section 8(a)(1) and (5) of the Act.
2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by refusing to continue negotiating with the Union and unilaterally implementing its bargaining proposal in May 2002 in the absence of agreement or impasse.
3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reducing demand flow employees' wages on August 11, 2003.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached addendum.

STATEMENT OF THE CASE

This case was before the Board on charges filed by the Union against the Company. After an investigation, the Board's General Counsel issued consolidated complaints alleging that the Company committed multiple violations of the Act, ranging from threatening employees with discharge, to giving employees the impression that their union activities were under surveillance, to making unilateral changes in employees' terms and conditions of employment without bargaining. The Company asserted as an affirmative defense that in May 2002, the parties had reached a new collective bargaining agreement justifying many of the Company's unilateral actions.

On July 29, 2003, shortly after an administrative law judge convened a hearing on the allegations, the parties, with the approval of the judge, entered an informal settlement agreement. On February 2, 2004, however, the Union filed another charge against the Company alleging that in August 2003, the Company unilaterally and discriminatorily changed the wages of certain employees—those who performed “demand flow” work—in violation of Section 8(a)(1) and (5) of the Act. Thereafter, the General Counsel filed a motion to revoke approval of the settlement agreement, reopen the hearing, and amend the consolidated complaint to

add the Union's new charge. On December 10, 2004, the judge granted the General Counsel's motion in relevant part, and the General Counsel reissued the complaint.

In its March 14, 2005 answer to the new complaint, the Company made a brand new assertion. The Company now claimed that in May 2002, not only had the parties allegedly reached an agreement justifying most of the Company's later actions, but had also reached a bargaining impasse at virtually the same time.

On March 29, 2005, the hearing re-opened, and the judge heard 19 days of testimony. On September 18, 2006, the judge issued a decision and recommended order, finding merit in most of the complaint allegations and rejecting the Company's defenses that the parties reached both agreement and impasse in May 2002.

A two-member panel of the Board (Chairman Schaumber and Member Liebman) issued a Decision and Order in this case on May 30, 2008. The two-member panel affirmed most of the judge's findings of fact, conclusions, and recommended order, with some modification. In particular, the panel stated that it "did not need to reach" the issue of whether the judge erred in excluding evidence related to the mediator because "the parties' subsequent conduct—when the mediator was not present—establish[ed] that the parties had not agreed on a successor contract." (A. 76.)

Thereafter, the Company filed a motion for reconsideration, claiming that the two-member Board did not constitute a legitimate quorum of the Board. At the same time, the General Counsel filed a motion for clarification and/or reconsideration of the remedial status of demand flow employees in the Spray Department. The Board denied the Company's motion for reconsideration and granted the General Counsel's motion for clarification, confirming that its remedy included the employees in the Spray Department.

The Company filed a petition for review and the Board filed a cross-application for enforcement of the 2008 Decision and Order, which this Court put into abeyance. After the Supreme Court issued *New Process*, the Court vacated the Board's 2008 Decision and Order and remanded. On October 22, 2010, a three-member panel of the Board issued the 2010 Decision and Order currently before this Court, which incorporates by reference most of the Board's previous two-member panel decision, and makes a two-paragraph substitution discussed below. The facts supporting the Board's decision, as well as the Board's conclusions and order, are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Tiffin Plant, Its Employees, and Employee Pay Systems

As of the hearing, the Company—a large, multi-national corporation with 132 facilities worldwide—operated a manufacturing facility in Tiffin, Ohio (“the plant”). The plant produced large ceramic sinks, toilet bowls, toilet tanks, industrial and hospital sinks, and similar products. (A. 79; 355.)

Employees throughout various departments handled each stage of the manufacturing process: pouring clay or “slip” into molds to create products called “greenware,” firing the greenware in huge kilns, glazing—or “spraying”—the fired pieces, firing the pieces once again, and packaging and shipping the finished products. (A. 79; 356-361.) Prior to April 2002, the Company paid employees in all departments by the hour as well as by incentive systems, such as how many pieces they produced (“piece work”). (A. 87; 389.)

In addition, the Company paid approximately 170 employees in three departments—Kiln, Glost, and Spray—under a “demand flow” system. (A. 88-89; 257.) Under this system, an employee learned the job of the person in the position immediately “upstream” and “downstream” in the production process from his own job, and could also learn up to two additional jobs. (A. 88-89; 257, 981-82.) Supervisors were thus able to flexibly assign demand flow employees to different

jobs at any time, allowing the Company to respond quickly to changing customer needs. (A. 88-89; 257, 811-12.) The Company paid demand flow employees a small hourly premium or pay increment, referred to as a “quarter,” for each additional job the employees learned to perform. (A. 88-89; 257, 454-81, 666, 948-56, 983-84.)

B. The Union, the 1997-2002 Collective Bargaining Agreement, and Company Personnel Changes in the Last Year of the Collective Bargaining Agreement

Since approximately 1945, the Union has represented a unit of all of the plant’s production and maintenance employees. As of 2002, there had been very few strikes, and only one of any appreciable duration during those almost 60 years. (A. 79; 366.)

Until April 30, 2002, the parties operated under a 1997-2002 collective-bargaining agreement (“1997-2002 CBA,” or “CBA”). (A. 79; 170.) In the last year of this CBA, the Company hired a new plant manager, John Carlberg, and a new human resources director, Stan Savukas. (A. 79; 911, 939, 988.)

C. The Negotiations for a Successor Collective-Bargaining Agreement

1. The parties' negotiating committees and objectives

The parties began negotiations for a successor contract in April 2002. (A. 79; 367.)² During the negotiations, the Company's bargaining committee consisted of John Carlberg, Stan Savukas, Controller Dan Pieffer, and Production Manager Leonard Simmons. (A. 79; 388, 540.) At some of the negotiating sessions, especially in late April, Corporate Director of Human Resources Kathy Hartvickson and Corporate Vice President Mo Heshmati participated. (A. 80; 378.) The Company's primary objective was to make dramatic changes in the CBA, including the elimination of incentive pay such as piece work and demand flow, as well as the elimination of many longstanding plant rules and practices. (A. 80; 368-69, 678.)

The Union's bargaining committee consisted of Union President Ronald Fatzinger, Vice President Jerry Haver, Recording Secretary Craig Goshe, Statistician Vincent (Vinnie) Gaietto, Guard Paul Elcher, and International Representative Lloyd Nolan. (A. 80; 484.) While the Union was concerned about employee pay, the Union also sought to address non-economic terms and conditions of employment, sometimes referred to as "language" issues. For

² All dates that follow are in 2002, unless otherwise specified.

example, many employees felt that the Company forced employees to work excessive overtime and gave employees too few days off. The Union also wanted to negotiate over union security and work assignment issues, including job bidding. In addition, the Union planned to negotiate about the grievance process, which had become stalled due to large numbers of stacked-up grievances that the Company had failed to process in the last year of the CBA. (A. 80; 371, 397, 541-42, 820, 1006.)

2. The parties begin negotiating the non-economic, language issues; outside of negotiations, the Company asks employees what they want in a contract and if they will go on strike; the Company threatens to close the plant if employees go on strike

Initially, each party presented its first bargaining proposal, confined to the non-economic terms and conditions of employment. They agreed to later proceed to economic issues, such as wages, cost of living adjustments, pay premiums, and health insurance. (A. 80; 372-77.)

Over the course of the next few weeks, the parties agreed to, reduced to writing, and initialed a few of the non-economic, language issues. (A. 80; 379, 555, 942, 241-64.) The parties also discussed the possibility of expediting the process by having only two negotiators from each side, in “subcommittees,” negotiate the language issues. (A. 601-02.)

While negotiations proceeded, in mid-April, Company agent John Kesler asked employee James Uhrik what employees in his department wanted in a new CBA. Uhrik replied that they wanted better wages and a good contract. Kesler later told Uhrik that Kesler had asked some employees if they would go on strike. (A. 84; 485-87.)

Around this same time, Plant Manager Carlberg called Fatzinger into his office. Carlberg asked Fatzinger why he was talking with employees in the plant. Carlberg told Fatzinger that he didn't "need" the current employees and that if they did go on strike, the Company would "shut the plant down." (A. 84; 550-52.)

3. In late April, the parties are still bargaining over non-economic terms and conditions of employment; the parties bring in a private mediator

By the third week of April, the bargaining had still not progressed beyond the non-economic language issues. On April 23, the Union stated that it did not think the Company was being serious about the negotiations, and, if things did not change, the Union would strike after the expiration of the CBA on April 30. (A. 84; 544-47.)

At the same time, the Union requested that the Company call in a federal mediator to assist the parties. (A. 80; 544-47.) The next day, the Company proposed, and the Union agreed, to use private mediator J.J. Pierson, because a

federal mediator was not available. (*Id.*) On April 26, Pierson joined the discussions. (A. 80; 554.)

4. The final days before expiration of the CBA on April 30: The Company brings in a new attorney who insists on switching to economic issues but agrees to re-visit language issues

On April 27, Company added attorney Desmond Massey to its bargaining committee. (A. 80: 380-81, 383.) During a lengthy presentation, Massey outlined his background, his experience with other negotiations, and the Company's desire to do away with all or most of the past practices developed by the parties over the years. (*Id.*) Massey further stated that he was there only to deal with economic issues. (A. 80; 860.)

On April 27, however, the parties continued almost exclusively to discuss the non-economic, language issues. (A. 80; 381, 556.) Later that day, Massey insisted that the parties leave the non-economic issues for a time. (A. 80; 860-61.) He stated that once the parties agreed on economic issues, the Company was willing to "revisit" non-economic issues. (A. 80; 868.) The Union submitted a counteroffer which listed all the non-economic, or language, issues which were still open. (A. 80; 1051.)

5. The parties discuss economic issues

For the remaining days of April through the 30th, the parties discussed their widely different economic proposals. The Company proposed a comprehensive wage classification scheme for the entire plant that significantly altered the status quo by eliminating piece work and demand flow wages. Moreover, the Company proposed that employees, for the first time, contribute to their own medical insurance. The Union proposed some improvements to wages and benefits, but did not want a complete overhaul of the existing pay system. (A. 80; 388-89, 863.)

6. The bargaining sessions from April 30-early morning hours of May 1

By April 30, the parties had not reached agreement on many economic issues. (A. 81; 384-87.) Company Corporate Vice President Heshmati, who was present at most of the joint bargaining sessions that day, angrily told the Union that the Union's proposals would break the Company. (A. 81; 561-63.)

By approximately 10 p.m., the Company's proposed wage classification system, the new medical insurance plan, and approximately 37 non-economic, language issues were still outstanding. (A. 81; 392, 396, 566-67, 819-20, 862-63, 1052.) The Company's bargaining notes state, "if we have a tentative agreement on outstanding issues, may be inclined to revisit non-economics." (A. 81; 868-69, 978.)

- a. **April 30 between 10 p.m. and 11:45 p.m.: The Union tentatively agrees to a majority of the Company's economic proposals contingent on the Union securing "the whole package," including resolution of 37 pending language issues**

At about 10 p.m., the parties broke into separate caucuses. (A. 81; 394.)

Fatzinger told his committee to consider whether it could accept the Company's proposed economic changes if the parties could reach agreement on the non-economic, language issues. (A. 81; 394-95, 568, 778-79.)

The Union committee then agreed to accept most of the Company's wage changes, but only if they were part of a "total package" that also resolved the open language issues. (A. 81; 394-95, 569-70, 780-82, 821-22, 870-72.) Accordingly, at about 11 p.m., the Union proposed a few caveats to the economic proposals, including reassigning several specific jobs to different classifications, and placing a cap on employees' contributions to medical insurance in the third year of the contract. (A. 81; 397-99, 493, 528-30, 570-72, 783-84, 822-24, 875.) The Union also proposed that the Company agree to the Union's grievance proposal and provide for a full-time paid union representative. (*Id.*) Finally, the Union would only agree to the Company's economic proposal if all outstanding, non-economic, language issues—the Union's top priority—were resolved. (A. 81; 537-38, 571.)

The Union asked the mediator to convey its counter-offer to the Company. (A. 81; 573-75.) While the union committee awaited the Company's response, Union Statistician Gaietto worked at his computer listing the 37 specific non-

economic, language issues that were still left to be resolved. (A. 81; 575-76, 874-75.)

As time passed, and the Company did not respond, Union President Fatzinger made phone calls to update union members who had gathered at the union hall in anticipation of the CBA's midnight expiration. (A. 81; 400-01, 580.) In these phone calls, the second of which he made at approximately 11:45 p.m., Fatzinger told the union members to prepare for a strike. (A. 81; 402-03, 583, 877-78.)

**b. April 30 between 11:45 p.m. and just after midnight on May 1:
The Company responds to the Union's counter-offer but fails to address all issues, including the critical non-economic, language issues; the Union informs the Company that it failed to address outstanding issues; midnight passes**

Around 11:45 p.m., the mediator returned to the Union committee with a response from the Company. (A. 81; 692.) The Company's offer, however, failed to address (1) all of the job classification changes, (2) the Union's proposal of a cap on the medical insurance contribution, and (3) the Union's demand that the outstanding non-economic language issues be resolved. (A. 81; 692, 785, 891.) Although the Company appeared to agree to other Union proposals, the parties did not initial or reduce them to writing. (A. 81; 496, 586, 883, 890, 964.)

The Union sent word through the mediator that the Company had not addressed all the issues. (A. 81; 586-87.) By this time, midnight had passed, but

no one had requested an extension of time for negotiations or an extension of the contract. (A. 81; 588.)

- c. **May 1 just past midnight: The Union calls a strike; the Company agrees to a medical insurance cap, but still fails to address the 37 remaining language issues; Union President Fatzinger sweeps papers off the table and the union committee leaves**

About 15 minutes after midnight, the mediator returned to the union committee with the Company's latest response, in which the Company agreed to the medical insurance cap and one job reclassification in the wage scheme, but still did not agree to continue negotiation of the non-economic language issues. (A. 81; 588, 693, 786, 894.) Around that time, Fatzinger called the union hall again and advised the members to deploy pickets to their assigned areas because they were now on strike. (A. 81; 588, 693.) Fatzinger angrily swept his papers off the table. (A. 81; 403-04, 786, 827-28, 894.) The union committee gathered their papers and left the hotel. (A. 81; 405.)

- d. **May 1 between Midnight-1 a.m.: The Company pleads with the Union to call off the strike; Mediator Pierson curses and calls the Union stupid for striking over language; Fatzinger explains the significance of the non-economic language issues; Union considers extending contract to negotiate language issues**

Shortly thereafter, Fatzinger returned to the hotel retrieve his belongings. As he entered, Corporate Human Resources Director Hartvickson, other members of the Company's committee, and Mediator Pierson stood inside. Hartvickson

pleaded with Fatzinger to stop the strike. (A. 81-82; 591, 594.) Massey stated that he had never heard of a union going out on strike over language issues. (A. 82; 595, 832.) Pierson cursed and called the union committee stupid for striking over language issues. (A. 82; 595.)

Fatzinger replied that the Company did not understand how important the language issues were to the employees. He told the Company that employees had been working 12 hours a day, 7 days a week, and felt they never saw their families. Fatzinger walked up the stairs towards the union caucus room. (A. 82; 595-96, 598.)

Before Fatzinger reached the room, Production Manager Simmons stopped him. Simmons told Fatzinger that they would all lose their jobs if there was a strike, because the Company would shut down the plant. (A. 82; 597, 787, 831-32, 896.)

Once Fatzinger reached the room, he and Nolan—who had also returned to the room to retrieve papers—discussed the possibility of offering to extend the current contract until they could conclude negotiations. They agreed to meet with the Company's committee and returned to the front lobby. (A. 82; 598.)

e. **May 1 just before 1 a.m.: Union agrees to extend the 1997-2002 CBA to negotiate the non-economic terms and conditions of employment; parties pick subcommittee members to negotiate; Union calls off strike**

Fatzinger and Nolan met with Massey and Hartvickson and told them that the Union was willing to extend the current contract in order to finish negotiating the open language items. (A. 82; 600, 614.) In response, Hartvickson nodded affirmatively, thanked them, and hugged Fatzinger. (A. 82; 412, 600, 788, 897.) The parties then agreed to use the expedited process they had discussed earlier in the negotiations, whereby a subcommittee of two people from each committee would negotiate the open language items. (A. 82; 600-02, 977.) The Company chose Carlberg and Savukas for its subcommittee, and the Union chose Gaietto and Vice President Haver. (A. 82; 409, 411, 601-04, 833-34.) Then the Union called off the strike. (A. 82; 1054.) The mediator went to bed and his involvement ended. (A. 92, 76; 599-600, 800, 900, 967.)

f. **May 1 at 1 a.m.: Negotiations resume; the Company attempts to get Fatzinger to sign a statement that agreement has been reached; Fatzinger refuses**

At about 1 a.m. on May 1, the subcommittees began negotiating over the remaining non-economic terms and conditions of employment. (A. 82; 412, 605, 899.) Fatzinger directed his subcommittee to agree, modify, or withdraw its proposals on these issues, in order to try to secure quick agreement to a few of the

most important ones, in return for dropping others. (A. 82; 409.) Heshmati instructed the Company's subcommittee that it did not have to agree to anything, but it should give the Union a few things. (A. 82; 934, 940.)

The subcommittees began negotiating over overtime, agreed on a few parts of that section, and agreed to leave other sections open. After approximately an hour, progress on the overtime language issues slowed, and the parties moved on to the job bidding proposals. They continued to deal with language issues in the job bidding proposal for approximately another hour or so. (A. 82; 413-20, 613, 902, 937, 941.)

In the meantime, Massey called Fatzinger on the phone and asked him to come to the Company's caucus room. Once Fatzinger got there, Massey and Hartvickson began to talk about the negotiations. Fatzinger felt uncomfortable being without his committee, and left. (A. 82; 608-11.)

Later, Massey asked Fatzinger to return to the Company's caucus room. When Fatzinger arrived, Massey, Hartvickson, and Simmons presented him with a piece of paper stating that the parties had reached agreement on economic issues, and that a contract was set to go into effect within 24 hours. Massey asked Fatzinger to sign the paper; Fatzinger refused. (A. 82; 617-20.)

g. May 1 Around 3:30 a.m.: the subcommittee agrees to parts of job bidding proposal and then agrees to break for sleep and return at 10 a.m. to continue negotiating

The subcommittees reached agreement on certain parts of the job bidding proposal. However, around 3:30 a.m., when the parties disagreed about a particular item, Savukas suggested a break. (A. 82; 419-20.)

During the break, Gaietto told Fatzinger that it was going slowly. A few minutes later, Fatzinger suggested to the four subcommittee negotiators that they get some sleep and resume negotiations in the morning. Fatzinger suggested 1 p.m., but Carlberg proposed a morning meeting. They agreed that the four subcommittee negotiators would resume negotiations at 10 a.m. (A. 82; 422, 624, 903, 698, 843-44, 907, 941.)

7. At 9 a.m. on May 1, Corporate Vice-President Heshmati tells staff that negotiations are continuing and asks what employees are saying about the situation

Some of the office staff had come to work at the plant in the event of a strike by the Union. At about 9 a.m., Heshmati arrived at the plant and told the gathered staff that Carlberg and Savukas were not there because they had been up late the night before negotiating. Heshmati stated that negotiations were going to continue that day, as no settlement had been reached. He also questioned the gathered staff,

“what are the employees saying out on the floor” about the situation involving the union, the strike, and the negotiations. (A. 82; 720-45.)

8. At 10 a.m. on May 1, the Union arrives at the hotel to continue negotiating, but the Company claims that the parties have already reached agreement

By 10 a.m., the union committee arrived at the hotel. No Company representatives were there. (A. 82; 423, 625.)

About 30 minutes later, Massey and Hartvickson entered the main negotiating room. Massey announced that there had been some kind of misunderstanding the evening before, and the Company had agreed only to “review” the open non-economic issues, not to “negotiate” them. Nolan became angry, and stated that he knew the difference between negotiate and review. The union committee said they were ready to resume negotiations. Massey stated that agreement on a contract had been reached. Nolan and Fatzinger both stated that no contract had been reached. Massey reasserted that an agreement had been reached. (A. 82; 424, 626-28, 790, 905, 699-700.)

9. The shocked Union nevertheless makes additional proposals

The union committee was, at first, at a loss for a response. They believed the Company was disingenuous in its claim that they had reached an agreement. (A. 82; 630, 791-92.)

However, the Union decided to put forth some alternative proposals to Company. The Union proposed that the parties simply renew the 1997–2002 collective-bargaining agreement for another 3 years. If the Company did not want to accept that option, the Union stated that it would take the Company’s last proposal to the membership to see if the employees would accept it. (A. 82; 424-26, 630, 702, 792.)

Massey asked whether the Union committee would recommend to its members that they accept the Company’s last proposal. Fatzinger responded that they would not recommend and would not oppose it. Hartvickson asked what would happen if the employees rejected the Company’s last proposal. Nolan replied that the Union would give the Company an “orderly shutdown” toward a strike. (A. 82; 427, 634.)

10. Massey again asserts that the parties already reached an agreement; Massey tells the Union that the Company is a “gorilla” and the Union is only a “pissant;” Massey threatens to sue each Union committee member individually for “a million dollars a day”

Massey repeated that the Company took the position that there was a contract. Nolan again said there was no contract, and referred to the four-person subcommittees which had been negotiating the remaining language issues. Massey argued back, raised his voice, and yelled that the Company was a “corporate gorilla,” and in comparison the Union was only a “pissant.” Massey told the union

committee that if the Union went on strike, the Company would sue “each and every one of you” as well as the International Union for a million dollars a day.

(A. 82-83; 429, 635-36, 712.)

D. The Company Publicly Announces That The Parties Have Reached Agreement

At about mid-day on May 1, the Company released news to a local radio station that the parties had “reached an agreement.” The Company also announced to employees that there was a contract, and urged them to vote in favor of it. (A. 83; 523-24, 525.)

E. The Union Schedules a May 2 Vote on the Company’s Last Proposal But Continues To Ask the Company To Resume Negotiations; Company Officials Interrogate Employees, Threaten to Close the Plant, Undermine the Union, and Threaten an Employee With Discharge

The Union scheduled a vote on the Company’s final proposal for May 2. (A. 83; 433-34.) That same date, the Union sent a letter to the Company offering to extend the CBA to May 20 so the parties could continue negotiations. (A. 83; 639-40, 324.)

Also on May 2, company officials had approximately nine conversations with employees. In four of these conversations, supervisors questioned employees about whether they intended to vote, whether they had voted, or how they intended to vote. In seven of these conversations, supervisors stated that if the Union went on strike, the Company would close the plant. In one conversation, Supervisor

Isadore “Mac” MacLaughlin told employee Tom Bushkuhl that “whatever he [Bushkuhl] did, don’t let the Union tell you how to vote.” In another conversation, Supervisor Jim Hall asked employees Tom Plott and Delbert Schank how they were going to vote. Schank told Hall that he was going to vote against the proposal, and Hall then asked Schank three separate times “why he wanted to quit.” (A. 84-85; 522, 525-26, 713.)

F. The Union Puts the Company’s Last Proposal to a Vote and Employees Reject It; the Union Renews Its Request For Further Bargaining; the Company Refuses and Implements Its Proposal

The employees voted against the Company’s last proposal by a large margin. Despite the employees’ rejection, and despite the Union’s subsequent request to return to negotiations, the Company continued to claim that the parties had reached an agreement on May 1. The Company implemented its last proposal on May 7. Immediately thereafter, the Union filed an unfair labor practice charge against the Company. (A. 83; 266-316, 325-28.)

The Company’s implemented proposal significantly changed the employees’ wages and working conditions. The Company eliminated piece work payments, implemented new work rules and incentive plans, and announced a shorter probationary period for new employees. In addition, although the Company continued to assign demand flow employees to various jobs in their departments in the same way and with the same frequency as before, it asserted that it no longer

operated a demand flow system. Consistent with that assertion, it implemented a new pay structure, which gradually reduced the former demand flow employees' wages over the next year or two. On later grievances it filed under the implemented proposal, the Union consistently wrote that it did not "waive any of its rights" to challenge the implementation of the new proposal. (A. 87, 89; 391, 446-49, 517-18, 641-46, 266-316, 320.)

G. The Company Bypasses the Union to Directly Deal with Employees, Tells Employees Not to Send Letters to Newspapers Complaining About Working Conditions, Solicits Grievances, Hires Consultants to Deal Directly with Employees, Unilaterally Changes Clean-Up Time in the Glost Department, and Disciplines Two Employees

Later in May, supervisors in the Glost department individually polled employees on their preference for an 8-hour or a 12-hour shift. The supervisors did not first consult the Union. The Company then implemented a new schedule based on such preferences. (A. 86; 716.)

In July, Corporate Vice President Heshmati met with employees and chided them because they had written letters to local newspapers complaining about working conditions. Heshmati told these employees that he "wanted these letters to stop." In addition, Heshmati asked the employees what they were dissatisfied about, and told them that he "was there to get the problem solved." (A. 86; 714-15, 717-18.)

In late July, about July 24 or 25, Vice President for Human Resources Larry Costello visited the plant and held meetings with employees. Costello told the employees he was having a “skip-level” meeting with them and asked them what problems they were having. He also told them he would look into the problems they raised and “fix” them. Costello further told the employees that he thought the parties had a deal in the negotiations and the Union tried to back out of the deal. (A. 87; 651-62, 838.)

In August, consultants hired by the Company met with employees and asked them what problems they were having with the Company. The consultants told employees that they were there “to make the plant a better place to work.” (A. 87; 656.) That same month, the Company changed the time that employees in the Spray department were allowed to start cleaning up their work areas. The Company did not consult the Union over this change. The Company also disciplined two employees, Vincent Gaietto and Richard Mizen, for not complying with this change. (A. 87; 438-53, 1040.)

H. The Company Continues to Make More Unilateral Changes and the Union Continues to Object; The Company Again Directly Polls Employees; The Union Requests Information from the Company But the Company Does Not Provide it for Two Years

In September, the Company informed the Union that it was going to make changes to one of its newly-implemented incentive programs. The Union agreed

not to contest the new changes, but reiterated the Union's objections to the original unilateral change to the programs. (A. 321.)

From November until the summer of 2003, the Company implemented new reward, prize, and bonus programs without bargaining with the Union. In January 2003, the Company implemented a new attendance policy and even more incentive programs. (A. 75 n.6; 663.)

In June 2003, the Company again directly polled employees in the Glost Department about shift preferences, without first consulting the Union. (A. 86; 957-60.) That same month, the Union requested information from the Company about employee payroll records that detailed variations in employees' pay resulting from overtime bypass or other pay variations. The Company did not provide the Union with any of the information until March 2005. Even then, the Company did not provide the Union with all the requested payroll records. (A. 88; 482-83.)

I. In July 2003, the Parties Enter Into a Settlement Agreement; In August 2003, The Company Unilaterally Reduces Demand Flow Wages; The General Counsel Moves to Rescind the Settlement Based on the Company's Breach; The Administrative Law Judge Agrees and Revokes The Settlement Agreement

As noted, the Union filed unfair labor charges against the Company in May 2002. In late July 2003, for a short time, the parties entered into a settlement agreement of those charges. (A. 87; 266-316.)

Under the settlement agreement, the Company agreed to restore the wages, hours, and working conditions of the employees as they had been on April 30, 2002. However, on August 10, 2003, the Company restored the wages rates of demand flow employees to their base rates under the old CBA, but without any of their pay increments or “quarters.” The Company took this action without any notice to, or consultation with, the Union. In this way, the Company again significantly reduced the demand flow employees’ wages from their April 30 levels. (A. 89; 323.)

Immediately thereafter, the General Counsel and the Union informed the Company that its actions with respect to the demand flow employees were not consistent with the agreement to restore pre-unfair labor practice wages. The Company disagreed. The General Counsel moved to rescind the settlement agreement. The administrative law judge granted the motion. (A. 89; 857.)

II. THE BOARD’S CONCLUSION AND ORDER

Based on the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge, loss of jobs, and plant closure; threatening employees with lawsuits because of their union activities; giving employees the impression that their union activities, and those of other employees were under surveillance; requesting

employees report on the union activities of other employees; soliciting grievances and impliedly promising to remedy them; soliciting employees' opinions on specific contract issues during bargaining; instructing employees to stop engaging in the protected activity of writing letters to newspapers about their wages, hours, or working conditions; disparaging the union to employees; undermining and bypassing the union; and coercively interrogating employees about their union activities. (A. 92, 75-92.)

The Board found that the Company violated Section 8(a)(1) and (5) by refusing to continue negotiations with the Union, by falsely asserting that agreement had been reached and unilaterally implementing the terms of its bargaining proposal; dealing directly with employees and bypassing the union; unilaterally polling employees about working hours; unilaterally implementing attendance, prize, incentive, and bonus programs without notice to the Union or affording the Union an opportunity to bargain; changing clean-up times and disciplining two employees based on that change; failing to provide relevant information requested by the Union; and unilaterally changing the wages of demand flow employees without notice to the Union or affording the Union an opportunity to bargain. (A. 92, 75-92.) Although it incorporated virtually all of the two-member panel's 2008 Decision and Order, the Board substituted two paragraphs for the third full paragraph at page 645 of the 2008 decision. (A. 92.)

In its new decision, the Board explained that it “decline[d] to pass” on the Company’s argument that the judge erred by excluding certain evidence from the mediator because the evidence, even if admitted, would not affect the Board’s analysis. In so doing, the Board affirmed the judge’s finding that the parties did not have a meeting of the minds on a successor agreement, specifically noting that “contrary to both the parties’ prior practice and the common collective-bargaining process generally,” there was no written agreement or signed or initialed document memorializing the alleged agreement. The Board also specifically observed that the parties “in fact” negotiated over the outstanding economic issues in the early morning hours of May 1, “when the mediator was no longer present,” and that Company Vice President Heshmati himself told employees that negotiations were ongoing when they arrived at work on May 1. Thus, the Board found that “these various forms of compelling evidence” demonstrated “that neither the Union’s nor [the Company’s] principals believed an agreement had been reached.” Thus, “the testimony of the mediator and related evidence that the judge refused to receive would not change our conclusion that [the Company] violated Section 8(a)(5) when it refused to continue negotiations in the absence of impasse or agreement on May 1, and its related actions after that time.” (A. 92.)

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 the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157.) (A. 76-77, 90-92.)

Affirmatively, the Board ordered the Company, upon the Union's request, to bargain with the Union and rescind the changes in terms and conditions of employment made unilaterally from May 7, 2002 through August 11, 2003; provide the Union with the information it requested in June 2003; make the employees whole; remove from its files any reference to the discipline of Gaietto and Mizen and notify them within three days that this has been done and the discipline will not be used against them; and preserve and provide to the Board records necessary to analyze the amount of backpay due. The Board also ordered the Company to post remedial notices. (A. 76-77, 90-92.)

SUMMARY OF ARGUMENT

During negotiations for a new contract, the Company committed numerous, now uncontested, hallmark violations of the Act. Nonetheless, the parties continued negotiating and the Union eventually agreed to most of the Company's proposed economic changes. In return, the Union sought negotiations over the remaining 37 non-economic, or language issues, including work assignments and overtime. After a brief strike at midnight upon contract expiration, the Union and the Company agreed to extend the terms of the expired CBA to allow time for negotiation over these 37 remaining issues. Bargaining into the wee hours of May 1, 2002, the parties agreed to break for sleep and finish negotiations later that morning. However, when the Union bargaining committee returned, it was met with the Company's stunning announcement that the parties had already reached an agreement. Despite the Union's repeated denials of agreement and entreaties to continue negotiating, the Company stubbornly implemented its last proposal. Following this implementation, the Company committed still more violations of the Act, most of which are not challenged here. This case involves the Company's conduct during this period and its shifting defenses for such conduct.

The Company's brazen assertions about what took place in May 2002 utterly ignore that the judge uniformly credited the testimony of the Union witnesses that negotiations were ongoing and eviscerated the credibility of the Company

witnesses. The Company offers no challenge to these credibility determinations. Given the credited facts, the record amply demonstrates that the parties were engaged in the bargaining process until the Company unilaterally declared it over, announced far and wide that the parties had reached agreement, and then unlawfully implemented the proposal over the Union's objections.

The Company's attempt to elevate the significance of the mediator's testimony excluded by the judge is without merit. As a factual matter, the mediator, who had retired to bed, was not even present at the relevant time. Moreover, the Board found "compelling evidence" demonstrated that neither the Union's nor the Company's principals believed an agreement had been reached. The parties did not sign or initial an agreement, the Union called a brief strike upon contract expiration, the parties engaged in negotiations after the mediator was no longer involved, and Company Vice President Heshmati announced that there was no agreement just before the Company claimed that there was. In the face of this compelling evidence, the Board declined to pass on the Company's arguments regarding the mediator's testimony because his testimony would not change its conclusion that the Company unlawfully refused to continue bargaining.

Although the Company later changed its theory to impasse, it cannot change the credited facts. As the Board found, the credited evidence exhaustively demonstrates that the parties can no more justify their May 2002 implementation

on the grounds of impasse than it can on agreement. Finally, the Company's August 2003 reduction to demand flow wages is yet another unlawful unilateral change for which its defenses fail. As the judge found, the evidence "exhaustively established" that the Company continued to assign employees to demand flow work in the same way as they had before, but changed employees' wages for such work without bargaining. Accordingly, the Company's 2003 actions constitute an additional violation of the Act.

ARGUMENT**I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS NUMEROUS UNCONTESTED FINDINGS THAT THE COMPANY ENGAGED IN EXTENSIVE UNLAWFUL CONDUCT IN VIOLATION OF SECTION 8(a)(1) AND (5) OF THE ACT**

The Company has not contested—either before the Board or this Court—numerous Board findings (A. 75 n.5). Specifically, the Company has not contested that it violated Section 8(a)(1) of the Act by threatening employees with discharge, loss of jobs, and plant closure; giving employees the impression that their union activities, and those of other employees, were under surveillance; requesting employees report on the union activities of other employees; soliciting grievances and impliedly promising to remedy them; soliciting employees’ opinions on specific contract issues during bargaining; instructing employees to stop engaging in the protected activity of writing letters to newspapers about their wages, hours, or working conditions; disparaging the Union to employees; undermining and bypassing the Union; and coercively interrogating employees about their union activities.³

³ 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 rights guaranteed in Section 7 of [the Act].” Section 7 of the Act (29 U.S.C. § 157) grants employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection” *See also Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (threats); *M&M Backhoe Serv. Inc. v. NLRB*, 469 F.3d 1047, 1051

Under settled law, the Board's order with respect to these uncontested findings is entitled to summary enforcement. *See Int'l Union of Petrol. & Indus. Workers v. NLRB*, 980 F.2d 774, 774 n.1 (D.C. Cir. 1992); *Carson & Gruman Co. v. NLRB*, 899 F.2d 47, 49 (D.C. Cir. 1990). *See also* Section 10(e) of the Act (29 U.S.C. § 160(e)) (party waives argument by failing to file exceptions before the Board).

In addition, although the Company took exception before the Board to the judge's finding that it unlawfully threatened to sue employees for one million dollars in retaliation for protected activity, the Company dropped that argument in its opening brief. Accordingly, it has waived any challenge to what is now the Board's uncontested finding (A. 85) that Massey's threat constituted "an egregious example of coercive conduct" that violated Section 8(a)(1) of the Act. Fed. R. App. P. 28(a)(9)(A) (argument in brief before the Court must contain party's contentions with citation to authorities and record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 n.2 (5th Cir. 1990)

(D.C. Cir. 2006) (surveillance); *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 103 (D.C. Cir. 2000) (solicitation of grievances); *Ne. Beverages Corp. v. NLRB*, 554 F.3d 133, 137, 140 (D.C. Cir. 2009) (direct dealing and bypassing union); *W&M Prop. of Conn. Inc. v. NLRB*, 514 F.3d 1341, 1348-49 (D.C. Cir. 2008) (interrogation).

(Board entitled to summary enforcement when employer does not challenge Board finding in opening brief).

Likewise, the Company took limited exceptions to the Board's additional findings that the Company violated Section 8(a)(5) and (1) of the Act on several occasions following its unlawful unilateral implementation in May 2002, but has dropped any challenges to these findings in its opening brief. Thus, the Board is entitled to summary enforcement of the following Section 8(a)(5) and (1) violations based on the above facts (pp. 26-29): dealing directly with employees and bypassing the Union; unilaterally polling employees about working hours; unilaterally implementing attendance, prize, incentive, and bonus programs without notice to the Union or affording the Union an opportunity to bargain; changing clean-up times and disciplining two employees based on that change; and failing to provide relevant information requested by the Union.⁴ Fed. R. App. P. 28(a)(9)(A); *Sitka*, 206 F.3d at 1181; *Brookshire*, 919 F.2d 363 n.2.

Significantly, those findings do not disappear simply because they have not been contested by the Company. Rather, they remain in the case, "lending their

⁴ Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." As discussed at p. 42 n.5, a Section 8(a)(5) violation is also an independent violation of Section 8(a)(1). *See also Ne. Beverages Corp. v. NLRB*, 554 F.3d 133, 137, 140 (D.C. Cir. 2009) (direct dealing and bypassing union); *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (failure to bargain); *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (failure to provide information).

aroma to the context in which the [contested] issues are considered.” *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991); *see also NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991) (“the Company cannot contest certain charges in a vacuum by not contesting others”).

The aroma of these uncontested violations is particularly foul here. These multiple violations occurred contemporaneously with the bargaining negotiations and related events that remain at issue. Moreover, the primary findings that the Company contests—unlawful unilateral changes without bargaining—are of the same type as many of these uncontested violations.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO CONTINUE NEGOTIATING WITH THE UNION AND UNILATERALLY IMPLEMENTING ITS BARGAINING PROPOSAL IN MAY 2002 IN THE ABSENCE OF AGREEMENT OR IMPASSE

Introduction

The primary issue on appeal involves the Company’s May 2002 imposition of a final bargaining proposal—foisting new wages, hours, and conditions of employment—on its union-represented employees. An employer cannot unilaterally take such action unless it can demonstrate that it did so pursuant to an agreement with the union, or if it can establish that it reached a bargaining impasse. As demonstrated below, ample evidence supports the Board’s finding that the parties reached neither agreement nor impasse—and, in fact, were still

negotiating—when the Company abruptly implemented its final proposal. Accordingly, the Company’s unilateral implementation and related actions were unlawful.

The Company’s defense has significantly evolved in response to the overwhelming evidence of its unlawful conduct. As noted, the Company argued for years that its unilateral changes were justified because, it claimed, the parties had reached an agreement in May 2002. Just before the hearing, however, the Company asserted that its unilateral changes were justified because the parties had reached a bargaining impasse at virtually the same time. Now, in its opening brief before this Court (Br. 29-40), the Company leads with its belated impasse defense—and moves the time that it claims impasse was reached (Br. 34) from the morning of May 1 (almost simultaneous with agreement), to the afternoon of May 1, culminating in implementation on May 7.

As shown below, however, the Company’s conveniently-shifting impasse defense does not exist in a vacuum; indeed, it must be assessed in the context of the Company’s repeated contradictory assertions that the parties reached an agreement. Thus, we first demonstrate that the Board reasonably found that the parties had not reached agreement at the time the Company announced its final offer—regardless of anything Mediator Pierson could have testified to before he retired for the night and no longer participated in the negotiations. We then show

that the Company's repeated false assertion of such an agreement, among other factors, fatally undermines its belated impasse claim.

A. General Principles and Standard of Review: An Employer Cannot Make Unilateral Changes in Mandatory Subjects of Bargaining Absent Agreement or Impasse

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 8(d) of the Act requires employers to bargain collectively before introducing changes “with respect to wages, hours, and other terms and conditions of employment.” *Id.* § 158(d).

Accordingly, an employer violates Section 8(a)(5) by making any unilateral changes to mandatory bargaining subjects covered by Section 8(d) without first bargaining to impasse or agreement.⁵ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Agreement or impasse is required because the terms and conditions of employment from the previous CBA continue in effect by operation of the Act; they are no longer agreed-upon

⁵ A violation of Section 8(a)(5) is also a violation of Section 8(a)(1), which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise” of their statutory right to bargain collectively through representatives of their own choosing. 29 U.S.C. § 158(a)(1); *see also Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

terms but terms imposed by law, at least insofar as there is no unilateral right to change them. *Katz*, 369 U.S. at 736.

B. The Parties Did Not Reach Agreement on a New CBA

1. Applicable principles and standard of review regarding agreement

To determine whether parties have reached agreement on a CBA, the Board assesses whether parties have reached a “meeting of the minds” on all substantive issues and material terms of an agreement. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004); *Intermountain Rural Elec. Ass’n*, 309 NLRB 1189, 1192 (1992). Whether the parties have reached a meeting of the minds “is determined not by parties’ subjective inclinations, but by their intent as objectively manifested in what they said to each other.” *Crittendon Hosp.*, 343 NLRB 717, 718 (2004); *M-K Ferguson Co.*, 296 NLRB 776, 776 n.2 (1988).

Whether parties had a meeting of minds is a question of fact for the Board to determine in the first instance. *UFCW Local 304A v. NLRB*, 772 F.2d 421, 425-26 (8th Cir. 1985). Board findings of fact are “conclusive” as long as they are supported by substantial evidence. *See generally* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). *See also United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (“The court applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable

inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.”)

Moreover, this Court gives great deference to an administrative law judge’s credibility determinations, as adopted by the Board. *Exxel/Atmos, Inc. v. NLRB.*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). Indeed, this Court defers to such credibility determinations unless they are “hopelessly incredible,” “self-contradictory,” or “patently unreasonable.” *NLRB v. Capital Cleaning Contractors*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

2. The parties failed to reach agreement because they did not have a meeting of the minds on all substantive and material issues

Substantial evidence supports the Board’s finding (A. 92) that the parties failed to reach agreement on 37 substantive and material non-economic terms and conditions of employment, or “language” issues. Accordingly, the Company’s claim (Br. 40-41, 41 n. 6) that the parties agreed to the Company’s implemented proposal is specious.

The overwhelming weight of the evidence demonstrates that the 37 non-economic, language issues—part of the “total package” that the Union wanted in exchange for conceding to the Company’s economic demands—were substantive and material to the Union. Indeed, the Union briefly struck after the midnight deadline passed and there was still no resolution to these issues. As discussed

above at p. 20, the Union also made clear after it called off the strike that it was doing so, and agreeing to extend the contract, to negotiate over these 37 language issues. (A. 82-83; 598, 600, 604.)

The Company's claim of agreement is further belied by the credited evidence that the parties agreed to continue negotiating, and not just "discussing," the remaining issues after the Union called off the strike. The judge expressly found (A. 81 n.7) that the Union negotiating team (Fatzinger, Gaietto, Haver, and Baker)—all of whom stated that the Company agreed to continue negotiating after the Union called off the strike—"testified in a careful and detailed manner," and displayed demeanors showing that they were "serious in [their] attitude and w[ere] attempting to do [their] best to recall the events [they] w[ere] being asked about."

In stark contrast, the Company's witnesses (Massey, Hartvickson, and Carlberg)—who asserted that agreement had been reached around midnight and that they only agreed to "discuss" the language issues—"displayed large areas of lack of recollection of the detailed events of the evening," gave "conclusory" testimony "about crucial events," and "glossed over important areas without any detail." Significantly, the judge specifically found (A. 80 n.6, 81) Massey to be "a strikingly unconvincing witness, evincing bluster and aggression in his demeanor, failing to listen carefully to questions, and testifying inconsistently in several instances." The Company has not challenged these crucial credibility findings.

In addition, as the Board found (A. 92), “compelling evidence” belies the Company’s assertion that agreement was reached. As the Board observed (A. 92), the Union only agreed to extend the CBA after its brief midnight strike to “continue negotiating over the outstanding noneconomic issues.” Not only did the Union express its desire to negotiate these issues and pick a subcommittee to do so, but the Board noted (A. 83) that the Company also “designated a bargaining subcommittee consisting of the two local managers . . . to sit down with a two-member union subcommittee at a table.” Moreover, the Board found that Corporate Vice President Heshmati instructed the Company’s negotiators “to ‘give’ on some issues.” The Board therefore reasonably concluded (A. 83) that the parties’ conduct after midnight “looks exactly like bargaining,” and found “that it was bargaining.” (A. 83.)

Moreover, after noting (A. 83) that “there is no credible evidence in this record” that the Company made it clear to the Union at any relevant time that it was using the word “discuss” in a “specialized sense, rather than its ordinary meaning,” the Board concluded (A. 83) that the Union “was entitled to apprehend [the Company’s] intention to discuss or talk about the unresolved issues as an agreement to continue bargaining about them.” The Board thereby rejected (A. 83) the Company’s “late-raised contentions that it did not agree to continue bargaining,

that it used the word ‘discuss’ only, and that ‘discuss’ meant something other than its ordinary meaning.”

As the Board further observed (A. 92, 83), there was no signed or initialed overall document “memorializing the alleged agreement between the parties prepared at any time on May 1.” The absence of such a document was “contrary to both the parties’ prior practice and the collective-bargaining practice generally.” (A. 92, 83.) Accordingly, the Board concluded (A. 83) that this was “strong evidence of the absence of agreement, of the meeting of the minds.” *See Crittendon Hosp.*, 343 NLRB 717, 718-19 (2004) (lack of affirmative evidence of agreement strongly suggests no meeting of the minds). Fatzinger also notably refused to sign the “paper”—asserting that the parties had reached an agreement—that Massey and Hartvickson gave him while the subcommittee was negotiating. (A. 82.)

The Board found additional compelling evidence (A. 92, 82 and n.9) in the testimony of “particularly impressive witness” Elizabeth Cleveland. Her uncontested testimony (A. 735-37)—that at 9 a.m. on May 1, Company Vice President Heshmati stated that negotiations were going to continue and that the

parties had not reached a settlement—powerfully demonstrates that negotiations were still going on, and there was no agreement, after the parties broke for sleep.⁶

As exhaustively demonstrated above, by 10 a.m. on May 1, both parties had objectively indicated that they had not reached agreement. Thus, as the Board found (A. 83), the Company’s sudden claim to the contrary was not only surprising to the Union, but, “would be surprising to any reader of the record evidence.” Accordingly, the Board reasonably concluded that at no time “on the night of April 30 through the morning of May 1” had the parties “agreed to *all* the terms of a collective-bargaining agreement.”

3. The Company’s remaining assertions that the parties reached an agreement are without merit

The Company essentially makes two assertions (Br. 40-52) in an attempt to salvage its claim that its unilateral actions were justified because the parties reached an agreement on May 1. First, the Company asserts (Br. 40-52) that it should have been allowed to present testimony by, and certain evidence related to, Mediator Pierson, which it claims would show that the parties had reached an

⁶ The Company’s weak attempt (Br. 43) to minimize the significance of Heshmati’s announcement by claiming it is “hardly determinative,” ignores the import of his status as a principal company official making a contemporaneous statement in direct contradiction of the Company’s later position.

agreement.⁷ Second, the Company frivolously asserts (Br. 41 n.6), that the Union “acquiesced” to the implemented proposal after the fact. Both assertions fail.

To begin, the Board explicitly addressed (A. 92) the Company’s repeated claim (Br. 42) that its proffered mediator evidence would support the discredited assertion that the parties reached an agreement. As the Board found (A. 83), Mediator Pierson “went to bed and was no longer involved” before the parties actually continued their negotiations without him. *See also* A. 92 (“The parties agreed to continue negotiating over the outstanding economic issues, and the parties in fact did so in the early morning hours of May 1, when the mediator was no longer present.”). Thus, regardless of the Company’s proffered claim of what the mediator believed before he went to bed, the credited evidence detailed above demonstrates that after the mediator retired for the night, the subcommittee negotiated—not merely “discussed”—the open language issues until taking a break at 3:30 a.m.⁸ As the Board found (A. 82) the “conduct looks exactly like

⁷ The Company mischaracterizes (Br. 41, 44, 51) the judge’s ruling on the mediation evidence throughout its brief, falsely asserting that the judge found the mediator evidence “highly relevant.” To the contrary, the judge found (A. 81 n.8) that the parties were “the only ones whose testimony will show whether a ‘meeting of the minds’ occurred.”

⁸ Earlier in negotiations, well before Mediator Pierson became involved, the parties had discussed using the subcommittee structure that it used after Mediator Pierson went to sleep, further buttressing the Board’s finding that the parties were engaged in bargaining. (A. 601.)

bargaining,” and indeed “was bargaining.”⁹ It is also uncontested that Heshmati stated as late as 9 a.m. on May 1—well after the mediator was gone—that negotiations were still on-going.

Based on the above “forms of compelling evidence that neither the Union’s nor [the Company’s] principals believed an agreement had been reached,” the Board reasonably found (A. 92) that the testimony of the mediator and related evidence that the judge refused to receive would not change its conclusion that the Company refused to continue negotiations in the absence of agreement.¹⁰ Accordingly, the Company’s claim is without merit.

Finally, the Company makes the incredulous claim (Br. 41, n.6) that the Union should be estopped from complaining about the implemented proposal because it “acquiesced” after the Company implemented it. To the contrary, to the

⁹ Any understanding by the mediator that the parties reached an agreement before he went to bed—at odds with the judge’s findings based on her credibility determinations of the parties themselves—could, at best, indicate that there had been ambiguity earlier in the evening. To the extent there was any such ambiguity, it only weakens the Company’s claim. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004) (“When misunderstandings may be traced to ambiguity for which neither party is to blame, or for which both parties are equally to blame, and parties differ in their understanding, [even] their seeming agreement will create no contract.”).

¹⁰ Because the Board declined to pass on the issue, this Court should disregard the Company’s substantive argument (Br. 47-52) that the judge erred in applying the mediation privilege to exclude the evidence at issue. If this Court determines, however, that the Board should have resolved this issue, the Board requests that this Court remand it to the Board for consideration in the first instance.

extent it could, the Union consistently objected to the implemented proposal by stating such objections on grievance forms and in correspondence to the Company, not to mention filing the unfair labor practice charges that underlie this litigation. The Union simply had no other choice in the matter once the Company implemented the proposal. Thus, the Company's frivolous estoppel claim should also be disregarded.

C. The Parties Did Not Reach Impasse Over the Terms of the Company's Proposal

Despite the clear evidence that the parties had not reached agreement on May 1, the Company consistently proclaimed—to the media, to its employees, and to the Union—that they had. Indeed, as discussed above, for years the Company relied on its “agreement” to justify its implementation of new terms and conditions of employment in May 2002. In this context, the Company's belated and inconsistent impasse defense (Br. 29-40) can be exposed for the fallacy that it is.

1. Applicable principles and standard of review

A genuine impasse in negotiations exists when “there [is] no realistic prospect that continuation of discussion at that time would [be] fruitful.” *American Fed. of Television and Radio Artists, Kansas City Local v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) (“*AFTRA*”), *affirming Taft Broad. Co.*, 163 NLRB 475, 478 (1967) (“*Taft*”). The burden of establishing that an impasse exists rests with the

party asserting it. *See e.g., Outboard Marine Corp.-Calhoun*, 307 NLRB 1333, 1363 (1992).

The Board considers a number of factors in determining whether impasse exists. Those include the “bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations” *Taft*, 163 NLRB at 478.

The Board does not require that all the *Taft* factors militate in favor of a finding of impasse. “Of central importance” is “the parties’ perception regarding the progress of the negotiations.” *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Hence, there can be no impasse unless “[b]oth parties in good faith believe that they are at the end of their [bargaining] rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987). Further, impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole. *Vincent Indus. Plast., Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000) (citation omitted).

The Board’s finding as to impasse may not be disturbed unless it is irrational or unsupported by substantial evidence. *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986) (“*Teamsters Local 175*”). Indeed, “in the whole complex of industrial relations few issues are less suited to appellate judicial

appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems.”

Teamsters Local 639, 924 F.2d at 1083 (attribution omitted).

2. The Company failed to prove that the parties were at impasse when it implemented its proposal

Substantial evidence supports the Board’s finding (A. 83) that “the record evidence can simply not be contorted into a shape” that would support the Company’s impasse argument. First, during the course of the negotiations, the parties made tremendous progress on critical economic issues, including the Union’s concession to the elimination of many long-held wage policies. This concession, contingent on resolving the language issues, paved the way for the two-on-two subcommittee negotiations that made further progress on the language issues of overtime and work assignments. *See Colfor, Inc. v. NLRB*, 838 F.2d 164, 167 (6th Cir. 1988) (overall progress is considered in determining impasse); *Teamsters Local 175*, 788 F.2d at 31 (continuous negotiating progress is “strong evidence” against an impasse).

The parties’ conduct during the critical last hours of the negotiations strongly demonstrates that both the Union and the Company both believed that fruitful negotiating could continue—right up until the Company’s artificial declaration that negotiations were over at 10 a.m. on May 1. Indeed, the Board reasonably found (A. 83) that the subcommittee had “not even finished going

through all the non-economic issues, much less come to final positions on them,” when the parties agreed to reconvene at 10 a.m. In addition, before they broke for sleep at 3:30 a.m., “each side ‘reserved’ on some items,” which the Board aptly observed (A. 83) “is ordinarily understood to mean that the parties mean to come back to those items,” not that they were at their final positions. *See Taft*, 163 NLRB at 478 (contemporaneous understanding of the parties as to the state of negotiations is factor in determining if impasse exists); *see also Teamsters Local 639*, 924 F.2d at 1084 (parties’ perception regarding the progress of negotiations is “of central importance” to determining if impasse exists); *NLRB v. Powell Elec. Mfg.*, 906 F.2d 1007, 1012-13 (5th Cir. 1990) (impasse did not exist where union made counteroffers just prior to employer’s declaration of impasse, and was willing to negotiate).

Tellingly, even when the Company artificially declared an end to negotiations after 10 a.m. on May 1, the Board found (A. 83)—without contradiction—that “no person on [the] Company’s negotiating committee used the word ‘impasse,’” but instead, they stated the exact opposite, that “there was a contract.” This completely inconsistent statement—coupled with Vice President Heshmati’s 9 a.m. admission that “the parties will still negotiating”—further puts

the lie to the Company's claim that the parties had reached an impasse when the Company abruptly refused to continue bargaining.¹¹

Finally, as the Board found (A. 92), even "in the face of the Company's impudent claim that a contract had been reached the preceding night," the Union showed that "it was ready to continue coming up with offers and alternative proposals." Indeed, the Union offered to continue the previous CBA in effect (which constituted a concession to the continuation of the non-economic, language issues in the old CBA), or to submit the Company's last proposal to the employees for a vote. Moreover, even after the employees voted to reject the Company's proposal on May 2, the Union made a written request to the Company to extend the old CBA pending further negotiations—a request met, again, with the Company's brazen assertion, in writing, that the parties had already reached an agreement. (A. 324, 325-28.)¹² The Union's flexibility and willingness to move under these circumstances is strong evidence against impasse. *See Teamsters* 639, 924 F.2d at 1084 ("if either negotiating party remains willing to move further toward an

¹¹ The Company mischaracterizes (Br. 38) the Board's finding here, claiming that the Board based its finding of no impasse "solely" on the fact that the Company did not use the word "impasse." As discussed, this was only one piece of the Board's analysis. Nevertheless, the Company's failure to utter a claim of impasse at the crucial time, in favor of a stubborn assertion of agreement, is, by itself, a powerful indication that the Company did not believe it had reached impasse.

¹² This request refutes the Company's assertion (Br. 33) that it was "undisputed" that the Union did not seek further negotiations.

agreement, an impasse cannot exist”); *Wycoff Steel*, 303 NLRB 517, 523 (1991) (parties’ demonstrated flexibility and willingness to compromise is an additional consideration relevant to the existence of impasse). Accordingly, the Board reasonably concluded (A. 83-84) that “these facts, taken together, preclude a finding of impasse.”

3. The Company’s Remaining Arguments That The Parties Reached Impasse are Meritless

The Company now attempts to deny any inconsistency in its defenses by claiming that (Br. 37) that the parties became entrenched in their bargaining positions, not early in the morning on May 1, but “later” that day or by “the afternoon.” The fatal flaw in this wishful contention is that there is no evidence whatsoever that the Company’s position changed a whit from its consistent (albeit false) assertion, beginning at 10 a.m. on May 1, that it believed that the parties had reached agreement. The Company cannot deny that from May 1 to May 7, it repeatedly announced, to whomever would listen—including a local radio station—that the parties had reached agreement, not impasse. Indeed, in a letter to the Union on May 6, the Company rebuffed the Union’s written request to continue negotiating by stating that the parties had reached agreement, not impasse. (A. 325-28) Thus, the Company’s repeated claim of agreement—unchanged from May 1 to May 7—belies its claim, years later, that the parties

reached not agreement, but impasse, by the afternoon of May 1. The Company simply cannot escape the import of its own contradictory behavior.

Moreover, the Company's stubborn claim that it had reached agreement with the Union, despite ample evidence that the parties were still negotiating, is a key fact that distinguishes this case from *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1115 (D.C. Cir. 2001), on which the Company heavily relies. (Br. 35-36, 39-40.) Indeed, directly contrary to the Company's false mantra (Br. 9, 32, 33) that it bargained in good faith like the employer did in *Truserv*, the judge explicitly found (A. 84) that was not the case here: "if [the Company] had been acting in good faith, [it] should have returned to the bargaining table once its last proposal had been rejected." The Company did not, choosing instead to adhere to its false assertion of agreement.

Further, in *Truserv*, the parties remained far apart on crucial wage proposals when the Company stated it had reached its final offer. *Truserv*, 254 F.3d at 1112. In contrast, the Union here made a substantial economic concession, essentially accepting almost all of the Company's economic proposal, just hours before the Company stopped bargaining.

The Company's reliance (Br. 39) on dicta in *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986)—that there was a "perhaps arguable" circumstance under which impasse and agreement could simultaneously co-exist—

also misses the mark. The musing from *Teamsters Local 175* is at odds with this Court’s actual holding in that case—that the supposed simultaneous agreement and impasse there did not, in fact, co-exist.¹³ Indeed, as noted above, the Court called the general proposition a “non-sequitor.” *Id.*

Thus, the Company has failed to impugn the Board’s finding that the parties were no more at impasse than they were at agreement when the Company implemented the terms of its new CBA. As the Board found (A. 84), “[the Company’s] abandonment of negotiations when no agreement had been reached and no impasse had been reached” and its “implementation of its last proposal in the absence of agreement or impasse” violated Section 8(a)(5) of the Act.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY REDUCING DEMAND FLOW EMPLOYEES’ WAGES ON AUGUST 11, 2003

As established above, an employer cannot make a unilateral change in a mandatory subject of bargaining without first bargaining to either agreement or impasse with the Union. Substantial evidence supports the Board’s finding (A. 76 n.11, 89) that the Company’s additional reduction of demand flow employees’ wages on August 11, 2003 —restoring base rates but failing to also restore their

¹³ Moreover, after *Teamsters Local 175* was decided, the Board reversed an earlier case suggesting that impasse and agreement could co-exist. *See Francis J. Fisher, Inc.*, 289 NLRB 815, 815 n.1 (1988) (overruling prior law to the extent indicating that impasse and tentative agreement may exist simultaneously).

incentives or “quarters”—constituted yet another impermissible violation of Section 8(a)(5) and (1) of the Act because the Company “fail[ed] to bargain over the decision and effects of abolishing the [d]emand [f]low wages.” The Company simply has not established otherwise.

As an initial matter, the Company’s conduct cannot be insulated from examination by its oblique assertion (Br. 21, 23) that it had stopped using demand flow principles, and thus it had no duty to pay demand flow wages.¹⁴ Any such claim is conclusively belied by the judge’s finding (A. 89) that “the evidence at trial established exhaustively that [the Company] continued to assign employees to various jobs in their departments in the same way and with the same frequency” both before and after it claimed it had eliminated demand flow principles. *See e.g.*, A. 802-03,850-51 (in practice, the Company continued to move employees up and down the line even after it claimed that demand flow had been discarded).

The Company’s remaining defenses are similarly without merit. First, it contends (Br. 52-56) that the Board cannot find an unfair labor practice based solely on a breach of a settlement agreement. However, the Board did not do that.

¹⁴ The Company only specifically defends (Br. 53-61) its actions regarding the demand flow wages in the context of its August 2003 reduction. In contrast, as regards the Company’s earlier demand flow wage reduction in May 2002, it has raised no defenses other than the agreement and/or impasse justification, discussed extensively above. Thus, the Company is foreclosed from applying the defenses it makes vis-à-vis its August 23, 2003 wage reduction to its earlier wage reduction in May 2002. *See Fed. R. App. P. 28(a)(9)(A).*

The Board's finding of an unlawful unilateral change is based on the Company's August 2003 elimination of demand flow incentive pay—an unfair labor practice in its own right. Accordingly, the Company's citation (Br. 54-56) to *Milk Marketing Inc.*, 292 NLRB 47 (1988) is unavailing. In that case, the Board simply held that conduct in breach of a settlement that, standing alone, would not also be an unfair labor practice, could not separately be deemed an unfair labor practice. *Milk Mktg.*, 292 NLRB at 48-49 (employer had “no obligation to bargain over the effects other than what might be incumbent on it by terms of the settlement,” and thus no stand-alone unfair labor practice). This is not such a case.

In addition, the Company's attempt to excuse its conduct—because, it says, it was merely attempting to abide by the settlement agreement (Br. 57)—ignores its actual behavior. As the Board found (A. 89), rather than seeking to comply with the settlement agreement, the Company “admittedly decided on the change to demand flow wages on its own” by restoring base rates without the associated incentive pay. The Board found (A. 89) that such a change, “*without consulting* the Union or the General Counsel about whether the change was proper compliance,” constituted “unilateral buccaneering” that “cannot be seen as a responsible attempt to comply with a settlement agreement.” Accordingly, the Board reasonably found (A. 89) that the Company's conduct “could not be insulated from examination on that basis.”

The Company additionally asserts (Br. 58-61) that in the language of the expired CBA, the Union waived any right to bargain over demand flow wages. However, as the Board correctly observed (A. 89) and the Company ignores, since there “was no [CBA] in effect,” any such alleged waiver would not continue. *See Pan Am. Grain Co., Inc.*, 343 NLRB 318, 318 (2004), *vacated and remanded on other grounds*, 432 F.3d 69 (1st Cir. 2005); *Paul Mueller Co.*, 332 NLRB 312, 313 (2000). To the extent the Company argues (Br. 22, 57) that the short-lived settlement agreement revived the expired contract, the judge’s eventual revocation of that agreement forecloses such a claim.

Finally, there is no merit to the Company’s passing claim (Br. 57) that it did not have to bargain over the wage reduction because “demand flow is a manufacturing process” that could be terminated “at any time, pursuant to the Company’s management rights.” As the Board reasoned (A. 89), and the Company does not contest, such an argument is beside the point because “at minimum,” the change to demand flow employees’ wages was “an ‘effect’ about which [the Company] clearly had a duty to bargain.” *See First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (well settled that even where an employer’s decision is not a mandatory subject of bargaining because the decision is an exclusive management prerogative—an employer nonetheless violates Section 8(a)(5) and (1) of the Act by failing to give its employees’ bargaining

representative advance notice and an opportunity to bargain about that decision's effect on employee's interests). Thus, as the Board stated (A. 89), "without any possibility of cavil," the Company "owed the Union notice of its intent to reduce the wages of the demand flow employees in August 2003, and an opportunity to bargain about the change." The Company did not do so. Accordingly, this Court should enforce the Board's finding that the Company unlawfully reduced employees' demand flow wages in August 2003.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review, grant the Board's cross-application for enforcement, and enforce the Board's Order in full.

/s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

/s/ Heather S. Beard
HEATHER S. BEARD
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-1788

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Acting Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

September 2011

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq., and the Federal Regulations (“C.F.R.”), are excerpted below:

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

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 of 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 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 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 157 of this title;

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

Section 10 of the Act (29 U.S.C. § 160):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(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. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. 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. . . .

(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 a court a written petition praying that the order of the Board be modified or set aside. . . .

Regulations:

Federal Rule of Appellate Procedure 28(a)(9)(A):

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

- (9) the argument, which must contain:
- (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN STANDARD COMPANIES INC.,)
AMERICAN STANDARD INC., d/b/a)
AMERICAN STANDARD)
)
Petitioner/Cross-Respondent) Nos. 10-1390
) 10-1391
)
v.) Board Case No.
) 8-CA-33352
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 13,541 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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

Dated at Washington, DC
this 1st day of September, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN STANDARD COMPANIES INC.,)
AMERICAN STANDARD INC., d/b/a)
AMERICAN STANDARD)
)
Petitioner/Cross-Respondent) Nos. 10-1390
) 10-1391
)
v.) Board Case No.
) 8-CA-33352
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 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.

I certify foregoing document was served on all those 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:

Gregory L. Murphy
Vorys, Sater, Seymour and Pease, LLP
1909 K St NW, 9th Floor
Washington, D.C. 20006-1152

David A. Campbell
Daniel J. Clark
G. Ross Bridgman
Vorys, Sater, Seymour and Pease, LLP
P.O. Box 1008
52 East Gay Street
Columbus, OH 43216

Ross Andrews
Satter & Andrews
217 S. Salina St., 6th Floor
Syracuse, NY 13202

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

Dated at Washington, DC
this 1st day of September, 2011