Nos. 11-1337 & 11-1416

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERIE BRUSH & MANUFACTURING CORP.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

1. Erie Brush & Manufacturing Corp. was the respondent before the Board and is the Petitioner/Cross-Respondent before the Court.
2. The Board is the Respondent/Cross-Petitioner
3. The Service Employees International Union, Local 1 was the charging party before the Board, and has intervened on the side of the Board
4. The Board's General Counsel was a party before the Board
5. There are no amici in the case.

B. Ruling Under Review: The ruling under review is a Decision and Order of the Board issued on August 9, 2011 and reported at 357 NLRB No. 46.

C. Related Cases: The Board is not ware of any potentially related cases in this Court or any other court of the District of Columbia.

Respectfully submitted,

s/Linda Dreeben
Linda Dreeben
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Dated at Washington, DC
this 29th day of March 2012

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] 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.)

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
Company	Petitioner/Cross-Respondent, Erie Brush & Manufacturing Corp.
Union	Intervenor, Service Employees International Union, Local 1

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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 SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Erie Brush & Manufacturing Corp. ("the Company") to review, and the cross-application of the National Labor

Relations Board ("the Board") to enforce, a Board Order against the Company. The Board's Decision and Order ("Board's Order") issued on August 9, 2011, and is reported at 357 NLRB No. 46. (A.15-27).[1] The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Court has jurisdiction over the proceeding pursuant to Section 160(e) and (f) of the Act. The Company filed its petition for review on September 19, 2011. The Board filed its cross-application for enforcement on October 27, 2011. Both were timely; the Act places no time limit on filings to review or enforce Board orders. The charging party before the Board, Service Employees International Union, Local 1 ("the Union"), has intervened on the side of the Board.

[1] "A." references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

Upon an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint against the Company, alleging violations of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A.23-24.) After conducting a hearing, an administrative law judge issued a decision on January 26, 2007. Specifically, the judge found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union between May 10 and June 21, 2006, unless the Union agreed to an open shop, and that the refusal tainted a decertification petition filed shortly thereafter by the employees. The judge found that the Company was therefore not privileged to withdraw recognition from the Union based on the petition, and that the Company has been in violation of Section 8(a)(5) and (1) of the Act as it has refused to recognize the Union ever since. (A.15, 26.) The Company subsequently filed exceptions to that decision. On August 9, 2011, the Board (Chairman Liebman and Member Pearce; Member

Hayes dissenting) issued a Decision and Order, affirming, with modifications, the judge's findings and conclusions regarding the unfair labor practices. (A.15.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background and Negotiations at the Bargaining Table

The Company manufactures car wash and polishing brushes at its facility in Chicago, Illinois. (A.24; 143.) On January 14, 2003, the Company's production and maintenance employees voted in a Board-conducted election to have the Union represent them for purposes of collective bargaining. The Board certified the Union as the employees' exclusive-bargaining representative later that year. Following a request by the Union to begin bargaining, the Company refused, thereby challenging the Board's certification. On May 2, 2005, the Court of Appeals for the Seventh Circuit issued an opinion requiring the Company to recognize and bargain with the Union for at least one year.[2] (A.15, 24; 44-45.)

Following the court decision, the Union and Company began negotiations for a first contract on June 28, 2005. (A.15, 24; 47.) During their first meeting, the parties informally agreed to discuss noneconomic issues before economic ones.

[2] *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795 (7th Cir. 2005).

Between June 28, 2005, and March 31, 2006, the parties met at the bargaining table on eight occasions.[3] (A.15, 24; 46-50, 79-80, 219-46, 247-54.)

During the eight bargaining sessions, the parties reached agreement on nearly all noneconomic issues except whether the contract would contain a clause providing for union security and a clause providing for arbitration of unresolved grievances. The Union initially insisted on both provisions and went as far as stating there would be no contract without union security. The Company, on the other hand, wanted an open shop, where employees could decline to financially support the Union, and it demanded that unresolved employee grievances would be taken to the courts instead of an arbitrator. (A.15, 24; 53, 55, 82-83, 119-20.)

On March 3, after continued disagreement over these two noneconomic provisions, the chief negotiators for each side said they would go back to their respective officials and see if there was any room for movement. (A.17; 54.) When the parties met again on March 31, the Union's chief negotiator, Charles Bridgemon, said the Union was willing to revise its position on union security in exchange for new language regarding lockout, and it would trade the ability to go to arbitration for a change in the previously agreed-upon no-strike language. But the Company's negotiator, Irving Geslewitz, declined the offer. (A.17; 55-56.)

[3] Unless otherwise stated, all dates refer to 2006.

After further discussion on March 31, Bridgemon told Geslewitz that he felt there was an impasse on union security and arbitration. And he contemporaneously suggested that the parties bring in a mediator to help resolve their differences. Geslewitz said that he would have to check with the Company's president. (A.15, 24; 58, 65, 82-83, 126-27.) On April 5, Geslewitz contacted the Union via email and said that the Company would not agree to enter mediation. He said that it was pointless if the Union had no flexibility on union security or arbitration. (A.15; 84, 255.)

As it turned out, March 31 was the last time the parties met at the bargaining table. They communicated primarily via email thereafter.

B. The Union Requests that Bargaining Continue, and the Company Refuses

On May 10, Bridgemon – after discussing the outstanding issues internally with the Union's officials – contacted Geslewitz and requested that the parties return to the bargaining table to begin working on the economic issues. At this point, the parties had yet to discuss any economic provisions for the contract. Bridgemon suggested that they could revisit the remaining noneconomic issues later. (A.15, 16, 20; 84, 256.) On May 26, however, the Company refused the Union's request to continue negotiations. Geslewitz again stated that there was no point in further meeting given the Union's demands for the two noneconomic items. (A.15, 24; 256.)

A few days later, on May 31, Bridgemon replied with assurances that he would continue to discuss the union security and arbitration issues with the Union. At the same time, Bridgemon again suggested that the parties move forward and negotiate the economic issues and then move back to the unresolved noneconomic issues later. (A.15, 24; 257.) On June 1, Geslewitz claimed the parties were at impasse and again stated that the Company would not meet unless the Union changed its position on union security and arbitration. (A.15, 24; 258.)

The next day, on June 2, Bridgemon responded, denying that the parties were at impasse. He indicated that, after his continued discussions with the Union, he now had room to move to the Company's position on grievance processing, specifically stating that he was willing to negotiate court language instead of arbitration language. Bridgemon closed his message by again requesting that the parties return to the bargaining table and asked that Geslewitz telephone him to schedule a meeting. (A.15, 24; 259.) On June 7, Geslewitz responded, but he again indicated that the Company would not meet. He said he needed more information about the Union's position on arbitration. And, in any event, he expressed that it was pointless to meet and bargain further if the Union maintained its position on union security. (A.15, 24; 260.)

After the Company's continued refusals to meet, the Union's attorney got involved and sent Geslewitz a letter on June 16. She stated that the Company was

unlawfully refusing to bargain, and she threatened to file an unfair labor practice charge. Shortly thereafter, on June 21, Geslewitz contacted Bridgemon via email saying he was willing to schedule a bargaining session. After some back and forth, the parties eventually agreed to meet on July 24, but this session never took place. (A.15-16, 24; 67-68, 135-36, 261.)

C. The Employees Give the Company a Decertification Petition, and the Company Withdraws Recognition from the Union

Before the scheduled July 24 bargaining session, the Company received an employee petition, on or around July 5, indicating that a majority of the employees no longer wished to be represented by the Union. Based on the petition, Geslewitz contacted Bridgemon and canceled the upcoming negotiations and told him that the Company was withdrawing recognition from the Union. The Company has refused to bargain with the Union ever since. (A.16, 25; 136-40, 262.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 9, 2011, a three-member panel of the Board (Chairman Liebman and Member Becker; Member Hayes dissenting) issued its Decision and Order. The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union between May 10 and June 21 unless the Union agreed to an open shop. The Board further found that the employee's decertification petition was tainted by the Company's refusal to bargain with the Union. Because the Company was not privileged to withdraw recognition from the

Union based on the employee petition, the Board found that the Company has been in violation of Section 8(a)(5) and (1) ever since it withdrew recognition. (A.15, 18-19, 26.)

The Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union and, until an agreement has been reached on a collective-bargaining agreement or lawful impasse has occurred, from failing and refusing to bargain with the Union unless the Union agrees to withdraw any specific proposal, including a union security clause. Additionally, the Company must cease and desist from "in any like or related manner" interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A.15, 18-19, 27.)

Affirmatively, the Board's Order directs the Company to, upon request, bargain for a reasonable period of time, of not less than 6 months, with the Union, and if an understanding is reached, embody the understanding in a signed agreement. The Company is also required to post a remedial notice. (A.15, 18-19, 26-27.)

SUMMARY OF ARGUMENT

Following the certification of a union, one of the most basic requirements of the National Labor Relations Act is that the employer and union meet at reasonable times and confer over the terms and conditions of employment. 29 U.S.C. 158(d). Here, after a series of negotiating sessions, the parties continued to disagree over two issues. The Company demanded an open shop in which the employees would not be required to financially support the Union, and it required that employee grievances would be submitted to the courts instead of an arbitration process. While the parties grappled with these difficult issues, there were many opportunities to continue bargaining. Instead of moving forward to find areas of common ground, the Company chose to condition further bargaining on the Union concessions. Despite the Union's attempts to continue the negotiating process, the Company – during the period between May 10 and June 21 – repeatedly refused to return to the bargaining table unless the Union gave up its position on union security. Absent a valid defense, the Company's refusal to meet and bargain violated the Act.

Substantial evidence supports the Board's finding that the Company did not prove its defense, that there was a "single-issue impasse" that justified its total refusal to continue to meet and bargain. The Board, analyzing the first element of the test, found that the Company failed to show the actual existence of a good-faith

impasse on union security. Although the Union's negotiator declared the parties were at impasse on union security and arbitration, his remarks were mitigated by the fact that he requested mediation at the same time. Contrary to indicating a deadlock, the Union's desire to enter mediation showed a willingness to continue bargaining and a mindset that further negotiations could be fruitful. The Union also made movement away from its position on arbitration, and its negotiator provided assurances it would continue to look for flexibility on union security. Substantial evidence additionally supports the Board's finding that, even assuming the Company could show that the parties were at impasse on union security, it failed to prove the third element of test, that the impasse resulted in a complete breakdown in the overall negotiations. With important issues left on the bargaining table, namely economics, there was plenty of opportunity for the give-and-take process to potentially resolve the parties' differences.

The Company walked away from the bargaining table, and did so during a critical period – the Union's certification year. This resulted in a tainted employee decertification petition, which removed any legitimate basis for the Company's withdrawal of recognition from the Union. To remedy the Company's misconduct, the Board rationally justified the need for an affirmative bargaining order. In line with customary practice, the Board extended the Union's certification year by six months.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

A. The Parties Were Not at Impasse; Therefore the Company Was Not Privileged To Refuse To Bargain with the Union Between May 10 and June 21

1. Applicable principles and standard of review

Under Section 8(a)(5) of the Act, an employer commits an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).[4] The obligation to "bargain collectively" requires 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." 29 U.S.C. § 158(d). While this obligation requires no party to make any concessions or yield any positions fairly maintained, negotiations must be entered upon with a "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). While the different sides may maintain an attitude of "take it or leave it," collective bargaining "presupposes a desire to reach ultimate

[4] A violation of Section 8(a)(5) also derivatively violates Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" their statutory labor rights. 29 U.S.C. § 158(a)(1). *See, e.g.*, *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003).

agreement, to enter into a collective bargaining contract." *Id.* at 485. *Accord United Steelworkers of America, AFL-CIO v. NLRB*, 363 F.2d 272 (D.C. Cir. 1966).

Furthermore, the duty to bargain "may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact – 'to meet and confer' – about any of the mandatory subjects." *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *accord Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991). Even if the employer has every desire to reach an over-all agreement with the union and earnestly and in good faith bargains to that end, "[a] refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates 8(a)(5)." *Katz*, 369 U.S. at 743.

While it is clear that Section 8(d) of the Act requires an employer and union to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment, the duty to bargain may be suspended temporarily where the parties reach a lawful impasse. Such a stalemate in negotiations can be deemed a good-faith impasse, however, only after "the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (internal quotation and citation omitted); *Teamsters*

Local 639 v. NLRB, 924 F.2d 1078, 1083 (D.C. Cir. 1991). In sum, the evidence must show that both parties believed that they were at the end of their bargaining rope. *Id.* at 1084. The burden of establishing impasse lies with the party asserting it. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011) (citing *PRC Recording Co.*, 280 NLRB 615, 635 (1986)).

The Board's legal determinations under the Act are entitled to deference, and this Court has repeatedly recognized its limited role in reviewing a Board decision. It upholds the judgment of the Board unless, upon reviewing the record as a whole, it concludes that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case. *Wayneview Care Ctr. v. NLRB*, 664 F.3d at 348 (internal quotation marks and citation omitted); *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). And the Board's reasonable inferences between conflicting views may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*. *See Universal Camera*, 340 U.S. 474, 488 (1951); *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

The existence of impasse is a question of fact, and "[t]he 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." *Wayneview Care Ctr.*, 664 F.3d

at 348 (quoting 29 U.S.C. § 160(e)). As this Court has repeatedly emphasized, "in the whole complex of industrial relations[,] few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *Wayneview Care Ctr.*, 664 F.3d at 348 (internal quotation marks and citation omitted). *See also Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 734 (D.C. Cir. 1969) (the degree of cooperation a party must show is a matter for the Board's expertise).

2. Absent a valid defense, the Company violated the Act when it conditioned further bargaining on the Union dropping its demand for union security

The Board closely scrutinizes an employer's attempts to place conditions upon bargaining. And it has repeatedly found violations of the Act when an employer requires them. *See Fitzgerald Mills Corp.*, 133 NLRB 877, 884 (1961), *enforced*, 313 F.2d 260 (2d Cir. 1963) (unlawful to condition further bargaining on the union's waiver of strikers' reinstatement rights); *Chemung Contracting Corp.*, 291 NLRB 773, 784 (1988) (unlawful to condition further bargaining on receipt of union's written proposals in advance of meeting).

The evidence here clearly shows that the Company refused to bargain with the Union between May 10 and June 21. As the Board found, the Company repeatedly took the position that it would not move forward in negotiations unless

the Union unequivocally dropped its position on union security and gave up on its proposal that the grievance process end in arbitration. Even though the Union eventually agreed to move off its position on arbitration, the Company consistently maintained that it would not meet unless the Union conceded on union security.[5] (A.15, 24; 256-60.)

Absent a valid defense, the Company violated the Act when it required the Union to accept its position on union security before engaging in further negotiations. *See Vanderbilt Prods.*, 129 NLRB 1323, 1328-30 (1961), *enforced*, 297 F.2d 833, 833-34 (2d Cir. 1961); *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034-35 (1986); *South Shore Hosp.*, 245 NLRB 848, 858-60 (1979), *enforced*, 630 F.2d 40, 43-44 (lst Cir. 1980).

3. The Company failed to prove the parties were at impasse; therefore it was not privileged to refuse to bargain

The Board typically requires an overall deadlock in bargaining before finding impasse. In limited instances, however, the Board has recognized that an

[5] The Company, at no point, claimed that its refusal to discuss economic issues was a result of the parties' informal understanding that they would discuss noneconomic issues first. Even if the Company had made such a claim, the Board found that there was no evidence in the record of any binding ground rules that mandated putting off economic negotiations until after the parties resolved their problems with union security and arbitration. As the Board stated, an informal agreement about bargaining "protocol" does not preclude a union from changing its mind, "particularly if it believed bargaining over economic issues might move the parties closer to an overall agreement." (A.15 n.5; 18 n.9; 79-80, 95, 212-16.)

impasse on a single critical issue may cause a complete breakdown in negotiations. *CalMat Co.*, 331 NLRB 1084, 1097-98 (2000). The Company (Br. 21, 27, 33) before the Board and the Court has invoked this doctrine. In such cases, the party asserting a single-issue impasse must establish three elements. First, there must be an actual existence of a good-faith bargaining impasse on that issue. Second, the issue as to which the parties are at impasse must be a critical issue. Third, the impasse on the critical issue led to a breakdown in overall negotiations. *Id*. As this Court has recognized, "the party asserting a single-issue impasse bears the burden of proving not only that the deadlocked issue is critical, but that 'there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.'" *Wayneview Care Ctr.*, 664 F.3d at 350 (citing *CalMat Co.*, 331 NLRB at 1097).

a. The Company failed to prove the first element of the single-issue impasse test

Substantial evidence supports the Board's finding that the Company failed to establish the first element of the single-issue impasse test, that there was an actual existence of a good-faith bargaining impasse on the issue of union security. (A.16-17) (citing *Calmat*, 331 NLRB at 1098). While the parties had their disagreements, and each side took a hard line during the negotiations on both union security and arbitration, they had not exhausted all the prospects of concluding an agreement. The evidence showed that further discussion at the time would have

been fruitful and the parties could have resolved their disagreement. The Company simply abandoned negotiations before the give-and-take process was over.

The Board began its analysis by noting the parties' bargaining history. (A.16.) Here, the Union and Company were bargaining their first contract together. In a new relationship, issues such as union security present "special problems" that take the parties somewhat longer to resolve, and the lack of an established relationship often requires "giving the parties a fuller opportunity to effect an agreement." *Grinnell Fire Prot. Sys. Co. v. NLRB*, 236 F.3d 187, 196 (4th Cir. 2000). *See also N.J. MacDonald & Sons*, 155 NLRB 67, 71-72 (1965).

The contemporaneous understanding of the parties also weighed against finding impasse. As the Board recognized, the perceived deadlock must be mutual; both parties must believe they are at the end of their rope. *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083-84 (D.C. Cir. 1991) ("If either negotiating party remains willing to move further toward an agreement, an impasse cannot exist."); *PRC Recording*, 280 NLRB at 635. While the Union's negotiator stated that he felt the parties were at impasse both on union security and arbitration on March 31, his other actions and the state of negotiations revealed further negotiations would have been fruitful.

As the Board also explained, the Union demonstrated its willingness to find a path to an agreement by agreeing to enter mediation. Bridgemon's statement

about impasse on union security and arbitration was immediately followed by a suggestion that parties utilize a mediator's assistance on those issues. (A.16-17, 24; 55-58, 84.) That suggestion shows that he did not believe that further bargaining with respect to either issue would be futile; indeed, it showed a continued willingness to bargain and resolve the disagreements. *See Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 585 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000).

Record evidence also supports the Board's conclusion that the Union's position was gradually softening.[6] (A.17.) By the end of March, specifically on March 31, the Union had offered to revise its position on union security and arbitration. At that point, the Union was willing to modify its position on union security in exchange for new language regarding lockout, and would trade the ability to go to arbitration for a change in the previously agreed-upon no-strike language.[7] (55-56.) Despite the Company's continued refusals, Bridgemon

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[6] The Company states that none of the issues before the Court involve giving deference to the Board's credibility determinations (Br. 5 n.2), but it takes issue with many of the Board's factual conclusions, including its determination that the Union's position had changed. (Br. 8 n.5.) In doing this, the Company ignores parts of the record which the Board credited and only points to self-serving testimony. Where differences in the record exist, the Board's determinations should be upheld. *NLRB v. Capital Cleaning Contrs.*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

[7] The Union's offer on March 31, to give up its demand for arbitration in exchange for the ability to strike, is grounded in historical bargaining trade offs recognized by the Supreme Court. *See Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 455 (1957) ("the agreement to arbitrate grievance disputes is the

repeatedly assured Geslewitz that he would continue to discuss the issues with the Union, which is evidenced in Bridgemon's testimony and emails to the Geslewitz. (54, 257, 259.) Significantly, as of June 2, the Union no longer demanded that grievances be resolved in arbitration and agreed to negotiate language in line with the Company's demands that they proceed to court, showing that further negotiations could have been fruitful. The Union's negotiator had whittled the noneconomic issues down to one – union security. And he assured the Company that he was continuing to discuss this issue with the Union in an attempt to find areas of flexibility. (A.17, 24; 259.)

The Company emphasizes (Br. 28-29) the intractable nature of the Union's negotiator's earlier statements – that there could be no agreement without provisions on union security and arbitration. But, as shown, the Union had softened its position. Moreover, the Board is careful about giving too much weight to remarks of inflexibility at the bargaining table. As this Court has observed:

> Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset. Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and later in the process.

Detroit Newspaper Printing & Graphic Commc'ns Union v. NLRB, 598 F.2d 267, 273 (D.C. Cir. 1979).

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quid pro quo for an agreement not to strike"). The Company here wanted to deny the Union both the ability to arbitrate grievances and the right to strike.

Likewise, Bridgemon's statement regarding impasse cannot be viewed in a vacuum, nor is it determinative of the state of negotiations. *See Tom Ryan Distrib,* 314 NLRB 600, 605 (1994). Again, the Board is appropriately cautious when considering a statement made at the bargaining table. Giving too much weight to a negotiator's declarations in the give-and-take atmosphere of collective bargaining "would frustrate the Act's policy of encouraging free and open communications between the parties." *Indus. Elec. Reels*, 310 NLRB 1069, 1072 (1993), quoting *Sage Dev. Co.*, 301 NLRB 1173, 1176 (1991) (citations omitted); *see also PRC Recording*, 280 NLRB at 635 (words like 'impasse' or 'deadlock' do not necessarily imply that future bargaining would be futile and are legal conclusions not binding on the Board"). Aside from the Union's isolated statements, the rest of its words and actions demonstrated that it was not at the end of its rope and that it believed there further bargaining would be fruitful.

The Board succinctly described (A.17) why the Company was mistaken to rely (Br. 28, 32-33) on *Civic Motor Inns d/b/a Holiday Inn Downtown New Haven*, 300 NLRB 774 (1990), and *Pepsi-Cola-Dr. Pepper Bottling Co.*, 219 NLRB 1200 (1975). In each of these cases, the parties were involved in lengthy negotiations that undeniably ended in impasse. In each, there was a hiatus in bargaining after the impasse, of 5 and 6 months respectively, before the union requested that the employer resume bargaining. The question was not whether impasse existed; it

was whether the Union had substantially changed its position enough to break the impasse. In these cases, the burden was thus on the union to prove a substantial change in its position. *Holiday Inn*, 300 NLRB at 775-76; *Pepsi-Cola Bottling*, 219 NLRB at 1200. In this case, the burden is squarely on the Company to prove an impasse existed. Having failed to do that, the inquiry ends.

The Company's criticism (Br. 28, 32-33) that the Board fails to further distinguish the cases misses the point. The Company is incorrectly trying to shift the burden to the Union. At the same time, the Company ignores other factors that distinguish the cases. The parties in *Holiday Inn* had bargained over the course of 25 sessions before reaching impasse, and during that time, they discussed and agreed on numerous noneconomic and economic terms, including union security, successorship, grievance and arbitration, sick leave, jury duty, vacation, and certain wage rates. 300 NLRB at 774. The parties in *Pepsi-Cola Bottling* had bargained numerous sessions and utilized a mediator before reaching an impasse. 219 NLRB at 1202-03. Also, in both of these cases, the Board found that the unions did not substantially move from their previous positions when they asked the employers to resume bargaining. In *Holiday Inn*, the union unwaveringly maintained that it would not agree to the employer's language on subcontracting. 300 NLRB at 774-75. And in *Pepsi-Cola Bottling*, there was no evidence that the union offered anything more than a willingness "to adjust the language to meet the needs on an

agreement" with the employer, with no reference to any specific sticking points. 219 NLRB at 1200. Here the Union softened its position, specifically on the contentious issues, and it continued to offer opportunities where the give-and-take process could possibly help them reach an agreement.

The circumstances here also undermine the Company's comparison (Br. 24-25, 27) to *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001). In *TruServ*, the employer signaled to the union that it was reaching the limits of its bargaining due to economic exigencies and that it would soon be delivering its last, best, and final offer. This was after the employer and union had discussed both noneconomic and economic issues. When the parties met during the final session, the employer thoroughly explained its offer to the union. After the union rejected the employer's comprehensive proposal, the employer declared impasse and implemented its offer. The union disagreed that the parties were at impasse, and this Court made clear that without more, "a bald statement of disagreement by one party to the negotiations is insufficient to defeat an impasse." *Id*. at 1117. The Court also found that the union never indicated it was willing to move on any specific issue or offer anything more than to generally continue negotiations. *Id.* at 1111-12, 1116.

In contrast to *TruServ*, the Union here did more than simply say the parties weren't at impasse and generally say it was willing to continue bargaining. It

suggested mediation and then moved to the Company's position on arbitration, and it repeatedly requested bargaining over economics, a complete area of bargaining yet to be discussed, while it continued to try and find possible movement on the specific outstanding issue of union security. Instead of engaging in the process, however, the Company simply refused to meet.

b. The Company failed to prove the third element of the single-issue impasse test

While the Board reasonably found that the parties were not at impasse over any single issue, it additionally found that even assuming the Company established impasse on union security, it failed to establish the third element of the single-issue test, that any deadlock led to a breakdown in the overall negotiations. (A.18.) Substantial evidence supports the Board's finding.

The Company was required to show that there could be no progress on any aspect of the negotiations until the impasse on the single issue was resolved. *See CalMat*, 331 NLRB at 1098. On May 10, the Union requested bargaining over the economic issues the parties had yet to discuss. Shortly thereafter, it moved off its position on arbitration. That evidence, along with Bridgemon's assurances that he would continue to discuss the union security with the Union, undermine any argument that there was a complete breakdown in negotiations. *See NLRB v. Whitesell Corp.*, 638 F.3d 883, 891-92 (8th Cir. 2011) (no impasse where parties were deadlocked over discipline and overtime but still had room to negotiate on

wages and other economic items). The Company, however, unilaterally cut off those possibilities by repeatedly refusing to meet and bargain with the Union.

The Company mistakenly asserts (Br. 21, 31-32) that this case is like *Richmond Electrical*, 348 NLRB 1001 (2006). In *Richmond Electrical*, the union admitted that it was bound by established guidelines and wage rates of a separate master agreement that included a "most favored nations" clause. If it failed to achieve the pre-set standard, the union would have had to adjust its contracts with numerous other employers. As a result, the union in *Richmond Electrical* never gave any indication it would move or that it was flexible on the critical, quantifiable issue of wages. *Id*. at 1002-03. The Union's softening position and the open areas left to be discussed in this case simply do not show that union security was an insurmountable obstacle to an overall agreement.

Instead of sitting down to begin a discussion of economics and find areas where the give-and-take process could have helped the parties to find common ground on the issue of union security or "open shop," the Company insisted that the Union give up its position before moving forward. The Company's unwillingness to discuss economic issues undermines any argument that, even if

the parties were at impasse on union security, impasse caused a complete breakdown in negotiations.[8]

The Company was required to meet all of the elements of the single-issue impasse test. Here, it met neither the first nor the third. Therefore, the parties were not at impasse, and the Company violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union from May 10 to June 21.

B. The Company's Unlawful Refusal To Meet Tainted the Employee's Decertification Petition and, as a Result, the Company's Withdrawal of Recognition Based on that Petition Also Violated the Act

1. Applicable principles and standard of review

The law is clear that an employer must engage in one full year of good faith bargaining with a union following its certification, regardless of any changes in the majority status of the union. *See Brooks v. NLRB*, 348 U.S. 96 (1954). Indeed, that requirement was built into the Order of the Seventh Circuit. *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795 (7th Cir. 2005). And, as here, where the certification year follows court challenge, the year begins with the parties' first face-to-face negotiations. *Va. Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894-95 (9th Cir. 2009); *Van Dorn Plastic Mach. Co. v. NLRB*, 939 F.2d 402, 403 (6th Cir.

[8] The Company also curiously says (Br. 35-38) the Board erroneously based its decision on the Company's bad faith and fixed intent to delay negotiations. While the administrative law judge referenced the General Counsel's initial allegations (A.24), neither bad faith nor "intent to delay" is referenced again. The Board simply does not rely on these factors in its decision, and the Company's argument is misplaced.

1991). The purpose of the insulated period is to give collective bargaining time to produce results and to promote stability in industrial relations. *See Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94, 100-01 (2d Cir. 1979).

During the certification year, the union enjoys a conclusive presumption of majority support. *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 186 (2d Cir. 1998). After the certification year, an employer may rebut the presumption and withdraw recognition from the union if it can show that the union no longer has the support of a majority of the unit employees. *Id.*; *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 278-79 (5th Cir. 1997). "This rule, however, assumes that the employer did not commit any unfair labor practice." *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997).

An employer forfeits its defense that the union has lost majority support, and violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), by withdrawing recognition from the union if the employer has engaged in conduct that tends to "'affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.'" *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 464 (6th Cir. 1992) (quoting *Master Slack Corp.*, 271 NLRB 78, 84 (1984)). *Accord NLRB v. Williams Enter., Inc.*, 50 F.3d 1280, 1288 (4th Cir. 1995). As the Seventh Circuit observed in *Inland Tugs v. NLRB*, 918

F.2d 1299 (7th Cir. 1990), "as indicated by the substantial body of law as to when (not often) and how (very carefully) an employer can withdraw recognition from a union . . . , the law looks quite unfavorably on an employer's attempt to circumvent its employees' chosen representative." *Id.* at 1310 (quoting *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 685 (1944)).

Delayed bargaining caused by an employer's unlawful refusal to bargain will foreseeably result in loss of employee support. *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177-78 (1996), *enforced in relevant part*, 117 F.3d 1454 (D.C. Cir. 1997). *See also Elec. Workers IUE v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("[e]mployee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining"). As a result, there is a presumption of unlawful taint caused by a general refusal to bargain, which can only be rebutted by a showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices. *Lee Lumber*, 322 NLRB at 177-78. *Accord Marion Hosp. Corp. v. NLRB*, 321 F.3d 1178, 1187 (D.C. Cir. 2003).

The Board is given the "primary responsibility for developing and applying national labor policy," and this Court therefore gives "considerable deference" to the presumptions and legal determinations adopted by the Board so long as they

are neither arbitrary nor inconsistent with established law. *Lee Lumber*, 117 F.3d at 1459 (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)); *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). This deference is given regardless of whether the Court thinks a different rule would be preferable. *Curtin Matheson*, 494 U.S. at 786-88. And the Board's reasonable inferences between conflicting views of the evidence may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*. *See Universal Camera*, 340 U.S. at 488; *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

2. As a result of the Company's unlawful refusal to meet and bargain, the Board reasonably concluded the employee decertification petition was tainted, making the Company's withdrawal of recognition unlawful

Having determined that the Company unlawfully refused to bargain between May 10 and June 21, there is a presumption that the employee decertification petition given to the Company shortly thereafter was tainted. *See Lee Lumber*, 322 NLRB at 177-78. While it may be true that the Union was not providing the employees with continuous updates, the Company refused to return to the bargaining table at a crucial time – the period right before the certification year was about to expire. As the parties commenced bargaining on June 28, 2005, the Union's certification year, when it enjoyed an irrebuttable presumption of majority status, was set to end June 28, 2006.

Because the Company never cured its unfair labor practices, it is unable to rebut the presumption that the refusal to bargain tainted the decertification petition. It never resumed bargaining and never gave the employees the opportunity to see if the Union would be able to negotiate an agreement. *Lee Lumber*, 322 NLRB at 177-78; *Marion Hosp.*, 321 F.3d at 1184. The Company's defense (Br. 39), instead, primarily stands or falls on whether the parties were at impasse. As discussed above (*supra* at 16-26), the Company failed to show this was the case.

The Company additionally asserts (Br. 40-41) that the situation here was unusual, saying the causation between the refusal to bargain and employee disaffection should not be presumed because the employees were not engaged in or aware of the Union's efforts at the bargaining table. Such "unusual circumstances," however, are narrowly construed. *Lee Lumber*, 322 NLRB at 178 n.24. As the Board has emphasized, such disaffection is foreseeable, regardless of whether the employees actually know that the employer is unlawfully refusing to deal with the union. *Id.* at 177. If an employer refuses to bargain, it will appear the union can do nothing for the employees. *Id*. The Union here was not required to notify the employees that the Company had refused to meet and bargain, effectively saying it could do nothing for them. The circumstances here fit squarely within the rule pronounced in *Lee Lumber*. *Id*. And the Company was

not justified in withdrawing recognition on the basis of this tainted decertification petition. *Id*. at 180.

C. The Board's Affirmative Bargaining Order Is the Appropriate Remedy

1. Applicable principles and standard of review

To remedy unfair labor practices, the Board is expressly authorized, under Section 10(c) of the Act (29 U.S.C. § 160(c)), to order the violator to cease and desist from the unlawful conduct, and "to take such affirmative action . . . as will effectuate the policies of th[e] Act." The basic purpose of a Board remedial order is "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). *Accord Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995).

Where an unlawful refusal to bargain has occurred, the Board has stressed that a bargaining order protects the right of the present employees to choose *for or against* continued representation on the basis of "a fair opportunity to assess what their . . . representative can . . . accomplish for them through [the collective-bargaining] process." *Caterair Int'l*, 322 NLRB 64, 68 (1996). The Board's analysis in this regard is merely the application of the general principle, recognized by the Supreme Court in *Franks Bros. Co v. NLRB*, that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v.*

NLRB, 321 U.S. 702, 707 (1944). After a lengthy hiatus in bargaining, the union may need time simply to reestablish its ties with bargaining unit employees. *Van Dorn Plastic Mach. Co. v. NLRB*, 939 F.2d 402, 405 (6th Cir. 1991). Moreover, if the employer refuses to bargain in good faith during the certification year, the Board customarily extends or renews the certification year as a remedy for a Section 8(a)(5) violation. *See Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *Glomac Plastics*, 592 F.2d at 100-01.

The Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord St. Francis Fed. of Nurses & Health Prof'ls v. NLRB*, 729 F.2d 844, 849 (D.C. Cir. 1984). The Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). In particular, "[b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). *See also Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 & n.11 (1984).

2. The Board's remedy reasonably requires an extension of the certification year for a limited period to allow the parties an uninterrupted opportunity to bargain to an agreement

To remedy situations where an employer refuses to bargain with the employees' chosen representative, the Board has repeatedly held that an affirmative bargaining order is an appropriate remedy. *Caterair Int'l,* 322 NLRB 64, 68 (1996). And here, the Board balanced the following considerations: first, the employees Section 7 rights; second, whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and third, whether alternative remedies would otherwise remedy the violations of the Act. *Vincent Indus. Plastics, Inc. v. NLRB,* 209 F.3d 727, 738 (D.C. Cir. 2000); *Marion Hosp.*, 321 F.3d at 1187. Contrary to the Company's assertions (Br. 42-44), the Board, adopting the administrative law judge's rationale, fully explained the necessity of its bargaining order. (A.18 n.11, 26-27.)

Going through the analysis, the Board began by recognizing that the Company's refusal to bargain and subsequent unlawful withdrawal of recognition denied the employees of their Section 7 rights. Specifically, they were denied the benefits of collective bargaining for a portion of the certification year. In balancing the rights involved, the Board found that six months would be enough time to remedy the ill effects of the Company's unlawful refusal to bargain and

unlawful withdrawal of recognition, while at the same time accounting for the rights of those who may oppose unionization. (A.18 n.11, 26-27.)

Contrary to the Company's assertions (Br. 44), the order does not unduly burden the Section 7 rights of any employees who might oppose continued union representation. If the employees choose to dispense with union representation, they will have the ability to initiate a decertification petition if the Union fails to negotiate a contract after being given a fair change to negotiate one. (A.26.)

As the Board stated, the bargaining order here additionally fosters meaningful collective bargaining and industrial peace by giving the parties a reasonable period of time to resume negotiations. It accounts for bargaining that already occurred, while at the same time allowing the parties time to focus on bargaining, without distracting the Union with challenges to its majority status for a period of six months. (A.18 n.11, 26-27.) *See Brooks v. NLRB,* 348 U.S. 96, 1000 (1954) (newly-certified union "should not be under exigent pressure to produce hothouse results").

Finishing the analysis, the Board described why alternatives other than a bargaining order temporarily barring attacks on the Union's majority status would insufficiently remedy the unfair labor practices. Other remedies would allow additional challenges on the Union's status before the taint of the Company's previous violations had dissipated and during the period when the Union is

attempting to reestablish its relationship in the workplace. Alternative remedies would therefore continue to frustrate the parties' ability to engage in the bargaining process thereby depriving employees of their Section 7 rights. The Board reasonably found that such circumstances weigh in favor of issuing an affirmative bargaining order. (A.18 n.11, 27.)

Moreover, by refusing to bargain when it did, the Company cut the Union's certification year short, and the Union was not given its full opportunity to negotiate an initial collective-bargaining agreement on behalf of the employees. (A.18 n.11, 26.) When a party refuses to bargain during the certification year, the Board, with approval of the courts, has customarily extended the usual one-year period to prevent that party from gaining an unfair advantage from its failure to bargain.[9] Indeed, this Court has remanded the issue to the Board when it has not concretely extended the bargaining obligation. *Local Union No. 2338, Int'l Broth. of Elec. Workers, AFL-CIO v. NLRB*, 499 F.2d 542, 543-44 (D.C. Cir. 1974).

Based on the evidence here and balancing the interests at stake, the Board acted within its powers and reasonably provided an affirmative bargaining order of

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[9] *Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1054-56 (7th Cir. 1998); *NLRB v. National Med. Hosp. of Compto*n, 907 F.2d 905, 910-11 (9th Cir. 1990); *NLRB v. All Brand Printing Corp.*, 594 F.2d 926, 929 (2d Cir. 1979); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1090-91 (8th Cir. 1969); *NLRB v. Commerce Co.*, 328 F.2d 600, 601 (5th Cir. 1964). *See also Va. Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894-95 (9th Cir. 2009)

six months. This will remedy the previously interrupted certification year and give the parties an opportunity to bargain.

CONCLUSION

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

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National Labor Relations Board
March 2012

ADDENDUM

STATUTES

Sec. 7 of the Act (29 U.S.C. § 157) provides:

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

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;

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

Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Sec. 10 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.

***

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been

suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

***

(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]. . . . 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) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. 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. 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

ERIE BRUSH & MANUFACTURING CORP.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1337 & 11-1416
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	13-CA-43530
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,472 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 29th day of March 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 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 the 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 29th day of March, 2012