No. 11-2376

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

QUALITY HEALTH SERVICE OF P.R., INC.
D/B/A HOSPITAL SAN CRISTOBAL

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on an application from the National Labor Relations Board ("the Board") to enforce a Board order issued against Quality Health Service of P.R., Inc. d/b/a Hospital San Cristobal ("the Hospital"). The Board found that the Hospital changed the holiday and sick leave policies, number of paid holidays, and some shift schedules without bargaining with the employees' union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act

(the "Act").[1] The Board had jurisdiction over the proceeding under Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices.[2] The Board's Decision and Order issued on February 17, 2011, and is reported at 356 NLRB No. 95.[3] (A. 1-7.) The Board's order is final with respect to all parties. This Court has jurisdiction pursuant to Section 10(e) of the Act because the unfair labor practices were committed in Puerto Rico.[4] The Act places no time limits on the filing of enforcement proceedings; therefore, the Board's November 22, 2011 application for enforcement was timely.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portions of its order relating to the Hospital's undisputed violations of Section 8(a)(5) and (1) of the Act for its unilateral changes to the number of paid holidays and to employees' shift schedules.

2. Whether substantial evidence supports the Board's conclusion that the Hospital violated Section 8(a)(5) and (1) of the Act when it unilaterally changed

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[1] 29 U.S.C. §§ 151, 158(a)(5) and (1).

[2] 29 U.S.C. § 160(a).

[3] "A." references are to the Appendix. "S.A." references are to the Supplemental Appendix. "Br." refers to the Hospital's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[4] 29 U.S.C. § 160(e).

holiday pay and sick pay policies without providing the Union with notice and an opportunity to bargain.

3. Whether the Board acted within its discretion by declining to defer to arbitration the holiday pay and sick leave changes when the Hospital failed to put a binding arbitration agreement into evidence, there is no evidence of a contractual sick leave policy, and the holiday pay charges were intertwined with wholly statutory issues.

4. Whether this Court should reject the Hospital's partial compliance claim because compliance does not preclude enforcement of a Board order and similarly rebuff the Hospital's plea for compensatory time over backpay for want of jurisdiction because it failed to raise that claim to the Board.

STATEMENT OF THE CASE

Acting on four unfair labor practice charges filed by Unidad Laboeal de Enfermeras y Empleados de la Salud ("the Union"), the Board's Acting General Counsel issued complaint alleging that the Hospital violated Section 8(a)(5) and (1) of the Act by making unilateral changes to the holiday pay and sick leave pay policies, the number of paid holidays, the number of sequential overnight shifts required of nurses, and the work schedules of respiratory care employees, and by refusing to provide information about the change in holiday pay. (A. 1-2; 323-26.) Following a hearing, the parties settled the information-request allegation. (A. 2;

261-64.) The administrative law judge found merit to the remaining allegations except the assignment of sequential night shifts and declined the Hospital's request to defer the holiday pay and sick pay claims to arbitration. (A. 2.) The Hospital filed exceptions challenging the judge's findings regarding holiday pay, sick pay, the holiday calendar, and deferral to arbitration, but not the change to the respiratory department's shifts.

On review, the Board affirmed the judge's decision in full and expanded on it slightly. (A. 1.) It classified the employees' holiday pay and the holiday schedule as terms and conditions of employment, both as established past practices as found by the judge, and also as contractual benefits. (A. 1 n.3.) The Board also explained the many reasons it affirmed the judge's decision not to defer: the Hospital failed to put the contractual arbitration clause into evidence; it failed to provide evidence of a contractual sick pay provision; and the holiday pay charge was interrelated with two nondeferrable statutory claims. (A. 1 n.3.) The facts supporting the Board's decision and the Board's Conclusions and Order are summarized below.

STATEMENT OF FACTS

I. The Board's Factual Findings

A. Background: The Collective-Bargaining Agreement and Its Relevant Terms

The Hospital is a private acute-care facility located in Cotto Laurel Ward, Ponce, Puerto Rico. The Union is the bargaining representative for six units of Hospital employees; these units include licensed practical nurses, respiratory therapy technicians, service and maintenance workers, registered nurses, office clerical employees, physical therapy assistants, and medical technicians.

The Hospital and the Union agreed to a collective-bargaining agreement that was set to expire on February 28, 2010. (A. 2; 212.) Article XIX of that collective-bargaining agreement has a holiday schedule and holiday pay provision. The holiday schedule lists 12 full-day holidays and 9 half-day holidays, one of which is Discovery of Puerto Rico Day. Under Article XIX, if a holiday "coincides with [an employee's] day off," "they will receive holiday pay." (A. 3; 434-35.)

B. In Late 2009, the Hospital Stops Providing Holiday Pay to Employees for Holidays that Fall on Employees' Days Off

Per the contract and past practice, the Hospital gave holiday pay to unit employees even if a holiday coincided with their day off. (A. 3; 34, 434-35.) On October 1, 2009, the Hospital issued an internal memorandum that stated, "if that

Holiday falls on a day scheduled to be off, it is added to vacations, and in other cases, it is added as compensatory." (A. 1; S.A. 2.) Upon issuance of the memo, the Hospital stopped providing holiday pay to employees for holidays that fell on their day off, beginning with Discovery of Puerto Rico Day. (A. 1; 34-38.) The Hospital never notified the Union of the elimination of holiday pay, and the Union first learned of it five days after the Hospital instituted the change. (A. 3; 37-38, 160-61.) The Union made multiple information requests to the Hospital regarding the impacts of the October 1, 2009 change, but the Hospital did not respond. (A. 1 n.3, 3; 40-44, 169, 340, 342, 344.)

C. In Early 2010, the Hospital Eliminates Sick Pay for Employees Who Report Their Illness to the Worker's Insurance Compensation Fund

The Hospital allowed employees who suffered occupational accidents to collect sick pay from the Hospital and also from Puerto Rico's worker's insurance compensation fund. On January 7, 2010, the Hospital sent employees a memo stating that it was "implementing changes," and that employees could no longer simultaneously collect sick leave pay and money from the fund. The memo refers only to maternity leave, but the Hospital changed its policy for all sick leave. The Hospital sent the sick leave memo to the Union the day it implemented the change. When the Union asked to bargain, the Hospital said the change was "not a matter to be negotiated with the Union." (A. 4; 48-49, 56, 162-63, 351.)

D. After the Collective-Bargaining Agreement Expired, the Hospital Changed Shift Schedules in its Respiratory Care Unit

Prior to May 2010, employees in the respiratory care department worked permanent shifts. (A. 4; 192-93.) Around December 1, 2009, the Hospital suggested to the Union that it might impose rotating shifts at some unidentified future date but then changed its mind within the month. (A. 4; 58, 167, 195-200, 253.) Six months later, on May 5, 2010 (in a letter misdated April 5, 2010), the Hospital shifted gears again and informed the Union that it would rotate the shifts to avoid paying overtime, effective May 16, 2010. (A. 4; 57-60, 167-69, 361, 363.) The Union asked to bargain, but the Hospital refused. (A. 4; 61, 365, 367.) It stated that the decision "that the employees rotate or do not rotate is not the Labor Union's decision. It is our decision. Only the effects of this decision are negotiable, not the decision." (A. 4; 114, 167.)

E. In May 2010, the Hospital Eliminated Several Paid Holidays

As noted, the Hospital paid employees for 12 full-day holidays and 9 half-day holidays per year, as stated in Article XIX of the collective-bargaining agreement, for a total of 16½ paid holidays. (A. 5; 114, 434-37.) On May 27, 2010, the Hospital notified its employees that it was eliminating certain holidays effective May 31, 2010. The net result of the changes left employees with 13 full-day holidays and no half-day holidays, a decrease of 3½ days of paid holiday leave. (A. 5; 64-67, 114, 372-73.) The Hospital informed the Union of the change

four days before implementation, and did not bargain about the change, despite the Union's protest. (A. 5; 64-67, 171, 375, 377.)

II. The Board's Conclusions and Order

On February 17, 2011, the Board (Chairman Liebman, and Members Pearce and Hayes) issued its decision and found that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally altering the holiday pay and sick pay policies, the number of holidays, and some work schedules without providing the Union with notice and an opportunity to bargain. The Board also affirmed the administrative law judge's decision to not defer the holiday pay and sick pay allegations to arbitration. (A. 1 n.3.)

The Board's order requires the Hospital to cease and desist from refusing to bargain with the Union by failing to give notice to and bargain with the Union before making changes in the wages, hours, and working conditions of employees. It also requires the Hospital to cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.[5] (A. 6.)

Affirmatively, the order requires the Hospital to rescind the alteration of the past practice of providing holiday pay to employees whose day off falls on a holiday, restore the past practice, and make whole all employees who were denied

[5] 29 U.S.C. § 157.

holiday pay on their day off, with interest. The Hospital must also rescind the elimination of the past practice of allowing employees to use sick leave when receiving workers compensation, restore the past practice, and make whole all employees who were denied sick leave, with interest. It must further rescind the changed holiday schedule, restore the former holidays, and make whole all employees for the holiday pay to which they would have been entitled pursuant to the former holiday schedule, with interest. The Board also ordered the Hospital to rescind the elimination of permanent shifts in its respiratory care department and restore them. And lastly, the Hospital must post and electronically distribute a remedial notice for 60 consecutive days, and it must file a sworn affidavit to the Region attesting to its compliance. (A. 6.)

SUMMARY OF ARGUMENT

The Hospital committed four unlawful unilateral changes to employees' terms and conditions of work. The Hospital does not contest two of these violations, the number of paid holidays and the shift changes, and the Board is entitled to summary enforcement of its order regarding those unfair labor practice findings. Moreover, substantial evidence supports the Board's finding that the Hospital unlawfully and unilaterally changed its sick pay and holiday pay policies. In its opening brief, the Hospital does not dispute the merits of any of the four

changes. Instead, its sole defense is that the Board should have deferred to arbitration the unilateral change claims regarding sick pay and holiday pay.

The Board acted wholly within its discretion when it declined to defer the holiday pay and sick pay unilateral changes to arbitration. The minimal requirement for pre-arbitration deferral is a collective-bargaining agreement with a final and binding arbitration clause covering the dispute. The Hospital, however, did not put any such arbitration clause into evidence. The Hospital also failed to show that the sick leave policy was contractual such that it could be resolved in arbitration. Finally, the Board also acted within its discretion in declining to defer the holiday pay claim to arbitration because the issue was related to two nondeferrable statutory claims, and Board policy disfavors bifurcation of proceedings with related contractual and statutory questions. The Hospital contests none of these reasons for refusing to defer, and its arguments favoring deferral are waived, meritless, or both.

The Hospital's remedial claims do not warrant reversal or modification of the Board's order. Under Supreme Court precedent, the claimed partial compliance with the order does not diminish the need for enforcement of the order, including the cease-and-desist provisions, because the Hospital can refuse to comply at any time. Also, the Hospital never raised to the Board its challenge to

the remedy for the holiday pay violation. The Court therefore lacks jurisdiction to consider it.

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole.[6] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] This Court will "sustain inferences that the Board draws from the facts and its application of statutory standards to those facts and inferences as long as they are reasonable."[8] The ultimate question is "whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion."[9]

The Board's conclusions of law will be upheld if its interpretation of the Act is "reasonably defensible."[10] The Supreme Court recognized that Congress "made

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[6] 29 U.S.C. § 160(e); *Union Builders, Inc. v. NLRB*, 68 F.3d 520, 522 (1st Cir. 1995); *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 612 (1st Cir. 1987).

[7] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord Posadas de Puerto Rico Assocs., Inc. v. NLRB*, 243 F.3d 87, 90 (1st Cir. 2001).

[8] *NLRB v. LaVerdiere's Enters.*, 933 F.2d 1045, 1050 (1st Cir. 1991).

[9] *NLRB v. Hosp. of San Pablo, Inc.*, 207 F.3d 67, 70 (1st Cir. 2000) (quoting *Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998)).

[10] *Kelley v. NLRB*, 79 F.3d 1238, 1244 (1st Cir. 1996).

a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain."[11] The principles applicable to review of a Board determination not to defer a matter to arbitration are similarly well settled. The proper standard is abuse of discretion.[12]

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER PERTAINING TO THE HOSPITAL'S UNLAWFUL UNILATERAL CHANGES TO THE NUMBER OF HOLIDAYS AND TO THE SCHEDULING OF CERTAIN SHIFTS

In its brief, the Hospital does not dispute the Board's findings that it unilaterally reduced the number of holidays and altered some shift schedules in violation of Section 8(a)(5) and (1). (Br. 4, 15.) Under settled law, the Hospital's failure to contest these Board findings before the Court in its opening brief constitutes a waiver of these defenses and warrants summary enforcement of the portion of the Board's order with respect to these violations.[13]

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[11] *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir. 1988) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)).

[12] *NLRB v. U.S. Postal Service*, 906 F.2d 482, 490 (10th Cir. 1990); *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 202 (1st Cir. 1981).

[13] *McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 7-8 (1st Cir. 1997); *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 26 (1st Cir. 1985).

The Board is entitled to summary enforcement of its order on the shift change issue for a second reason, too. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court. . . ."[14] The Supreme Court and this Court consistently recognize that a litigant's failure to present a question to the Board precludes courts from subsequently asserting jurisdiction over that issue.[15] As this Court observed, adherence to this jurisdictional command results in "a win-win situation" because "it simultaneously enhances the efficacy of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship."[16] Here, the Hospital failed to file exceptions with the Board challenging the judge's finding that the Hospital violated Section 8(a)(5) and (1) of the Act when it changed its respiratory care employees from permanent shifts to rotating shifts. Thus, the Court lacks jurisdiction to review this violation.

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[14] 29 U.S.C. § 160(e).

[15] *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *The Edward S. Quirk Co. v. NLRB*, 241 F.3d 41, 43 (1st Cir. 2001); *Edward St. Daycare Ctr., Inc. v. NLRB*, 189 F.3d 40, 44 (1st Cir. 1999); *Local 25, A/W Int'l Bhd. of Teamsters v. NLRB*, 831 F.2d 1149, 1155 (1st Cir. 1987).

[16] *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT THE HOSPITAL UNLAWFULLY CHANGED HOLIDAY AND SICK PAY POLICIES WITHOUT BARGAINING

A. An Employer Violates the Act by Unilaterally Changing Employees' Terms and Conditions of Employment Without Providing Their Union Notice and an Opportunity to Bargain

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees."[17] Section 8(d) of the Act defines "the duty to bargain collectively" as "the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[18] Thus, an employer violates Section 8(a)(5) when it makes a material and substantial change to mandatory subjects of bargaining without notice to or an opportunity to bargain with the employees' union, and in the absence of an impasse or agreement in bargaining.[19] Holiday pay, sick pay, the number of holidays, and work schedules are undisputed terms and conditions of employment subject to mandatory bargaining.[20] The Act

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[17] 29 U.S.C. § 158(a)(5).

[18] 29 U.S.C. § 158(d).

[19] *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Visiting Nurse Servs. of W. Mass. v. NLRB*, 177 F.3d 52, 57-58 (1st Cir. 1999).

[20] *Katz*, 369 U.S. at 743-44 (1962) (sick leave benefits); *Visiting Nurse Servs. of W. Mass.*, 177 F.3d at 56 (paid holidays); *Northwest Graphics, Inc.*, 342 NLRB 1288,

prohibits unilateral changes during the tenure of a contract and also after an existing agreement has expired.[21] An employer that violates 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 rights under the Act.[22]

B. Holiday Pay

The Hospital unlawfully changed its holiday pay policy when it deviated from the terms of its collective-bargaining agreement and its past practice. Prior to October 1, 2009, employees were consistently paid for holidays that fell on their day off. (A. 1 n.3, 3; 34, 435, S.A. 2.) The practice was enshrined in Article XIX of the collective-bargaining agreement, stating that if a holiday "coincides with [an employee's] day off," "they will receive holiday pay[.]" (A. 3; 435.) The human resources director confirmed this practice in her testimony, when she affirmatively answered the question: "Prior to October 1, 2009, if a holiday coincided with an employee's day off, that employee would be paid regardless, correct?" (A. 34.)

1297 (2004) (schedule changes), *enforced mem.*, 156 F.App'x 331 (D.C. Cir. 2005).

[21] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Visiting Nurse Servs. of W. Mass.*, 177 F.3d at 57-58.

[22] 29 U.S.C. § 158(a)(1); *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

On October 1, 2009, the Hospital issued a memorandum that, without acknowledging that it was instituting a change, altered the Hospital's policy so that employees would receive an extra day of vacation instead of holiday pay for holidays that fell on an employee's day off. (A. 3; 104-07, S.A. 1-2.) The change was immediately implemented; not only did the Hospital fail to notify the Union at all or offer to bargain, the Union did not even learn about the change (from employees) until more than five days after the Hospital issued its memo. (A. 3; 35, 37-38, 106, 159-61.) The Hospital's opening brief concedes this, admitting that that it "discontinue[d] granting holiday pay to its employees when a holiday fell on their day off[.]" (Br. 4.)

The Board also reasonably found that holiday pay was a term and condition of employment as an established past practice, in addition to a contractual term. (A. 1 n.3.) The Board has defined past practice as an activity which has been "established by practice or custom."[23] Here, the Hospital consistently paid employees for holidays and used the same holiday calendar since March 2002.[24] (A. 2; 34, 212-14.) The Hospital does not dispute the past practice finding. Accordingly, the record supports the Board's conclusion that the Hospital violated

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[23] *Granite City Steel Co.*, 167 NLRB 310, 315 (1967).

[24] *Isla Verde Hotel Corp. v. NLRB*, 702 F.2d 268, 271 (1st Cir. 1983) (finding a past practice based on two years' recurrence of practice).

Section 8(a)(5) and (1) by unilaterally changing contractual benefits and past practices regarding holiday pay.[25]

C. Sick Leave Policy

The record demonstrates that the Hospital unlawfully changed its sick leave policy from a long-standing past practice. (A. 1 n.3, 4.) It is undisputed that prior to the Hospital's January 7, 2010 memo, employees who suffered occupational accidents earned sick leave pay *and* received allocations from Puerto Rico's worker's insurance compensation fund. (A. 351.) After the memo issued, employees could no longer collect sick pay if they collected payments from the compensation fund. (A. 48-49, 162-63, 351.) Without elaboration, the Hospital asserted that it was "impossible" for employees to receive both sick pay and money from the compensation fund. (A. 351.) The Hospital did not tell the Union about the change until the day of implementation, when it stated that the change was "not a matter to be negotiated with the Union." (A. 48-49.) Employees' sick pay is a mandatory bargaining subject because it directly relates to compensation;[26] as such, the Hospital's admitted failure to bargain over this change violated Section 8(a)(5) and (1).

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[25] *Visiting Nurse Servs. of W. Mass.*, 177 F.3d at 56.

[26] *NLRB v. Katz*, 369 U.S. 736, 743-44 (1962); *see La Porte Transit Co., Inc. v. NLRB*, 888 F.2d 1182, 1187-88 (7th Cir. 1989).

III. THE BOARD DID NOT ABUSE ITS DISCRETION IN DECLINING TO DEFER THE HOLIDAY PAY AND SICK PAY CLAIMS TO ARBITRATION

A. The Board Enjoys Plenary Authority To Decide Unfair Labor Practice Cases; the Hospital Does Not Challenge the Board's Bases for Not Deferring the Changes to Arbitration

The Board reasonably exercised its wide discretion in deciding to not defer the holiday pay or sick leave issue to arbitration. As this Court has recognized, Section 10(a) of the Act grants the Board plenary authority to decide unfair labor practice cases regardless of any other means of adjustment established by agreement."[27] In considering deferral, the Board exercises its discretion to defer only when arbitration will resolve both the contractual and the unfair labor practice issues "in a manner compatible with the purposes of the Act."[28]

The Hospital does not contest any of the Board's reasons underlying its decision to not defer the holiday pay and sick pay issues to arbitration. (Br. 9-15.) Under settled law, the Hospital's failure to contest the Board's findings before the

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[27] *NLRB v. Davol, Inc.*, 597 F.2d 782, 786 (1st Cir. 1979) (citing 29 U.S.C. § 160(a)).

[28] *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 n.9 (3d Cir. 1974) (quoting *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) (internal citations omitted)).

Court in its opening brief constitutes a waiver of any challenge to those findings and precludes such arguments in any reply brief.[29]

Even if the Hospital had not waived those challenges, this Court recognizes that "the existence of a collective-bargaining agreement establishing grievance procedures culminating in final and binding arbitration is a precondition to deferral."[30] Without an arbitration clause in the record demonstrating that the two disputes were subject to that procedure, the Hospital failed to meet this basic standard. Accordingly, the Board reasonably applied precedent when it declined to defer the holiday pay and sick pay claims to arbitration.[31] (A. 1 n.3.) Further, arbitration is reserved for contract interpretation, and there was no evidence in the record that the sick leave policy was even included in the collective-bargaining agreement.[32] (A. 1 n.3, 2-3.)

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[29] *McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 7-8 (1st Cir. 1997); *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 26 (1st Cir. 1985).

[30] *Asociacion Hosp. del Maestro, Inc. v. NLRB*, 842 F.2d 575, 578 (1st Cir. 1988) (rejecting deferral "because of the controlling fact that the parties failed to submit in evidence the expired collective bargaining agreement or its terms, if any, relating to arbitration").

[31] *Id.*

[32] *Id.*; *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971).

Finally, established Board policy disfavors bifurcation of proceedings with related contractual and statutory questions,[33] and the Board refuses to defer such cases.[34] It also declines to defer information requests because the obligation to provide such information derives from statutory duties independent of the labor contract,[35] and because requested information is essential for a union to effectively represent unit employees.[36] Here, the holiday pay violation was related to a series of information requests aimed at determining the impact of the Hospital's change. (A. 1 n.3, 3; 23-29, 324-25.) By the time the Hospital complied and settled the information request allegations, the holiday pay claim had been fully litigated before the administrative law judge and deferral was not warranted in the interest of judicial economy.[37] The holiday pay claim was also related to the Hospital's

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[33] *Avery Dennison*, 330 NLRB 389, 390-391 (1999).

[34] *Hoffman Air & Filtration Sys.*, 312 NLRB 349, 352 (1993); *Am. Postal Workers Union Local 4560*, 302 NLRB 918, 918 (1991); *S.Q.I. Roofing*, 271 NLRB 1, 2 n.3 (1984); *Sheet Metal Workers Local 17*, 199 NLRB 166, 168 (1972), *enforced mem*. 502 F.2d 1159 (1st Cir. 1973).

[35] *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437-38 (1967); *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002) ("the Board has long adhered to a policy of refusing to defer disputes concerning information requests"); *NLRB v. Davol, Inc.*, 597 F.2d 782, 786 (1st Cir. 1979); *Hoffman Air & Filtration Sys.*, 312 NLRB at 353.

[36] *See Acme Indus. Co.*, 385 U.S. at 435-36.

[37] *Hoffman Air & Filtration Sys.*, 312 NLRB at 352.

(now undisputed) reduction of total paid holidays because the change impacts the amount of holiday pay owed to each eligible employee. (A. 1 n.3.)

B. The Hospital's Arguments that the Sick Pay and Holiday Pay Claims Should Have Been Deferred to Binding Arbitration Lack Merit

In lieu of contesting any of the Board's bases for declining to defer the changes to holiday pay and sick pay to arbitration,[38] the Hospital offers a series of irrelevant or incorrect claims and relies on inapposite law.

First, to the extent that the Hospital relies on an arbitration-related doctrine it calls "according to law," (Br. 12-13), that argument is waived because the Hospital did not raise it before the Board.[39] (A. 454-462.) Moreover, in relying on that doctrine, the Hospital essentially just states the uncontroversial and irrelevant proposition that arbitrators will consider United States and Puerto Rico Supreme Court decisions as persuasive legal precedent. (Br. 13.) It also cites no evidence that the collective-bargaining agreement contained an "according to law" standard. (Br. 13.) Similarly, the professionalism and quality of arbitrators in Puerto Rico was never at issue in this case. (Br. 12.)

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[38] *See supra* note 13 (waiver by brief).

[39] *See supra* notes 14-16 (waiver by 29 U.S.C. § 160(e)).

Next, the authority the Hospital relies on is inapposite. It erroneously cites to "post-arbitration deferral cases" for its arguments.[40] (Br. 9, 14, 15.) In post-arbitration deferrals, where the Board has already placed its unfair labor practice investigation in abeyance pending a grievance and arbitration process, the Board defers to the resulting decisions when (1) the arbitration proceedings are fair and regular; (2) all parties agree to be bound by the award; and (3) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act.[41] In *pre*-arbitration cases like this one, however, the Board will not defer at the outset unless, among other things, "the parties' contract provided for arbitration in a very broad range of disputes [and] the arbitration clause clearly encompassed the dispute at issue[.]"[42] As shown, without a grievance procedure and contractual sick-pay provision in the record, deferral in this case was not proper.

Likewise, the Hospital's claim that the Board "bears the burden of persuasion to demonstrate that there are deficiencies in the arbitral process[,]" (Br. 14-15), is incorrectly pulled from *post*-arbitration deferral cases. As this Court made clear in *Asociacion Hospital del Maestro, Inc. v. NLRB*, in pre-arbitral

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[40] *NLRB v. Motor Convoy*, 673 F.2d 724 (6th Cir. 1984); *Olin Corp.*, 268 NLRB 573 (1984); *Ryder Trucklines, Inc.*, 273 NLRB 713 (1984).

[41] *Spielberg Mfg. Co.*, 112 NLRB 1080, 1081 (1955).

[42] *United Techs. Corp.*, 268 NLRB 557, 558 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971).

deferral cases, the party advocating deferral must, at the very least, provide an arbitration clause before the Board will defer.[43]

Lastly, the Hospital never advanced its (incorrect) claim that the Union failed to exhaust its administrative remedies to the Board. (Br. 11-12, A. 454-62.) Accordingly, under Section 10(e) of the Act, this Court is without jurisdiction to hear that challenge.[44] In any event, the claim fails because the Hospital neglected to put the grievance procedure into the record, leaving the Board (and this Court) ill-equipped to discern the contours of the grievance procedure and to determine whether the Union was required to comply with it. Further, the Hospital's exhaustion claim cannot prevail because the Hospital presented the changes to holiday pay and sick pay as faits accomplis. (A. 3, 4.) A union "does not waive its right to bargain over unilateral changes by failing to engage in the futile act of trying to turn back the clock and bargain over an action the employer has already taken."[45] Here, the Hospital never notified the Union of the changes to holiday pay and sick pay. By the time the Union learned about the changes from employees, the Hospital had already effectuated them. Moreover, while the contractual grievance procedure is not in the record, the Union's representative testified

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[43] *Asociacion Hosp. del Maestro, Inc. v. NLRB*, 842 F.2d 575, 578 (1st Cir. 1988).

[44] *See supra* notes 14-16 (waiver by 29 U.S.C. § 160(e)).

[45] *Tri-Tech Servs.*, 340 NLRB 894, 903 (2003).

without contradiction that, lacking any notice from the Hospital, he did not learn of the change to holiday pay until after the time to file a grievance had passed. (A. 3; 160-63.) Accordingly, the Union was presented with a done deal, making any demand for bargaining futile.[46]

IV. THE HOSPITAL'S ARGUMENTS REGARDING PARTIAL COMPLIANCE AND THE REMEDY ARE WITHOUT MERIT

A. The Hospital's Asserted Partial Compliance with the Board's Order is Irrelevant to Enforcement

Board orders are not self-enforcing; they require enforcement by a federal appellate court.[47] Under long-standing Supreme Court and First Circuit precedent, employer compliance or partial compliance with a Board Decision and Order does not render an enforcement proceeding moot and does not deprive the Board of its opportunity to secure enforcement from an appropriate court.[48] An employer's compliance may be temporary, and noncompliance could resume if enforcement is not ordered by the court of appeals. As the Supreme Court has found, "[t]he Act

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[46] *Id.*; *see also Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023-24 (2001).

[47] *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990).

[48] *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950); *NLRB v. Local 1445, United Food & Commercial Workers Int'l Union*, 647 F.2d 214, 217-18 (1st Cir. 1981); *NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d 1108, 1114 (1st Cir. 1975).

does not require the Board to play hide-and-seek with those guilty of unfair labor practices."[49]

The Hospital's asserted partial compliance is thus irrelevant to enforcement. Moreover, even if compliance with a Board order could obviate enforcement, the Hospital has admittedly not fully complied with the Board's order and could revert to full noncompliance at any time.[50] (Br. 15.) Accordingly, full enforcement of the Board's order, including its cease-and-desist provisions, is required.

B. The Court Lacks Jurisdiction to Consider the Hospital's Meritless Argument that the Remedy for its Holiday Pay Violation Should be Compensatory Time not Backpay

The Hospital argues that the proper remedy for the holiday pay violation was a compensatory time and not a monetary make-whole remedy, but failed to file exceptions to that aspect of the remedy. (A. 454-462.) Accordingly, under Section 10(e) of the Act, this Court is without jurisdiction to consider that argument.[51]

In any event, even if the Court had jurisdiction over this remedial challenge, the Hospital offers no legal or factual authority to contradict the Board's authority to fashion a remedy based on the Hospital's conceded past practice.[52] Section

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[49] *Mexia Textile Mills*, 339 U.S. at 568.

[50] *P*I*E Nationwide, Inc.*, 894 F.2d at 890.

[51] *See supra* notes 14-16 (waiver by 29 U.S.C. § 160(e)).

10(c) of the Act empowers the Board when it adjudicates an unfair labor practice to issue "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 Act."[53] This grant of remedial power is a broad one, and "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."[54] Back pay is one of the simpler and more explicitly authorized remedies utilized to attain this end.[55]

Here, the Hospital's past practice was to pay employees for holidays that fell on their days off. (A. 1 n.3, 3; 34, 435, S.A. 2, Br. 4.) As such, the Board acted within its broad remedial discretion under Section 10(c) of the Act in ordering make-whole *pay* rather than compensatory time. This remedy restores the employees to the position they would have been in absent the Hospital's unlawful change.

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[52] *Pan Am. Grain Co., Inc. v. NLRB*, 558 F.3d 22, 28-29 (1st Cir. 2009) (Court defers to the "Board's knowledge and expertise in fashioning remedies unless the order patently disregards the policies of the Act;" affirmed back pay for Section 8(a)(5) violation).

[53] 29 U.S.C. § 160(c).

[54] *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)).

[55] *Id.*

To support its compensatory-time argument, the Hospital relies on a contractual argument that fails. Instead of citing the collective-bargaining agreement, the Hospital inexplicably relies on a draft proposal it submitted to the Union during contract negotiations. (A. 68, 379.) While the *draft proposal* states "[i]f the holidays coincide with their day off, they will not be paid," the actual contract provision is not so favorable. (A. 379.) The agreed-upon provision states that if a holiday "coincides with their day off," "they will receive pay." (A. 212-15; 434-35.) Accordingly, the Hospital offers no legal or factual support for its view that the Board's monetary make-whole remedy should be modified to provide only compensatory time.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's order in full.

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National Labor Relations Board
April 2012

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	No. 11-2376
Petitioner	)	
	)	
v.	)	Board Case No.
	)	24-CA-11438
QUALITY HEALTH SERVICE OF P.R., INC.	)	
d/b/a Hospital San Cristobal	)	
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,053 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 5th day of April, 2012

UNITED STATES COURT OF APPEALS
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Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, D.C.
this 5th day of April, 2012