Nos. 10-1400; 10-1403

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**MONMOUTH CARE CENTER,
MILFORD MANOR NURSING AND REHABILITIATION CENTER, AND
PINEBROOK NURSING HOME**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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MILFORD MANOR NURSING AND	*	
REHABILITIATION CENTER,	*	
AND PINEBROOK NURSING HOME	*	Nos. 10-1400, 10-1403
	*	
Petitioner/Cross-Respondent	*	
	*	
v.	*	
	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and *Amici*: Monmouth Care Center ("Monmouth"), Milford Manor Nursing and Rehabilitation Center ("Milford"), and Pinebrook Nursing Home ("Pinebrook") (collectively "the Employers") are the petitioners/cross-respondents before the Court; the Employers were the respondents before the Board. The Board is the respondent/cross-petitioner before the Court; its General Counsel was a party before the Board. There are no *amici* in this case. Service Employees International Union 1199 New Jersey Health Care Union was the charging party before Board.

B. Ruling Under Review: This case involves the Employers' petition to review, and the Board's application to enforce, a Decision and Order of the Board issued on November 17, 2010, and that is reported at 356 NLRB No. 29.

C. Related Cases: The Board is unaware of any related cases pending in this Court or any other court.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Dated at Washington, DC
This 13th day of October 2011

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(29 U.S.C. § 151 et seq.)

GLOSSARY

A	Joint Appendix
Act	National Labor Relations Act
Agency Employees	Temporary Employees Used by the Employers and Provided by Employment Agencies
Agency Personnel	Temporary Employees Used by the Employers and Provided by Employment Agencies
Board	National Labor Relations Board
Br	Petitioners' Opening Brief
Employers	Monmouth Care Center, Milford Manor Nursing and Rehabilitation Center, and Pinebrook Nursing Home
Local 1199	Service Employees International Union 1199 New Jersey Health Care Union
Milford	Milford Manor Nursing and Rehabilitation Center
Monmouth	Monmouth Care Center
MOU	Memorandum of Understanding
Pinebrook	Pinebrook Nursing Home
Tuchman Agreement	Collective-Bargaining Agreement Between Local 1199 and an Employer Group Represented by Morris Tuchman
Union	Service Employees International Union 1199 New Jersey Health Care Union

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition for review of Monmouth Care Center ("Monmouth"), Milford Manor Nursing and Rehabilitation Center ("Milford"), and Pinebrook Nursing Home ("Pinebrook") (collectively "the Employers"), and the cross-application of

the National Labor Relations Board ("the Board") to enforce, a Board Order against the Employers. The Board found that the Employers committed unfair labor practices by failing and refusing to timely and completely supply relevant information requested by Service Employees International Union 1199 New Jersey Health Care Union ("Local 1199" or "Union") and by failing and refusing to meet and bargain in good faith with the Union.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. The Court has appellate jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that any person aggrieved by a Board order may seek review of the order in this Court, and Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides that the Board may cross-apply for enforcement.

The Board's Decision and Order issued on November 17, 2010, and is reported at 356 NLRB No. 29. (A 73-74.)[1] It is a final order with respect to

[1] Record references in this final brief are to the Joint Appendix (A) or to the Supplemental Joint Appendix (SA). When a reference contains a semicolon, references preceding it are to findings of the Board. References following the semicolon are to the supporting evidence. When a "p." follows a reference to the supporting evidence, it refers to the specific transcript page on which the supporting evidence is found.

all parties under Section 10(e) and 10(f) of the Act (29 U.S.C. § 160(e) and 160(f)). The Decision and Order incorporates by reference the findings and reasoning of a prior decision in this case, which issued on April 27, 2009, and is reported at 354 NLRB No. 2.[2] (A 10-74.)

The April 27, 2009 decision was issued at a time when the Board only had two sitting members. In 2009, the Employers petitioned the Court for review of that order, and the Board cross-applied for enforcement. Before the case was briefed, the Court placed it in abeyance pending the final resolution of the validity of decisions issued by the two-member Board. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members. 130 S. Ct. 2635 (2010). After the Supreme Court's decision, the Court granted the Board's request that the case be remanded for disposition by a properly-constituted Board. The Board then issued its November 17, 2010 Decision and Order that incorporated by reference the April 27, 2009 decision.

[2] Because the November17, 2010 Decision and Order incorporates the April 27, 2009 Decision and Order, all cites to the findings of the Board will be made to the April 27, 2009 Decision and Order.

The Employers filed their petition for review of the November 17, 2010 decision and order on November 24, 2010, and the Board filed its cross-application for enforcement on December 1, 2010. All filings were timely; the Act places no time limits on petitioning for review, or applying for enforcement of Board orders.

STATEMENT OF THE ISSUES

I. Section 10(e) of the Act deprives courts of jurisdiction over issues not presented to the Board. The Employers failed to contest the Board's finding that they violated Section 8(a)(5) and (a)(1) of the Act by failing to timely and completely provide information needed to administer and police the collective-bargaining agreement. Is the Board entitled to summary enforcement of this finding?

II. Section 8(a)(5) of the Act requires that parties bargain in good faith. As part of that duty, an employer must provide the union with relevant information upon request. The Board found that the Employers, during negotiations for a collective-bargaining agreement, failed to timely and completely supply relevant information requested by Local 1199. Does substantial evidence supports the Board's finding that the Employers

violated Section 8(a)(5) and (1)[3] of the Act by failing to provide the relevant information requested by Local 1199?

III. The bargaining duty imposed by Section 8(a)(5) of the Act, as defined in Section 8(d), requires that the parties meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and condition of employment. The Board found that the Employers, by failing to respond to the Union's bargaining requests and by refusing to schedule bargaining dates, failed to meet and confer at reasonable times. Does substantial evidence supports the Board's finding that the Employers violated Section 8(a)(5) and (1) by failing to meet at reasonable times and confer in good faith with Local 1199?

RELEVANT STATUTUTORY PROVISIONS

Relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

Acting upon charges filed by Local 1199, the Board's General Counsel issued a complaint alleging that the Employers violated Section

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[3] An employer's failure to meet its Section 8(a)(5) bargaining obligation results in a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights." *See Verizon New York, Inc. v. NLRB,* 360 F.3d 206, 207 (D.C. Cir. 2004.)

8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to fully and completely provide relevant information requested by Local 1199, and by failing to meet and confer with Local 1199 with respect to wages, hours, and other terms and conditions of employment. (SA 4-9.) After a hearing, an administrative law judge found merit to the General Counsel's allegations and issued a decision and recommended order. (A 10-72.) The Employers filed exceptions to the administrative law judge's decision. On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended order as modified. (A 10-14.) In particular, the Board affirmed the administrative law judge's finding that the Employers violated Section 8(a)(5) and (1) of the Act by failing to provide relevant information upon request and by failing to meet at reasonable times for the purpose of collectively bargaining with the Union. (A 10-14.)

The Board's findings of fact are set forth below; its conclusions and order are summarized thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDING OF FACTS

A. Background and Bargaining History

The Employers are long-term nursing homes, located in Englishtown (Pinebrook), West Milford (Milford), and Long Branch (Monmouth), New

Jersey. (A 14-15.) The Employers are all managed by the same management company, Gericare, and also have the same owners. (A 15; 117 (p. 232), 166 (pp. 460-61).) Eleanor Harris serves as human-resources director for Gericare. (A 15; 215 (p. 769).) David Jasinski has represented the Employers as their attorney since the mid-1990s. (A 15; 192 (p. 648).) Jasinski and Harris have served as the Employers' bargaining representatives since the early 2000s. (A 15; 77 (p. 21), 217 (p. 779).)

The Employers and Local 1199 have a long-standing bargaining relationship and have agreed to successive Memorandums of Understanding ("MOU") extending the terms, as modified in the respective MOUs, of prior agreements.[4] (A 15-16; 123 (p. 255), 848-53, 987-1078, 1109-43.) Prior to the 2005 bargaining discussed below, the Employers and Local 1199 bargained jointly and signed a single MOU covering the Employers. (A 16; 117 (p. 232), 848-53.)

The Employers also had a practice of using employment agencies to supply temporary workers ("agency employees" or "agency personnel") on a

[4] Sometime during Jasinski's tenure as the Employers' attorney, the employees' former collective-bargaining representative, Local 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board ("Local 1115"), merged with Local 1199. (A 6; 125 (p. 266).) After the merger, the Employers recognized Local 1199 as the employees' bargaining representative and the collective-bargaining agreements between Local 1115 and the Employers remained in effect. (A 6; 125 (p. 266).)

"needs basis." (A 16; 245 (p. 931).) The Union was aware of the practice but did not protest until sometime in 2001, when it filed a grievance over the practice. (A 16; 145 (p. 932).) The grievance was settled as part of the 2001 MOU negotiations, with the parties agreeing to a provision that allowed the Employers to "utilize [a]gency personnel to a maximum of 25% of total staffing." (A 17; 192 (p. 650), 246 (pp. 934-37), 850-53.) The 2001 MOU also provided that the Union would be responsible for monitoring the 25 percent figure and that "all agency personnel employed after (1) year . . . shall become union members." (A 17; 192 (p. 650), 850-53.)

The Union, as permitted under the terms of the 2001 MOU, reopened bargaining in 2002. (A 17; 117 (p. 232), 193 (p. 652), 850-53.) During the 2002 negotiations, the parties agreed to increase the permissible use of agency employees to 40 percent, with the other terms regarding agency personnel remaining the same. (A 17; 243 (p. 925), 848-49.) On December 14, 2002, the parties executed an MOU extending the contract to March 31, 2005. (A 17; 848-49.)

In early 2005, the Union and the Employers began bargaining for a new MOU. (A 18; 194 (p. 658).) The 2005 negotiations, in contrast to the Employers' and Local 1199's prior bargaining practices, were conducted

independently for each facility.[5] (A 21; 86 (p. 58), 118-19 (pp. 238-39).) Uma Pimplaskar represented the Union at the first bargaining sessions for each of the three Employers and presented the Union's initial proposals. (A 18; 79 (p. 29), 93-94 (pp. 89, 93-94), 152 (p. 388), 255-56.) Justin Foley replaced Pimplaskar as the Union's chief negotiator in April 2005 and served in that capacity until July 15, 2005. (A 25; 93 (p. 89).) Larry Alcoff, who has negotiated over 50 nursing-home contracts in New Jersey alone, then assumed the lead negotiator role for the Union. (A 25; 116 (pp. 228, 230), 158 (p. 422).)

B. Local 1199 Requests Information Necessary for Bargaining Purposes

Local 1199 first requested information from the Employers regarding the 2005 negotiations on January 20, 2005. (A 20; 93 (p. 89), 856-59.) The January 2005 request, made by letter to the Employers, sought 24 different items and requested information related to the use of agency personnel. (A 20; 856-59.) Much of the requested information was provided by Jasinski at the initial bargaining sessions with Pimplaskar, but certain agency-usage information was not. (A 20; 98 (pp. 110-12).)

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[5] The Union repeatedly requested that the facilities be bargained for jointly. (A 21, 23; 86 (p. 58), 118 (p. 238).) Jasinski, asserting that each Employer was a separate facility, rejected the Union's requests. (A 21, 23; 86 (p. 58), 118 (p. 238).)

At the May 11, 2005, bargaining session between Local 1199 and Monmouth, Foley advised Jasinski that Monmouth had not fully complied with the January 2005 request and that the missing information was needed for bargaining purposes.[6] (A 20; 78 (p. 26).) Local 1199's bargaining representative continued to advise Jasinski that the information requests had not been fully complied with at numerous subsequent bargaining sessions.[7] (A 20-28; 80-82 (pp. 36, 39, 44-45), 86 (p. 58), 88 (pp. 65-66), 90 (p. 75), 124 (p. 261).) In addition to the oral requests made at the bargaining table, Foley sent letters to the Employers on May 14 and May 21, 2005, renewing the information requests and requesting additional information. (A 20-21; 494-96, 499-500.)

On August 30, 2005, Alcoff sent the Employer identical information requests. (A 31; 128 (p. 277), 1082-86.) The letters requested 11 different items (A 32; 1082-86.):

(1) All information ordered by the NLRB in Case 22-CA-26745 regarding the use of Agency personnel;

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[6] The failure to provide the information requested in the January 20, 2005, letter was not alleged as an unfair labor practice.

[7] These include the May 16, 2005 session with Pinebrook, the June 3, 2005 session with Monmouth, the June 13, 2005 session with Milford, the June 15, 2005 session with Pinebrook, the June 29, 2005 session with Pinebrook, the July 8, 2005 session with Monmouth, and the August 12, 2005 session with Monmouth. (A 20-28; 80-82 (pp. 36, 39, 44-45), 86 (p. 58), 88 (pp. 65-66), 90 (p. 75), 124 (p. 261), 494-96, 499-500.)

(2) A list of all A-Best employees including: name, job title, shift, date of hire by A-Best, first date of work at [the Employer], hours worked in each calendar year since first date worked at [the Employer], current wage rate, any benefits provided, address, city, zip, home phone number, and social security number;

(3) Any memoranda or employee handbook outlining the policies of A-Best;

(4) A list of all employees hired in the past six (6) months, including: name, job title, years of service in the industry and job category, and the staring rate of pay for each employee;

(5) Any wage survey conducted by the employer as a basis for the proposal of establishing minimums based on years of service in the industry and job category;

(6) Any written policy on merit pay or bonuses, a list of the factors to be evaluated in determining merit pay or bonuses, and any evaluative measurement that shall be used in determining merit pay or bonuses;

(7) Any correspondence from [the Employer] to the Union proposing merit pay since 2002;

(8) Cost in each year of the contract of the Merit Pay proposal and basis for determining said cost;

(9) Documents describing tuition or training reimbursements available to employees in the bargaining unit;

(10) A complete copy of cost reports submitted, including supplemental submissions, for reimbursement from Medicaid and from any other public entity or funding source for the years 2002, 2003, and 2004; and

(11) Total gross annual payroll for the bargaining unit.

Jasinski responded by letter on behalf of Monmouth on September 8, 2005. (A 32, 52; 130 (p. 285), 1087-89.) Jasinski's letter stated that items (1), (2), (3), and (4) were irrelevant to bargaining; that wage surveys were conducted by "several Associations" and therefore Monmouth was not in possession of item (5); that items (6), (7), (8), and (9) did not exist; that item (10) was available to Local 1199 via the employees; and that item (11) had already been provided. (A 32, 52; 1087-89.) On September 9, 2005, Jasinski sent a virtually identical letter to Local 1199 on behalf of Pinebrook. (A 33, 52; 1090-92.) Milford's response, if any, was never entered into evidence. (A 33.)

At the September 12, 2005, bargaining session between Local 1199 and Pinebrook, Alcoff and Jasinski discussed the August 2005 information request. (A 33, 52; 131-32 (pp. 290-91).) Alcoff asserted that the requested agency-usage information was relevant because the Employers' use of agency personnel constituted the central issue in negotiations and because the information was necessary for Local 1199 to develop economic proposals. (A 33; 131-32 (pp. 290-91).) Alcoff also stated that, upon receipt of the agency-usage information, Local 1199 was prepared to modify its proposals. (A 33; 133 (pp. 295-96).) Jasinski responded by reiterating that items (1), (2), and (3) were irrelevant to the negotiations; asserting that items

(6), (7), (8), and (9) did not exist; and agreeing to provide items (4), (10), and a copy of the most recent collective-bargaining agreement. (A 33, 52; 132 (p. 291), 133 (p. 296).) Alcoff memorialized the above discussion and, later the same day, renewed Local 1199's request in a letter to Jasinski. (A 24, 43; 1093-94.)

The Employers partially responded to the August 2005 information request in late September 2005. (A 34, 53; 133 (p. 297), 502-26.) On October 10, 2005, Alcoff wrote Jasinski regarding the Employers. (A 34, 53; 134 (pp. 300-01), 1097-99.) In this letter, Alcoff stated that a copy of the most recent collective-bargaining agreement and the agency-usage information – items (1), (2), and (3) in the August 2005 request – had not been provided. (A 34, 53; 134 (pp. 301-02), 1097-99.) Alcoff also requested a list of all bargaining-unit employees terminated since January 1, 2005, and a copy of all work schedules for each nursing, dietary, and housekeeping unit since April 1, 2005. (A 35, 53; 1097-99.) In a November 2, 2005 letter, Alcoff again asked that the Employers furnish the missing information. (A 35, 53; 1106-08.)

On November 3, 2005, at a bargaining session between Local 1199 and Pinebrook, Alcoff reminded Jasinski that Pinebrook had not provided the requested agency-usage and employee-turnover information or a copy of

the most recent collective-bargaining agreement. (A 29, 53; 137 (p. 322).) Jasinski asserted that the information was irrelevant. (A 29, 53; 137 (p. 322).) On January 25, 2006, Alcoff provided Jasinski with information that the Employers had requested and requested that Jasinski respond to Local 1199's outstanding information requests. (A 36; 139-40 (pp. 330-31), 1146.) Jasinski did not reply. (A 29; 139 (p. 330).)

On May 8, 2006, Local 1199 filed unfair practice charges against the Employers alleging that since August 30, 2005, the Employers had failed and refused to provide relevant information necessary for bargaining purposes. (A 53, SA 7-9.)

On June 23, 2006, Alcoff sent Jasinski another letter referencing the Employers. (A 38; 140 (p. 332), 1147-48.) The letter requested bargaining dates and additional information (A 38-39, 53; 140-41 (pp. 332-35), 1147-48):

> (1) A current list of all employees performing bargaining unit work by job classification in seniority order, including name, address, social security number, job title, date of hire, wage rate, shift, enrollment in health insurance, part-time or full-time status, number of hours worked and paid since January 1, 2006, personal days, and/or holidays earned but unused;
>
> (2) A copy of any and all correspondence to employees since September 1, 2005, regarding any terms or conditions of employment;

(3) Copies of any personnel policies or the employee handbook that were changed and/or provided to employees on or after September 1, 2005;

(4) A list of all A-Best and other Agency personnel working in each facility and the number of hours each employee has worked since September 1, 2005;

(5) A copy of any A-Best employee handbook, current wage rates paid to A-Best employees in each facility, any memoranda to A-Best or from A-Best or Gericare or related entities regarding terms or conditions of employment. Copies of any correspondence between A-Best and Gericare or related entities regarding this request for information, including any responses from A-Best;

(6) Any and all summary reports or data used by the Employer in each facility to monitor compliance with the collective-bargaining agreement restrictions on Agency personnel;

(7) The aggregate cost to the employer of the health, dental, vision, and life insurance plans for bargaining unit employees from January 1, 2006, through May 31, 2006;

(8) The gross bargaining unit payroll from January 1, 2006, through May 31, 2006; and

(9) A list of all bargaining unit employees who have terminated employment for any reason since on or after September 1, 2005, including name of the employee, job title, date of hire, reason given for termination, final wage rate, shift, and last date of employment.

Jasinski did not respond to the letter until the end of October when he sent letters on three consecutive days: an October 31, 2006 letter on behalf of Pinebrook; a November 1, 2006 letter on behalf of Monmouth; and a November 2, 2006 letter on behalf of Milford. (A 39-40, 53; 1149-54.) The

letters were all similar in content and asserted that the Employers had already provided all the documents responsive to Local 1199's information requests. (A 39-40, 53; 1149-54.)

On December 1, 2006, Alcoff responded by separate letter to the Employers. (A 40, 53; 142 (p. 341), 1155-57.) The letters were all similar in content and advised Jasinski that neither the August 2005 nor the June 2006 information request had been fully complied with. (A 40-41, 53; 1155-57.) The letters also reminded Jasinski that the requested information was needed by Local 1199 to develop counterproposals. (A 40-41; 1155-57.) Jasinski responded, asserting that the information had been provided at the commencement of negotiations, but, nevertheless, would be provided again. (A 42, 53; 1158-59.)

In early January 2007, the Employers partially responded to Local 1199's June 2006 information request. (A 42, 54; 145-46 (pp. 358, 364), 538-66.) On February 9, 2007, Alcoff wrote Jasinski a letter in which he reviewed the status of the June 2006 information request paragraph by paragraph. (A 43; 143-44 (pp. 350-51), 1160-61.) In the letter, Alcoff stated that the information requested in paragraphs (3), (5), (7), (8), and (9) had not been provided; that the information requested in paragraphs (1) and (4) had not been completely provided; and asked that Jasinski confirm that

the information requested in paragraph (2) did not exist and that all of the information regarding paragraph (6) had been provided. (A 43; 1160-61.) Jasinski never responded to Acloff's February 9 letter, and the Employers never provided any additional information. (A 43, 54; 233 (p. 858).)

C. Local 1199 Requests Information Necessary To Administer and Police the Collective-Bargaining Agreement

Sometime in late 2005 or early 2006, Local 1199 filed a grievance against the Employers, alleging that each had failed to place agency personnel in the bargaining unit and had failed apply the terms of the contract to those employees. (A 36; 247 (p. 950).) On January 20, 2006, Local 1199, by its attorney Ellen Dichner, sent identical information requests to the Employers. (A 36, 51; 828-33.) The letter requested that certain information regarding bargaining-unit employees and agency personnel be produced by February 15, 2006. (A 36, 5; 828-33.)

Dichner received no response from the Employers by the requested date, so she sent a follow-up letter to Jasinski on February 27, 2006. (A 36, 51; 827.) Dichner's second letter alerted Jasinski that none of the requested information had been provided, renewed the request, and warned that unfair labor practice charges would be filed if the information was not provided. (A 36, 51; 827.) On March 3, 2006, Jasinski partially responded to the information requests. (A 37, 51; 835.) In a letter dated March 13, 2006,

Dichner acknowledged receipt of the provided information but advised Jasinski that the Employers had not responded to specific requests. (A 37, 51; 837-38.)

On March 16, 2006, Jasinski responded by three identical letters, one for each facility, to Dichner. (A 37, 51; 840-44.) In the letters, Jasinski asserted that the Employers provided all the relevant documents in their possession. (A 37-38, 51; 840-44.)

On March 23, 2006, Dichner replied to Jasinski with a single letter, referencing the Employers. (A 38, 51; 845-47.) In the letter, she reviewed the Employers' response to the January 2006 request paragraph by paragraph. (A 38, 51; 845-47.) Dichner explained in detail precisely which requested items the Employers had provided and which they had not. (A 37-38, 51; 845-47.)

The Employers did not respond to Dichner's March 23, 2006, letter. (A 38, 51.) And no further information in response to Local 1199's January 2006 information request was provided. (A 38, 51-52.)

D. Local 1199 and the Employers Bargain for Successor Agreements to the Contract that Expired on March 31, 2005

1. Negotiations between Local 1199 and Monmouth

The first bargaining session occurred in early 2005, with Pimplaskar as the chief union negotiator. (A 18; 79 (p. 29), 93 (p. 89), 94 (pp. 95-96).)

At this session, Pimplaskar presented Local 1199's initial proposal. (A 18; 94 (pp. 95-96).) On May 11, 2005, Local 1199 and Monmouth bargained for the second time. (A 19; 78-79 (pp. 24-25).) Foley, who by then replaced Pimplaskar, began the session by proposing that the parties extend the recently expired MOU. (A 20; 79 (p. 25).) Jasinski, however, did not give a definite answer. (A 20; 79 (p. 25).) Foley then inquired about the outstanding information requested in January 2005 and informed Jasinski that the agency-usage information was needed by the Union for bargaining purposes. (A 20; 79 (pp. 25-26).)

Foley then reviewed the proposal made by Pimplaskar at the first meeting, and the majority of the following discussion centered on the Union's proposal to limit the use of agency employees. (A 20; 78-79 (pp. 28-29), 152 (p. 388).) The Union's proposal sought to immediately limit agency usage to the filling of temporary staffing needs and provided that after an agency employee worked regularly for 90 days he would be made a permanent bargaining-unit employee. (A 20; 99 (p. 119), 860-61.) Jasinski replied that the existing 40 percent cap was necessary to provide flexibility and to ensure full staffing and that the Union's proposal would be a significant change from the current policy. (A 20; 79 (p. 30).) The session ended with agreement on only a few minor clerical issues. (A 20; 79 (p.30).)

On May 18, 2005, Jasinski faxed a counterproposal from Monmouth to the Union. (A 21; 257-63.) The counterproposal partially responded to the Union's proposal and stated that Monmouth would propose economic terms only after the Union submitted a complete proposal. (A 21; 257-63.) The proposal contained no changes to the existing agency-employee clause. (A 22; 257-63.)

The third bargaining session between the Union and Monmouth took place on June 3, 2005. (A 21; 79 (p. 31), 80 (p. 35).) This session lasted only 30 minutes, and the only issue discussed was agency personnel. (A 21; 80 (p. 33), 101 (p. 131).) Jasinski iterated that Monmouth needed the 40 percent cap because the existing cap allowed for staffing flexibility. (A 21; 81 (p. 37), 100 (p. 126).) Foley replied that the Union's proposal also provided flexibility by allowing Monmouth to use agency employees to fill in for absent bargaining-unit employees. (A 21; 100-01 (pp. 128-29).)

Local 1199's and Monmouth's fourth bargaining session occurred on July 8, 2005. (A 24; 81 (p. 38).) Foley once again began the session by advising Jasinski that Monmouth had not yet provided the agency-usage information requested in January 2005. (A 24; 81 (p. 39).) Foley then presented a revised economic package. (A 24-25; 81 (p. 39), 101 (p. 129), 872.) The package differed from the prior offer by eliminating the

requirement that agency employees become permanent bargaining-unit employees after 90 days of regular work and by providing for different benefit-fund and pension-fund contributions. (A 24-25; 102 (pp. 133-34), 872.) Regarding benefit-fund contributions, the Union initially proposed that Monmouth contribute 21 percent of payroll to the fund, with a possible increase to 24 percent at the discretion of the benefit-fund trustees. (A 24; 102 (p. 133), 872.) The revised proposal provided for a set contribution of 22.33 percent of payroll for the life of the contract, effective July 15, 2005. (A 24; 102 (p. 133), 872.) With regard to the pension fund, the revised proposal reduced Monmouth's contribution from 2.5 percent of individual-employee earnings for the life of the contract to 2.0 percent, effective July 15, 2005, with a possible increase to 2.5 percent on March 1, 2008. (A 24-25; 872.) The Union's proposal was discussed but no agreement was reached. (A 25; 82 (p. 41).)

On August 12, 2005, Local 1199 and Monmouth bargained for the last time. (A 25; 124 (p. 260).) The session lasted no more than an hour and was the first in which Larry Alcoff served as the Union's chief negotiator. (A 25; 124 (p. 261).) Alcoff started the meeting by reminding Jasinski that Monmouth had yet to provide the requested agency-usage information. (A 25; 124 (p. 261).) Alcoff, prompted by a Local 1199 shop steward's

assertion that all of Monmouth's recent hiring had been done through the temporary-employee agency A-Best, then asked several questions about Monmouth's hiring of agency employees. (A 25; 124 (p. 262), 179 (p. 547).) Neither Jasinski nor Harris was able to answer Alcoff's questions. (A 25; 124 (p. 262), 179 (p. 547).) The session ended with a discussion of overtime and overtime assignments. (A 25; 124-25 (pp. 262-63).) Local 1199 and Monmouth have not met since. (A 64; 126 (p. 268).)

2. Negotiations between Local 1199 and Milford

The first bargaining session between Local 1199 and Milford took place in early 2005. (A 18; 79 (p. 29), 93 (p. 89), 94 (pp. 95-96).) Pimplaskar represented the Union and presented Local 1199's initial proposal. (A 18; 94 (pp. 95-96).) On June 13, 2005, Local 1199 and Milford bargained for the second time. (A 21; 82 (p. 44).) Foley, who replaced Pimplaskar, began the session, which lasted only 45 minutes, by requesting that the current contract be extended an additional 60 to 90 days. (A 21; 82 (p. 44).) After Jasinski refused to extend the contract, Foley inquired about the agency-usage information previously requested from Milford. (A 21; 82-83 (pp. 44-45); 873-74.) Jasinski answered that the information would be provided. (A 21; 83 (p. 45).)

Foley then presented a proposal on behalf of Local 1199. (A 22; 83 (p. 47), 875-906.) After discussing the Union's proposal, Jasinski made a partial counterproposal on behalf of Milford that was virtually identical to that made by Monmouth on May 18, 2005, and discussed above, and that contained no changes to the agency-personnel clause. (A 22; 83-84 (pp. 47-52, 104 (pp. 149-50), 907-13.) Jasinski explained that because Milford had trouble filling overtime needs, the 40 percent cap was necessary for reasons beyond the flexibility reasons previously identified. (A 22; 103 (p. 148).) Jasinski also explained Milford's hiring process for agency personnel. (A 22; 102 (p. 135).) During a caucus, however, several Milford employees informed Foley that Jasinski's explanation of Milford's hiring practices was counter to their experience. (A 22; 102 (p. 136).)

On August 19, 2005, the third and final bargaining session between Local 1199 and Milford occurred. (A 25; 116-17 (pp. 230-231).) Alcoff, who replaced Foley, presented a modified proposal that provided for the gradual reduction, as opposed to the immediate limitation previously proposed, in the use of agency employees from the current cap of 40 percent of staffing for the first year of the contract, to 30 percent for the second year, then to 20 percent for the third year, and finally to 15 percent for the fourth and final year of the contract. (A 26; 118 (p. 237), 119 (p. 242), 160 (p.

433), 970-83.) The Union believed that the gradual reduction would allow Milford to recruit and retain full-time employees to replace the agency personnel. (A 22, 26; 118 (p. 237), 119 (p. 242), 162 (p. 441), 970-83.) The modified proposal also moved the effective date of the wage increases and the increased benefit-fund contributions back 4 months; split the wage increase differently over the contract term; capped LPN and RN wage rates; redefined gross payroll; and set the benefit-fund contribution fast at 22.33 percent, as opposed to the variable 21 percent to 24 percent in the prior proposal. (A 26; 118 (pp. 235-36), 159-60 (pp. 429-31), 177-78 (pp. 525-26), 208 (p. 714), 494-96, 970-83.)

After Alcoff finished, Jasinski presented Milford's counterproposal. (A 27; 120 (p. 243), 984-86.) Milford's proposal provided for wage increases similar to the Union's modified proposal, but contained no parity increases and included a provision for merit pay at the sole discretion of Milford. (A 27; 120 (pp. 245-46), 161 (p. 437), 984-86.) With respect to benefit-fund contributions, Milford matched Local 1199's employer contribution rate of 22.33 percent, but limited the contribution to 37.5 hours a week as opposed to gross payroll. (A 27; 162 (pp. 438-39), 984-86.) Milford also sought to eliminate employer contributions to the training and education, alliance, and legal funds. (A 27; 120 (p. 246), 984-86.)

Regarding agency usage, Milford's proposal provided for no change to the existing 40 percent cap. (A 27; 187 (p. 620), 984-86.) Milford's proposal also sought to limit Local 1199's right to access the Milford's property and prohibited certain union activity. (A 22; 120 (p. 246), 121 (p. 249), 984-86.)

After the parties discussed both Local 1199's and Milford's proposals, Jasinski stated that "this is our final offer." (A 28; 122 (p. 253).) Alcoff responded "[h]ow can it be your final offer? First of all it's your first offer . . . and you haven't given us any of the information on agency personnel." (A 28; 122 (p. 253).) Jasinski then repeated, "it's our final offer." (A 28; 122 (p. 253).) The session ended with Alcoff requesting further bargaining, and Jasinski stating that he did not have his calendar with him but that he would contact Alcoff about scheduling additional bargaining sessions. (A 28; 122 (pp. 253-54), 189 (p. 629).) Jasinski did not contact Alcoff and no further bargaining sessions were scheduled. (A 64; 122 (p. 254).)

3. Negotiations between Local 1199 and Pinebrook

As at Monmouth and Milford, the first meeting between Local 1199 and Pinebrook occurred early in 2005 with Pimplaskar presenting the Union's initial proposal. (A 18; 79 (p. 29), 93 (p. 89), 94 (pp. 95-96).) On May 16, 2005, the second bargaining session commenced with Foley, Pimplaskar's replacement, requesting that Local 1199 and the Employers

bargain jointly. (A 21; 86 (pp. 57-58).) Jasinski maintained that each facility was a separate entity and declined the request. (A 21; 86 (p. 58), 104 (p. 152).) Foley then advised Jasinski that Pinebrook, like the other Employers, had yet to fully provide the information requested in January 2005. (A 21; 86 (p. 58).) Foley next reviewed the Union's proposal, but there was little substantive bargaining. (A 21; 86-87 (pp. 60-61), 916-27.)

The third bargaining session between Local 1199 and Pinebrook took place on June 15, 2005. (A 22; 87 (p. 63-64).) The session began with a discussion about the importance of agency usage to both Local 1199 and Pinebrook and the Union's need for the agency-usage information not yet provided. (A 22; 88 (pp. 65-66), 105 (p. 155).) The Union then presented an economic proposal. (A 22; 88-89 (pp. 66, 69-72), 934-58.) The proposal included wage increases of 4 percent a year for 3 years; parity pay increases to bring new employees up to standard rates; and an increase in Pinebrook's health-care contribution to 22.33 percent of payroll. (A 22; 934-58.) Pinebrook then presented a proposal substantially identical to those made by Monmouth on May 18, 2005, and Milford on June 13, 2005. (A 22; 88 (p. 68), 105 (p. 155).) Both proposals were reviewed but no agreements were reached. (A 22; 89 (p. 72).)

Local 1199 and Pinebrook bargained for the fourth time on June 29, 2005. (A 22; 90 (p. 73).) Alcoff attended the session to assist Foley, who was at this time still the Union's lead negotiator. (A 22; 126 (p. 270), 154 (p. 406).) After a discussion of the yet-to-be-provided agency-usage information, Jasinski presented the Union with an economic proposal that supplemented Pinebrook's June 15 offer. (A 22; 90 (p. 75), 107 (p. 161), 127 (p. 271), 959-69.) The proposal provided for a wage increase of 3 percent in the first year, and 2.5 percent in the second, third, and fourth years. (A 22; 959-69.) It also provided for merit pay at Pinebrook's sole discretion; a discontinuance of employer contributions to the Union's education, alliance, and legal funds; a pension fund contribution of $.20 an hour up to 37.5 hours a week for employees employed over 1 year; employer health insurance contributions of 22.33 percent of pay for up to 37.5 hours a week; and changes to the union-activity and visitation clauses. (A 22; 959-69.)

The union representatives reviewed the proposal in caucus, and upon returning to the bargaining table, Foley told Jasinski that the offer was far from acceptable. (A 22; 127 (pp. 271-72), 227 (p. 817).) Alcoff then requested a sidebar discussion and explained Local 1199's concerns about Pinebrook's offer to Jasinski and Harris. (A 23; 90 (pp. 75-76), 127 (pp.

272-73).) Alcoff stressed the need for the previously requested agency-usage information and asked how the negotiations could move forward. (A 23; 90 (pp. 75-76).) Jasinski replied that the Union's agency-usage proposal was problematic to advancing the negotiations. (A 23; 90 (p. 76).) The session ended with Foley, Alcoff, Jasinski, and Harris agreeing to participate in an off-the-record meeting. (A 23; 91 (p. 77), 92 (p. 82).)

The off-the-record meeting, held in early July 2005 and lasting approximately 45 minutes, began with Alcoff requesting that, in an effort to move negotiations forward, the Employers bargain jointly. (A 23; 118 (p. 238).) Jasinski responded that the three facilities each had separate interests and that he was not interested in joint negotiations. (A 23; 119 (p. 239), 218 (p. 785).) Jasinski then stated, in response to a question from Alcoff about the difficulty in reaching agreement, that agency usage was the foremost issue and a roadblock to reaching agreement. (A 23; 92, 119 (p. 239), 155 (p. 411).) Alcoff replied that, based upon his experience in the nursing-home industry, the extensive use of temporary employees resulted in poorer resident care and more cost to the facilities. (A 23; 119 (p. 240), 155-56 (pp. 413-414).) Jasinski responded that the use of agency employees is a fundamental part of the culture at all three facilities and that none of the three was interested in changing the current policy. (A 23; 119 (p. 240), 239

(p. 891).) Alcoff then suggested setting aside the agency issue and concentrating on other issues in an attempt to build goodwill between the parties. (A 23; 119 (p. 241), 156 (p. 415).) The meeting ended with the parties agreeing to bargain at Monmouth on July 8, 2005. (A 24; 119 (p. 242).)

Prior to the fifth bargaining session between Local 1199 and Pinebrook, held on September 12, 2005, Local 1199 requested information by letter from the Employers. (A 28, 31-32; 128 (p. 277), 1082-86.) In the August 30, 2005 letter, the Union requested, among other things, updated agency-usage information. (A 32; 1082-86.) Alcoff began the meeting by asking Jasinski for the information requested on August 30, 2005. (A 28; 131 (p. 290).) Jasinski initially replied that the information regarding agency usage was not relevant and that the request was nothing more than a stall tactic. (A 28; 131 (p. 290).) Alcoff replied that agency usage was the central issue of the bargaining. (A 28; 131 (p. 290).) Jasinski then indicated that some of the information would be supplied; that some he did not have; that some did not exist; and that if the Union needed information regarding agency personnel, it could subpoena the information from the agencies. (A 28; 132 (p. 291), 203 (p. 692).)

Alcoff then presented a proposal similar to that made to Milford on August 19. (A 28; 132 (p., 292).) Alcoff stated that the Union could not make significant changes to the proposal until the requested information was provided by the Employers, but that, in an effort to show movement, the effective dates of several fund contributions had been moved back. (A 28; 132-33 (pp. 294-95), 165 (p. 455).) Jasinski then submitted Pinebrook's counterproposal, which was similar to Milford's August 19 proposal discussed above. (A 28; 132 (p. 292) 527-29.) After a brief discussion of the proposals, Jasinski declared that this was Pinebrook's final offer and that the parties were at impasse. (A 28; 132 (p. 292), 203 (p. 692).) Alcoff stated his disagreement regarding the presence of impasse and asked "[h]ow could we be at impasse when you're not providing information on those things you've identified as the central thing." (A 28; 132 (pp. 292-93).) The session ended with Alcoff telling Jasinski that future bargaining was needed and that he looked forward to receiving the outstanding information. (A 28; 132 (p. 293).)

On November 3, 2005, Local 1199 and Pinebrook bargained with the aid of two mediators from the New Jersey State Board of Mediation. (A 29; 137 (p. 391), 204 (p. 627).) The session began with Alcoff and Jasinski informing the mediators of the current proposals. (A 29; 137 (p. 322).)

Alcoff then went over the information that Pinebrook had yet to provide, which included agency-usage information. (A 29; 137 (p. 322).) Next, at a sidebar discussion suggested by the mediators, Alcoff stated that he wanted to figure out how to get a deal and made several "what-if" suggestions. (A 29; 138 (pp. 323-34), 234 (pp. 868-69).) The what-if suggestions included a one-year probationary period for all new hires to save Pinebrook benefit contributions and the suggestion that the parties live with the status quo while attempting to reach agreement on the agency-usage issue. (A 29; 138 (p. 324).) Jasinski made no counterproposals to Alcoff's what-if suggestions, but replied with a verbal assault on Alcoff and again declared that the parties were at impasse. (A 29; 138 (p. 3250, 178 (p. 527).) Alcoff denied that the parties were at impasse, and stated that he was available to bargain every day between then and Christmas, except for Thanksgiving and Christmas day, and asked that the mediators be present as well. (A 29; 138 (p. 326).) The meeting ended without the parties agreeing on a date for the next bargaining session. (A 29; 138 (p. 326).)

4. Local 1199 repeatedly attempts to schedule further bargaining sessions with the Employers

On December 28, 2005, Alcoff sent Jasinski a letter offering nine dates in January 2006 to bargain with the Employers. (A 29, 35; 139 (pp. 327-28), 1144.) Jasinski never responded to the letter. (A 29, 35; 139 (p.

330).) On January 19, 2006, Alcoff sent Jasinski another letter offering to bargain with the Employers on any date between February 4 and March 2, 2006. (A 29, 35; 139 (p. 329), 1145.) Again, Jasinski never replied to the letter. (A 29, 35; 139 (p. 330).)

On February 23, 2006, Local 1199 filed the initial unfair labor practice charges against the Employers. (A 29, SA 4-6.) The charges alleged that the Employers refused to meet and bargain over mandatory terms of collective bargaining. (A 29, SA 4-6.) The charges were later amended to add the failure and refusal to provide information discussed above. (A 29, SA 7-9.) On July 26, 2006, the Board's General Counsel issued a complaint alleging that the Employers violated Section 8(a)(5) and (1) Act (29 U.S.C. Section 158(a)(5) and (1)) by refusing to meet and bargain with Local 1199 and by failing and refusing to supply relevant information to Local 1199 upon request. (A 29, SA 10-28.)

On June 23, 2006, Alcoff sent Jasinski a letter referencing the Employers and requesting available bargaining dates and additional information. (A 38; 1147-48.) Jasinski did not reply to Alcoff's June 23 letter until late October and early November 2006, when he sent Alcoff a letter on the behalf of the Employers, each stating that despite his belief that the parties were at impasse, Monmouth and Milford would be willing to

schedule a bargaining session with Local 1199. (A 29-30, 39-40; 1149-54.) Alcoff responded to Jasinski by separate letter to the Employers on December 1, 2006. (A 30, 40-41; 1155-57.) In the letters, Alcoff stated that the Union was prepared to offer counterproposals as soon as the information requests were fulfilled and offered several bargaining dates in December 2006. (A 30, 40-41; 1155-57)

Jasinski responded by letter in late December 2006 and early January 2007 and suggested several bargaining dates. (A 32, 41-42; 803.) Subsequently, Local 1199 and Pinebrook agreed to meet on January 24, 2007. (A 31; 722-24,803.)

The January 24, 2007 session began with an exchange of information and a discussion of the benefit-fund information just provided to Jasinski by the Union. (A 31; 144 (p. 353-54), 804.) Alcoff then went over Local 1199's information request item by item. (A 31; 144 (p. 354).) Jasinski demanded that Alcoff put the items not yet provided in a written request. (A 31; 144 (p. 354).) After a brief discussion of Local 1199's health-care plan and the bargaining-unit status of the LPNs, Alcoff asked several questions regarding Pinebrook's use of agency personnel. (A 31; 144-45 (pp. 353-56).) Many of the questions concerned information that Local 1199 had requested but never received from Pinebrook. (A 31; 145 (p. 355).) Jasinski

was unable to answer a number of Alcoff's questions. (A 31; 145 (pp. 355-56).) The session ended with a tentative agreement on a merit-pay increase. (A 31; 145 (p. 357).) Alcoff requested another bargaining session, but Jasinski replied he that did not have his calendar with him. (A 31; 145 (p. 357).) Local 1199 and Pinebrook have not bargained since the January 24 session. (A 65; 145 (p. 357).)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, and Members Becker and Hayes) found, in agreement with the administrative law judge, that the Employers violated Section 8(a)(5) and (1) of the Act by failing to timely and completely provide information relevant and necessary for Local 1199 to perform its duties as the collective-bargaining representative of their employees and by failing and refusing to meet at reasonable times for the purposes of collective bargaining. (A 10-12.)

The Board's Order requires the Employers to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 10-12.) The Order affirmatively requires the Employers to bargain in good faith with Local 1199, to furnish to Local 1199, in a timely and complete manner, the requested information, to make a

reasonable effort to secure any requested information currently not in its possession, and if that information cannot be secured, to explain and document the reasons for its continued unavailability, and to post copies of remedial notices. (A 10-12.)

SUMMARY OF ARGUMENT

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) requires that employers bargain in good faith with the bargaining-representative of their employees. The duty to bargain in good faith includes the obligation to provide, upon request, information relevant to the collective-bargaining and representational duties of the employees' bargaining representative and to meet and bargain with the employees' bargaining representative at reasonable times.

In the instant case, the Employers have not contested the Board's findings that they failed to timely and completely provide information requested in February 2006. Section 10(e) of the Act denies the Court jurisdiction to review Board findings when the findings have not been excepted to and therefore such findings are entitled to summary enforcement.

Further, substantial evidence supports the Board's finding that the Employers have not met their duty to bargain in good faith by failing to

provide relevant information upon request. Local 1199 requested relevant information from the Employers in August 2005 and June 2006. The Employers – despite numerous demands from Local 1199 that the information be provided – failed to fully comply with the information requests. In particular, the Employers failed to provide information regarding the use of agency employees, the central issue of bargaining.

Substantial evidence also supports the Board's finding the Employers failed to meet their good-faith bargaining obligations by refusing to meet and bargain at reasonable times. Negotiations between Local 1199 and the Employers began in 2005, and a handful of bargaining sessions were held with the Employers that year. After these initial bargaining sessions, the Employers, however, refused to respond to Local 1199's bargaining requests and further bargaining sessions did not occur.

The Employers make several arguments in defense of their failure to provide information and to meet and bargain, but each lacks merit. The Employers first argue that Local 1199 never objected to their responses to the August 2005 and June 2006 information requests. The record, however, clearly shows that Local 1199 repeatedly alerted the Employers that the requests were not fully complied with. The Employers next argue that they were fully responsive to both of these requests. The Board explicitly

addressed this argument and found, based on testimonial and documentary evidence, that the Employers had not completely provided the requested information.

The Employers also argue that their duty to meet and bargain with Local 1199 was suspended because the parties had bargained to impasse. The facts do not support a finding of impasse because Local 1199, who had demonstrated flexibility on issues such as agency personnel, wages, and healthcare, had bargained with the Employers only a few times and because both Local 1199 and the Employers had presented economic proposals just before the Employers refused to further meet and bargain with Local 1199. Moreover, this Court, along with other circuits, has long held that a valid impasse cannot be present when an employer, as here, fails to provide information needed by the union to engage in meaningful negotiations.

The Employers further argue that Local 1199 adopted a fixed bargaining position and that such conduct led to impasse and constitutes bad faith bargaining on the behalf of Local 1199. The Board, however, based upon testimonial and documentary evidence, rejected this argument and found that Local 1199 demonstrated flexibility in its bargaining position.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE EMPLOYER FAILED TO TIMELY AND FULLY PROVIDE INFORMATION NECESSARY TO ADMINISTER AND POLICE THE COLLECTIVE-BARGAINING AGREEMENT

The Employers did not contest before the Board the finding that the Employers violated Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) by failing to timely and completely provide information requested by Dichner in 2006 and necessary for the prosecution of grievances against the Employers. (A 10, 15-16, 50-52.)

Under well settled law, the Board's Order with respect to these uncontested findings is entitled to summary enforcement. Section 10(e) of the Act (29 U.S.C. § 160(e)) (court has no jurisdiction to alter findings when party failed to file exceptions before the Board). *See also Int'l Union of Petroleum & 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).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYERS FAILED TO TIMELY AND COMPLETELY SUPPLY REQUESTED INFORMATION NECESSARY FOR LOCAL 1199 TO ENGAGE IN MEANINGFUL NEGOTIATIONS

A. Governing Legal Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) requires that employers bargain in good faith with its employees' collective-bargaining representative. The duty to bargain in good faith includes the obligation to provide the employees' collective-bargaining representative with information relevant to the collective-bargaining process. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-437 (1967); *NY & Presbyterian Hosp. v. NLRB*, 2011 WL 2314955 at *8 (D.C. Cir. 2011). As this Court has recognized, the duty to provide information relevant to bargaining is a "fundamental obligation" and critical to the collective-bargaining process. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). Furthermore, collective-bargaining representatives have "no obligation to make continued requests," and an employer "violates the Act not only by refusing to provide . . . relevant information but also by not providing it in a timely manner." *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005).

Accord Providence Hosp. v. NLRB, 93, F.3d 1012, 1021-22 (1st Cir. 1996); *Capital Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996).

The Board's factual findings are "conclusive" under Section 10(e) of the Act if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see also Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 58 (D.C. Cir. 2009). Under this standard, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. The Board Reasonably Found that the Employers Violated Section 8(a)(5) and (1) of the Act by Refusing To Provide Local 1199 with Requested Information Necessary for Local 1199 To Engage in Meaningful Negotiations

As shown below, the Board reasonably found (A 54-56) that the Employers failed to provide "a large amount of information, particularly with regard to agency usage." On August 30, 2005, Local 1199 sent the Employers identical letter requesting information – including information regarding agency usage – necessary for the Union to develop proposals and to engage in meaningful negotiations.[8] (A 31; 128 (p. 277); 1082-86.) In late September 2005, the Employers partially responded to the request but

[8] The Employers have never contested the relevancy of any information requested in either the August 2005 or the June 2006 information requests.

provided no information regarding agency usage. (A 34, 43, SA 1; 133 (p. 297), 502-526.) On October 10 and November 2, 2005 and January 25, 2006, Local 1199 requested by letter that the Employers furnish the outstanding agency-usage information. (A 34-36, 53; 134 (pp. 300-01), 139-140 (pp. 330-31), 1097-99, 1106-08, 1146.) On June 23, 2006, Local 1199 renewed and modified the information request to include updated bargaining-unit employee and agency-personnel information. (A 38-39, 53; 140-41 (pp. 332-35), 1147-48.) The Employers, however, provided no additional information until January 2007 and again failed to fully provide the requested agency-usage information. (A 42-43, 54; 143-46 (pp. 350-51, 358, 364) 1160-61, 538-566.) Thus, substantial evidence supports the Board's finding (A 54-56) that the Employers failed to timely and fully comply with either the August 2005 or the June 2006 information request.

The Employers contend (Br. 44-49) that Local 1199 failed to object to the Employers' responses to the information requests and that at all times during the negotiations the Employers were fully responsive to the Union's information requests. Neither of these contentions is supported by the record.

Contrary to the Employers' argument, the record clearly shows that Local 1199 continuously alerted the Employers that the information requests

had not been fully complied with. Alcoff informed Jasinski that the August 2005 information request was not fully complied with orally and by letter on September 12, 2005; by letter on October 10, November 2, 2005, and January 25, 2006; and orally at the November 3, 2005 bargaining session at Pinebrook. (A 29, 33-34, 36, 52-53; 133-34 (295-96, 300-02), 137 (p. 322), 139-140 (330-31), 1093-96, 1097-99, 1106-08, 1146.) Alcoff also alerted Jasinski that the information requested in June 2006 was not fully provided by letter on December 1, 2006, and February 9, 2007, and orally at the January 24, 2007 bargaining session at Pinebrook.[9] (A 31, 40, 43, 53; 142-44 (pp. 341, 350-51, 353-54), 1155-57, 1160-61.)

Further, the Board explicitly addressed the Employers' claim that they were fully responsive to the Union's information requests and found that the Employers failed to fully comply with either the August 2005 or June 2006 information request. (A 10, 55-56.) In finding that "[t]here can be no doubt" that the Employers have not fully complied with the requests, the Board specifically credited Alcoff's testimony, which was supported by detailed documentation, and discredited Jasinski's "vague and unconvincing

[9] Local 1199 also alerted Jasinski, twice by letter and orally at eight bargaining sessions, that the Employers had not provided the agency-personnel information requested in January 2005. (A 20-28; 80-83 (pp. 36, 39, 44-45), 86 (p. 58), 88 (pp. 65-66), 90 (p. 75), 124 (p. 261), 494-96, 499-500.)

testimony." (A 55.) Accordingly, ample evidence supports the Board's findings that the Employers violated Section 8(a)(5) and (1) of the Act by failing to timely and completely provide relevant information upon request.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYERS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO BARGAIN WITH LOCAL 1199

A. Governing Legal Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as the obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." In order to determine whether the parties have conferred in good faith, the Court must examine the overall conduct of the parties. *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 498 (1960). Dilatory and delaying tactics that undermine the process of collective bargaining are indicative of unlawful, bad faith bargaining. *See Bryant & Stratton Bus. Inst., Inc., v. NLRB*, 140 F.3d 169, 182-84 (2d Cir. 1998) (refusal by employer to meet on weekends or bargain on consecutive days); *Calex Corp. v. NLRB*, 144 F.3d 904, 909-11 (6th Cir. 1998) (refusal by employer to meet more frequently as requested by union); *Radisson*

Plaza Minneapolis v. NLRB, 987 F.2d 1376, 1382 (8th Cir. 1993) (refusal by employer to meet more frequently without explanation and early termination of bargaining sessions).

The applicable standard of review is the same as that described above at p. 40.

B. Substantial Evidence Supports the Board's Finding that the Employers Failed To Meet and Bargain with Local 1199

1. Monmouth and Milford

As the Board found (A 64), the "evidence is overwhelming" that Monmouth and Milford have "fallen far short of fulfilling [their] obligation to meet at reasonable times" with Local 1199. Indeed, Jasinski consistently ignored Local 1199 bargaining representative Alcoff's repeated efforts to schedule bargaining sessions.

The record evidence shows that at the conclusion of the last Milford session in August 2005, Alcoff requested further bargaining. (A 28; 122 (pp. 253-54.) Jasinski stated that he would get back to him regarding future bargaining dates but failed to do so. (A 28; 122 (pp. 253-54), 189 (p. 629).)

Similarly, during October 2005, Alcoff made at least three phone calls to Jasinski regarding the scheduling of bargaining sessions and spoke to Jasinski's secretary. (A 35, 64, SA 2-3.) Jasinski never returned the phone calls nor offered any bargaining dates for Monmouth or Milford. (A 35, 64,

SA 2.) Then in a November 2, 2005 letter, Alcoff reminded Jasinski that he had yet to agree to further bargaining dates and offered additional dates in November and December 2005. (A 35, 64; 1106-08.) Jasinski again failed to agree to or to propose any bargaining dates for Monmouth or Milford. (A 35, 64, SA 2.)

Over the next year, Alcoff continued his efforts to schedule bargaining sessions with both Monmouth and Milford, but Jasinski ignored his requests. Specifically, on December 28, 2005, Alcoff wrote Jasinski offering numerous specific bargaining dates in January 2006. (A 44, 64; 1144.) Jasinski, however, did not reply to the letter. (A 35, 64; 139 (pp. 329-30).) Alcoff then sent letters on January 19 and January 25, 2006, requesting bargaining with Monmouth and Milford during February and March 2006, but Jasinski did not respond to either letter. (A 35, 64, SA 3; 139 (p. 330), 1145, 1146.) In a June 23, 2006 letter, Alcoff reminded Jasinski that there had not been a bargaining session for many months and again requested that Jasinski provide bargaining dates. (A 38, 64; 1147-48.) Jasinski did not respond until 4 months later, and then only after the Region had issued its initial complaint in this case, and stated that Monmouth and Milford were willing to schedule additional bargaining dates. (A 39-40, 64, SA 10-29; 1149-54.) Although Alcoff replied and offered to meet and

bargain on any date during the weeks of December 12 and December 19, 2006 and on several dates in January 2007, Jasinski never responded or made any effort to schedule bargaining sessions for Milford or Monmouth. (A 33, 41-42, 55, 64, SA 3; 722-24, 1155-57.) Consequently, the parties have had no further bargaining sessions. (A 64; 116-17 (pp. 230-31), 124-26 (pp. 260-63, 268).)

In the circumstances present here, the Board reasonably found that Monmouth's and Milford's approach to their bargaining obligations has been one of delay and outright refusal to bargain. Monmouth and Milford completely ignored Local 1199's bargaining requests for over a year. (28, 39-40, 64; 1106-08, 1144, 1145, 1145, 1147, 1149-54.) Then, even after Monmouth and Milford indicated a willingness to meet and bargain, they again ignored Local 1199's bargaining requests and no bargaining sessions were ever scheduled. (A 64; 116-17 (pp. 230-31), 124-26 (pp. 260-63, 268).) Such dilatory tactics amount to a purposeful effort to thwart the collective-bargaining process established under Section 8(a)(5) and 8(d) of the Act and constitute bad faith. *See Bryant & Stratton Bus. Inst., Inc., v. NLRB*, 140 F.3d 169, 182-84 (2d Cir. 1998); *Calex Corp. v. NLRB*, 144 F.3d 904, 909-11 (6th Cir. 1998); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993). Accordingly, substantial evidence supports the

Board's finding that Monmouth and Milford have violated Section 8(a)(5) of the Act by failing to meet and bargain with Local 1199.

2. Pinebrook

Ample evidence also supports the Board's finding (A 65) that Pinebrook failed to satisfy its obligation to meet at reasonable times with Local 1199. Thus as shown above (pp. 30-31), on November 3, 2005, Local 1199 and Pinebrook bargained with the aid of two mediators from the New Jersey State Board of Mediation. (A 29, 65; 137 (p. 321), 204 (p. 697).) At the end of this session, Alcoff offered to bargain any day between then and Christmas, except for Thanksgiving and Christmas, and asked that the mediators attend any future bargaining sessions. (A 29, 65; 137 (p. 320).) Jasinski, however, did not agree to another meeting. (A 29, 65; 138 (p. 326).) Thereafter, Pinebrook, like Monmouth and Milford, repeatedly failed to respond to Alcoff's written bargaining requests and made no reply to Local 1199's bargaining requests of December 28, 2005, January 19 and January 25, 2006, and June 23, 2006. (A 29, 35, 64; 139 (pp. 329-30).)

Although Jasinski eventually agreed to give the Union "another chance," the parties bargained only once more on January 24, 2007. (A 31, 41-42 65; 144 (p. 354), 803.) At the close of that session, Alcoff requested further bargaining, but Jasinski replied that he did not have his calendar with

him and therefore could not schedule any dates. (A 31, 65; 145 (p. 357).) Afterwards, Jasinski never contacted Local 1199 to offer any dates and the parties have not bargained since. (A 65; 147 (p. 367).)

Pinebrook has taken the same approach to its bargaining obligation as Monmouth and Milford – delay and refusal. In the nearly 15 months between November 2, 2005, and January 24, 2007, no bargaining sessions occurred despite Local 1199's numerous bargaining requests. (A 29, 31, 65; 137 (p. 321), 144 (p. 354), 204 (p. 697).) And for the first 12 of those months, Pinebrook refused to even respond to Local 1199's bargaining requests. (A 29, 35, 65; 137 (p. 320), 139 (p. 329-30).) Further, following the lone meeting on January 24, 2007, Jasinski again failed to provide any dates in response to Local 1199's oral request for further bargaining. (A 31, 65; 145 (p. 357), 147 (p. 367).)

Such conduct falls far short of meeting the Section 8(d) "affirmative duty to make expeditious and prompt arrangements . . . for meeting and conferring." *People Care, Inc.*, 327 NLRB 814, 825 (1999) (internal citations omitted). Indeed, the courts have found similar, but less egregious, conduct to constitute unlawful delay and bad faith bargaining. *See Bryant & Stratton Bus. Inst., Inc., v. NLRB*, 140 F.3d 169, 182-84 (2d Cir. 1998); *Calex Corp. v. NLRB*, 144 F.3d 904, 909-11 (6th Cir. 1998); *Radisson Plaza*

Minneapolis v. NLRB, 987 F.2d 1376, 1382 (8th Cir. 1993). Accordingly, substantial evidence supports the Board's finding that Pinebrook has violated Section 8(a)(5) of the Act by failing to meet and bargain with Local 1199.

C. The Employers' Defenses to Their Refusal to Meet and Bargain Lack Merit

The Employers argue that their refusal to meet and bargain with Local 1199 is lawful because the parties were at impasse and because Local 1199 bargained in bad faith. As shown below, each of these arguments lacks merit.

1. The Employers failed to prove that the parties bargained to impasse

The Employers argue that the parties had bargained to impasse and therefore their duty to bargain was suspended. The Board has defined impasse as "the point in time . . . when the parties are warranted in assuming that further bargaining would be futile." *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994) (internal citation omitted). In *Taft Broadcasting Co.*, the Board enumerated the factors to be considered when determining if the parties are at impasse: the bargaining history; the good faith of the parties; the length of negotiation; the importance of the issues as to which there is disagreement; and the contemporaneous understanding of the parties. 163

NLRB 475, 478 (1967). If the parties bargain to a valid impasse, the duty to bargain is temporarily suspended. *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992). The burden of proving the existence of impasse rests on the party asserting it. *Grinnell Fire Prot. Sys., Co. v. NLRB*, 236 F.3d 187, 196 (4th Cir. 2000).

Whether a valid impasse exists "is a question of fact involving the Board's presumed experience and knowledge of bargaining problems." *Steelworkers Local 1453 v. NLRB*, 983 F.2d 240, 246 (D.C. Cir. 1992) (internal citation omitted). Consequently, "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." *Id.*

The Employers argue (Br. 39-40) that the parties were at impasse because Local 1199 refused to vary from the terms of a collective-bargaining agreement containing a "most favored nations" clause that it had reached with another employer group (the "Tuchman Agreement").[10] The Employers also claim (Br. 39-40) that the parties were therefore deadlocked on the issue of agency usage. This argument must fail for several reasons.

[10] A most favored nations clause provides that if a union subsequently agrees to more favorable terms with another employer, then those more favorable terms may be applied for the benefit of the original employers.

First, as the Board expressly found (A 59), the Tuchman agreement never arose in negotiations regarding agency personnel. In making this finding, the Board relied upon Alcoff's testimony, which was not disputed by Jasinski. (A 59; 135-36 (pp. 309, 313-14), 142 (p. 340).) Further, the Board expressly found that Local 1199 never stated that it could not deviate from the terms of the Tuchman Agreement. (A 59; 135-36 (pp. 309, 313-14), 142 (p. 340).) In making this finding, the Board reasonably credited Alcoff's testimony over Jasinski's because of Alcoff's testimonial demeanor, the difficulty of invoking a most favored nations clause that is based upon "net economic impact,"[11] and the fact that Local 1199 had already negotiated several collective-bargaining agreements with less-favorable terms than those found in the Tuchman Agreement. (A 5; 135-36 (pp. 311-313).) In their brief, the Employers do not challenge that credibility determination.

The facts also demonstrate that Local 1199 was willing to, and in fact did, make considerable movement on the use of agency personnel. Local

[11] The most favored nations clause in the Tuchman Agreement takes effect only if Local 1199 agrees to a collective-bargaining agreement with another employer in which the "net economic impact" is more favorable to the other employer than the terms of the Tuchman Agreement. Alcoff's undisputed testimony established that "net economic impact" is difficult to measure in a nursing-home setting and that no employer signatory to the Tuchman Agreement has ever invoked the clause. (A 59; 136 (p. 313).)

1199's initial proposal to the Employers regarding agency personnel sought to immediately limit agency usage to the filling of temporary staffing needs and provided that after an agency employee worked regularly for 90 days that he would be made a permanent bargaining-unit member. (A 20; 99, 494-96.) Then, on July 8, 2005, Local 1199 modified its economic proposal to eliminate the 90-day requirement. (A 24-25; 81 (p. 39), 101 (p. 129), 872.) On August 19, Local 1199 further modified its agency personnel proposal to provide for a gradual reduction over 4 years, as opposed to the immediate elimination, in the use of agency employees. (A 26; 118-19 (pp. 237, 242), 160 (p. 433), 970-83.) And on November 3, Local 1199 suggested that the parties operate under the status quo while attempting to reach agreement on the agency-usage issue. (A 29; 138 (p. 324).) Thus, contrary to the Employers' claims, Local 1199 did not refuse to vary from the terms of the Tuchman Agreement.

Moreover, as the Board noted, Monmouth's and Milford's arguments that impasse existed are "so ludicrous, that they border on frivolous" and Pinebrook's argument is "far from sufficient" to establish impasse. (A 56, 58.) Indeed, Local 1199 and Monmouth bargained only five times, with the last session lasting only 30 minutes. (A 56-57; 77-81 (pp. 24-25, 29, 31, 35, 38), 93-94 (pp. 89, 95-96), 124 (p. 260).) During bargaining, Monmouth

never presented an economic proposal, never submitted a "final offer," and never declared its belief that the parties were at impasse. (A 57; 124-26 (pp. 260-63, 268).) Further, at the July 8, 2005 session, Local 1199 presented a proposal that made considerable movement on economics and agency-personnel usage. (A 24-25, 57; 81-82 (pp. 39, 41), 101-02 (pp. 129, 133-34), 872.) The parties bargained over this modified proposal only once before Monmouth discontinued bargaining with Local 1199. (A 57; 124-26 (pp. 260-63, 268).)

Likewise, Local 1199 and Milford bargained only three times. (A 57; 79 (p. 29), 82 (p. 44), 93-94 (pp. 89, 95-96), 116-17 (pp. 230-31).) Milford did not present an economic proposal until the last session on August 19, 2005. (A 57; 120 (p. 243), 984-86.) At this session, Local 1199 also presented a modified economic proposal that made movement on agency usage, wages, and benefit-fund contributions. (A 57; 118-19 (pp. 235-37, 242), 159-60 (pp. 429-431, 433), 162 (p. 441), 178 (p. 526), 208 (p. 714), 494-96, 970-83.) After Milford presented its economic package for the first time, Jasinski stated that the proposal was Milford's final offer. (A 57; 122 (p. 253).) Not surprisingly, Alcoff responded that further bargaining was needed, stating "[h]ow can this be your final offer? First of all, it's your first offer and second . . . there's been no negotiation on it." (A 57; 122 (p. 253).)

Jasinski did not contest Alcoff's statement that further bargaining was needed but instead replied that he could not schedule further dates because he did not have his calendar with him. (A 57; 122 (pp. 253-54), 189 (p. 629).) Despite Local 1199's numerous requests, however, no further dates were scheduled. (A 65; 145 (p. 357), 147 (p. 367).)

The Board found (A 58) that Pinebrook's assertion that the parties were at impasse was similarly undermined by the record evidence. Local 1199 and Pinebrook bargained only seven times. (A 58; 79 (p. 29), 86-87 (pp. 57-58, 63-64), 90 (p. 73), 93-94 (pp. 89, 95-96), 132 (p. 290), 137 (p. 321), 144 (pp. 353-54.) At the fifth session, Pinebrook abruptly declared impasse despite the fact that both Local 1199 and Pinebrook had just presented new proposals. (A 28, 58; 132 (p. 292), 203 (p. 692), 527-29.) Local 1199's proposal made movement on agency usage by providing for the gradual elimination of agency personnel, pushed wage increases back, and removed the variable rates from benefit-fund contributions. (A 58; 132-33 (pp. 294-95), 494-96, 970-83.) Alcoff contested Jasinski's impasse declaration and told Jasinski that Local 1199's proposals showed movement despite that fact that agency-personnel information was needed to formulate modified economic proposals. (A 58; 132-33 (pp. 292-93, 295).)

Pinebrook also declared impasse at the parties' sixth bargaining session. (A 58; 138 (p. 325), 178 (p. 527).) Local 1199, however, demonstrated a willingness to make further movement by making several suggestions such as a one-year probationary period for new hires and a proposal to maintain the status quo while bargaining over agency usage. (A 58; 138 (pp. 323-24), 234 (pp. 868-69).)

The negotiations between Local 1199 and the Employers share several common features. First, the parties bargained only a handful of times or fewer. Second, the parties had limited bargaining – or in the case of Monmouth, no bargaining because Monmouth never present an economic proposal – over the Employers' economic proposals because they were offered at or near the time that the Employers refused to further meet and bargain with Local 1199. Third, the parties also had limited bargaining over Local 1199's modified economic proposals, each of which showed flexibility on agency usage and other economic terms. Last, as demonstrated by Alcoff's statements to the contrary and Local 1199's repeated requests for further bargaining, the parties had no contemporaneous understanding that impasse existed.

As such, the Employers have failed to carry their burden that they had bargained to a valid impasse with Local 1199. *See Grinnell Fire Prot. Sys.*,

Co. v. NLRB, 236 F.3d 187, 199-200 (4th Cir. 2000) (no impasse due to limited number of bargaining sessions and flexible union positions); *Beverly Farm Found., Inc., v. NLRB*, 144 F.3d 1048, 1052-53 (7th Cir. 1998) (no impasse despite 19 bargaining sessions because of limited bargaining over economic proposals and union's flexible bargaining posture); *Cotter & Co.*, 331 NLRB 787, 787-88 (2000) (abrupt final offer and declaration of impasse not valid because union demonstrated flexibility and parties did not have contemporaneous understanding that they were at impasse).

2. The Employers' failure to provide information also precludes a finding of impasse

As the Court has recognized, the duty to provide information relevant to the issues on the bargaining table is a "fundamental obligation" that is critical to the collective-bargaining process. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). Consequently, the Board, with court approval, has long recognized that lawful "impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *E.I. Du Pont Nemours & Co. v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007) (internal citation omitted). *Accord Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 505 (5th Cir. 2002);

Olivetti Office U.S.A., Inc. v. NLRB, 926 F.2d 181, 188-89 (2d Cir. 1991); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 449-50 (4th Cir. 1969).

As shown above at pp. 40-43, the Employers have failed to provide information regarding what both parties considered the central issue of negotiations – agency usage. Accordingly, the failure to timely and fully supply information related to the central bargaining issue precludes a finding of valid impasse.

In their defense, the Employers argue (Br. 44-48) that Local 1199's information requests were not made for legitimate bargaining purposes but rather in an effort to forestall impasse. The record does not support the Employers' claims.

As the Board found (A 54-55), and contrary to the Employers' arguments, Local 1199 requested information relevant to bargaining and necessary for the development of contractual proposals. Indeed, the Employers do not even contest the relevancy of any information requested. Throughout the negotiations, Local 1199 advised Jasinski that information concerning the use of agency personnel was needed by the Union for bargaining purposes and such information was requested as early as January 2005. (A 20, 33, 40-41; 78 (p. 26), 131-32 (pp. 290-91); 1093-96, 1155-57.) The Employers, however, never provided the requested agency-personnel

information. (A 20; 98 (pp. 110-12).) This failure prompted Local 1199 to again request, *inter alia*, agency-personnel information in August of 2005. (A 32; 1082-86.) The Employers again failed to fully provide the agency-personnel information, and the Union was forced to request the information for a third time in June 2006. (A 33, 38, 52, 55-56; 1093-96, 1147-48.) If the requests appear duplicative, it is only because the Employers continually failed to provide the information.

The Employers' argument (Br. 47-48) that Local 1199 did not use the information provided to advance negotiations is also without merit. The Employers failed to provide much of the requested information, including most of the information concerning the use of agency personnel, the issue recognized by both parties as central to negotiations. (A 23, 56; 92 (p. 83), 119 (p. 239), 155 (p. 411), 1160-61.) Local 1199 was therefore limited in its ability to advance new proposals because it did not have the necessary information to do so. Moreover, Local 1199 repeatedly informed Jasinski that agency-personnel information was needed by the Union to develop counter proposals and that movement was difficult until the information was received. (A 20, 33, 40-41; 78 (p. 26), 131-33 (pp. 290-91, 295-96), 1093-96, 1155-57.) Nevertheless, as discussed above at pp. 51-52, Local 1199 did in fact make several proposals regarding the use of agency personnel.

Moreover, the Employers' claim (Br. 44) that the Union sought information only after the Employers declared impasse is factually incorrect. First, as discussed above (p. 56), Local 1199 was forced to repeat its request for agency-personnel information only because the Employers' continually failed to provide such information. (A 20, 32-33, 38, 53, 55-56; 98, 1082-86, 1147-48.) Second, none of the employers had declared impasse before Local 1199 made its August 30, 2005 information request: Monmouth never declared impasse during bargaining; Milford made a "final offer" on August 19, 2005, but had not declared impasse; and Pinebrook did not declare impasse until September 12, 2005. (A 57-58; 122, 124-26,132.) Thus the Employers' claim is factually incorrect.

Finally, the cases relied upon by the Employers in support of their arguments are inapposite. In *Sierra Bullets, LLC*, the Board found that the union's outstanding information request did not preclude a finding of impasse because the requested information did not relate to the central issues. 340 NLRB 242, 244 (2003). Here, however, Local 1199's information request related to agency usage, the central issue in bargaining. (A 56-58; 1082-86, 1147-48.) In *ACF Industries*, the Board found that an information request made clearly to forestall impasse did not preclude such a finding. 347 NLRB 1040, 1043 (2006). Unlike in *ACF*, and as shown

above, Local 1199 requested information for bargaining purposes and not to forestall impasse. (A 20, 33, 40-41; 78, 131-32, 1093-96, 1155-57.) And in *Teamsters Local Union No. 122*, the union negotiator engaged in wide array of delay tactics – threats, filibusters, story telling, bereavement leave – of which repeated and minutely detailed information requests were only one. 334 NLRB 1190, 1235-48 (2001). Here, as shown above, Local 1199 requested information for bargaining purposes and engaged in none of the delay tactics used by the union in *Teamsters Local Union No. 122*. (A 20, 33, 40-41; 78, 131-32, 1093-96, 1155-57.)

3. Substantial evidence supports the Board's finding that Local 1199 did not engage in bad faith bargaining

The Employers argue (Br. 41-44, 49-54) that Local 1199 engaged in bad faith bargaining by refusing to negotiate terms other than those found in the Tuchman Agreement because of the most favored nations clause found therein. As shown below, the argument lacks merit for several reasons.

First, the Board expressly found that Local 1199 did not adopt a "take it or leave it" position based upon the terms of the Tuchman Agreement. (A 59.) As shown above at p. 51, the Board reasonably credited Alcoff's testimony that Local 1199 did not adhere to the terms of the Tuchman Agreement, over Jasinski's contention that it did, and the Employers do not challenge that credibility determination. The Board further relied upon the

fact that Eleanor Harris – who was present at every bargaining session in which Jasinski alleged that Foley and/or Alcoff declared that Local 1199 would not bargain terms other than those found in the Tuchman Agreement – failed to provide corroborating testimony. (A 59.) Thus, the Employers' reliance on Jasinski's discredited and self-serving testimony to establish that Local 1199 adopted a fixed bargaining position is misplaced.

Consistent with the credited testimony, the Board found that there were significant differences between the Tuchman Agreement and Local 1199's proposals, particularly regarding the use of agency employees. (A 26.) Such differences include the gradual reduction of agency-employee use in Local 1199's August 19, 2005 proposal to Milford and September 12, 2005 proposal to Pinebrook, but not found in the Tuchman Agreement; the limitation in the Tuchman Agreement on the use of agency employees only during paid days off and only on a needs basis; and the further limitation in the Tuchman Agreement on the use of agency employees to occasions when neither bargaining-unit nor no-frills employees are available. (A 26; 494-96, 725, 872, 875-906, 916-26, 970-83.)

Moreover, even if Pimplaskar did state at the initial bargaining sessions that certain issues, including benefit-fund and pension-fund contributions, were nonnegotiable, the Board gave Pimplaskar's alleged

statements due weight when determining whether Local 1199 bargained in bad faith. (A 60-61.) In finding that that Local 1199 had not bargained in bad faith, the Board considered the totality of the Union's conduct and specifically noted that Local 1199 subsequently modified its proposals regarding both benefit-fund and pension-fund contributions, and that Alcoff, upon his assumption of bargaining duties, told Jasinski that he was there to bargain a contract and not deal with statements of his predecessors. (A 63; 101-02 (pp. 132-34), 118-19 (pp. 235-237, 242), 159-60 (pp. 429-31), 177-78 (pp. 525-26), 208 (p. 714), 494-96, 970-83.)

The Board cases relied upon by the Employers (Br. 49-51) are again inapposite and do not provide reason to disturb the Board's conclusions. In each case, the Board's finding regarding bad faith bargaining and impasse is premised upon the union's adoption of a take-it-or-leave-it stance or refusal to bargain terms other than those found in a master contract. As discussed above, Local 1199 was willing to bargain over every issue on the table and repeatedly demonstrated flexibility in its proposals and at the bargaining table.

Accordingly, substantial evidence supports the Board's finding that Local 1199 did not engage in bad faith bargaining.

CONCLUSION

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

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ADDENDUM

STATUTES

Sec. 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Sec. 8(d) of the Act (29 U.S.C. § 158(d)) provides in relevant part:

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

Section 10 of the Act (29 U.S.C.§ 160) provides in relevant part:

(a) 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. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where

predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(e) 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 proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except

that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MONMOUTH CARE CENTER, MILFORD MANOR NURSING AND REHABILITIATION CENTER, AND PINEBROOK NURSING HOME	)	
Petitioner/Cross-Respondent	)	Nos. 10-1400 10-1403
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 22-CA-27287

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 13,794 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s Linda Dreeben
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Dated at Washington, DC
this 13th day of October 2011

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 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:

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Dated at Washington, DC
this 13th day of October, 2011