

Nos. 11-1280 & 11-1322

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

**KLB INDUSTRIES, INC., d/b/a
NATIONAL EXTRUSION AND MANUFACTURING COMPANY**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, UAW**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

RUTH E. BURDICK
Supervisory Attorney

DAVID SEID
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-7958
(202) 273-2941

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KLB INDUSTRIES, INC. d/b/a NATIONAL)	
EXTRUSION AND MANUFACTURING)	
COMPANY)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1280, 11-1322
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	8-CA-37672
)	
and)	
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE, AND)	
AGRICULTURAL IMPLEMENT WORKERS)	
OF AMERICA, UAW)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici: KLB Industries, Inc., doing business as National Extrusion and Manufacturing Company, was the respondent before the National Labor Relations Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of

America, was the charging party before the Board, and is the intervenor before this Court. The Board's General Counsel was a party before the Board.

B. *Rulings Under Review:* The case under review is a decision and order of the Board issued on July 26, 2011, and reported at 357 NLRB No. 8.

C. *Related Cases:* This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to 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
(202) 273-2960

Dated at Washington, DC
this 14th day of March 2012

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	2
Statement of issues	3
Relevant statutory provisions.....	3
Statement of the case.....	4
I. The Board’s findings of fact.....	5
A. Background; in September 2007, the Company and the Union begin negotiations for a new bargaining agreement; the Company informs the Union that it needs a concessionary agreement and demands substantial wage concessions.....	5
B. Throughout September, the Union reduces its wage proposal and the parties exchange proposals on healthcare insurance	7
C. During negotiations on October 2 and 3, the parties continue to disagree on the issue of wages	9
D. On October 4, the Union requests information about the Company’s proposals to decrease wages	10
E. On October 8, the Union rejects a revised company offer; during subsequent negotiations the parties continue to disagree on the issue of wages	11
F. In an October 18 letter, the Company refuses to supply the Union with the information it had requested about the Company’s proposed wage cuts	12
G. On October 22, the Company locks out the employees and ends its healthcare insurance plan; the Union reiterates its requests for information about the Company’s expressed need for wage concessions.....	13

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
H. In January and March 2008, the Company rejects the Union’s revised wage proposals.....	14
I. In June 2008, the Company calls the police to take action against the Union’s picketing signs.....	15
II. The Board’s conclusions and order.....	15
Summary of argument.....	17
Standard of review	19
I. The Board is entitled to summary enforcement of its uncontested finding that the Company violated Section 8(a)(1) of the Act by calling the police for the purpose of taking action against the Union’s legal picketing.....	20
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the union with the requested relevant information	21
A. Applicable legal principles	21
B. The record amply demonstrates that the Union’s information request is relevant to its bargaining duties and that the Company’s refusal to provide that the information was unlawful	23
C. The Company’s contentions are meritless.....	30
1. The Board did not act inconsistently with Supreme Court’s decision in <i>Truitt</i> or the Board’s prior cases	31
2. The Board reasonably found that the Company did not carry its burden of showing that the Union’s information request was made in bad faith	37

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
III. Substantial evidence supports the Board’s finding that company Violated Section 8(a)(5), (3), and (1) of the Act by locking out and Temporarily replacing unit employees and cancelling their health insurance	39
A. Applicable principles	39
B. The Company’s failure to supply information in support of its demand for wage concessions rendered the lockout unlawful	40
Conclusion	47

TABLE OF AUTHORITIES

Cases	Page(s)
<i>*A-1 Door & Building Solutions</i> , 356 NLRB No. 76 (2011), 2011 WL 96412	18,25,32,33,36
<i>A.M.F. Bowling Co.</i> , 303 NLRB 167 (1991) <i>enforcement denied on other grounds</i> , 977 F. 2d 141 (4th Cir. 1992)	26
<i>*American Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1965)	40,44
<i>Beyerl Chevrolet, Inc.</i> , 221 NLRB 710 (1977)	22
<i>CalMat Co.</i> , 331 NLRB 1084 (2000)	25
<i>*Caldwell Manufacturing</i> , 346 NLRB 1159 (2006)	18,24,25,32,33,36
<i>*Clemson Brothers, Inc.</i> , 290 NLRB 944 (1988)	42
<i>ConAgra, Inc. v. NLRB</i> , 117 F.3d 1435 (D.C. Cir. 1997)	35,36
<i>Concrete Pipe & Products Corp.</i> , 305 NLRB 152 (1991)	34,35
<i>Corson & Gruman Co. v. NLRB</i> , 899 F.2d 47 (D.C. Cir. 1990)	30

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Crowley Marine Services, Inc. v. NLRB</i> , 234 F.3d 1295 (D.C. Cir. 2000)	20,22
<i>D.C. Liquor Wholesalers</i> , 292 NLRB 324 (1989), <i>enforced</i> , 924 F.2d 1078 (D.C. Cir. 1991)	40
<i>Diamond Walnut Growers, Inc. v. NLRB</i> , 113 F.3d 1259 (D.C. Cir. 1997)	21,47
<i>E.I. DuPont De Nemours & Co.</i> , 276 NLRB 335 (1985)	25,32,36
<i>E.I. DuPont Pont De Nemours & Co. v. NLRB</i> , 489 F.3d 1310 (D.C. Cir. 2007)	22,29,42
<i>Empire Terminal Warehouse Co.</i> , 151 NLRB 1359 (1966), <i>enforced</i> , 355 F.2d 842 (D.C. Cir. 1996)	32
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	20
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981)	45
<i>Flying Food Group, Inc. v. NLRB</i> , 471 F.3d 178 (D.C. Cir. 2006)	21
* <i>Globe Business Furniture, Inc.</i> , 290 NLRB 841 (1988), <i>enforced</i> , 889 F.2d 1087 (6th Cir. 1989) (same)	42

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Hawkins Construction Co.</i> , 285 NLRB 1313 (1987) <i>enforcement denied on other grounds</i> , 857 F.2d 1224 (8th Cir. 1988)	37
<i>International Paper Co.</i> , 319 NLRB 1253 (1995) <i>enforcement denied on other grounds</i> , 115 F.3d 1045 (D.C. Cir. 1997).....	37
<i>International Telegraph & Telegraph Co.</i> , 159 NLRB 1757 (1966), <i>enforced in relevant part</i> , 382 F.2d 366 (3d Cir. 1967).....	26,32,33
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190 (1991).....	45
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967).....	22
* <i>NLRB v. Truitt Manufacturing Co.</i> , 351 U.S. 149 (1956).....	17,18,22,30,31,33
<i>NLRB v. Western Wirebound Box Co.</i> , 356 F.2d 88 (9th Cir. 1966)	31
<i>NLRB v. Whitesell Corp.</i> , 638 F.3d 883 (8th Cir. 2011)	29
<i>National Steel & Shipbuilding Co. v. NLRB</i> , 156 F.3d 1268 (D.C. Cir. 1998).....	30

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Nielsen Lithographing Co.</i> , 305 NLRB 697 (1991), <i>affirmed sub nom.</i>	33,34
<i>Graphic Commc'ns Int'l Union Local 508 v. NLRB</i> , 977 F.2d 1168 (7th Cir. 1992)	
<i>North Star Steel Co.</i> , 347 NLRB 1364 (2006)	34,35
<i>Oil, Chemical & Atomic Wkrs., Local Union No. 6-418 v. NLRB</i> , 711 F.2d 348 (D.C. Cir. 1983)	21,22
<i>Peterbilt Motors Co.</i> , 357 NLRB No. 13 (2011), 2011 WL 2784214	43,44
<i>Regal Cinemas, Inc. v. NLRB</i> , 317 F.3d 300 (D.C. Cir. 2003)	21
<i>Scepter, Inc. v. NLRB</i> , 280 F.3d 1053 (D.C. Cir. 2002)	19
<i>Stroehmann Bakeries, Inc. v. NLRB</i> , 95 F.3d 218 (2d Cir. 1996)	36
<i>Teamsters Local 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988)	45
<i>Teamsters Local No. 639 v. NLRB</i> , 924 F.2d 1078 (D.C. Cir. 1991)	40
<i>Tualatin Electric, Inc. v. NLRB</i> , 253 F.3d 714 (D.C. Cir. 2001)	20

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>United Steel Wkrs. of America, Local Union 14534</i> , 983 F.2d 240 (D.C. Cir. 1993) (Br. 20-21)	34
<i>U.S. Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998)	20
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	19,20
<i>Vincent Industrial Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000)	45
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	21,47

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

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	16
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	3,4,15,16,17,21,40,45
Section 8(a)(3) (29 U.S.C. § 158 (a)(3))	3,4,16,40
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	3,4,15,16,17,21,40,45
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2,19,46
Section 10(f)(29 U.S.C. 160(f))	2

GLOSSARY

Act	The National Labor Relations Act
Board	The National Labor Relations Board
Br.	The opening brief of KLB Industries, Inc., doing business as National Extrusion and Manufacturing Company
Company	KLB Industries, Inc., doing business as National Extrusion and Manufacturing Company
D&O	The Board's Decision and Order
Union	International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America

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

Nos. 11-1280 & 11-1322

**KLB INDUSTRIES, INC., doing business as
NATIONAL EXTRUSION AND MANUFACTURING COMPANY**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of KLB Industries, Inc., doing business as National Extrusion and Manufacturing Company (“the Company”) to review and set aside, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company. The Board had subject matter jurisdiction over the unfair labor practice proceeding under 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 affecting commerce. The Board’s Decision and Order issued on July 26, 2011, and is reported at 357 NLRB No. 8.¹

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act. (29 U.S.C. § 160(e) and (f)). The Board’s Order is final with respect to all parties. The Company filed its petition for review on August 9, 2011, and the Board filed its cross-application for enforcement on September 13, 2011. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board orders. The International Union, United

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

Automobile, Aerospace, and Agricultural Implement Workers of America (“the Union”) has intervened on the Board’s behalf.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested finding that the Company violated Section 8(a)(1) of the Act by calling the police for the purpose of taking action against the Union’s legal picketing.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with information relevant to the Company’s asserted need for substantial wage concessions based on its claims of competitive disadvantage made during contract negotiations.

3. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5), (3), and (1) of the Act by locking out and temporarily replacing its bargaining unit employees and cancelling their health insurance coverage in the face of its unremedied information request violations.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

During negotiations in 2007 and 2008 between the Company and the Union for a new collective-bargaining agreement, the Company demanded significant wage concessions for the stated purpose of improving its competitiveness. The Union then requested information to help it evaluate the Company's asserted need for wage concessions. The Company, however, refused to provide the requested information, locked out its bargaining unit employees, temporarily replaced them, and cancelled their health insurance coverage.

Based on those facts, and an amended charge filed by the Union, the Board's General Counsel issued a consolidated complaint alleging, as relevant here, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to provide the Union with information relevant to its asserted need for wage concessions. The complaint further alleged that the Company violated Section 8(a)(5), (3), and (1) of the Act (29 U.S.C. § 158(a)(5), (3), and (1)) by locking out and replacing its bargaining unit employees and cancelling their health insurance coverage, and also alleged that the Company violated Section 8(a)(1) by calling police to the facility for the purpose of taking action against legal picketing. (A. 430; 9-22, 199-204.)

After a hearing, an administrative law judge found that the Company had committed the alleged unfair labor practices. On review, the Board affirmed the

judge's rulings, findings, and conclusions. (A. 422-26.) The facts supporting the Board's Order are summarized directly below, followed by a description of the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; in September 2007, the Company and the Union Begin Negotiations for a New Bargaining Agreement; the Company Informs the Union that It Needs a Concessionary Agreement and Demands Substantial Wage Concessions

The Company produces aluminum extrusion products at a facility in Bellefontaine, Ohio. The Company was formed and assumed ownership of the facility in 1997. (A. 430; 10 par. 2(a), 205 par. 2.) Thereafter, the Company negotiated three successive collective-bargaining agreements with the Union, which represented the Company's 16 production and maintenance employees. The Union had also represented the predecessor's production and maintenance employees. The parties' 2004 agreement was scheduled to terminate no earlier than September 30, 2007. (A. 430 and n.2; 12 par. 6, 25-26, 34-35, 160-61, 205 par. 6, 254-89.)

Prior to starting negotiations for a new agreement, the Company had determined that it needed to save \$100,000 per year on its labor costs to remain "competitive." (A. 431; 31-32, 105 p. 893, 162-64.) The Company faced "business conditions that it had not faced in previous years." (A. 105 p. 894.)

Specifically, the Company faced increased competition from Asian countries, particularly China and Malaysia, that was “really able to undercut” the Company’s competitiveness. (A. 31; 105 p. 894.) In addition, the Company had increased healthcare costs and decreased productivity. (A. 432; 31, 105 p. 894, 167.) The Company had also recently lost a major customer which led to an approximately \$1 million decrease in annual revenue. (A. 432; 105 p. 894, 164-66, 412.)

Negotiations for a successor agreement began on September 20, 2007. Attorney Anthony Wakefield served as the Company’s lead negotiator. Craig Johnson, the Company’s controller, also served on the bargaining committee. Konrad Young, a union official, served as the Union’s lead negotiator. A federal mediator attended most of the bargaining sessions. (A. 430, 432; 11 par. 5(b), 12 par. 7(a), 23-24, 36-38, 108 p. 953, 205 par. 5, 206 par. 7(a).)

Throughout the negotiations the Company told the Union that it needed significant wage concessions to remain competitive. Specifically, the Company claimed that increased competition from Asian companies and increased costs had caused it to be operating at a competitive disadvantage. (D&O 424 & n.9; 47, 76 pp. 369-71, 167.)

On September 20, the Company proposed a three-year contract that would reduce hourly wages for unit employees by 20 percent in the first year, with no increases in the subsequent two years. The proposal also decreased company

contributions to employees' 401(k) funds, reduced shift differential pay and overtime pay, and increased employees' contributions toward their healthcare insurance premiums. (A. 431-32; 30-31, 39-46, 216-51.) In turn, the Union proposed a three-contract that sought hourly wage increases of \$2.00 the first year and \$1.00 in the second and third years. The Union also sought cost-of-living adjustments to wages. In addition, the Union proposed that the Company could not outsource while any employee was on layoff. (A. 432; 48-58, 80 pp. 457-58, 290-93.)

B. Throughout September, the Union Reduces Its Wage Proposal and the Parties Exchange Proposals on Healthcare Insurance

On September 21, union negotiator Young stated that to bridge the gap in wage proposals the Union would not seek cost-of-living adjustments. (A. 433; 64.) The Company proposed a healthcare insurance plan with a high deductible as an alternative to increasing employees' contributions to their existing healthcare insurance premiums. The Company asserted that the high deductible plan would save it \$47,000 per year. (A. 433; 59-63, 70 p. 236, 109-11 pp. 988-95, 252.)

On September 25, the Company revised its initial healthcare insurance proposal by increasing the percentage of employees' premiums that it was willing to pay. (A. 433 & n. 9; 65-68, 69 pp. 233-34, 297-319.) The Union offered a counterproposal on healthcare under which it would accept the Company's high

deductible healthcare plan if it added a healthcare reimbursement account. The Union claimed that its plan would save the Company \$20,000 per year. (A. 434; 69-70 pp. 232-37, 77 pp. 409-11, 111-12 pp. 998-1002, 320-21.)

At the September 30 bargaining session the parties agreed to extend the current bargaining agreement on a day-to-day basis with 24 hours of notice required to terminate the bargaining agreement. (A. 434; 86-87 pp. 750-53, 117-18, 322.) During the bargaining session, the parties primarily discussed healthcare. The Company proposed a healthcare plan that contained both a high deductible and a healthcare reimbursement account. (A. 435; 71-73 pp. 249-56, 118-25, 323-45.) The Union offered a reduced wage proposal that contained no hourly increase in the first year, a \$0.20 hourly increase the second year, and a \$0.10 cent hourly increase the third year. The Union also withdrew its proposal to eliminate the outsourcing of work. (A. 435; 73-74 pp. 257-60, 80 p. 458, 125, 188-89, 346.) Later that day, the Union met with its members and they rejected the Company's proposal. (A. 436 & n.13; 81 p. 603, 83-84 pp. 674-78.)

As of September 30, the Company understood that the parties had outstanding issues over wages, matching contributions to the 401(k) plans, vacation days for senior employees, and bonuses. (A. 436; 126-27.)

C. During Negotiations on October 2 and 3, the Parties Continue To Disagree on the Issue of Wages

On October 2, the Company responded to the Union's movement on wages with a proposal that reduced its wage concession demand from a 20-percent to a 12-percent hourly decrease over three years, with an 8-percent wage reduction in the first year, followed by 2-percent reductions in the second and third years. The proposal also left the Company's matching contributions to the 401(k) plans unchanged from the expiring contract. (A. 436; 128-29, 347.) At this point, the Company understood that wages, bonuses, and vacation for senior employees were the only outstanding issues. (A. 130.) The Union made a counter-proposal that returned to many of its pre-September 30 positions on issues not agreed to by the Company. With respect to wages, the Union sought increases of \$1.50 the first year, followed by \$0.80 increases in the second and third years. (A. 436; 348-51, 352-55.)

On October 3, the Company sent a letter to the Union providing notification that "[c]onsistent with the terms of the extension agreement . . . please accept this letter as the Company's notice that it intends to terminate the agreement now in effect between the parties on Sunday, October 7, 2007." (A. 436; 132-33, 359.) At the bargaining session on October 3, the Company proposed what it characterized as its last and final offer. (A. 436; 213-15.) The wage proposal in that offer was

unchanged from October 2. (A. 437; 27-28, 213-15.) The Union resubmitted its October 2 proposal with a few modifications. With respect to wages, the Union sought \$1.25 hourly increase the first year, and \$0.80 hourly increases in the second and third years. (A. 437; 82 pp. 617-18, 408-11.) The federal mediator said, “I guess we’re at impasse then.” Young disagreed. (A. 436; 78 pp. 440-41, 134-35, 174-75.) The parties agreed to meet on October 5 for their next bargaining session. (A. 437; 135, 175.)

D. On October 4, the Union Requests Information About the Company’s Proposals To Decrease Wages

On October 4, Young submitted a letter to Wakefield that sought information about the Company’s proposals on healthcare insurance, bonuses, and wage reductions. (A. 437-38; 356-58.) With respect to wages, the letter stated that during the course of negotiations, “the Company has continually asserted that [it] must improve the competitive position of the . . . facility,” and based on that assertion, “the Company has made numerous contract proposals that reduce the wages and benefits.” (A. 356-58.) The Union’s letter then requested the following items of information in order “to determine the veracity” of those claims:

1. A list of all current customers so that the Union may contact the customers to determine if any of them is contemplating purchasing products from other sources.

2. A copy of any and all quotes that the Company has provided, and whom these quotes have been issued to. Also, how many quotes have been awarded (or not awarded) in the past five (5) years.
3. Identify any and all outsourced work: (in the past 5 years) that had previously been done at this facility by the bargaining unit employees.
4. A list of all customers who have ceased buying from this facility during the last 5 years. The [U]nion needs this information to test the Company's assertion that they are not competitive. The [U]nion intends on contacting the former customers to learn the reasons why they stopped purchasing.
5. A complete list of prices for products so that the [U]nion can compare the prices of competitors.
6. In order for the Union to determine whether the [C]ompany's assertion of uncompetitiveness is based on price or other factors. Please provide market studies and/or marketing plans that would impact sales of products produced at [the facility].
7. With the current Company proposal to reduce wages, please provide a complete calculation of the projected company savings over the next three years, including any projected overtime.

(A. 422-23, 437-38; 356-58.)

E. On October 8, the Union Rejects a Revised Company Offer; During Subsequent Negotiations the Parties Continue To Disagree On the Issue of Wages

The parties met again with the federal mediator on October 5. Based on their discussions, the Company developed a "timed offer" that was valid until October 8. If not accepted, the Company would automatically reinstate its October 3 offer. The timed offer was for a four-year contract that would decrease wages by \$1.00 hourly in the first year and increase them 2.75 percent in each subsequent

year, with a \$500 signing bonus. (A. 438; 79 pp. 444-45, 137-52, 150 pp. 859-60, 176-85, 360-80, 397.) On October 8, the Union rejected the Company's timed offer. (A. 439; 88 pp. 768-69, 98-99 pp. 849-51, 185-86.)

On October 10, the parties met separately with the mediator. Wages were the "big issue." (A. 439; 153-54, 414.) The Union conveyed that the Company's health insurance plan was acceptable, but that its wage proposal was unacceptable. As a result of the separate meetings, the Company reinstated its October 3 offer. (A. 439; 153-54, 186-87, 415.) The Union also made a proposal that maintained its October 2 proposal in most respects, but reduced its wage proposal to a \$.80 hourly wage increase in each year of the contract. (A. 439; 75 p. 309, 154, 381-84.)

At a subsequent meeting on Tuesday, October 16, neither party made a proposal or offered any movement. The Company reiterated that the October 3 proposal was its final proposal. (A. 439; 28-29, 153, 156-58.) The Company negotiators viewed the parties' disagreement over wages as the only reason they had not reached an agreement. (A. 106 p. 913, 107 p. 915, 159, 197.)

F. In an October 18 Letter, the Company Refuses To Supply the Union With the Information It Had Requested About the Company's Proposed Wage Cuts

In an October 18 letter, the Company responded to the Union's information request. The Company provided information about bonuses and explained that the requested information about healthcare was not available. (A. 439; 385-89.) With

respect to wages, the Company stated the requested information about current customers was not relevant because “[t]he Company’s desire to remain competitive in both global and domestic markets is no different from the desire of any business conducting operations similar to those of [the Company].” (A. 439-40; 385-89.)

The Company also asserted that information about outsourced work was not relevant because it was not an issue in the current bargaining. (A. 440; 385-89.)

The Company stated that the overall cost savings from the wage cuts would be \$133,327.00, with the respective savings over the three years of \$36,177.00, \$44,498.00, and \$62,652.00. (A. 440; 385-89.)

G. On October 22, the Company Locks Out Employees and Ends Its Healthcare Insurance Plan; the Union Reiterates Its Request for Information About the Company’s Expressed Need for Wage Concessions

In an October 19 letter, company attorney Wakefield notified the Union that the Company would lockout bargaining unit employees on October 22. (A. 441; 390-91.) A letter sent that day to the employees by Company President and CEO Christopher Kerns stated that “consistent with the law” employees’ health insurance coverage will end effective October 23, 2007, and to continue insurance benefits past that date employees will need to apply for COBRA coverage.” (A. 441; 400.)

In an October 21 letter, Young responded to the Company’s refusal to supply the requested information about its need for wage reductions. (A. 441; 392-

96.) Young wrote that the Company's response about its anticipated wage savings did "not include the 'complete calculations' for the Union to assess the validity of these figures." Young also reiterated the Union's request for all of the information itemized in its earlier October 3 letter regarding wage reductions, and again explained that the Union needed the requested information so that it could "prepare appropriate responses to the Company's proposals." (A. 441; 392-96.)

On October 22, the Company locked out the unit employees. (A. 441; 191.)

On October 24, the Company wrote to its health insurance carrier to cancel the Company's policy, and was later told that cancellation of the policy precluded employees from COBRA eligibility. (A. 441; 191-93.) Subsequently, the Company replaced the locked-out employees. (A. 441; 191.)

H. In January and March 2008, the Company Rejects the Union's Revised Wage Proposals

At a meeting on January 30, 2008, the Company rejected the Union's reduced wage proposal that contained hourly increases of \$0.38, \$0.40, and \$0.45 for each year of the contract, and a continuation of the prior healthcare insurance. (A. 441-42; 89-90 pp. 773-77, 398.) Then, on March 18, the Union proposed a four-year contract that contained an hourly wage decrease of \$0.50 the first year, followed by increases of \$0.35, \$0.40, and \$0.40 in the following years. (A. 442; 90-91 pp. 777-79, 399.)

I. In June 2008, the Company Calls the Police To Take Action Against the Union's Picketing Signs

About the time that the lockout started in late October 2007, the Company had paid a surveying company to mark the boundaries of its property. A few weeks later, the Union placed picket signs in the ground across the road from the Company's facility in areas that the Union believed, based on the surveying marks, to be within the public right-of-way. (A. 443; 92-95 pp. 802-11, 401-07.) In June 2008, after the Union replaced signs that someone had removed from that area, the Company called the police on the belief that the Union had placed the signs on company property. (A. 443; 95-96 pp. 814-16, 97 pp. 824-26, 101 pp. 868-69.) The police arranged for a surveyor to evaluate the Company's trespassing claim. He concluded that, based on existing surveying marks, the Union's signs were not on company property. (A. 443; 92-95 pp. 802-11, 101-04 pp. 869-80.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Becker, with Member Hayes dissenting) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to furnish the Union with information relating to the Company's asserted need for substantial wage concessions based on its claims of competitive disadvantage. (A. 422 n.3, 463.) The Board majority also found, in

agreement with the judge, that the Company violated Section 8(a)(5), (3), and (1) of the Act (29 U.S.C. § 158(a)(5), (3), and (1)) by locking out and replacing its bargaining unit employees and cancelling their health insurance coverage. (A. 425, 426 & n.13, 463.) The Board (Chairman Liebman and Members Becker and Hayes) also found that the Company's cancellation of the employees' health insurance coverage violated Section 8(a)(5) of the Act. (A. 426 & n.2.) With regard to the judge's finding that the Company violated Section 8(a)(1) by calling the police for the purpose of taking action against the Union's legal picketing, the Company filed no exceptions and therefore the Board adopted the judge's finding without review. (A. 422 n.2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 464.) Affirmatively, the Order directs the Company to furnish the requested information, to offer locked-out employees full reinstatement to their former jobs, to make locked-out employees whole for any losses suffered as a result of the unlawful lockout and the unlawful termination of the Company's health insurance plan. (A. 464.) The Board's Order further requires the Company to post and electronically distribute a remedial notice to the unit employees. (A. 426.)

SUMMARY OF ARGUMENT

The key facts supporting the Board's decision are undisputed. It is uncontested that during negotiations for a new collective-bargaining agreement the Company demanded significant wage cuts for the stated purpose of improving its competitiveness. Indeed, the Company specifically acknowledged that it needed the wage cuts to address new competition from countries such as China and Malaysia which could significantly undercut its business. It is further undisputed that the Company's continuing demand for wage cuts was the key stumbling block to the parties' reaching a new bargaining agreement.

On those undisputed facts, the Board reasonably found, under settled principles, that the Company's refusal to provide the Union with information it had requested for the purposes of evaluating the Company's claims of competitive disadvantage violated its duty to bargain under Section 8(a)(5) and (1) of the Act. The Board's finding is fully consistent with the Supreme Court's holding in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956), that "if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Id.* at 152-53. The Board's finding is also consistent with its prior application of *Truitt*. For instance, in many cases, such as *Caldwell Manufacturing*, 346 NLRB 1159, 1159 (2006), and *A-1 Door & Building Solutions*, 356 NLRB No. 76 (2011), 2011 WL 96412, the Board

similarly applied *Truitt* to require an employer to substantiate its claims of competitive disadvantage.

The Company's contentions that it had no duty to supply that information are based on a misunderstanding of the law. The Company's argument, for instance, that it was not required to provide the requested information because it had not claimed an inability to pay is incorrect. That argument fails to recognize the distinction drawn by the Board between claims of competitive disadvantage and inability-to-pay claims. When an employer, as here, raises a claim of competitive disadvantage, the Board will require the employer to respond to requests for relevant information that is needed to substantiate the employer's claims, and the Board will apply a liberal discovery-type standard to determine whether the requested information is relevant. The Board, however, will not require the employer to "open its books" and to provide general financial information unless the employer raises an inability-to-pay claim. Here, the Union requested information relevant to the Company's competitive disadvantage claim; it did not request that it "open its books."

The Company's lockout of its unit employees to force them to accept the Company's proposed wage cuts was tainted by the unremedied unfair labor practice of failing to supply the Union with requested information pertaining to its demands for wage cuts. Thus, the lockout started just a few days after the

Company's refusal, despite the fact that the proposed wage cuts were the key factor that precluded the parties from reaching an agreement, and that the requested information was relevant to the Union's need to evaluate the Company's competitiveness claims. Consequently, the Board reasonably found that the Company's unlawful withholding of the requested information materially affected the progress of the parties' negotiations, and that the resulting lockout to bring economic pressure on employees to accept the Company's unsubstantiated proposal for wage cuts, and its related cancellation of the employees' healthcare insurance, were in violation of the Act.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1055 (D.C. Cir. 2002). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. Thus, the Board's reasonable inferences drawn from the facts may not be displaced on review even though the Court might justifiably have reached a different conclusion had it considered the matter de novo. *Id.* at 488; *accord U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law." *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted). In addition, the Board's judgment on the question of the relevance of information to a union's bargaining duties "is entitled to great deference, because determining whether a party has violated its duty to confer in good faith is particularly within the expertise of the Board." *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and internal quotation marks omitted).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY CALLING THE POLICE FOR THE PURPOSE OF TAKING ACTION AGAINST THE UNION'S LEGAL PICKETING

The administrative law judge found (A. 464) that, during the lockout, the Company unlawfully tried to take action against the Union's lawful picketing by calling the police to have the Union's picket signs removed. Before the Board, however, the Company did not file exceptions to the finding, and having failed to do so, the Company is now jurisdictionally barred from obtaining review of the

Board's adoption (A. 422 n.2) of that finding. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263 (D.C. Cir. 1997). Therefore, the Board is entitled to summary enforcement of its uncontested finding. *See Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO FURNISH THE UNION WITH THE REQUESTED RELEVANT INFORMATION

A. Applicable Legal Principles

Section 8(a)(5) and (1) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the bargaining representative of its employees. *See Oil, Chemical & Atomic Wkrs., Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 357-58 (D.C. Cir. 1983).² It is well settled that an employer's duty to bargain in good faith includes the duty "to provide information that is needed by

² Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) of the Act (29 U.S.C. 158(a)(5)), therefore, results in a "derivative" violation of Section 8(a)(1). *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 n.5 (D.C. Cir. 2003).

the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). The critical question in determining whether information must be produced is that of relevance to the union’s bargaining duties. The “Board’s relevance standard is ‘a liberal discovery-type standard.’” *E.I. DuPont De Nemours & Co. v. NLRB*, 489 F.3d 1310, 1316 (D.C. Cir. 2007) (citation omitted); accord *Acme Indus.*, 385 U.S. at 437 & n.6. Under that standard “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.” *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and quotation marks omitted).

As this Court has recognized, the duty to provide information relevant to the issues at the bargaining table is a “fundamental obligation” that is critical to the collective-bargaining process. *Oil, Chemical & Atomic Wkrs.*, 711 F.2d at 358. Consequently, “[a] party to good-faith collective bargaining—whether it be employer or union—cannot reasonably expect the other party to buy a pig-in-[a]-poke.” *Beyerl Chevrolet, Inc.*, 221 NLRB 710, 721 (1977); accord *Acme Indus.*, 385 U.S. at 438 n.8 (noting that to deny a union information is to “‘require[e] it to play a game of blind man’s bluff’”) (citation omitted). In sum, as the Supreme Court explained in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956),

“if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.”

Id. at 152-53.

B. The Record Amply Demonstrates that the Union’s Information Request Is Relevant To Its Bargaining Duties and that the Company’s Refusal To Provide that Information Was Unlawful

As an initial matter, the Company does not dispute that during negotiations for a new bargaining agreement in 2007 and 2008 it repeatedly asserted that it needed significant wage concessions because it was operating at a competitive disadvantage. Nor does the Company dispute that it expressed its concerns about its lack of competitiveness throughout the negotiations, or that it expressed explicit concerns over increased competition from Asian companies and increased operating costs. As union lead negotiator Young credibly testified, the Company’s rationale for its proposed wage concessions “centered around competitiveness.” (A. 424 n.9, 451-52; 76 p. 370.)

Moreover, the evidence amply supports the Board’s finding (A. 426, 460, 462) that the Company’s demand for significant wage concessions was the main stumbling block to the parties reaching an agreement. Indeed, company negotiator Wakefield, and company bargaining committee member Johnson, both testified that disagreement over wages was the issue that precluded the parties from reaching an agreement. (A. 159, 197.) Likewise, the Company stated in both its

opening statement at the hearing (A. 106 p. 913, 107 p. 915), and its brief to the administrative law judge (A. 452, 460), that disagreement over wages was the reason for why the parties failed to reach an agreement.

Given the parties' inability to arrive at an agreement on the Company's proposed wage reductions, it is "[n]ot surprising[]" that, as the Board found (A. 423), the Union requested information to evaluate the "veracity" of the Company's "continually asserted" claim that it needed wage concessions to improve its competitive position. (A. 423, 450; 356-58.) Thus, on October 4, the Union requested information about current and former customers, job quotes, outsourcing, pricing structure, market studies, projected savings, and competitors. In response, except for some partial information on the amounts of wages the Company anticipated saving under its proposed wage reductions, the Company refused to provide the requested information.

Consistent with settled Board law, the Board reasonably concluded that the requested information was relevant to the Union's bargaining duties. As the Board explained (A. 424), the "Union had a legitimate claim to information that it could use to understand, evaluate, and possibly rebut the [Company's] assertions" that it was operating at a competitive disadvantage. For example, in *Caldwell Manufacturing*, the employer asserted a need for a wage freeze and other concessions to make a facility more competitive and generally "to become more

competitive in the industry.” 346 NLRB 1159, 1160 (2006). The Board found relevant, and required the employer, to provide information on material costs, labor costs, manufacturing overhead, actual selling prices for the employer’s products, productivity calculations, and competitor data. *Id.* at 1159, 1160 & n.3, 1163-64. The Board explained that the information was relevant “because it would have assisted the [union] in assessing the accuracy of the [employer’s] proposals and developing its own counterproposals.” *Id.* at 1159. The same is true here.

Similarly, in *A-1 Door & Building Solutions*, the employer proposed reductions in profit sharing and wages that it claimed were needed for it to compete against other companies. 356 NLRB No. 76 (2011), 2011 WL 96412, at *1. The Board required the employer to provide information about its job bids and to explain why it won or lost bids. 2011 WL 96412, at *4. The Board found the information relevant because it “would have assisted the [u]nion in evaluating, and responding to, the [employer’s] repeated claim that it could not compete for contracts.” 2011 WL 96412, at *5. *See E.I. DuPont De Nemours & Co.*, 276 NLRB 335, 336, 340, 341 (1985) (the Board required the employer to provide feasibility studies, and data on production costs and those of competitors, to support a restructuring proposal designed to increase productivity and to support its claim that it needed the change to “strengthen competitiveness”); *CalMat Co.*, 331 NLRB 1084, 1096-97 (2000) (the Board required the employer who sought a

concession based on competitiveness concerns to provide competitor data if it were available); *A.M.F. Bowling Co.*, 303 NLRB 167, 168, 170 (1991) (the Board required the employer to provide information on wage surveys to justify its proposed need for a wage concession to become more competitive), *enforcement denied on other grounds*, 977 F. 2d 141 (4th Cir. 1992); *Int'l Tel. & Tel. Co.*, 159 NLRB 1757, 1790-91 (1966) (the Board required the employer who claimed that employee benefits impacted its bidding to substantiate its claim by disclosing the names of its competitors and identifying the contracts that it lost), *enforced in relevant part*, 382 F.2d 366 (3d Cir. 1967).

Here, the Company offers little challenge to the relevancy of the specific information the Union sought to evaluate the Company's asserted need for significant wage cuts. Instead, the Company suggests (Br. 32) that Union's request for information about the Company's customers and pricing is not relevant because the request has "nothing to do with anything discussed during the negotiations." That assertion misses the point: the requested information has everything to do with the Union's ability to evaluate the Company's reliance on asserted competitive pressures in demanding wage cuts, a demand that was the central theme of the negotiations.

For example, as the Board explained (A. 452), "[m]aintaining customers and keeping them from going to other sources is a core function of

competitiveness.” Accordingly, the information about the Company’s current and former customers is reasonable and relevant to the Union’s bargaining duties so that it could understand and verify the asserted competitive pressures facing the Company that led it to demand wage concessions. Indeed, at the hearing, the Company produced in its defense that exact evidence, which included a list of its top 20 customers for 2005, 2006, and 2007, and noted the loss of a major customer. (A. 424, 452; 412-13.) At the hearing, the Company even supplied sales figures for those customers that the Union had not requested. (A. 424, 452; 412-413.) The Company’s production of the very customer information that the Union had requested was, as the Board stated (A. 452), “a glaring if implicit admission of the relevance of the Union’s pursuit of customer information to test the Company’s alleged competitiveness problems.” In this regard, the Board is not, as the Company claims (Br. 25-27), relying on the information provided at the hearing to “bootstrap” its finding that the requested customer information is relevant, but relying on that evidence to confirm the relevance of the Union’s request. Similarly, the Company demonstrated the relevance of the Union’s request for information about the Company’s bidding quotes for projects when bargaining committee member Johnson testified that the Company’s concern over getting outbid for projects prompted its demand for steep wage cuts. (A. 453; 32-33.)

The remaining information the Union requested was similarly relevant to the Company's demand for wage concessions based on its claims of competitive disadvantage. For example, information about the Company's outsourcing was relevant because the Union made the request at a time when it is undisputed that some of its members were on layoff. (A. 454.) Accordingly, as the Board noted, whether some of those laid-off bargaining unit employees "used to perform any of the work more efficiently than outsourcing . . . would be of use to the Union in attempting to evaluate and verify the Company's wage reduction proposals." (A. 454.) Moreover, although the Company claims (Br. 32) that outsourcing was not discussed, the Union had proposed early in the negotiations to eliminate all outsourcing. *See* p. 7. Therefore, as the Board explained (A. 454), "the Union might have further pursued the issue if the request yielded information that made a further outsourcing proposal expedient," or "[a]lternatively, the information might have confirmed to the Union the appropriateness of its decision to withdraw the proposal."

Likewise, the Union's request for the prices of company products is "obviously relevant to a claim of competitiveness," as demonstrated by bargaining committee member Johnson's testimony linking the Company's failure to win job bids on submitting quotes that were too high. (A. 454; 32-33.) In addition, any existing marketing study could help the Union understand the role of competitors

in limiting the Company's sales so it might assess the Company's proposal and potentially modify its own counter proposals.

Finally, the Board (A. 423 n.6) reasonably found insufficient the Company's response to the Union's request for the savings that the Company thought it would realize from the proposed wage reductions. The Company's response that it anticipated an overall saving of \$133,327, with savings of \$36,177, \$44,498, and \$62,652 in successive years (A. 440; 385-89) was insufficient because the Company failed to include the complete calculations and made no mention of the overtime savings that the Union had also requested. As this Court has explained, a union is "entitled to inspect the data relied on by an employer and does not have to accept the employee's bald assertions or generalized figures at face value." *E.I. DuPont Pont De Nemours & Co. v. NLRB*, 489 F.3d 1310, 1316 (D.C. Cir. 2007) (employer's generalized figures to support cost-savings were insufficient). In these circumstances, the Union, as the Board explained (A. 454), had "no way to see the basis of the Company's conclusion, no way to evaluate the accuracy of the claim, or what the impact of alternative proposals would be."

The Company's related contention (Br. 29-30) that the Union itself could independently verify the potential savings to the Company that would result from its proposed wage reduction is equally unavailing. The Board, with court approval, has rejected such an assertion. *See, e.g., NLRB v. Whitesell Corp.*, 638 F.3d 883,

894 (8th Cir. 2011) (rejecting the employer’s claim that the union was “fully capable” of determining which employees would be affected by its vacation proposal and holding that the union “was entitled to the information upon which [the employer] was basing its individual vacation calculation”).

C. The Company’s Contentions Are Meritless

The Company primarily argues (Br. 14-15, 20-29) that those portions of the Union’s information request that it has refused to comply with are not relevant to the Union’s bargaining duties, absent a finding that the Company had pled poverty and expressed an inability to pay the employees without the proposed wage reductions. Absent such a finding here, the Company argues (Br. 20), the Board applied an incorrect interpretation of the Supreme Court’s decision in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956), and contradicted Board precedent. Additionally, the Company contends (Br. 30-31) that it was not required to supply the requested information because the Union acted in bad faith in requesting the information.³ Neither of the Company’s claims has merit.

³ In its opening brief, the Company failed to raise the defense, as it had done before the Board (*see* A. 452-53), that the requested information was confidential. Therefore, the Company has waived that defense before the Court. *See Nat’l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

1. The Board did not act inconsistently with the Supreme Court's decision in *Truitt* or the Board's prior cases

As the Board noted (A. 423), in requiring the Company to provide information about its claims of competitive disadvantage, which did not include a claim of an inability to pay, its unfair labor practice finding here is “entirely consistent with both the letter and spirit” (A. 423) of the Supreme Court’s decision in *Truitt*. In *Truitt*, the Supreme Court required the employer to “open its books” to substantiate a claim that it could not afford to pay a wage increase sought by the union because the increase would put the employer out of business. 351 U.S. at 151-52. Arguing that the Court’s holding should be applied inversely, the Company contends (Br. 20-29) that without such a showing of an inability to pay it is not required to turn over any information. That contention is logically flawed and does not follow from the holding of *Truitt* or cases applying *Truitt*.

Indeed, the Company does not dispute, as the Board noted (A. 424), that the Supreme Court’s observation in *Truitt* that a union has the right to require proof of an employer’s claim made during the give and take of bargaining (351 U.S. at 152-53) is not limited in application to situations where an employer states an inability to pay. See *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 90-91 (9th Cir. 1966) (stating that the “principle announced in *Truitt* is not confined to cases” where the employer claims an inability “to pay the wages demanded by the

union.”); *Int’l Tel. & Tel. Co.*, 159 NLRB 1757, 1758, 1790-91 (1966) (same), *enforced in relevant part*, 382 F.2d 366 (3d Cir. 1967).

Therefore, as shown above, the Board in cases such as *Caldwell Manufacturing*, 346 NLRB 1159, 1160 (2006), *A-1 Door & Building Solutions*, 356 NLRB No. 76 (2011), 2011 WL 96412, at *1, 4, 5, and *E.I. DuPont De Nemours & Co.*, 276 NLRB 335, 336, 340, 341 (1985), has applied the *Truitt* principle to require employers that have not claimed the inability to pay to nevertheless provide relevant information to support proposed concessions based on claims of competitive disadvantage. In such a situation, however, the Board does not require an employer to “open its books” and provide general financial information such as profits, net income, tax returns, salary information, and administrative expenses, because statements of competitive disadvantage do not amount to an inability to pay. *See Caldwell*, 346 NLRB at 1160; *E. I. DuPont*, 276 NLRB at 336, 339; *Empire Terminal Warehouse Co.*, 151 NLRB 1359, 1360, 1368 (1966) (the Board noted that the employer had substantiated its claim that the union’s demands placed it in a competitive disadvantage, and did not require it to provide financial records absent it claiming an inability to pay), *enforced*, 355 F.2d 842 (D.C. Cir. 1996); *Int’l Tel. & Tel. Co.*, 159 NLRB 1757, 1758, 1790 (1966) (the Board recognized the distinction between requiring an employer who raises competitiveness claims to supply supporting information, and requiring a employer

who raises an inability to pay claim to open its books), *enforced in relevant part*, 382 F.2d 366 (3d Cir. 1967).

Moreover, the Company's specific and repeated claims of competitive disadvantage, and its asserted need for wage concessions based on increased competition from Asian companies and higher operating costs did not, as the Company claims (Br. 19, 27-28), constitute mere "negotiating rhetoric" that would not require it provide supporting information. Rather, the Company's specific claims are akin to the employer's claims in *Caldwell Manufacturing*, where the employer asserted that concessions were needed to make its facility more competitive and "to become more competitive in the industry." 346 NLRB 1159, 1160 & n.3, 1163-64 (2006). Also similar is the employer's claim in *A-1 Door* that it needed concessions to compete against other companies. 356 NLRB No. 76 (2011), 2011 WL 96412, at *1, 5. In sum, as the Board explained (A. 424), "[o]n the particular facts of this case," the Company "did not invoke competitive pressure loosely, as an abstract proposition, or as an ever present factor. It was seeking substantial wage cuts and its justification for those cuts centered entirely on a present and pressing lack of competitiveness in specific markets."

Nor, as the Company claims (Br. 15, 20, 26, 28-29), is the Board's decision inconsistent with its subsequent application of *Truitt* in *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), *affirmed sub nom.*, *Graphic Commc'ns Int'l Union Local*

508 v. NLRB, 977 F.2d 1168 (7th Cir. 1992). That case does not hold that a union faced with something less than an inability-to-pay claim has no right to any information. In *Nielsen*, the employer claimed that it needed concessions to compete and that it had increased costs. The employer provided the union with supporting information to establish its increased costs, its decreased sales and productivity, and data to establish that it was losing business to competitors who paid lower wages. 305 NLRB at 697-98. The Board drew a distinction, however, between a competitiveness claim and an inability-to-pay claim, to find that, because the employer had not expressed an inability to pay, it was not required to “open its books” and provide the union with materials such as financial statements, tax returns, and information on its working capital. *Id.* at 698, 700. Therefore, *Nielsen* simply demonstrates, as the Board explained here (A. 424), that it “will deny a union’s request for financial statements but will still enforce its request for more information about the employer’s operations and competitiveness” because “an information request in this context is not an all-or-nothing proposition.”

The Board’s distinction between claims of an inability to pay and claims of competitive disadvantage is further demonstrated by the very cases upon which the Company relies. See *Concrete Pipe & Prods. Corp.*, 305 NLRB 152 (1991), *affirmed sub nom., United Steel Wkrs. of America, Local Union 14534*, 983 F.2d 240 (D.C. Cir. 1993) (Br. 20-21), and *North Star Steel Co.*, 347 NLRB 1364

(2006) (Br. 21-22). For example, in *Concrete Pipe* the employer informed the union that it needed wage concessions because of competition from non-union competitors and new products. In those circumstances, the Board found that the employer was not required to open its books to the union and supply financial information because it had not expressed an inability to pay. 305 NLRB at 153, 158. Likewise, in *North Star Steel*, the employer supported its expressed need for concessions by providing the union with “comprehensive” data about its business conditions, including production and booking reports. Absent expressing an inability to pay, however, the employer was not required to “open its books and provide financial and competitor information.” 347 NLRB at 1369-70, 1373 nn.23 & 24. Here, the Union did not request that the Company “open its books” and provide general financial information, and the Company’s claims to the contrary are mistaken.

Further, contrary to the Company’s insistence (Br. 15, 19, 22-23, 29, 34, 41), this Court’s decision in *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997), does not mandate a different result. In that case, the employer sought to reduce wages based on a stated “need to be competitive” (117 F.3d at 1437), and provided the union with various types of non-financial information, including “a presentation . . . on the gap between the wages paid by [the employer] under the existing CBA and those paid by [its] competitors” (*id.*). It also provided additional

information about “[its] wages, its competitors’ wages, its pension plan, and the number of temporary workers employed,” and 1-year’s worth of sales information. *Id.* at 1438. The employer, however, refused to provide “its certified financial information for the past 5 years” (*id.* at 1437), any additional sales information, or any information regarding other ConAgra companies (*id.* at 1438). The Court found, in disagreement with the Board, that the employer had not stated an inability to pay, and that it therefore was not required to supply the union with any additional information, most of which was general financial information. Accordingly, the exact question at issue before the Board here, and in cases such as *Caldwell, A-1 Door*, and *E.I. Du Pont*, was not before the Court in *ConAgra, Inc.*

For the same reasons, the Company’s reliance on *Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218 (2d Cir. 1996) (Br. 23-24, 38), is unavailing. The union in that case requested many items, including one of the same items requested here—a list of the employer’s customers. *Id.* at 22. The Board, having found that the employer had set forth an inability to pay, did not address whether any of the requested information was relevant absent requiring the employer to open its books. *Id.* Likewise, the Court did not address that issue when it reversed the Board to find that the employer had not established an inability to pay. Rather, the Court simply stated that the employer, absent expressing an inability to pay, was not required to disclose general financial information. *Id.* at 22-23.

Finally, the Company's broad policy argument (Br. 23-24) that the Board's decision here will require any employer who seeks wage concessions to open its books and provide financial information rings hollow. Rather, the Board simply applied a distinction it had previously drawn, and one recognized under the Supreme Court's *Truitt* decision, between requiring an employer to open its books based on a claim of an inability to pay, and requiring an employer to provide other information based on more limited bargaining claims. Information provided in the latter situation, which was similar to the information requested here, helps "foster honest and constructive collective bargaining," but it does not require the employer to provide the type of financial information required in an inability-to-pay case.

(A. 424 n.9.)

2. The Board reasonably found that the Company did not carry its burden of showing that the Union's information request was made in bad faith

The Board presumes that a union acts in good faith when it requests information from an employer, and it requires an employer that asserts bad faith as a defense to show that a union had no valid motive in making the request.

Hawkins Constr. Co., 285 NLRB 1313, 1314 (1987), *enforcement denied on other grounds*, 857 F.2d 1224 (8th Cir. 1988); *Int'l Paper Co.*, 319 NLRB 1253, 1266 (1995), *enforcement denied on other grounds*, 115 F.3d 1045 (D.C. Cir. 1997).

Here, the Board reasonably found (A. 455) that the Company failed to prove that

the Union acted in bad faith in requesting information about the Company's demand for wage concessions.

First, contrary to the Company's contention (Br. 15-16, 30-31), the timing of the Union's October 4 request does not demonstrate that the request had no valid purpose. Although the Company on October 3 proposed what it characterized as its final offer, it had, as of October 4, already agreed to continue bargaining. And, as of October 4, the Company had yet to threaten to implement its October 3 proposal, or propose its timed offer that made significant movement on a number of issues, including wages. In these circumstances, the Company's suggestion (Br. 33) that the Union simply waited until the parties risked reaching impasse to seek the information is unavailing. Moreover, although the mediator made an offhand comment on October 3 that the parties were at impasse, the Company never made that claim, and the parties scheduled additional bargaining that same day, and indeed held subsequent sessions.

The Board also reasonably found (A. 455) that even assuming, *arguendo*, that the Union's information request was motivated, in part, by concerns about the prospect of impasse and unilateral implementation, such concerns would not establish that the Union acted in bad faith. As the Board explained (A. 455), "if the Company's surprise declaration that it was terminating the contract and providing its final offer—just two weeks after bargaining began—jarred the Union

into getting more aggressive that is not a sanctionable act.” Moreover, the Union not only sought information on October 4, but redoubled its efforts to reach an agreement by working with the Company to help it develop a new offer. Had the Company supplied the requested information about wages that response could have, as the Board stated (A. 455), impacted the Union’s effort on the timed offer, as well as the employees’ receptiveness to the timed offer or the renewed October 3 offer.

Second, contrary to the Company’s contention (Br. 16, 32-33), the fact that the Union did not reiterate its information request until after the Company announced the lockout does not establish that the Union acted in bad faith. The Company ignores that it did not respond to the Union’s information request until October 18, the day before it announced the lockout. Thereafter, the Union promptly responded to the Company’s refusal to supply the requested information, and reiterated its need for the information.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5), (3), AND (1) OF THE ACT BY LOCKING OUT AND TEMPORARILY REPLACING UNIT EMPLOYEES AND CANCELLING THEIR HEALTH INSURANCE

A. Applicable Principles

An employer may lawfully lock out its employees if done “for the sole purpose of bringing economic pressure to bear in support of [its] legitimate

bargaining position.” *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); accord *Teamsters Local No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991). A lockout is unlawful, however, “where the Board has concluded on the basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade [its] duty to bargain collectively.” *American Ship Bldg.*, 380 U.S. at 308. Where an employer’s bargaining position is tainted by an unremedied unfair labor practice a lockout in support of that position is in violation of Section 8(a)(3) and (1) of the Act because the employees are effectively forced to accept that unlawful conduct to end the lockout. *Teamsters Local No. 639*, 924 F.2d at 1085. Likewise, by locking out employees “for the purpose of evading its duty to negotiate with the employer’s bargaining representative” the employer also violates Section 8(a)(5) and (1). *Id.* Consequently, the temporary replacement of unit employees who were unlawfully locked out violates Section 8(a)(5), (3), and (1) of the Act. *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1234, 1258 (1989), *enforced*, 924 F.2d 1078 (D.C. Cir. 1991).

B. The Company’s Failure To Supply Information In Support of Its Demand for Wage Concessions Rendered the Lockout Unlawful

There is no dispute that the Company locked out its unit employees on October 22, 2007, and thereafter hired temporary employees to replace them. Nor

is there any dispute, as the Board found (A. 460 and n.47), that the Company's motive for locking out its employees "was to compel the union's acceptance" of the wage cuts contained in its October 3 offer. Indeed, bargaining committee member Johnson provided uncontradicted testimony (A. 460; 191) that the sole purpose of the lockout was to pressure the unit employees to accept the Company's proposed wage reductions. The Board reasonably found (A. 425-26), however, that the Company could not lock out the unit employees for refusing to accept the Company's proposed wage cuts "while at the same time failing to fulfill its statutory duty to respond to the Union's October 4 information request relating to that proposal." (A. 426.)

Thus, as shown above pp. 23-24, the Company acknowledges that its demand for wage cuts was the critical factor that precluded the parties from reaching an agreement. Therefore, the Board was fully warranted in finding (A. 426) that the Company's proposed wage cuts "were *the* central point of disagreement during negotiations and remained a key stumbling block for an agreement after October 4." In addition, as further shown pp. 26-27, the Union's information request was designed to enable the Union to evaluate and respond to the Company's ongoing demands for substantial wage cuts. Yet, the lockout started just a few days after the Company had refused to comply with the Union's October 4 information request.

In those circumstances, the Board reasonably found (A. 426) that the Company's refusal to supply the information tainted the subsequent lockout, cancelling of health insurance, and the hiring of temporary replacement employees. *See Clemson Bros., Inc.*, 290 NLRB 944, 945 (1988) (finding employer's lockout unlawful where it was implemented following employer's unlawful refusal to provide union with information it had requested for bargaining); *Globe Business Furniture, Inc.*, 290 NLRB 841, 841 n.2 (1988), *enforced*, 889 F.2d 1087 (6th Cir. 1989) (same); *cf. E.I. DuPont De Nemours & Co. v. NLRB*, 489 F.3d 1310, 1315-16 (D.C. Cir. 2007) (recognizing the principle that an employer cannot lawfully declare impasse when it had refused to supply information that is central to the parties' differences).

The Company's claim (Br. 34-37) that its failure to supply information to the Union would have had no impact on negotiations is misplaced. As the Board explained (A. 462), "answering that question is not the test. The Act regulates and governs the process of collective bargaining, not the outcome." In any event, the Company's claim is undermined by the fact that the Union requested the information when the parties were in the midst of bargaining, before the Company threatened to implement its October 3 offer, and before the Company proposed its timed offer. Moreover, the Union, as the Board found (A. 461), had given up significant ground during the negotiations. Therefore, had the Company provided

the requested information it may have led the Union to make further concessions, but instead of supplying that information and returning to the table to negotiate, the Company implemented its unlawful lockout only days after denying the request.

The Board also reasonably rejected the Company's oddly misplaced claim (Br. 35) that the lockout was somehow rendered lawful based on the Board's dismissal (A. 443-45) of the complaint allegation that it had engaged in bad-faith surface bargaining. Simply put, given the critical nature of the wage issue, the Company's response to the Union's information request was, as the Board found (A. 460), "no small matter," and the Company offers no support for its mistaken claim.

Finally, the Board's decision in *Peterbilt Motors Co.*, 357 NLRB No. 13 (2011), 2011 WL 2784214, does not mandate a contrary result here, as the Company suggests (Br. 17-18, 35, 39-40). In that case, the Board addressed a question of first impression—that is, whether an employer's failure to supply information *after* a lockout began, converted the lawful lockout into an unlawful lockout because of the employer's information request violation. 2011 WL 278214, at *2. In deciding what standard to apply in making that assessment, the Board determined that "neither law nor logic suggests that a different standard should apply" than the standard applicable to cases—such as the case here—"when an unlawful failure to furnish information renders a lockout unlawful from its

inception.” *Id.* (citing *American Ship Bldg.*, 380 U.S. at 318). The Board then explained that “[a]lthough nowhere expressly stated, the standard consistently, if implicitly, applied by the Board is that where the unlawful withholding of information did not materially affect the progress of negotiations, the ensuing lockout is lawful notwithstanding the unremedied violation.” 2011 WL 278214, at *2 & n.14 (citing cases). Accordingly, contrary to the Company’s assertion (Br. 35), the Board in *Peterbilt Motors Co.* did not announce a new standard, but instead simply applied the very same settled principles applicable to this case.

In any event, in *Peterbilt Motors Co.*, the Board found that the employer’s information request violation had no material affect on negotiations because the parties had 150 differences and they were far apart on many important issues, and thus even if the information had been provided it would have impacted only a small portion of the parties’ differences. 2011 WL 278214, at *2. Here, in contrast, the parties had a specific difference over the Company’s proposed wage cuts and the requested information would have addressed that *central* difference between the parties’ negotiating positions. Thus, the Board reasonably, albeit implicitly, found that the Company’s unlawful withholding of the requested information materially affected the progress of the parties’ negotiations.

Moreover, the Union can hardly be faulted for continuing to negotiate while it was waiting for the Company to respond to the information request, which would

have required a certain amount of time in which to assemble a detailed response. Indeed, as the Company implicitly acknowledges (Br. 38), it would have faulted the Union had the Union instead refused to bargain while waiting for the Company's response to its information request.

Finally, the Board reasonably found (A. 463) that even if the October 22 lockout was lawful, the Company violated Section 8(a)(5) of the Act by unilaterally terminating the employees' healthcare benefits upon declaring the lockout. Thus, an employer has an obligation to give a union an opportunity to bargain over a change in an established term or condition of employment (*Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981)), and an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms without such notice (*Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000).)

Here, the Company does not dispute that it failed to give notice to the Union of its intent to cancel the employees' health insurance on October 23, the day after the lockout started. Instead, the Company informed the employees directly of the termination of their healthcare insurance when it notified them of the impending lockout. In these circumstances, the Union faced a *fait accompli*.

Contrary to the Company's contention (Br. 44-45), the case law does not support the Company's claim that an employer can immediately terminate health insurance coverage upon announcing a lockout, and without providing the Union with the requisite notice and opportunity to bargain. Rather, the cases the Company relies on (Br. 44-45) simply recognize the principle that an employer does not have to finance a strike by continuing employee benefits during a strike.

The Company fares no better by claiming (Br. 46-47) that the bargaining agreement itself gave the Company the right to immediately terminate employees' health insurance without giving the Union notice and an opportunity to bargain. Rather, the expiring bargaining agreement gave the Company the right to terminate the employees' health insurance "no later than the end of the month following the month in which the employee is laid off or is off work for any reason." (A. 462; 272.) But it did not require the Company to immediately terminate the health insurance without giving the Union notice and an opportunity to bargain over the cancellation or effect of that cancellation on employees. Although the Company now seems to contend (Br. 46-47) that it did not have to bargain because its actions were "covered by" the contract, the Company did not file any exceptions with the Board raising such an argument. Accordingly, Section 10(e) of the Act (29 U.S.C. § 160(e)), jurisdictionally bars the Court from reviewing that issue. *See Woelke &*

Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982); *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263 (D.C. Cir. 1997).

CONCLUSION

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

/s/ Ruth E. Burdick
RUTH E. BURDICK
Supervisory Attorney

/s/ David Seid
DAVID SEID
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-7958
(202) 273-2941

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

March 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KLB INDUSTRIES, INC. d/b/a NATIONAL)
EXTRUSION AND MANUFACTURING)
COMPANY)
)
Petitioner/Cross-Respondent) Nos. 11-1280, 11-1322
)
v.)
)
NATIONAL LABOR RELATIONS BOARD)
) Board Case No.
Respondent/Cross-Petitioner) 8-CA-37672
)
and)
)
INTERNATIONAL UNION, UNITED)
AUTOMOBILE, AEROSPACE, AND)
AGRICULTURAL IMPLEMENT WORKERS)
OF AMERICA, UAW)
)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,765 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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

Dated at Washington, DC
this 14th day of March 2012

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

UNFAIR LABOR PRACTICES

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

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

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

(5) to refuse to bargain collectively with the representatives of his employees

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. 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) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the 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.

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KLB INDUSTRIES, INC. d/b/a NATIONAL)	
EXTRUSION AND MANUFACTURING)	
COMPANY)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1280, 11-1322
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	8-CA-37672
)	
and)	
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE, AND)	
AGRICULTURAL IMPLEMENT WORKERS)	
OF AMERICA, UAW)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2012, 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:

Kerry Philip Hastings
Taft Stettinius & Hollister LLP
425 Walnut Street
Suite 1800
Cincinnati, OH 45202-3957

James B. Coppess, Attorney
AFL-CIO Office of General Counsel
815 Sixteenth Street, NW
6th Floor
Washington, DC 20006

Michael Brendan Nicholson
Blair Katherine Simmons
International Union, UAW
8000 E Jefferson Avenue
Detroit, MI 48214-0000

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

Dated at Washington, DC
this 14th day of March, 2012